

2020

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### Recommended Citation

Bethay, Kaitlin (2020) "Mothering in Mississippi: How State Laws Systemically Burden Single Mothers of Color," *Tennessee Journal of Race, Gender, & Social Justice*: Vol. 10 : Iss. 1 , Article 2.

Available at: <https://trace.tennessee.edu/rgsj/vol10/iss1/2>

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## Mothering in Mississippi: How State Laws Systemically Burden Single Mothers of Color

### Cover Page Footnote

Kaitlin Bethay, Associate Online Editor of the Mississippi Law Journal (Volume 90); J.D. Candidate 2021, The University of Mississippi School of Law. She would like to thank her parents, sister, and grandmother for their unwavering support. She would also like to thank Professor Matthew Hall for his guidance throughout the writing process and MacArthur Justice Center Director Cliff Johnson for encouraging her to explore this important topic.

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This article is available in Tennessee Journal of Race, Gender, & Social Justice: <https://trace.tennessee.edu/rgsj/vol10/iss1/2>

**MOTHERING IN MISSISSIPPI: HOW STATE LAWS SYSTEMICALLY BURDEN SINGLE MOTHERS  
OF COLOR**

***Kaitlin Bethay\****

**ABSTRACT**

*Upon entering the third decade of the twenty-first century, many are ready to believe that women in the United States have finally achieved full equality. However, throughout the country, this is still not the case, especially for women of color. States continue to create laws that disproportionately burden women because of their ability to carry and birth children. The view of “woman as mother” starts before she conceives and continues long after birth, leading to statutes and practices that control her body and heap extra punishment on her should she be seen as a “bad mom.” These legal burdens usually fall on single mothers of color in particular as they are usually the custodial parents and fail to fit the idealized white, upper-middle-class mother mold.*

*This article surveys statutes and practices in the State of Mississippi specifically, providing concrete examples across a wide variety of legal contexts and demonstrating how each work together to oppress poor, single mothers of color beginning in girlhood. The primary legal areas discussed include the juvenile and criminal justice systems, administrative regulations, and civil liability laws. Most of the statutes and practices covered seem neutral at first blush, but further inspection shows how the high legal cost of motherhood perpetuates a “bad mom” cycle that daughters seem destined to repeat.*

*While the article finds it unlikely that these laws will be invalidated by utilizing disparate impact theory, it does suggest small, practical solutions under each area that could help break down the cycle of oppression and allow women of all races and socio-economic backgrounds in Mississippi to be less burdened by motherhood.*

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\* Kaitlin Bethay, Associate Online Editor of the *Mississippi Law Journal* (Volume 90); J.D. Candidate 2021, The University of Mississippi School of Law. She would like to thank her parents, sister, and grandmother for their unwavering support. She would also like to thank Professor Matthew Hall for his guidance throughout the writing process and MacArthur Justice Center Director Cliff Johnson for encouraging her to explore this important topic.

## I. INTRODUCTION

When it comes to being a parent, many sacrifices must be made. Most of the time, these sacrifices occur naturally and willingly. Loss of time, sleep, and money is to be expected when someone is expecting. However, as much as we would like to think mothers and fathers are equally sharing the responsibility that comes with pregnancy and raising children, there are some aspects of parenting that oppress the mother more. Put bluntly, the legal burdens of bearing and raising children usually fall on single mothers of color since they tend to be the custodial parent.<sup>1</sup> These legal ramifications can be seen in various types of law.

However, these legal consequences are not the same across the United States. Many of the laws oppressing mothers are dependent on state statutes, policies, and interpretations. States have a lot of say in who is eligible for their assistance and who gets in trouble with the law. They decide everything from who can access welfare to the definition of certain crimes such as murder and child abuse. Since every state is different, looking at each individually is important to discover how their unique laws interact with one another to create a potentially oppressive system.

Mississippi in particular represents an interesting study in that it has a high population of single mothers, African Americans, and people living in poverty.<sup>2</sup> Looking at how these demographics fit into the framework of burdensome laws and interpretations could give insight into not only how the state might alter its actions to decrease disparate impact, but also how other states with similar laws could identify issues and change what they are doing.

This article will give a brief overview of issues and how they relate to mothers in each of these areas of law: juvenile, criminal, civil liability, and administrative. Before delving into the problems presented in these areas, the background section will discuss broader themes that provide context when analyzing state statutes and practices. These themes include society's views on women as mothers, the ability of women to choose whether to become mothers, and a general discussion of the disparate impact framework. The survey of state statutes will then present how different aspects of the law work together to create a cycle of oppression for single mothers of color starting in the juvenile system as girls and continuing through the criminal, civil, administrative, and juvenile contexts once they become pregnant.

## II. BACKGROUND

### A. Women as Mothers

Despite women currently making up nearly half the workforce and a majority of college graduates, society's views on motherhood remain markedly unchanged.<sup>3</sup> Women are still the

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<sup>1</sup> Gretchen Livingston, *The Changing Profile of Unmarried Parents*, PEW RES. CTR. (April 25, 2018), <https://www.pewsocialtrends.org/2018/04/25/the-changing-profile-of-unmarried-parents/>.

<sup>2</sup> *Percentage of Households Led by a Single Mother with Children Under Age 18 Living in the U.S. in 2018 by State*, STATISTA (Sept. 2018), <https://www.statista.com/statistics/242302/percentage-of-single-mother-households-in-the-us-by-state/>; Livingston, *Supra* note 1.

<sup>3</sup> NAT'L CTR. FOR EDUC. STAT., *Fast Facts: Enrollment*, NAT'L CTR. FOR EDUC. STAT. (2019), <https://nces.ed.gov/fastfacts/display.asp?id=98>; Mark DeWolf, *12 Stats about Working Women*, U.S. DEP'T OF LABOR BLOG (Mar. 1, 2017), <https://blog.dol.gov/2017/03/01/12-stats-about-working-women>.

primary caregivers when it comes to children, even though fathers have become more involved.<sup>4</sup> Indeed, society still sees women as very much defined by their ability to reproduce and raise offspring. If they are not a mother yet, they are potential mothers.<sup>5</sup> If they do not want children now, they will probably want one later. A woman says she does not want children and she is often met with “you will change your mind” from both men and women alike.<sup>6</sup>

This type of response is most apparent and dangerous when doctors decline to perform tubal ligations for patients.<sup>7</sup> Whether or not a woman has already had children is a major reason for denial. Physicians do not want women to experience regret should they change their mind about wanting children.<sup>8</sup> However, even women with children have faced skepticism from their doctors when asking for the procedure. Young mothers in particular face backlash because they have many potential childbearing years left and could change their minds throughout that time.<sup>9</sup> Women have had to provide evidence of psychological clearance and consent from their husbands in order to move forward with the process.<sup>10</sup> Compare this to vasectomies, where men are rarely questioned or required to have consent from their spouse.<sup>11</sup> This illustrates that a woman’s ability to reproduce is highly valued, more so than a man’s ability, and whether she likes it or not, “mother” is central to her identity.<sup>12</sup>

Once a woman does become a mother, she has certain expectations she must meet. Society envisions a good mother as someone who is ever-present in her child’s life and makes it a point to prioritize family first.<sup>13</sup> Even a married mother tends to bear ultimate responsibility for her child’s actions because parenting is still seen as very much the mother’s domain.<sup>14</sup> What could the helpless dad have done? He is just the helper, covering for mom while she is away. It is an old trope that still plays across all forms of media. Commercial breaks are littered with dads being reminded of

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<sup>4</sup> Gretchen Livingston & Kim Parker, *8 Facts about American Dads*, PEW RES. CTR. (June 1, 2019), <https://www.pewresearch.org/fact-tank/2019/06/12/fathers-day-facts/>.

<sup>5</sup> Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95, 96–97 (1993).

<sup>6</sup> Anton, *What to Expect When You’re Not Expecting*, WOMEN’S HEALTH, (Sept. 5, 2012), <https://www.womenshealthmag.com/health/a19927103/what-to-expect/>.

<sup>7</sup> Darlena Cunha, *The Outrageous Reasons These Women Couldn’t Get Their Tubes Tied*, VICE MEDIA (May 7, 2019, 10:30 AM), [https://www.vice.com/en\\_us/article/9kxam7/tubal-ligation-requirements-doctor-denials](https://www.vice.com/en_us/article/9kxam7/tubal-ligation-requirements-doctor-denials); J. Bryan Lowder, *Sterilize Me, Please: Why is it so difficult for young women to get their tubes tied?*, SLATE (July 9, 2012, 6:15 AM), <https://slate.com/human-interest/2012/07/getting-your-tubes-tied-why-do-young-women-have-a-hard-time-getting-sterilized.html>.

<sup>8</sup> Cunha, *supra* note 7; Lowder, *supra* note 7.

<sup>9</sup> Cunha, *supra* note 7; Lowder, *supra* note 7.

<sup>10</sup> Cunha, *supra* note 7; Lowder, *supra* note 7.

<sup>11</sup> Cunha, *supra* note 7; Lowder, *supra* note 7.

<sup>12</sup> Cunha, *supra* note 7.

<sup>13</sup> A.W. Geiger et al., *6 Facts about U.S. Moms*, PEW RES. CTR. (May 8, 2019), <https://www.pewresearch.org/fact-tank/2019/05/08/facts-about-u-s-mothers/> (stating that roughly 77% of women say they face a lot of pressure to be an involved parent, as opposed to 56% of men).

<sup>14</sup> *Id.* (“In 2016, moms spent around 25 hours a week on paid work, up from nine hours in 1965. At the same time, they spent 14 hours a week on child care, up from 10 hours a week in 1965. Dads, too, are spending more time on child care. (In addition to caring for their children, 12% of parents are also providing unpaid care for an adult. Among these parents, moms spend more time than dads on caregiving activities.)”).

playdates via a mom-programmed Amazon Echo<sup>15</sup> or making a mess in the kitchen that demands the sanitizing power of a Clorox wipe upon the mother's return.<sup>16</sup>

The way we place mothers in our culture tends to affect the way we implement laws. After all, the law sets the boundaries for acceptable behavior and what we view as being a bad mother usually translates into something criminal or deviant.<sup>17</sup>

### ***B. Is Motherhood a Real Choice?***

There is always the idea that if women did not want to subject themselves to the pressures and scrutiny, whether by statute or their peers, they should not have become mothers in the first place. Normally, we see motherhood as a path voluntarily chosen, but that is not always the case, especially in areas where access to birth control and abortion is scarce. As discussed above, even married mothers can struggle to obtain a sterilization procedure and this struggle is even more pronounced when the woman seeking it is doing so through Medicaid.<sup>18</sup> This creates a “substantial system-level barrier” for low-income women and women of color.<sup>19</sup>

#### ***1. Sterilization***

According to the consent form, women requesting sterilization under Medicaid must endure a thirty-day waiting period after consenting.<sup>20</sup> Currently, most sterilization procedures are completed immediately postpartum.<sup>21</sup> Women report that not signing the form at least thirty days from their delivery (whether due to signing it late or delivering early) or not having the form present at delivery prevented them from having their request fulfilled when they gave birth.<sup>22</sup> Women with private insurance are not subject to the same regulations, which creates a “two-tiered system of access in which low-income women may not be able to exercise the same degree of reproductive autonomy as their wealthier counterparts.”<sup>23</sup> Missing a chance for sterilization immediately postpartum further compounds inequitable access because it may mean missing the window of opportunity altogether given that pregnancy-related Medicaid eligibility ends shortly after delivery.<sup>24</sup>

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<sup>15</sup> Joint London, *Amazon Echo - Remember Baby*, YOUTUBE (Apr. 10, 2019), <https://www.youtube.com/watch?v=k6ulyhvPHUQ>.

<sup>16</sup> ALittleBitOfIrish, *TV Commercial - Clorox Disinfecting Wipes - One Husband And A Baby - Wife Comes Home To Mess*, YOUTUBE (Jan. 16, 2015), <https://www.youtube.com/watch?v=JQV5YgWKHg>.

<sup>17</sup> Roberts, *supra* note 5, at 98.

<sup>18</sup> Cunha, *supra* note 7.

<sup>19</sup> See generally Sonya Borrero, et al., *Medicaid Policy on Sterilization—Anachronistic or Still Relevant*, 370 NEW ENGL. J. MED. 102–04 (2014) (discussing the obstacles Medicaid puts in place for low-income woman who attempt to pursue sterilization).

<sup>20</sup> Medicaid Sterilization Consent Form (2019), MISS. DIV. OF MEDICAID, <https://medicaid.ms.gov/wp-content/uploads/2019/03/Sterilization-Consent-Form.pdf>.

<sup>21</sup> Borrero, *supra* note 19.

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

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* (“Preventing women from obtaining a desired sterilization puts them at high risk for unintended pregnancy. In one study, 47% of women who requested but did not receive a postpartum sterilization became pregnant during the first year after delivery — over twice the rate of pregnancies in women who did not request sterilization.”).

Without the procedure, new mothers have to rely on contraceptive methods that might be hard to access depending on where they live and their financial status.<sup>25</sup>

## 2. Contraception

Although oral birth control made its appearance on the market almost sixty years ago, more than half of pregnancies among Mississippi women are unintended.<sup>26</sup> The number of unintended pregnancies in the nation has declined over the past decade across all demographic groups;<sup>27</sup> however, Mississippi women still experience a higher percentage of unintended pregnancies than women in other Southeastern states and nationally, with low-income women and women of color at the greatest risk.<sup>28</sup>

Mississippi public health surveys of new mothers from 2009 through 2011 suggest that inconsistent birth control use and the use of less effective contraceptive methods were responsible for pregnancy.<sup>29</sup> Mississippi women overall are not as likely to use the most effective methods of contraception including long-acting reversible contraceptives (LARCs).<sup>30</sup> Since 2010, the most frequently used methods in Mississippi's Title X clinics have been the pill, male condom, Depo Provera injections, and the patch—all considered to be only “moderately effective” methods.<sup>31</sup> In fact, women who seek family planning services at Mississippi's publicly funded clinics are the least likely in the country to receive the most effective reversible methods.<sup>32</sup>

This is in large part due to the lack of availability and training of healthcare providers who are a “key factor” in a woman's access to effective birth control.<sup>33</sup> In a survey of Mississippi healthcare providers, more than ninety percent of OB-GYNs reported receiving training for counseling, insertion, and removal of LARCs, while just a little over fifty percent of general physicians and approximately thirty percent of nurse practitioners reported receiving training on

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<sup>25</sup> See *infra* notes 28–36 and accompanying text.

<sup>26</sup> CTR. FOR MISS. HEALTH POL'Y, *Issue Brief: Preventing Unintended Pregnancy in Mississippi*, CTR. FOR MISS. HEALTH POL'Y (May 2018), <https://mshealthpolicy.com/wp-content/uploads/2018/07/Unintended-Pregnancy-Brief-FINAL-72018.pdf> (Unintended includes mistimed and unwanted. For the purposes of this brief, unintended refers to unwanted pregnancies and those that were wanted at a later time than they occurred.)

<sup>27</sup> CTR. FOR MISS. HEALTH POL'Y, *Issue Brief: Preventing Unintended Pregnancy in Mississippi*, CTR. FOR MISS. HEALTH POL'Y (May 2018), <https://mshealthpolicy.com/wp-content/uploads/2018/07/Unintended-Pregnancy-Brief-FINAL-72018.pdf>.

<sup>28</sup> *Id.* (“Black women report higher levels of unintended pregnancy than white women (72% v. 46%) . . . Women relying on public insurance are 1.5 times as likely to report an unintended pregnancy as privately insured women, and almost 2 times as likely to report not wanting an unintended pregnancy.”).

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

<sup>30</sup> *Id.* at 2–3 (“LARCs (e.g. IUDs and implants) are highly effective methods . . . that require minimal on-going effort by the user. Usage of LARCS among Mississippi women has been low relative to other states but is growing among both publicly (Medicaid) and privately covered family planning users. LARC usage among women enrolled in the Mississippi Medicaid Family Planning Waiver program has increased by more than 400 percent since 2012, a utilization level that may have contributed to a 36 percent reduction in repeat births among teenage mothers and increased birth spacing intervals (a factor in healthy deliveries).”).

<sup>31</sup> *Id.* at 3.

<sup>32</sup> CTR. FOR MISS. HEALTH POL'Y, *Long-Acting Reversible Contraceptives: A Survey of Mississippi Health Care Providers*, CTR. FOR MISS. HEALTH POL'Y (Oct. 2018), <https://mshealthpolicy.com/wp-content/uploads/2019/07/LARC-Provider-Survey-Issue-Brief-Oct-2018.pdf>.

<sup>33</sup> *Id.*



LARC insertion and removal.<sup>34</sup> This is troubling because nearly three-fourths of women rely on their family doctor as their regular source of care and those limited to publicly funded clinics due to limited means of travel are less likely to be seen by an OB-GYN.<sup>35</sup>

Without readily available providers who can insert LARCs, Mississippi women can find themselves in a contraception desert where the only means available might be “moderately” effective to “less” effective methods.<sup>36</sup>

### 3. Abortion

Once women have an unintended pregnancy, options are limited. Abortion is legal in Mississippi due to the rulings in *Roe v. Wade*<sup>37</sup> and *Planned Parenthood v. Casey*,<sup>38</sup> but with restrictions.<sup>39</sup> Abortions cannot be provided after twenty weeks, unless there is a threat to the mother’s life or a lethal fetal abnormality,<sup>40</sup> and must be performed by a physician board-certified or eligible in obstetrics and gynecology.<sup>41</sup> Mothers must also receive counseling, have a fetal ultrasound, and wait twenty-four hours before the procedure is performed.<sup>42</sup> The waiting period in particular poses a large burden on women who do not live near the city of Jackson, the location of the only clinic offering abortion services in the state.<sup>43</sup> Women who make the trek have to take off

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<sup>34</sup> CTR. FOR MISS. HEALTH POL’Y., *supra* note 32.

<sup>35</sup> *Id.* at 2 (“As of 2014, just 429 active ob-gyns served the state, practicing in just 36 of 82 counties and clustering in urban areas and around facilities with labor and delivery units. Women in the majority of counties in Mississippi face at least an hour-long drive for prenatal, delivery, and postpartum care, as well as family planning if they want to see an ob-gyn.”).

<sup>36</sup> *Id.* at 1 (Most Effective Reversible Methods also called Long-Acting Reversible Contraceptives (LARCs): Implant, IUD; Moderately Effective Methods: Injectable Contraception, Vaginal Ring Contraceptive, Patch, Oral Pill, Diaphragm; Less Effective Methods: Male and Female Condoms, Sponge, Withdrawal, Fertility-based Awareness, Spermicide).

<sup>37</sup> 410 U.S. 113 (1973) (granting women the right to choose whether or not they get an abortion).

<sup>38</sup> 505 U.S. 833 (1992) (modifying *Roe*, 410 U.S. 113).

<sup>39</sup> *See generally* *Roe*, 410 U.S. 113, (holding modified by *Casey*, 505 U.S. at 674 (discussing a woman’s right to an abortion and states’ attempt to limit the right to choose)).

<sup>40</sup> MISS. CODE ANN. § 41-41-141 (West 2020).

<sup>41</sup> § 41-75-1(West 2020); Emily Wagster Pettus, *Judge Upholds Abortion Mandate in 2012 Law*, CLARION LEDGER (Mar. 16, 2018, 6:35 PM), <https://www.clarionledger.com/story/news/2018/03/16/abortion-ob-gyn-mandate-mississippi-law-upheld-federal-judge/434045002/> (The OB-GYN provision was upheld in *Jackson Women’s Health Org. v. Currier*, 320 F. Supp. 3d 828 (S.D. Miss. 2018) and Mississippi remains the only state to impose such a restriction.).

<sup>42</sup> § 41-41-33 (West 2020) (In order for consent to be considered voluntary and informed the woman must be told by the physician who will perform or induce the abortion or by the referring physician: the name of the physician who will perform the abortion; the medical risks associated with abortion; the gestational age of the “unborn child”; and the medical risks of carrying the child to term. She must also be informed twenty-four hours before the procedure by either the physician or his agent the following: availability of medical assistance benefits for prenatal, child birth, and neonatal care; that the father is liable to assist with the child; that there are available services provided by public and private agencies which provide pregnancy prevention counseling and medical referrals for obtaining pregnancy prevention medications or devices; and that she has a right to review the printed materials.); § 41-41-34 (West 2020) (In addition to the ultrasound, the physician or qualified person must offer the woman an opportunity to view the ultrasound image and hear the heartbeat.).

<sup>43</sup> Jessica Arons, *The Last Clinics Standing: These Six States Show How the Supreme Court Could End Abortion Access Without Overruling Roe v. Wade* (2018), AM. CIV. LIBERTIES UNION, <https://www.aclu.org/issues/reproductive-freedom/abortion/last-clinics-standing>.



not one, but two days from work and find a place to stay for the night. Girls under eighteen are also further limited in that are required to have parental consent to obtain an abortion.<sup>44</sup> However, they can obtain a judicial bypass if they show they are mature enough to decide on their own.<sup>45</sup>

These restrictions are a direct result of politicians' "pro-life" policies in that each rule is intended to make the process as difficult as possible so that the procedure may be effectively eliminated without directly contradicting *Roe v. Wade*.<sup>46</sup> Politicians have gone on the record saying as much. Former Governor Phil Bryant clearly stated in his 2012 state of the state address that he hoped to make Mississippi "abortion free,"<sup>47</sup> while current Governor Tate Reeves said during his term as Lieutenant Governor that such restrictions were meant to "effectively close the only abortion clinic in Mississippi."<sup>48</sup>

However, the future of abortion in Mississippi and the nation remains unclear as politicians have begun challenging *Roe v. Wade* directly.<sup>49</sup> A wave of "heartbeat bills" has taken over states, including Mississippi, which would ban abortions once a fetal heartbeat is detected (around six weeks gestation).<sup>50</sup> Mississippi governor Phil Bryant signed the bill into law in March 2019 but was later blocked by a federal district court judge in May 2019.<sup>51</sup> Another ban signed by the governor a year earlier sought to restrict abortions past fifteen weeks<sup>52</sup> was also struck down by the Fifth Circuit Court of Appeals in December 2019 after being blocked by a district court in November 2018.<sup>53</sup> In his opinion for the Fifth Circuit, Judge Higginbotham wrote:

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<sup>44</sup> MISS. CODE ANN. § 41-41-53 (West 2020).

<sup>45</sup> MISS. CODE ANN. § 41-41-55 (West 2020) (Consent will be waived if the chancery court finds by clear and convincing evidence that the minor is mature and well informed enough to make her own decision regarding abortion and that abortion is in her best interest.).

<sup>46</sup> CNN Wire Staff, *Mississippi Governor Signs Bill Tightening Restrictions on Abortion Providers*, CNN (Apr. 17, 2012, 2:19 AM), <https://www.cnn.com/2012/04/17/politics/mississippi-abortion/index.html>.

<sup>47</sup> *Mississippi State of the State Address 2012 Transcript*, PEW RES. CTR. (Jan. 24, 2012) <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2012/01/24/mississippi-state-of-the-state-address-2012>.

<sup>48</sup> CNN Wire Staff, *supra* note 46 (This comment was in reference to 2012's House Bill 1390, which included the OB-GYN requirement and the ultimately unconstitutional provision of requiring physicians to have admitting privileges at the local hospital.).

<sup>49</sup> Jessica Ravitz, *Mississippi Governor Signs 'Heartbeat Bill' into Law. Next Up: A Legal Fight*, CNN (Mar. 21, 2019, 8:17 PM), <https://www.cnn.com/2019/03/21/health/mississippi-heartbeat-bill-law-bn/index.html>.

<sup>50</sup> Ravitz, *supra* note 49.

<sup>51</sup> Caroline Kelly, *Court Strikes Down Mississippi 15-Week Abortion Ban*, CNN (Dec. 13, 2019, 9:33 PM), <https://www.cnn.com/2019/12/13/politics/mississippi-15-week-abortion-ban-struck-down/index.html>.

<sup>52</sup> Mississippi recently petitioned the Supreme Court to consider this case. Although the Supreme Court initially planned to decide whether to hear the case by October 29, 2020, the court postponed that decision to a later undetermined date. Pittman, *Supreme Court to Consider Mississippi's 15-Week Abortion Ban: 'Ideal Vehicle' to Challenge Roe*, MISS. FREE PRESS (Oct. 27, 2020), <https://www.mississippi-freepress.org/6423/supreme-court-to-consider-mississippi-15-week-abortion-ban-ideal-vehicle-to-challenge-roe/>; see also Smith, *Mississippi asks Supreme Court again to review its 15-week abortion ban*, CBS NEWS (Oct. 29, 2020), <https://www.cbsnews.com/news/mississippi-abortion-ban-supreme-court-considering-review/>.

<sup>53</sup> *Id.*

States may regulate abortion procedures prior to viability so long as they do not impose an undue burden on the woman's right, but they may not ban abortions. The law at issue is a ban. Thus, we affirm the district court's invalidation of the law . . .<sup>54</sup>

The heartbeat bill still awaits a ruling from the Fifth Circuit, but given the result of the fifteen-week restriction, it will likely not pass constitutional muster.<sup>55</sup> Nonetheless, as the number of cases from various states that challenge *Roe v. Wade* continues to grow, the likelihood of its appearance in the Supreme Court of the United States increases.<sup>56</sup>

Should the Supreme Court overrule *Roe v. Wade*, Mississippi already has a statute in place that will prohibit all abortions unless needed to save the mother's life or where the pregnancy was caused by rape.<sup>57</sup>

#### 4. Adoption

When abortion is not available, the next alternative to avoid motherhood would be carrying the child to term and then giving it up for adoption. However, many women decide not to take this route.<sup>58</sup> A five-year study found that of 231 women who were denied a wanted abortion, 161 went on to give birth and only fifteen went on to give up the child for adoption.<sup>59</sup> Among the top reasons women chose to parent their child were: greater support from family/partner than they originally expected, bonding after birth, and attitudes surrounding parenting and adoption such as guilt in giving up maternal responsibility.<sup>60</sup>

Though the option is readily available, it is a difficult decision that is influenced by our culture's view of women and their relationship with motherhood.<sup>61</sup> Not only that, but even

<sup>54</sup> Pittman, *supra* note 52; Jackson Women's Health Org. v. Dobbs, No. 18-60868 (5th Cir. Dec. 13, 2019), <http://www.ca5.uscourts.gov/opinions/pub/18/18-60868-CV0.pdf>.

<sup>55</sup> Caroline Kelly, *Block on Mississippi's Fetal-Heartbeat Abortion Bill is Upheld*, CNN (Feb. 20, 2020), <https://www.cnn.com/2020/02/20/politics/abortion-mississippi-heartbeat-bill-blocked-circuit-court/index.html>.

<sup>56</sup> Nora Ellmann, *State Actions Undermining Abortion Rights in 2020*, CTR. FOR AM. PROGRESS (Aug 27, 2020, 9:04 AM), <https://www.americanprogress.org/issues/women/reports/2020/08/27/489786/state-actions-undermining-abortion-rights-2020/>; Elizabeth Nash et al., *State Policy Trends 2018: With Roe v. Wade in Jeopardy, States Continued to Add New Abortion Restrictions*, GUTTMACHER INST., <https://www.guttmacher.org/article/2018/12/state-policy-trends-2018-roe-v-wade-jeopardy-states-continued-add-new-abortion> (last updated Jan. 2, 2019).

<sup>57</sup> MISS. CODE ANN. § 41-41-45 (West 2020) ("At such time as the Attorney General of Mississippi determines that the United States Supreme Court has overruled the decision of *Roe v. Wade*, 410 U.S. 113 (1973), and that as a result, it is reasonably probable that Section 2 of this act would be upheld by the court as constitutional, the Attorney General shall publish his determination of that fact in the administrative bulletin published by the Secretary of State as provided in Section 25-43-2.101, Mississippi Code of 1972."). See generally Kate Smith, "Trigger Laws" in These States Would Make Abortion Illegal if *Roe v. Wade* is Overturned, CBS NEWS, (Feb. 21, 2019, 5:11 PM), <https://www.cbsnews.com/news/roe-vs-wade-trigger-laws-in-these-states-would-make-abortion-illegal-if-roe-is-overturned-2019-02-21/>.

<sup>58</sup> Gretchen Sisson et al., *Adoption Decision Making Among Women Seeking Abortion*, 27 WOMEN'S HEALTH ISSUES 136, 138, 141 (2017).

<sup>59</sup> *Id.*, at 136, 138.

<sup>60</sup> *Id.* at 140.

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

pursuing such an option requires that a woman endure pregnancy and subject herself to any laws that could only be applied to her when she is in such a state.<sup>62</sup>

### ***C. The Custodial Parent and Single Mother Statistics***

For better or worse, this view of mothers being the primary caregivers translates into usually being the custodial parent.<sup>63</sup> If the mother is unmarried when she gives birth, most states presume she automatically has sole custody of her child. Mississippi also promulgates this view.<sup>64</sup> However, even in instances where the father does have a chance of gaining custodial rights, such as if a couple was married at the time of the birth or legally established paternity, women tend to gain custody.<sup>65</sup>

Mississippi has one of the highest rates of single mother households at eleven point three percent just behind Louisiana's eleven and sixty-seven hundredths percent and a significant jump from New Mexico's nine and sixty-nine hundredths of a percent.<sup>66</sup> In 2017, unwed mothers accounted for nearly fifty-three point five percent of all births in the state, far outpacing the national thirty-nine point eight percent and receiving a first-place ranking among states.<sup>67</sup> Mothers of color have the highest percentage of unwed births.<sup>68</sup> Moreover, Mississippi is ranked fifty-first when it comes to the overall poverty rate at nearly twenty percent.<sup>69</sup> Poverty rates among working-age women and children are even higher at twenty-one point one percent and twenty-six point seven percent respectively.<sup>70</sup>

Families headed by unmarried women are most susceptible to poverty and most likely to be among the "working poor."<sup>71</sup> Race also continues to determine single mothers' likelihood of living in poverty.<sup>72</sup> Although maternal employment can help lower poverty rates, the relationship between race, education level, and lack of work experience can significantly hinder the ability of

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<sup>62</sup> Sisson, *supra* note 58, at 139.

<sup>63</sup> Timothy Grall, *Custodial Mothers and Fathers and Their Child Support: 2015*, U.S. CENSUS BUREAU (2018) <https://www.youngwilliams.com/sites/default/files/pdf-resource/custodialmothersandfathersandtheirchildsupport2015.pdf> (finding that in 2016, about four of every five of the 13.6 million custodial parents were mothers, while one of every five custodial parents were fathers); *How Much Time Does Dad Get in Your State?*, CUSTODY X CHANGE (June 5, 2018), <https://www.custodyxchange.com/maps/dads-custody-time-2018.php> (showing Mississippi is ranked 48th in terms of how much child custody time fathers receive with fathers on average getting 23 percent of custody time).

<sup>64</sup> MISS. CODE ANN. § 93-9-9 (West 2020); see Beverly Bird, *The Custody of Kids When Not Married in Mississippi*, LEGALZOOM, <https://info.legalzoom.com/custody-kids-not-married-mississippi-20894.html>; Beverly Bird, *The Custody of Kids When Not Married in Mississippi*, LAWFORFAMILIES.COM, <https://www.lawforfamilies.com/12717750-the-custody-of-kids-when-not-married-in-mississippi.html>.

<sup>65</sup> Grall, *supra* note 63, at 2–3.

<sup>66</sup> Livingston, *supra* note 1.

<sup>67</sup> *Stats on the State of Mississippi*, CTR. FOR DISEASE CONTROL, <https://www.cdc.gov/nchs/pressroom/states/mississippi/mississippi.htm> (last updated Apr. 11, 2018).

<sup>68</sup> *Mississippi Demographics Data*, TOWN CHARTS (Dec. 2018), <http://www.towncharts.com/Mississippi/Mississippi-state-Demographics-data.html> (White = 31%, Black = 74%, Hispanic = 35%, Asian = 35%, Native American = 77%).

<sup>69</sup> *Mississippi Report 2018*, TALK POVERTY (2018), <https://talkpoverty.org/state-year-report/mississippi-2018-report/>.

<sup>70</sup> *Id.*

<sup>71</sup> Sarah Damske et al., *Single Mother Families and Employment, Race, and Poverty in Changing Economic Times*,

62 SOC. SCI. RES. 120, 121 (2017).

<sup>72</sup> *Id.*

single mothers to pull themselves out of poverty.<sup>73</sup> In 2017, forty-eight percent of all unwed mothers in the United States who gave birth lived below the poverty line, while in Mississippi that percentage was a little over half.<sup>74</sup> Additionally, nearly half of these mothers had no more than a high school education.<sup>75</sup>

It is on these single mothers with sole custody that certain laws tend to have a disproportionate impact.

#### ***D. Disparate Impact***

Disparate or disproportional impact refers to practices that seem neutral, but when put into practice tend to adversely affect one particular group of people.<sup>76</sup> This theory has been recognized by courts and has been addressed in foundational constitutional law cases such as *Yick Wo v. Hopkins*,<sup>77</sup> *Washington v. Davis*,<sup>78</sup> and *McCleskey v. Kemp*.<sup>79</sup> In these cases, the Court determined that in order to invalidate such laws as unconstitutional, evidence of the disparate impact must be shown along with evidence of discriminatory purpose.<sup>80</sup> Bringing forth statistics showing the discrepancy is not enough unless a connection can be made between the result and a motive to discriminate.<sup>81</sup> A motive can be exceedingly difficult to prove but can be shown in a variety of ways such as statements explicitly stating discriminatory intent, evidence of discriminatory administration, and the totality of the circumstances.<sup>82</sup>

However, an agency will likely not specify race or the specific group they are targeting, instead using “X” as a criterion where “X” is the functional equivalent of the group.<sup>83</sup> For example, literacy tests at the polls and state constitutional amendments requiring that voters understand and explain any provision of the Federal Constitution have been struck down by the Court.<sup>84</sup> In these cases, the Court found that the only plausible function was to discriminate against Black voters.<sup>85</sup> The Court said in *Lassiter v. Northampton Board of Election*,

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<sup>73</sup> Damske, *supra* note 71.

<sup>74</sup> TOWN CHARTS, *supra* note 67.

<sup>75</sup> *Id.*

<sup>76</sup> *What are Disparate Impact and Disparate Treatment?*, SHRM.ORG, <https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/disperateimpactdisparatetreatment.aspx>.

<sup>77</sup> 118 U.S. 356 (1886) (holding that ordinance requiring operators of laundries not made of brick or stone to apply for a permit to continue operation was discriminatorily applied when 200 laundry owners of Chinese descent were denied a permit, while similarly situated operators not of Chinese descent were granted permits).

<sup>78</sup> 426 U.S. 229 (1976) (holding that a police admission test was not unconstitutional even though African Americans disproportionately failed holding that mere disproportionate impact is not enough without evidence of discriminator purpose).

<sup>79</sup> 481 U.S. 279 (1987) (holding that statistics were not enough when presented with studies that showed African Americans were more likely to receive the death penalty without evidence of discriminatory purpose).

<sup>80</sup> *Id.*; *Washington*, 426 U.S. at 239.

<sup>81</sup> *McCleskey*, 481 U.S. at 335.

<sup>82</sup> Christopher J. Schmidt, *Analyzing the Text of the Equal Protection Clause: Why the Definition of “Equal” Requires A Disproportionate Impact Analysis When Laws Unequally Affect Racial Minorities*, 12 CORNELL J.L. & PUB. POL’Y 85, 93, 130 (2002).

<sup>83</sup> Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. Pa. L. Rev. 540, 551–52 (1977).

<sup>84</sup> *Id.* at 552.

<sup>85</sup> *Id.*

[A] literacy test may be unconstitutional on its face. In *Davis v. Schnell*, . . . the test was the citizen’s ability to “understand and explain” an article of the Federal Constitution. The legislative setting of that provision and the great discretion it vested in the registrar made clear that a literacy requirement was merely a device to make racial discrimination easy.<sup>86</sup>

Nonetheless, the purpose is not always easy to see and as seen in cases *Washington* and *McCleskey*.<sup>87</sup>

Under the present state of disparate impact analysis, the Supreme Court does not apply strict scrutiny to facially neutral laws when both discriminatory effect *and* purpose are not present.<sup>88</sup> In a case where no proof shows discriminatory purpose, the rational basis standard applies to the equal protection claim.<sup>89</sup> Under the rational basis test, the following are required for the government to succeed: (1) a legitimate purpose for the challenged legislation, and (2) a reasonable basis for the lawmakers to believe that the use of the challenged classification would promote that purpose.<sup>90</sup>

If the government can show that their reason for instituting the law was in line with their function as legislators and that the law serves that function, then the law will be constitutional and avoid invalidation.<sup>91</sup> This ability to rebut the charges with a legitimate purpose and evade the need to adhere to a compelling government interest with a narrowly tailored solution instituted by strict scrutiny gives lawmakers a steep advantage in statute implementation that can only be overcome with a large amount of evidence to the contrary.<sup>92</sup>

### III. SURVEY OF MISSISSIPPI STATUTES AND PRACTICES

Surveyed below are seemingly neutral laws and practices that, upon further inspection, adversely affect single mothers of color in particular.<sup>93</sup> The problem is further complicated because one law is not the sole oppressor, but multiple laws interacting with each other causing a cycle of “bad moms.”

While these laws are unlikely to be invalidated by courts due to lack of discriminatory purpose, acknowledging the burden they place on a particular group is the first step in amending old laws and creating new ones that end the discriminatory effect.

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<sup>86</sup> Perry, *supra* note 83, at 552 (quoting *Lassiter v. Northampton Bd. of Election*, 360 U.S. 45, 53 (1959)).

<sup>87</sup> *Id.* at 553–54.

<sup>88</sup> Schmidt, *supra* note 82, at 94.

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

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 94–95.

<sup>93</sup> See *infra* notes 97–99 and accompanying text.



### *A. In the Juvenile Justice System as Girls*

Before women become mothers, their experiences in childhood help shape them into who they will be and how they will raise their children.<sup>94</sup> Girls who end up in the juvenile system are usually those with histories of neglect, trauma, and abuse.<sup>95</sup> Studies found that these previously incarcerated girls were more likely to be addicted to drugs, alcoholics, in violent relationships, suicidal, or unable to provide for their children.<sup>96</sup> This is one of the ways the cycle of “bad moms” begins.

In 2018, over sixty percent of the females in the Mississippi juvenile justice system were Black, despite making less than half the state’s juvenile population.<sup>97</sup> Although the overall number of females in the state system has gone down in recent years, this percentage has remained the same.<sup>98</sup> This is on par with the rest of the country, which sees an overrepresentation of Black youths overall.<sup>99</sup>

Black girls are placed in the unique position of having to contend with two marginalized identities—being Black *and* female.<sup>100</sup> Black women and Black girls have historically been portrayed as outside the bounds of what society believes to be the ideal American woman.<sup>101</sup> With the odds stacked against them based solely on their sex and race, Black girls’ actions inside and outside the schoolhouse are interpreted differently than if their white peers did the same.<sup>102</sup> They are often treated as though they are more mature than their counterparts and their expressions “assigned adult-like characteristics.”<sup>103</sup> Ascribing adult-level intent to their actions leads to harsher

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<sup>94</sup> Maanvi Singh, *Some Early Childhood Experiences Shape Adult Life, But Which Ones?*, NPR (Dec. 19, 2014, 10:47 AM), <https://www.npr.org/sections/health-shots/2014/12/19/371679655/some-early-childhood-experiences-shape-adult-life-but-which>.

<sup>95</sup> Marty Beyer et. al., *A Better Way to Spend \$500,000: How the Juvenile Justice System Fails Girls*, 18 WIS. WOMEN’S L.J. 51, 53 (2003).

<sup>96</sup> *Id.* at 52.

<sup>97</sup> MISS. DEP’T OF HUMAN SERVS. DIV. OF YOUTH SERVS., 2018 ANNUAL REPORT (2018).

<sup>98</sup> *Id.* (Total Females = 2,768); MISS. DEP’T OF HUMAN SERVS. DIV. OF YOUTH SERVS., 2017 ANNUAL REPORT (2017) (Total Females = 2,987); MISS. DEP’T OF HUMAN SERVS. DIV. OF YOUTH SERVS., 2016 ANNUAL REPORT (2016) (Total Females = 3,123).

<sup>99</sup> See Alfonso Serrano, *Juvenile Injustice: Racial Disparities in Incarceration Start Early*, COLORLINES (Feb. 28, 2018, 12:33 PM), <https://www.colorlines.com/articles/juvenile-injustice-racial-disparities-incarceration-start-early>.

<sup>100</sup> Brazitte A. Poole, *The School of Hard Knocks: Examining How Pennsylvania School Disciplinary Policies Push Black Girls into the Criminal Justice System*, 57 DUQ. L. REV. 382, 385 (2019).

<sup>101</sup> *Id.*, (citing DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION AND THE MEANING OF LIBERTY* 11 (Enroll McDonald ed., 1997)) (“During that time, the Black woman’s femininity was judged against the ‘prevailing vision of the True Woman, who was chaste, pure, and *white*.’ Out of this perception, socially constructed images of Black womanhood were created, including but not limited to, the ‘Sapphire,’ ‘Jezebel,’ and ‘Mammy’ prototypes. The Sapphire represents the depiction of an angry Black female who is aggressive, emasculating, and unfeminine. The Jezebel represents the hypersexualized Black female, and the Mammy represents the nurturing asexual Black female. These oppressive depictions are ever-present in the ways Black girls are perceived, both inside and outside of school settings. Arguably, these images are present in everyday depictions in entertainment and impact the ways which Black girls are perceived by various types of people.”).

<sup>102</sup> *Id.* at 387–88.

<sup>103</sup> *Id.* at 388 (“For example, a study conducted by Georgetown University found that, compared to white girls of the same age, Black girls were perceived by participants to be more independent and know more about adult topics (such as sex), and needing of less nurturing, less protection, less support, and less comfort.”).

treatment as behavior resulting from immature reasoning is instead viewed as “intentional and malicious.”<sup>104</sup>

This mischaracterized activity often leads to trouble at school and with law enforcement.<sup>105</sup> Across the country, Black students were suspended or expelled at a rate three times greater than their counterparts in 2014, according to the U.S. Department of Education Office for Civil Rights.<sup>106</sup> The same study also found Black girls were suspended at higher rates than most boys and girls of any other race or ethnicity.<sup>107</sup> And when girls get in trouble at school, they are more likely to come in contact with the juvenile justice system, which could lead to confinement.<sup>108</sup> Many youths who are part of the juvenile justice system “have experienced academic failure, disengagement from school, and/or school disciplinary problems.”<sup>109</sup> However, school only makes up five point six percent of referral agents in Mississippi, with law enforcement making up nearly half at forty-five point two percent.<sup>110</sup>

When referred by law enforcement, it is usually for status offenses. Girls across races have been detained for minor offenses and “status offenses” at higher rates than boys since the juvenile court’s inception.<sup>111</sup> Status offenses include nonviolent offenses that are criminal simply because of the girl’s age such as running away, truancy, and curfew violations.<sup>112</sup> This continues to be true in Mississippi, where the top-ranking offense for females is running away.<sup>113</sup> Adjudication for one of these offenses drives Black girls into confinement at disproportionate rates<sup>114</sup> and confinement can take on a variety of forms in juvenile corrections systems such as residential treatment centers, boot camps, group homes, or home detention.<sup>115</sup> States also rely on “locked long-term youth correctional facilities, which are typically operated under prison-like conditions that include correctional guards, locked cell blocks, and individual cells.”<sup>116</sup>

Many girls in the system already come from “stressful and conflict-ridden” homes that can create a lifetime risk of physical and mental ailments.<sup>117</sup> Such environments characterize a “pathway of antisocial behavior,” which in turn can lead to poor physical health by way of

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<sup>104</sup> Poole, *supra* note 100,3 at 389.

<sup>105</sup> *Id.* 384–85.

<sup>106</sup> *Id.* at 385 (citing U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION DATA SNAPSHOT: SCHOOL DISCIPLINE 1 (2014)).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 384.

<sup>109</sup> YOUTH INVOLVED IN THE JUVENILE JUSTICE SYSTEM, <https://youth.gov/youth-topics/juvenile-justice/youth-involved-juvenile-justice-system> (last visited Dec. 22, 2019).

<sup>110</sup> MISS. DEP’T OF HUMAN SERVS. DIV. OF YOUTH SERVS., 2018 ANNUAL REPORT 12 (2018).

<sup>111</sup> Barry C. Feld, *Questioning Gender: Police Interrogation of Delinquent Girls*, 49 WAKE FOREST L. REV. 1059, 1064 (2014).

<sup>112</sup> Poole, *supra* note 100, at 399 (citing Kim Taylor-Thompson, *Girl Talk—Examining Racial and Gender Lines in Juvenile Justice*, 6 NEV. L.J. 1137, 1144 (2006)).

<sup>113</sup> MISS. DEP’T OF HUMAN SERVS. DIV. OF YOUTH SERVS., *supra* note 97, at 16.

<sup>114</sup> Poole, *supra* note 100, at 399 (“Black girls are confined at a rate of 123 per 100,000 girls, while their white counterparts are confined at a rate of 37 per 100,000 girls for the same behaviors.”).

<sup>115</sup> *Id.* at 400.

<sup>116</sup> *Id.*

<sup>117</sup> Candice L. Odgers, Summer J. Robins, & Michael A. Russell, *Morbidity and Mortality Risk Among the “Forgotten Few”: Why Are Girls in the Justice System in Such Poor Health?*, 34 LAW & HUM. BEHAV. 429, 431 (2010).



addiction and sexually transmitted diseases.<sup>118</sup> In one study, over ninety percent of detained female adolescents reported being sexually active with seventy-five percent having sexual intercourse before turning thirteen years old.<sup>119</sup> Another study found that one-third of detained girls surveyed reported having been pregnant and more than half had not used a condom the last time they had sex.<sup>120</sup>

Whether girls become mothers during as teenagers or down the line as adults, their experience during these formative years can shape the way they move about the world. The juvenile justice system was created to rehabilitate youth and give them a second chance, recognizing that adolescents do not possess the same reasoning as adults because the brain is still developing.<sup>121</sup> However, Black girls tend to benefit the least from lenient treatment in the system due to their “adultification” by authorities.<sup>122</sup> As a result, they may be adversely affected in various ways from losing opportunities for schooling, employment, and professional licenses.<sup>123</sup> Even more serious, arrests can put a limit on their constitutional rights.<sup>124</sup> Thus, adjudication of both delinquent and status offenses “can open the floodgates for a substandard life for Black girls.”<sup>125</sup>

## ***B. In the Criminal Context***

### ***1. Before Birth***

Women are subject to prosecution before they even give birth. The idea that a mother must protect her children in and outside the womb at all costs is so strong that we see it in the way we make and interpret our laws. A woman can be held criminally liable for taking drugs while pregnant, even if her baby is born without health problems.<sup>126</sup> This is currently happening in Mississippi under the poisoning portion of the state child abuse statute.<sup>127</sup> As of now, the interpretation has not been challenged due to intimidation by the court and judges.<sup>128</sup> Women end up losing their children and carry a felony conviction that can limit their ability to get jobs, housing, and certain forms of monetary assistance—all things that help create a “good mom.”<sup>129</sup>

In Jones County, *Mississippi Today* identified eighteen women charged with poisoning their children under the felony child abuse statute because of suspected drug use during

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<sup>118</sup> Odgers, Robins, & Russell, *supra* note 117, at 430–31.

<sup>119</sup> *Id.* at 433 (citing P.J. Kelly et al., *Risk Behaviors and the Prevalence of Chlamydia in a Juvenile Detention Facility*, 39 *CLINICAL PEDIATRICS* 521–27 (2000)).

<sup>120</sup> *Id.* (citing R. Crosby, et al., *Health Risk Factors Among Detained Adolescent Females*, 27 *AM. J. OF PREVENTIVE MEDICINE* 404–10 (2004)).

<sup>121</sup> Poole, *supra* note 100, at 402.

<sup>122</sup> *Id.*, at 387.

<sup>123</sup> *Id.* at 404 (citing *Commonwealth v. Malone*, 366 A.2d 584, 588 (Pa. Super. Ct. 1976)).

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

<sup>125</sup> *Id.*

<sup>126</sup> *See, e.g.*, Erica Hensley et al., *Delivering Justice*, *MISS. TODAY* (May 12, 2019), <https://mississippitoday.org/2019/05/11/delivering-justice/> (noting how a mother delivered a seemingly healthy baby but was charged with felony child abuse).

<sup>127</sup> *MISS. CODE ANN.* § 97-5-39 (West 2020) (stating any person shall be guilty of felonious child abuse if the person intentionally, knowingly, or recklessly poisons a child); *see also* Hensley, *supra* note 126.

<sup>128</sup> Hensley, *supra* note 126.

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

pregnancy.<sup>130</sup> The minimum for such an offense is five years, but the maximum is life in prison.<sup>131</sup> One woman, Christina Yanacheak pled guilty to avoid a jury trial and a possible life sentence.<sup>132</sup> Instead, she received ten years with five suspended.<sup>133</sup> She had struggled with crack cocaine since her early twenties and avoided it after she became pregnant.<sup>134</sup> However, in her ninth month of pregnancy, she smoked crack and gave birth the next day.<sup>135</sup> The baby was healthy at birth, but due to traces of drugs in his system, Child Protective Services arrived at the hospital to remove him from her care.<sup>136</sup> Yanacheak was arrested two weeks later for felony child abuse.<sup>137</sup> Another woman, Savannah Knight Dozier, was arrested for the same offense when her son never tested positive for drugs, but a hair follicle screen showed methamphetamine and amphetamine in her system.<sup>138</sup> She also pled guilty but was instead sentenced to drug court.<sup>139</sup>

While both of the women interviewed by *Mississippi Today* were white, statistics show that while drug use during pregnancy occurs in similar percentages across races, women arrested for pregnancy drug use are for the most part women of color.<sup>140</sup> Minors are also subject to this treatment, such as cocaine-addicted sixteen-year-old Rennie Gibbs of Lowndes County who was prosecuted for depraved heart murder<sup>141</sup> in Mississippi after the stillbirth of her baby.<sup>142</sup> Despite her age, she was charged as an adult, furthering the argument that Black girls are less innocent and more mature than their white counterparts.<sup>143</sup> The charges were eventually dismissed after a nine-

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<sup>130</sup> Erica Hensley et al., *Delivering Justice (Second Installment)*, MISS. TODAY (June 9, 2019), <https://mississippitoday.org/2019/05/11/delivering-justice/>.

<sup>131</sup> MISS. CODE ANN. § 97-5-39 (West 2020).

<sup>132</sup> Hensley, *supra* note 126.

<sup>133</sup> *Id.*

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

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

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

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

<sup>138</sup> Hensley, *supra* note 102.

<sup>139</sup> *Id.* (“Drug court requires participants to take frequent drug tests, life skills classes and attend recovery meetings over the course of three to five years. If Savannah successfully completes the program, the child abuse conviction will be removed from her record.”).

<sup>140</sup> Carla-Michelle Adams, *Criminalization in Shades of Color: Prosecuting Pregnant Drug-Addicted Women*, 20 CARDOZO J.L. & GENDER 89, 93–94 (2013) (citing Seema Mohapatra, *Unshackling Addiction: A Public Health Approach to Drug Use During Pregnancy*, 26 WIS. J.L. GENDER & SOC’Y 241, 257 (2011)); Seema Mohapatra, *Unshackling Addiction: A Public Health Approach to Drug Use During Pregnancy*, 26 WIS. J.L. GENDER & SOC’Y 241, 257 (2011) (quoting Peggy Fulton Hora & Theodore Stalcup, *Drug Treatment Courts in the Twenty-First Century: The Evolution of the Revolution in Problem-Solving Courts*, 42 GA. L. REV. 717, 722 (2008)) (“Statistics show that “[d]espite the fact that seventy-two percent of regular drug users are white, fifteen-percent are African American, and ten percent are Latino, of those incarcerated in state prisons on drug charges, forty-five percent are African American, twenty-one percent are Latino, and twenty-six percent are white.””).

<sup>141</sup> MISS. CODE ANN. § 97-3-19 (West 2020) (defining depraved heart murder as an act “eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual”).

<sup>142</sup> Mohapatra, *supra* note 140, at 242.

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

year battle,<sup>144</sup> but another Black Mississippi woman, Latrice Fisher of Okibbeha County, now faces the same charges for the death of her newborn.<sup>145</sup>

Whether through the avenue of child abuse or murder, criminalization of pregnancy for women, in particular women of color, continues to be chosen over viewing the issue in terms of a public health or medical crisis. For the women of Jones County, the chance of getting into drug court versus prison after pleading guilty depends on the discretion of the prosecutor and judge.<sup>146</sup> Of the women who have been prosecuted and pled guilty, about half have been sentenced to drug court while the other half are facing time in prison.<sup>147</sup> A Jones County prosecutor said she advocates drug court for women she thinks will successfully complete the process.<sup>148</sup> If she determines a mother is “too deep into the drug culture” and “do[es not] want to change [her] life,” then prison might be the only viable option.<sup>149</sup> In other cases, the Jones County law enforcement has found pregnant women who use controlled substances and held them in jail with a high bond so they cannot “get out and harm the baby.”<sup>150</sup> A captain of the Jones County Sheriff’s Department described this as being like “rehab” because they are left to “detox” in their cells.<sup>151</sup>

The constitutionality of these actions is questionable. However, given that no women have challenged the child abuse application at trial, a higher court has not been able to rule on the matter.<sup>152</sup> Under the child abuse statute, a child is a “person who has not reached his eighteenth birthday.”<sup>153</sup> There is no mention of “fetus” or “unborn child” in the statute, but since there is not an explicit statement that says they are not included, prosecutors are moving forward.<sup>154</sup>

Mississippi is not the only state using this method to combat drug use during pregnancy. In fact, the most successful criminal prosecutions for prenatal controlled substance use have utilized existing child abuse or child endangerment statutes that do not specify their application to fetuses.<sup>155</sup> South Carolina became the first state to uphold a criminal conviction involving prenatal

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<sup>144</sup> Nina Martin, *Judge Throws Out Murder Charge in Mississippi Fetal Harm Case*, PROPUBLICA (Apr. 4, 2014, 2:00 PM), <https://www.propublica.org/article/judge-throws-out-murder-charge-in-mississippi-fetal-harm-case> (stating that the judge noted in her opinion that prosecutors could refile charges, but at most Gibbs could only be charged with manslaughter).

<sup>145</sup> Teddy Wilson, *Mississippi Woman Criminally Charged for Pregnancy Outcome After Home Birth (Updated)*, REWIRE NEWS (Feb. 6, 2018), <https://rewire.news/article/2018/02/06/mississippi-woman-criminally-charged-pregnancy-outcome-home-birth/>.

<sup>146</sup> Hensley, *supra* note 126.

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

<sup>148</sup> *Id.*; see also Hensley, *supra* note 130 (“Although pregnant women receive priority for the approximately 700 beds in Mississippi for people seeking addiction treatment, only two centers — Fairland Center in Clarksdale and Catholic Charities in Jackson — with 44 beds total specialize in treating and housing pregnant or parenting women. Nationally, states dedicate about 20 percent of their recovery beds to pregnant women, with treatment approaches varying by state.”).

<sup>149</sup> Hensley, *supra* note 126.

<sup>150</sup> *Id.* at 102.

<sup>151</sup> *Id.* at 99.

<sup>152</sup> *Id.* at 99 (noting that the approach has not been taken to trial yet).

<sup>153</sup> MISS. CODE ANN. § 97-5-39 (West 2020).

<sup>154</sup> *Id.*

<sup>155</sup> Kyle Kennedy, *How to Combat Prenatal Substance Abuse While Also Protecting Pregnant Women: A Legislative Proposal to Create an Appropriate Balance*, 70 ARK. L. REV. 167, 176 (2017).

drug use under its existing child endangerment law.<sup>156</sup> The Tennessee Court of Appeals later upheld another woman's conviction under a severe child abuse statute when she gave birth prematurely and her child suffered withdrawal symptoms.<sup>157</sup> The Alabama Court of Criminal Appeals took a similar position a few years later, ruling that a woman was guilty of chemical endangerment of a child when her newborn tested positive for illegal drugs.<sup>158</sup>

However, not all states have reached a similar result in determining whether a fetus has attained personhood under these statutes. Nevada, for instance, found that a fetus was not a person until the child left the womb for the purposes of the child endangerment statute.<sup>159</sup> Though the state tried to argue violation of the statute could occur during the time between birth and severing the umbilical cord, the Supreme Court of Nevada found ingestion of an illegal drug during pregnancy does not "fall clearly within the language of the statute" and that "such a construction would render the statute impermissibly vague."<sup>160</sup> The Supreme Court of Arkansas took a similar stance when it rejected the same line of reasoning for a violation of the state's Uniform Controlled Substance Act. In this case, the court found the record lacked "substantial evidence" that there was an "ongoing transfer" during the brief period an infant was still attached to the umbilical cord.<sup>161</sup> Finally, the Supreme Court of North Dakota ruled that "an unborn viable fetus is not a child under the endangerment of a child statute," and, "a pregnant woman is not criminally liable for endangerment of a child for prenatal conduct that ultimately harms a child born alive."<sup>162</sup>

The states invalidating child abuse and endangerment statutes to fetuses have a better grasp of the concrete results and abstract rights. Choosing punitive measures for women does not align with the science surrounding exposure to drugs *in utero* nor does properly weigh the mother's constitutional liberties afforded to her. Instead, it dissuades women from getting the care they need.

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<sup>156</sup> Kennedy, *supra* note 155, at 176–77 (citing *Whitner v. State*, 492 S.E.2d 777, 779–84 (S.C. 1997)) ("The South Carolina Supreme Court concluded that a fetus was a person under the applicable statute and that the state's policy of protecting children supported the court's interpretation. Additionally, the court stated that because "it is common knowledge that use of cocaine during pregnancy can harm the viable unborn child," the defendant had 'all the notice the Constitution requires.' Finally, the court found that Whitner's right to privacy, specifically to carry her pregnancy to term, was not violated because cocaine use is illegal and cannot be placed 'to the lofty status of a fundamental right.'").

<sup>157</sup> *Id.* (citing *In re Benjamin M.*, 310 S.W.3d 844, 845–46 (Tenn. Ct. App. 2009)) ("The court reasoned that to accept the mother's argument that a fetus is not a child, would mean that "harm to a child knowingly inflicted before birth cannot be harm to, or abuse of, a child." This would ignore the legislative intent and statutory language to ensure 'care, protection, and wholesome moral, mental and physical development of children.' Moreover, the court found that the Tennessee statute, along with common law precedent, "clearly establishes that a parent may be held responsible for the prenatal conduct that exposes the child, once born, to great bodily harm.'").

<sup>158</sup> *Id.* at 177–78 (citing *Ankrom v. State*, 152 So. 3d 373, 376–77 (Ala. Crim. App. 2011)) ("Hope Elizabeth Ankrom, the mother, argued that the term 'child' did not include a viable fetus. Rejecting this theory, the court found that the word 'child' was unambiguous, reasoning that 'child' applied to a viable fetus in other contexts, the dictionary definition of 'child' includes a fetus, and it is common in everyday use for 'someone to state that a mother is pregnant with her first 'child.' Further, the court explained that their ruling was supported by the public policy of Alabama, as stated by the Alabama Legislature.'").

<sup>159</sup> *Id.* at 179 (citing *Sheriff, Washoe Cty. v. Encoe*, 885 P.2d 596, 597 (Nev. 1994)).

<sup>160</sup> *Id.* (quoting *Encoe*, 885 P.2d at 598).

<sup>161</sup> *Id.* at 173 (quoting *Arms v. State*, 2015 Ark. 364, 7–8, S.W.3d 637, 640 (2015)).

<sup>162</sup> *Id.* at 180 (quoting *State v. Stegall*, 828 N.W.2d 526, 533 (N.D. 2013)).

According to the American Congress of Obstetricians and Gynecologists, neonatal abstinence syndrome does not cause permanent harm and is treatable with modern medicine.<sup>163</sup> In fact, legal activities such as smoking cigarettes and drinking alcohol are more likely to have long-term detrimental effects if done during pregnancy.<sup>164</sup> Therefore, Jones County’s current application of “poisoning” under the child abuse statute<sup>165</sup> does not seem to equal taking illicit drugs while pregnant.

However, whether consuming controlled substances is considered child abuse or neglect under the law, healthcare workers must contact Child Protective Services if they are treating a pregnant woman they find out has been partaking in drug use.<sup>166</sup> This keeps women from seeking necessary medical assistance and prevents healthcare professionals from treating them appropriately.<sup>167</sup> In a state already struggling with high infant and maternal mortality rates, particularly in the Black community, putting up more barriers does more harm than good.<sup>168</sup>

Aside from the scientific and practical inconsistencies and drawbacks, interpreting child abuse statutes to include fetuses tramples the mother’s constitutional rights expounded upon in cases such as *Robinson v. California*.<sup>169</sup> Under *Robinson*, the Court recognized that addiction was an illness and that a person’s status as an addict should not be criminalized.<sup>170</sup> Furthermore, a state’s compelling interest to protect human life cannot be used to justify punishing drug addiction, which has been recognized as a mental illness by the Court and health practitioners.<sup>171</sup>

Such an interpretation would also violate the precedent set in *Roe v. Wade*, which recognized that protecting a potential human life may serve as a compelling government interest,

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<sup>163</sup> *Toolkit on State Legislation: Pregnant Women & Prescription Drug Abuse, Dependence, Addiction*, AM. CONG. OF OBSTETRICIANS AND GYNECOLOGISTS, <https://docplayer.net/624910-Toolkit-on-state-legislation.html> (last visited Dec. 22, 2019) (“Today, overwhelming scientific consensus based on over 20 years of child development research has not identified a recognizable long-term condition, syndrome or disorder that should be termed ‘crack baby.’ It is now understood that poverty, poor nutrition and inadequate health care can account for many of the effects popularly, but falsely attributed to cocaine.”).

<sup>164</sup> *Id.*; Laura Beth Cohen, *Informing Consent: Medical Malpractice and the Criminalization of Pregnancy*, 116 MICH. L. REV. 1297, 1301 (2018).

<sup>165</sup> MISS. CODE ANN. § 97-5-39 (West 2019).

<sup>166</sup> MISS. CODE ANN. § 43-21-353 (West 2020); *see also* Hensley, *supra* note 102 (“Health care professionals are mandatory reporters in Mississippi, said Bonlitha Windham, director of prevention services with the child protection agency. When they are caring for pregnant women who use drugs, Windham told Mississippi Today: “Medical providers must make a referral to (Child Protection Services) regardless of whether the situation is considered child abuse or neglect under law and regardless of whether or not the situation constitutes an illegal action.”).

<sup>167</sup> *See* Hensley, *supra* note 130.

<sup>168</sup> MISS. STATE DEP’T OF HEALTH, INFANT MORTALITY REPORT (2018) (noting that Mississippi was ranked 49th in infant mortality according to a 2016 National Vital Statistics Report. There was a serious racial disparity between the Black infant mortality rate at 11.9 deaths per 1,000 births compared to the white rate of 6.2.); MISSISSIPPI MATERNAL MORTALITY REPORT 2013-2016 (2019), MISS. STATE DEP’T OF HEALTH (“The MS pregnancy-related mortality ratio was 22.1 deaths per 100,000 live births. This was 1.2 times higher than the US number of 18 deaths per 100,000 live births. The pregnancy-related mortality ratio for Black women was 51.9 deaths per 100,000 live births, nearly three times the White ratio of 18.”).

<sup>169</sup> *Robinson v. California*, 370 U.S. 660 (1962).

<sup>170</sup> *See generally Robinson*, 370 U.S. 660 (holding that a person’s status as an addict cannot be criminalized).

<sup>171</sup> *Adams*, *supra* note 140, at 99.



but only if narrowly tailored.<sup>172</sup> In *Skinner v. Oklahoma*, the Court labeled the right to procreate as fundamental and, therefore, subject to strict scrutiny, meaning a state cannot further a compelling interest without using the least restrictive means necessary.<sup>173</sup>

Criminalizing drug use during pregnancy does not further the interest of protecting protentional human life, nor does it present a narrowly tailored solution. In its quest to ensure healthy babies are born to healthy mothers, Mississippi is likely making the problem worse by deterring mothers from getting prenatal care and leading them to possibly terminate their pregnancies so they do not have to face the criminal justice system.<sup>174</sup> Not only do these policies fail to serve the public health interest, but they are also under-inclusive.<sup>175</sup> An under-inclusive law “fails to regulate all individuals who are similarly situated.”<sup>176</sup> The fact that indigent women of color are more likely to be prosecuted for this offense, despite statistics showing this problem occurs in similar percentages across races, demonstrates these policies are not properly tailored to combat the issue.<sup>177</sup>

## 2. After Birth

Once a woman gives birth and chooses to take on parental responsibilities by forgoing adoption, the criminal justice system can still unreasonably target her.<sup>178</sup> Take Casey Campbell who was at work when her four-year-old daughter suffered severe burns under the watch of her live-in boyfriend.<sup>179</sup> He told Campbell that he tripped and spilled hot coffee and Campbell, fearing retaliation given his abusive history, held off getting medical treatment.<sup>180</sup> In the early hours of the morning, she took her child to the hospital only to have the physician contact the police and later receive a conviction for felony child endangerment.<sup>181</sup>

These “failure to protect laws” are triggered when parents or guardians do not prevent the abuse of their children by a caregiver.<sup>182</sup> In some ways, it seems like an appropriate child abuse deterrent. Parents should not leave their children with others who could harm them. Indeed, the language of these statutes is gender-neutral, holding both mother and father to account.<sup>183</sup> However, these laws almost always charge and convict the woman.<sup>184</sup>

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<sup>172</sup> Adams, *supra* note 140, at 97.

<sup>173</sup> *Id.* at 91 (citing *Skinner v. Okl. ex rel. Williamson*, 316 U.S. 535, 541 (1942)).

<sup>174</sup> *Id.* (citing *State v. Gethers*, 585 So. 2d 1140, 1143 (1991)).

<sup>175</sup> *Id.* at 97.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*; Mohapatra, *supra* note 140, at 257.

<sup>178</sup> See *infra* notes 179–86 and accompanying text.

<sup>179</sup> Jeanne A. Fugate, *Who’s Failing Whom? A Critical Look at Failure-to-Protect Laws*, 76 N.Y.U. L. REV. 272, 272–73 (2001) (citing *Campbell v. State*, 999 P.2d 649, 654 (Wyo. 2000)).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 273.

<sup>183</sup> *Id.* at 247.

<sup>184</sup> *Id.* (“As one advocate stated, “In the 16 years I’ve worked in the courts, I have never seen a father charged with failure to protect when the mom is the abuser. Yet, in virtually every case where Dad is the abuser, we charge Mom with failure to protect.””).

A typical failure to protect case has several characteristics.<sup>185</sup> (1) The mother did not fit the “maternal role” by failing to shield her child from someone living in the house or caring for her child.<sup>186</sup> (2) The mother is likely is experiencing abuse herself and fears provoking the abuser further.<sup>187</sup> (3) Mothers are more likely to be charged under these statutes than fathers. There “is no ‘typical’ failure to protect case where the defendant is male.”<sup>188</sup> Even when women are convicted of child abuse, many reported opinions fail to mention whether the men noted in the opinion faced charges.<sup>189</sup>

Though single mothers typically have custody of their children and, therefore, a duty to care for them,<sup>190</sup> this alone does not account for the gender disparity in prosecutions.<sup>191</sup> The other factor contributing to this outcome is rooted in gender stereotyping of women, particularly women from poor socio-economic backgrounds and women of color, as they do not fit the idealized “maternal role.”<sup>192</sup>

In stereotyping women generally, predominately white, middle-class judges, caseworkers, and attorneys<sup>193</sup> find that women “have a greater capacity for nurturing and, therefore, a heightened duty to protect.”<sup>194</sup> They assume mothers are “all-knowing,” “all-sacrificing,” and consequently subject to higher scrutiny.<sup>195</sup> Courts assume a mother’s instinct, deriving from her unconditional love, will triumph over any “physical, financial, emotional, and moral obstacles.”<sup>196</sup> The Tennessee Court of Appeals even stated,

[T]he Court finds that even animals protect their young . . . . Now, [the defendant] may have well been afraid of her husband. There were times when he was gone and even if she was afraid if she had the natural maternal instinct that any mother should have, that maternal instinct should have overcome her fear if she is to be a fit mother and she failed to do that.<sup>197</sup>

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<sup>185</sup> Fugate, *supra* note 179, at 279.

<sup>186</sup> *Id.* at 279–80.

<sup>187</sup> *Id.* at 280 (“One concept used to explain the actions of women in these cases is ‘Battered Woman Syndrome’ (BWS), where an expert testifies at trial about concepts of ‘learned helplessness’ to help the judicial system better understand the predicament of women in abusive relationships. Although the use of BWS testimony has prevented the unjust convictions of battered women, many advocates now believe that BWS reinforces negative stereotypes about women’s passivity and weakness. In any case, BWS evidence often is deemed inadmissible in the context of failure-to-protect cases.”).

<sup>188</sup> *Id.* at 281.

<sup>189</sup> *Id.* at 281–82 (citing *State v. Burgess*, 518 S.E.2d 209, 210–11, 213 (N.C. Ct. App. 1999); *State v. Reed*, No. 89-CR-029, 1991 WL 95227, at \*1–\*12 (Ohio Ct. App. May 31, 1991)).

<sup>190</sup> Grall, *supra* note 63, at 3.

<sup>191</sup> Fugate, *supra* note 179, at 274.

<sup>192</sup> *Id.* at 285.

<sup>193</sup> Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 S.C. L. REV. 577, 585 (1997).

<sup>194</sup> Fugate, *supra* note 179, at 275.

<sup>195</sup> *Id.* at 294.

<sup>196</sup> *Id.* at 290 (quoting Linda J. Panko, *Legal Backlash: The Expanding Liability of Women Who Fail to Protect Their Children from Their Male Partner’s Abuse*, 6 HASTINGS WOMEN’S L.J. 67, 74 (1995)).

<sup>197</sup> *Id.* at 291 (quoting *Tenn. Dep’t of Human Servs. v. Tate*, No. 01-A-01-9409-CV-00444, 1995 WL 138858 (Tenn. Ct. App. Mar. 31, 1995)).



While women are judged harshly, women of color face an even higher bar.<sup>198</sup> The same white, middle-class authorities see these families as not fitting in the “dominant cultural paradigm—white, married, middle-class, and suburban.”<sup>199</sup> They deviate from these stereotypes in several ways: they are more likely to be poor, they are more likely to be single mothers, and they are more likely to live in high-risk areas.<sup>200</sup> They are contrary to everything the ideal mother is supposed to be. In turn, they are “devalued” and labeled as “dysfunctional.”<sup>201</sup>

These mothers usually do not have access to affordable childcare and traditionally “depend on informal kinship and community networks for babysitting.”<sup>202</sup> This “network” that is so widespread in communities of color, does not fit within the white normative bounds of a mother as a guardian who depends on paid childcare and, as a result, is seen as turning her back on maternal duties.<sup>203</sup> Mothers of color, therefore, face a more severe setback. They are more likely to be single mothers and have ultimate responsibility for their children, but they are also subject to the normal gender stereotypes that come with being a woman and their lifestyle likely does not fit within the “good mother” paradigm.

In Mississippi, mothers continue to be subject to failure to protect laws. MISS. CODE ANN. § 97-5-39(1)(e) reads:

A parent, legal guardian or other person who knowingly permits the continuing physical or sexual abuse of a child is guilty of neglect of a child and may be sentenced to imprisonment for not more than ten (10) years or to payment of a fine of not more than Ten Thousand Dollars (\$10,000.00), or both.<sup>204</sup>

Unlike other states, there is no caveat for those who fear retaliation from an abusive partner. For example, in Minnesota and South Dakota it is an affirmative defense to show that at the time of the offense, the defendant reasonably thought that they would be subject to substantial bodily harm.<sup>205</sup> Without this defense set in place, to report would mean possibly losing a necessary source

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<sup>198</sup> See, e.g., Appell, *supra* note 193, at 588.

<sup>199</sup> *Id.* at 585.

<sup>200</sup> *Id.* at 585–86.

<sup>201</sup> *Id.* at 579; see also Michelle S. Jacobs, *Requiring Battered Women Die: Murder Liability for Mothers Under Failure to Protect Statutes*, 88 J. CRIM. L. & CRIMINOLOGY 579, 608 (1998) (“Poverty and ethnicity often determined which families would be charged with neglect and abuse. Fathers were largely absent in these environs, as the responsibility for raising children was thought to properly rest on the shoulders of the mothers. Thus, the very creation of the juvenile justice system institutionalized the notions that mothers are primarily responsible for the care of the children.”).

<sup>202</sup> *Id.* at 585.

<sup>203</sup> *Id.* at 586.

<sup>204</sup> MISS. CODE ANN. § 97-5-39(1)(e) (West 2020).

<sup>205</sup> S.D. CODIFIED LAWS § 26-10-30 (West 2020) (“It is an affirmative defense, to be proven by clear and convincing evidence, to prosecution under this section if, at the time of the offense, there was a reasonable belief that acting to stop or to prevent the abuse would result in substantial bodily harm to the defendant or the child in retaliation.”); MINN. STAT. § 609.378 (West 2020) (“It is a defense to a prosecution . . . that at the time of the neglect or endangerment there was a reasonable apprehension in the mind of the defendant that acting to stop or prevent the neglect or endangerment would result in substantial bodily harm to the defendant or the child in retaliation.”).

of income to take care of children and inciting further abuse.<sup>206</sup> To not report could mean prosecution.<sup>207</sup> While this defense could be applied across genders, women, in particular, would likely make use of it considering they are more likely to experience domestic violence nationally<sup>208</sup> and in Mississippi.<sup>209</sup>

### ***C. In the Administrative Context***

For mothers who have lost financial support from an abusive partner, or never had the support to begin with, government assistance may be necessary to take care of their children.<sup>210</sup> Programs such as the Supplemental Nutrition Assistance Program (SNAP or “food stamps”) and Temporary Assistance for Needy Families (TANF or “welfare”) can be used when mothers find themselves in these situations, which is more likely for mothers of color.<sup>211</sup>

However, in order to qualify for welfare in Mississippi, the potential recipient must fill out a questionnaire that determines the likelihood of drug abuse.<sup>212</sup> If the results indicate a high likelihood, then a potential recipient must subject themselves to a drug test in order to receive benefits.<sup>213</sup> If she refuses the test, she may not reapply for cash assistance for the next ninety days or, in the case of a second refusal, one year.<sup>214</sup> A mother may still receive benefits if she tests positive, but must comply with an approved treatment plan and test negative at the end of treatment.<sup>215</sup> If she refuses to undergo the treatment or tests positive at the end, she cannot reapply for cash assistance until ninety days after the department determines ineligibility or one year if the department has determined ineligibility on at least one other occasion.<sup>216</sup>

This process has been met with skepticism since its initiation in 2014.<sup>217</sup> In the original bill, a failed drug test or refusal to take the questionnaire would have resulted in sanctions on the

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<sup>206</sup> See *supra* notes 204–05 and accompanying text.

<sup>207</sup> It should be noted that no opinions from Mississippi show an instance where failure to protect laws were used against a mother who feared retaliatory abuse. However, this does not demonstrate that the law is not being used in this way. Women could be pleading guilty to the offense due to intimidation from the courts and lack of a codified affirmative defense.

<sup>208</sup> See CTR. FOR DISEASE CONTROL AND PREVENTION, NATIONAL INTIMATE PARTNER SURVEY (2010-2012), <https://www.cdc.gov/violenceprevention/pdf/NISVS-infographic-2016.pdf>.

<sup>209</sup> See NAT’L COAL. AGAINST DOMESTIC VIOLENCE, DOMESTIC VIOLENCE IN MISSISSIPPI (2016), [https://assets.speakcdn.com/assets/2497/mississippi\\_2019.pdf](https://assets.speakcdn.com/assets/2497/mississippi_2019.pdf).

<sup>210</sup> See generally Damske, *supra* note 71 for a discussion on how families headed by single women of color disproportionately bear a greater burden of poverty risk.

<sup>211</sup> *Id.*

<sup>212</sup> NAT’L CONFERENCE OF STATE LEGISLATURES, *Drug Testing for Welfare Recipients and Public Assistance* (Mar. 24, 2017), <http://www.ncsl.org/research/human-services/drug-testing-and-public-assistance.aspx>; see also R.L. Nave, (Some) Drug Kinks Fixed, JACKSON FREE PRESS (Sept. 17, 2014, 2:00 PM), <https://www.jacksonfreepress.com/news/2014/sep/17/some-drug-testing-kinks-fixed/> (discussing the adequacy of the questionnaire potential welfare recipients must complete, which claims to screen for drug use).

<sup>213</sup> MISS. CODE ANN. § 43-17-6 (West 2020).

<sup>214</sup> *Id.*

<sup>215</sup> NAT’L CONFERENCE OF STATE LEGISLATURES, *supra* note 212.

<sup>216</sup> § 43-17-6.

<sup>217</sup> Anna Wolfe, *Drug Test Law: Punishing Parents, Starving Kids*, JACKSON FREE PRESS (July 23, 2014, 11:34 AM), <https://www.jacksonfreepress.com/news/2014/jul/23/drug-test-law-punishing-parents-starving-kids/>.

entire household, children included.<sup>218</sup> However, upon revision, this was changed to allow benefits to transfer to a parent stand-in called a “protective payee.”<sup>219</sup> Still, civil liberties groups such as the American Civil Liberties Union (ACLU) call it a “disgusting framework” that is meant to discriminate against poor individuals and is costly.<sup>220</sup> Studies show that welfare recipients are not more likely to abuse drugs than the general population and screening ends up costing the taxpayer more money.<sup>221</sup>

This is exactly what transpired in Mississippi. After eight months of implementation, only one point three percent were identified by the questionnaire as having a high probability of substance dependence.<sup>222</sup> Once tested, only fourteen hundredths of a percent of all applicants had an illegal substance in their system.<sup>223</sup> To obtain that result, Mississippi spent \$18,750 on questionnaire kits and \$3,096 on drug kits for a total of \$21,846 that could have been used to provide benefits to 129 families.<sup>224</sup>

The questionnaires themselves also pose problems. Policymakers selected the Substance Abuse Screening Inventory (SASSI) as their screening kit.<sup>225</sup> However, the SASSI Institute is “not a measure of use of controlled substances,” but rather a tool to gauge the “probability of being diagnosed with any type of substance abuse disorder, including alcohol.”<sup>226</sup> Questions are all true or false and include statements like:

- True or False: Crying never helped anything.
- True or False: Most people will laugh at a joke at times.
- True or False: I do not like to sit and daydream.
- True or False: At times I feel worn out for no special reason.
- True or False: I always feel sure of myself
- True or False: I am usually a happy person.
- True or False: I am a restless person.
- True or False: I have been tempted to leave home.<sup>227</sup>

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<sup>218</sup> Nave, *supra* note 212.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> Celia Goetzl, *Government Mandated Drug Testing for Welfare Recipients: Special Need or Unconstitutional Condition?*, 15 U. PA. J. CONST. L. 1539, 1541 (2013) (citing Jordan C. Budd, *Pledge Your Body for Your Bread: Welfare, Drug Testing, and the Inferior Fourth Amendment*, 19 WM. & MARY BILL RTS. J. 751, 776–77 (2009)).

<sup>222</sup> Matt Williams, *Mississippi’s Leaders Thought Welfare Recipients Were On Drugs. They Were Wrong.*, RETHINK MISSISSIPPI (May 12, 2015), <https://www.rethinkms.org/2015/05/12/last-year-mississippi-started-testing-welfare-applicants-for-drugs-99-9-percent-have-passed/>.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*; see also Jimmie E. Gates, *Only Two Welfare Recipients Test Positive for Drugs*, CLARION LEDGER (Dec. 5, 2014, 9:28 AM), <https://www.clarionledger.com/story/news/politics/2014/12/05/two-positive-drug-tests-new-welfare-drug-testing/19945003/> (discussing the low rate of welfare recipients who test positive for drugs).

<sup>225</sup> Wolfe, *supra* note 217.

<sup>226</sup> SUBSTANCE ABUSE SUBTLE SCREENING INVENTORY INST., SCREENING ISSUES, <https://sassi.com/screening-issues/> (last visited Dec. 22, 2019).

<sup>227</sup> See Nave, *supra* note 212; Williams, *supra* note 222; Wolfe, *supra* note 217.

Furthermore, using these questions to deny benefits is not what they were created to do.<sup>228</sup> SASSI even provides the following disclaimer on their website:

Increasingly, governmental agencies are requiring substance abuse assessment as part of the process of applying for general assistance. When policy makers recognize the value of providing adjunctive services such as substance use counseling and vocational counseling to recipients of general assistance in need of such services, the SASSI can be a helpful tool. Substance use treatment would have a beneficial effect for both the individual and society. However, when public assistance is made contingent on participation in the assessment and treatment process, it increases the risk for violations of ethical principles and applicants' rights.<sup>229</sup>

Yet, the organization still took the state's payment and provided its services, despite being fully aware of its purpose.<sup>230</sup>

It is hard to know how many marginalized families have been affected by this practice, as the Mississippi Department of Human Services (MDHS) has failed to track TANF applicants who did not comply with drug screening requirements,<sup>231</sup> but given the issues surrounding the SASSI questionnaires, cost, and studies showing little need for such a process, the solution is already showing itself to be extremely flawed.

But what if a mother, or anyone else, wanted to challenge this in a welfare hearing? In order to navigate welfare benefits, most claimants end up appearing pro se, while trained advocates support the government.<sup>232</sup> The Supreme Court held that welfare recipients are entitled to be heard before the government terminates assistance under the Due Process Clause, but did not say that states are required to appoint counsel for these hearings.<sup>233</sup> As a result, mothers in this position would likely lack the proper representation and lose benefits they may have received with appropriate help.<sup>234</sup>

#### ***D. In the Civil Liability Context***

Parental liability laws place the blame on parents for their child's wrongdoing. Under the Mississippi Code this includes:

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<sup>228</sup> SUBSTANCE ABUSE SUBTLE SCREENING INVENTORY INST., *supra* note 226.

<sup>229</sup> SUBSTANCE ABUSE SUBTLE SCREENING INVENTORY INST., *supra* note 226.

<sup>230</sup> Williams, *supra* note 222.

<sup>231</sup> *Id.*

<sup>232</sup> See generally Stephen Loffredo & Don Friedman, *Gideon Meets Goldberg: The Case for A Qualified Right to Counsel in Welfare Hearings*, 25 *TOURO L. REV.* 273 (2009) (discussing how the Supreme Court did not acknowledge a due process right of appointed counsel in welfare hearings).

<sup>233</sup> *Id.* at 280–81.

<sup>234</sup> There are constitutional questions surrounding drug testing for benefits including possible Fourth Amendment violations and a possible “unconstitutional conditions” analysis. See Goetzl, *supra* note 177 for a discussion on government mandated drug testing as an unconstitutional requirement imposed on welfare recipients; see also Jacquelyn Bolen, “Screening” the Poor: *The Legality of Drug Testing for Welfare Benefits*, 18 *RICH. J.L. & PUB. INT.* 77 (2014) (discussing specifically Virginia’s House Bill mandating drug testing for welfare recipients).

- Section 93-13-2. Liability imposed on parent when child maliciously or willfully damages property.<sup>235</sup>
- Section 97-15-1. Liability imposed on parent when child willfully defaces/damages sign, device, signal, bridge, underpass, or overpass.<sup>236</sup>
- Section 63-1-25. Liability imposed on parent who signs child’s driver’s application and child negligently or willfully engages in misconduct.<sup>237</sup>

Legislatures pass laws like these in an effort to get parents to exercise more supervision over their children. However, this disproportionately affects single mothers of color who are unable to employ that kind of supervision because they are at work trying to make ends meet.<sup>238</sup> The fines accrued from these instances are likely to pose a greater burden on these mothers, possibly leading them to seek government assistance if they have not already.<sup>239</sup>

Parental liability statutes attempt to deter juvenile crime but ignore the complex socio-economic issues surrounding the problem.<sup>240</sup> It is not one parent’s fault, but a variety of factors that contribute to the delinquency of a child, including racism and poverty.<sup>241</sup> However, some scholars and policymakers still take the position that quality and number of parents is the main connection between a child a crime.<sup>242</sup> This stigmatization of single mothers is easy because women of color are already subject to numerous negative stereotypes.<sup>243</sup>

These statutes reinforce how “an ideal mother”<sup>244</sup> ought to behave and single mothers of color “do not fulfill [this] ideal.”<sup>245</sup> The standard created is, once again, one based on a white middle-class ideal that creates unreasonable expectations for those who do not fit.<sup>246</sup> It does not take into account hardships that result from living in a lower socio-economic class such as higher

<sup>235</sup> MISS. CODE ANN. § 93-13-2 (West 2019).

<sup>236</sup> § 97-15-1.

<sup>237</sup> § 63-1-25.

<sup>238</sup> See Damaske, *supra* note 71 (stating that families headed by single women of color disproportionately bear a greater burden of poverty risk).

<sup>239</sup> *Id.*

<sup>240</sup> Elena R. Laskin, *How Parental Liability Statutes Criminalize and Stigmatize Minority Mothers*, 37 AM. CRIM. L. REV. 1195, 1207 (2000).

<sup>241</sup> *Id.* (citing Irving Spergel, DEP’T OF JUST., GANG SUPPRESSION AND INTERVENTION (1993)).

<sup>242</sup> *Id.* at 1208.

<sup>243</sup> *Id.* at 1210 (“The public readily accepts that these women are not able to properly mother their children because they believe that single mothers on welfare are lazy or morally flawed, or that they give birth to children only to get an increase in their allowances from the government. These women, who do not readily fit into society’s conception of perfect parents because they are poor, divorced, or unmarried women of color are therefore expendable and can be scapegoats for society’s problems. The stigmatization is even worse for Black and Latina women because regardless of how much effort they put into motherhood, or what socio-economic class they are a member of, they will never be able to achieve the societal model of good motherhood because ‘ideal motherhood is white.’”) (quoting Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 11–16 (1993)).

<sup>244</sup> *Id.* at 1212.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 1213.

chances that a youth will be arrested because of substantial police presence in minority communities or gang activity in the area.<sup>247</sup>

By punishing single mothers through parental liability statutes, the many causes of delinquency are not addressed and, in fact, may be exacerbated.<sup>248</sup> The fines could drive a family further into poverty or crime, and imprisonment of the only parent would leave the child without a guardian.<sup>249</sup> A better approach to the problem would be to keep families together by drawing them closer through programs that address all of the factors that contribute to delinquency.<sup>250</sup> An ideal program would include group sessions with a social worker or psychologist and age-specific activities that would allow children and adolescents to form productive relationships with their peers.<sup>251</sup>

### *E. In the Juvenile Justice System as Mothers*

The cycle ends where it began—in the juvenile justice system context. However, this time it is the woman’s children who are in the system. Studies show that successful completion of probationary terms and desisting crime relies on the mother’s attitudes toward the legal system and her knowledge of maneuvering through it.<sup>252</sup> A lack of knowledge and negative feelings towards the legitimacy of the system seemingly predicted whether the child would re-offend.<sup>253</sup> This negative attitude could have very well started as a girl in the system or through her experiences as a mother in the civil, criminal, or administrative spheres.

If the chances of reoffending are high, then the mother may be in a position where she is once again constantly being scrutinized by the law, which has in many ways set her and her daughters up to fail. Had she had a more positive experience in the legal system, the situation could be very different.

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<sup>247</sup> Laskin, *supra* note 240, at 1211–12 (“The institutionalized racism at all levels of the criminal justice system, from police investigations to sentencing, incarcerates more minority men, causing society to view minority youths as criminals. As a result, more minority youths enter the jurisdiction of the criminal justice system, exposing their parents to scrutiny and potential prosecution, thereby translating the institutional racism against the youths to their parents, who are largely single mothers. Once these parents are open to scrutiny, they are vulnerable to the same subjective decision-making that has led to the incarceration of a disproportionate number of minority men.”).

<sup>248</sup> *Id.* at 1212.

<sup>249</sup> MISS. CODE ANN. § 93-13-2 (West 2020) (fines not to exceed \$5,000); § 97-15-1 (fines between \$200 and \$500, up to six months imprisonment, or punishment by both fine and imprisonment); § 63-1-25 (no limit imposed); *see* Laskin *supra* note 240, at 1211–12.

<sup>250</sup> *Id.* at 1214–16.

<sup>251</sup> *Id.*

<sup>252</sup> Caitlin Cavanagh & Elizabeth Cauffman, *What They Don’t Know Can Hurt Them: Mothers’ Legal Knowledge and Youth Re-Offending*, 23 PSYCHOL. PUB. POL’Y & L. 141, 141 (2017).

<sup>253</sup> *Id.* at 142 (“Troublingly, a large-scale national review of parental involvement in juvenile courts concluded that there are few resources available to educate parents in the juvenile justice process . . . Indeed, many probationary programs offer little or no education for parents as far as their family’s rights and duties.”).



#### **IV. SOLUTION SUMMARY**

While our culture sets up barriers for single mothers of color due to gender stereotypes and racism, other burdens are creations of bad government policy that can be more readily changed. The following are specific practices and statute amendments that the State of Mississippi and its judges could implement to level the playing field for all mothers:

- The State should prioritize the distribution of long-acting reversible contraceptives and training of healthcare providers to insert and remove them.
- In the juvenile system, “status offenses” should not be grounds for confinement.
- Judges should interpret the child abuse and neglect statutes to not include fetuses or the State should explicitly exclude fetuses from the definition of a child.
- The State should include an affirmative defense to failure to protect laws when the defendant fears substantial bodily harm.
- The State should abolish the practice of drug screening to receive TANF benefits.
- The State should encourage an alternative means of deterring juvenile delinquency besides parental civil liability laws such as educational programs that address the various causal factors.

#### **V. CONCLUSION**

Though Mississippi likes to tout its “family values,” the laws in place put mothers of color in a cycle that keeps them impoverished and increases the likelihood that their children will continue with the same burdens. However, there are steps policymakers can take to ensure that women across races and socioeconomic backgrounds can parent without oppression.



