

2021

## Can You Hear Me?: How Implicit Bias Creates a Disparate Impact in Maternal Healthcare for Black Women

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## **Can You Hear Me?: How Implicit Bias Creates a Disparate Impact in Maternal Healthcare for Black Women**

### ABSTRACT

Black women die from childbirth at a disproportionately higher rate than white women. Despite knowing about this issue for years, medical professionals cannot attribute this disparity to a physical condition. Multiple studies show physicians' implicit biases lead to poor patient care. Overall, Black women consistently report feeling silenced by their treating physicians—a feeling that has persisted since slavery. Stereotypes about Black women cloud physicians' ability to provide adequate care. For those with Medicaid, the problems are even greater. Unfortunately for Black women and their families, creating a successful medical malpractice or wrongful death claim is nearly impossible. This is because Black women cannot overcome the reasonable person standard set by the medical profession. Thus, to ensure Black women are afforded the same right as other women—a healthy birthing experience—another remedy is necessary. This Comment explores those potential remedies.

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## INTRODUCTION

In 2000, my mother—a Medicaid recipient—was pregnant with my younger brother. She continued to work during her pregnancy because she already had two children at home, and she could not afford to not work. Throughout her pregnancy, she had the distinct feeling that something was wrong with her baby and expressed this fear to her physicians, but to no avail. Although the doctors were unable to point to a medical reason for this feeling, she knew that this pregnancy was significantly different from her two previous pregnancies. On February 21, 2001, my brother was born, and to everyone's surprise, including the doctors', he was blue. He was

diagnosed with a heart condition, Tetralogy of Fallot, which causes oxygen-poor blood to flow through his body. He was immediately rushed into open heart surgery.

At only one day old, my brother underwent a major surgical procedure, and he later underwent four major surgeries in just the first nineteen years of life. His birth defect was most likely caused by a viral illness my mother contracted during her pregnancy that she was neither tested nor treated for. Despite repeatedly voicing her concerns, the doctors never listened. If the doctors had taken her concerns seriously, they may have performed more tests and caught the abnormality sooner. This is not an uncommon story for mothers of color. Fortunately, my mother's story had a happy ending—my brother is a sophomore in college who is active in multiple sports. However, the stories of many Black women do not always end as happily as my mother's.

For the past few years, Black women have vocalized the subpar quality of reproductive healthcare they receive.<sup>1</sup> During a 2019 Democratic Primary Debate, candidates Elizabeth Warren and Amy Klobuchar addressed the sharp divide of pregnancy complications experienced by Black women versus white women.<sup>2</sup> According to the Centers for Disease Control and Prevention, Black women “are over three times more likely to die from pregnancy or childbirth-related causes” when compared to other groups.<sup>3</sup> For every 100,000 births, Black women account for 43.5 deaths.<sup>4</sup> This leaves many people wondering: Why are Black women dying from childbirth? “The most common causes of maternal death in all women are cardiac events, drug overdoses, hypertension, eclampsia, and hemorrhaging.”<sup>5</sup> Some Black women have pre-pregnancy obesity, high blood pressure, or diabetes which may cause them to suffer from pregnancy

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1. See, e.g., Amy Roeder, *America is Failing its Black Mothers*, HARV. PUB. HEALTH, Winter 2019, [https://www.hsph.harvard.edu/magazine/magazine\\_article/america-is-failing-its-black-mothers/](https://www.hsph.harvard.edu/magazine/magazine_article/america-is-failing-its-black-mothers/) [<https://perma.cc/FS9L-MR9G>].

2. Anna North, *Democrats Need to Win Women in 2020. The Debate Showed the Candidates Know That*, VOX (June 27, 2019, 6:30 AM), <https://www.vox.com/2019/6/27/18760657/democratic-debate-june-2019-2020-gender-abortion> [<https://perma.cc/6ES4-32KQ>].

3. Serena Williams, *Serena Williams: What My Life-Threatening Experience Taught Me About Giving Birth*, CNN OP. (Feb. 20, 2018, 3:32 PM), <https://www.cnn.com/2018/02/20/opinions/protect-mother-pregnancy-williams-opinion/index.html> [<https://perma.cc/9EZD-BLLH>].

4. Morgan Brinlee, *Racism Is Literally Killing Pregnant Black Women & These Numbers Prove It*, BUSTLE (Nov. 7, 2017), <https://www.bustle.com/p/race-maternal-mortality-are-linked-black-mothers-are-paying-the-price-3017625>, [<https://perma.cc/Y2VX-LVJ8>].

5. *Id.*

complications more frequently.<sup>6</sup> But, this does not account for all Black women. The underlying medical issues that Black women experience are attributable to the “systematic racial bias and institutionalized racism structures” experienced daily by Black women.<sup>7</sup>

Black women dying during childbirth has also transcended class distinctions. In 2018, professional tennis champion Serena Williams highlighted her own near-death experience from childbirth.<sup>8</sup> After giving birth to her daughter via cesarean section, she almost died after developing a pulmonary embolism.<sup>9</sup> Representative Shawn Thierry from Texas is another prominent woman of color who almost lost her life during childbirth.<sup>10</sup> Regardless of their prior medical history or wealth, Black women share a similar sentiment—doctors not listening.<sup>11</sup> Both Mrs. Williams and Representative Thierry expressed their concerns to their physicians.<sup>12</sup> Mrs. Williams’ sentiments were ignored for hours.<sup>13</sup> Doctors opined that her “pain medication must be making her confused.”<sup>14</sup> Although Representative Thierry’s physicians were able to quickly fix her problem, she recognizes the racial disparities in the quality of healthcare offered to birthing mothers.<sup>15</sup> The problem may stem from the predominantly male<sup>16</sup> profession’s inability or unwillingness to listen to the needs of women, or their failure to understand the Black, female body. Perhaps the disparity is perpetuated by the fact that nearly 49% of Black women are either uninsured or have Medicaid.<sup>17</sup> Or, as this Comment will

6. *Id.*

7. Akilah Wise, *Structural Racism in Medicine Worsens the Health of Black Women and Infants*, REWIRE NEWS GRP. (Jan. 17, 2020, 11:14 AM), <https://rewire.news/article/2020/01/17/structural-racism-in-medicine-worsens-the-health-of-black-women-and-infants/> [<https://perma.cc/4666-WHJF>].

8. Williams, *supra* note 3.

9. *Id.*

10. Brinlee, *supra* note 4.

11. *Id.*

12. Roeder, *supra* note 1.

13. *Id.*

14. *Id.*

15. Brinlee, *supra* note 4.

16. Men still outnumber women in the medical profession 64% to 36%, despite women currently out-enrolling men in medical school. Linda Searing, *The Big Number: Women Now Outnumber Men in Medical Schools*, WASH. POST (Dec. 23, 2019, 8:00 AM), [https://www.washingtonpost.com/health/the-big-number-women-now-outnumber-men-in-medical-schools/2019/12/20/8b9eddea-2277-11ea-bed5-880264cc91a9\\_story.html](https://www.washingtonpost.com/health/the-big-number-women-now-outnumber-men-in-medical-schools/2019/12/20/8b9eddea-2277-11ea-bed5-880264cc91a9_story.html) [<https://perma.cc/PK7A-NZVF>].

17. *Black Women Experience Pervasive Disparities in Access to Health Insurance*, NAT’L P’SHP FOR WOMEN & FAMS. (Apr. 2019), <https://www.nationalpartnership.org/our->

explore in more depth, physicians' implicit biases interfere with their care of Black women, resulting in higher fatality rates.

Title VI of the Civil Rights Act of 1964 prohibits federally funded programs from discriminating on the basis of race.<sup>18</sup> Even without evidence of overt invidious discrimination, a plaintiff can plead a disparate impact theory of discrimination under Title VI.<sup>19</sup> Disparate impact is a legal theory that facially neutral practices nevertheless cause discriminatory effects against a protected class.<sup>20</sup>

Using Title VI's disparate impact framework, this Comment argues that the inadequate healthcare provided to Black women during their pregnancies is the direct result of the implicit biases of their physicians—a reality that must be addressed expeditiously.<sup>21</sup> Part I analyzes the history of Black women's healthcare and how it impacts the current treatment of Black women. Part II shows how physicians' implicit biases cause this impact and uses jurisprudential theories to analyze how those biases have shaped the reasonable standard of medical care. Part III explains how such biases inherently make medical malpractice and wrongful death suits insufficient legal remedies for Black women who suffer from discriminatory healthcare practices. Part IV concludes with a discussion of possible professional, political, and alternative legal remedies to cure this unexamined issue.

#### I. BLACK WOMEN HAVE SUFFERED FROM SUBPAR HEALTHCARE SINCE THEY WERE ENSLAVED

Black women's distrust for medical professionals stems from many years of experimentation and forced sterilization. "Slavery, segregation,

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work/resources/health-care/black-womens-health-insurance-coverage.pdf [https://perma.cc/YH2X-NAGJ] [hereinafter *Black Women Experience Pervasive Disparities*].

18. 42 U.S.C. § 2000(d) (2020).

19. See *Guardians Ass'n v. Civ. Serv. Comm'n*, 463 U.S. 582, 593 (1983). The Supreme Court of the United States held that Title VI reaches "unintentional, disparate-impact discrimination." *Id.*

20. See generally Amitabh Chandra et al., *Challenges to Reducing Discrimination and Health Inequity Through Existing Rights Laws*, 36 HEALTH AFFS., no. 6, 2017, at 1041, 1042.

21. While this Comment only seeks to utilize Title VI's disparate-impact framework as an organizational tool to address the issue of disparate medical care, it is worth noting that most (if not all) hospitals receive federal funds. See *Health and Hospital Expenditures*, URB. INST., <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/health-and-hospital-expenditures#:~:text=Overall%2C%2089%20percent%20of%20total,to%20state%20and%20local%20governments> [https://perma.cc/9F3B-UU4M]. Therefore, Title VI arguably prohibits most (if not all) hospitals from providing subpar medical care to patients of color, regardless of if that subpar care is intentional.

and racism” have caused Black people to develop different behavioral patterns.<sup>22</sup> Historically, medical professionals had false perceptions about Black people based on racist assumptions.<sup>23</sup> These perceptions permeated into society and have continued to cause negative connotations about Black women. Assumptions that Black women are “able to endure intense discomfort during pregnancy and labor” has a huge impact on their reproductive treatment today.<sup>24</sup>

### *A. History*

#### *1. Medical Treatment of Black Women During Slavery*

During slavery, physicians experimented on Black women to perfect medical treatments. Many healthcare advancements—“brilliant . . . medical feats”—were first tested on Black women and the poor.<sup>25</sup> As early as the 1800s, female slaves were used as “test monkeys” for serious surgeries.<sup>26</sup> In the early 1800s, Dr. Ephraim McDowell<sup>27</sup> successfully learned how to remove ovarian tumors, using slaves to perfect the dangerous surgery.<sup>28</sup> In another example, Dr. Marion Sims<sup>29</sup>, although known today as a hero and the father of gynecological surgery, used immoral tactics to develop his famous procedures.<sup>30</sup> Dr. Sims repeatedly performed a procedure to perfect a fistula repair surgery on the same group

22. Vernellia R. Randall, *Slavery, Segregation and Racism: Trusting the Health Care System Ain't Always Easy! An African American Perspective on Bioethics*, 15 ST. LOUIS U. PUB. L. REV. 191, 193 (1996).

23. TINA K. SACKS, *INVISIBLE VISITS: BLACK MIDDLE-CLASS WOMEN IN THE AMERICAN HEALTHCARE SYSTEM* 96 (Oxford Univ. Press 2019).

24. *Id.* at 97. The Author personally believes Black women are extremely strong and endure a lot because they are often seen as the go-to person for others' problems; they do not like to burden others with their personal struggles.

25. Randall, *supra* note 22, at 196.

26. *Id.*

27. Dr. McDowell is known as the father of abdominal surgery. Kat Eschner, *This American Doctor Pioneered Abdominal Surgery by Operating on Enslaved Women*, SMITHSONIAN MAGAZINE (Dec. 19, 2017), [https://www.smithsonianmag.com/history/father-abdominal-surgery-practiced-enslaved-women-180967589/\[https://perma.cc/8JWT-GYP4\]](https://www.smithsonianmag.com/history/father-abdominal-surgery-practiced-enslaved-women-180967589/[https://perma.cc/8JWT-GYP4]). He operated on four different enslaved women before he successfully developed a surgical treatment for ovarian cancer. *Id.*

28. Randall, *supra* note 22, at 196.

29. Eschner, *supra* note 27. Dr. J. Marion Sims is known for creating fistula repair surgeries. *Id.* In recent years, many have advocated for the removal of statues honoring Sims and have attempted to shed light on his inhumane methodology. *Id.*

30. Randall, *supra* note 22, at 197.

of enslaved women.<sup>31</sup> Sims bought female slaves from their owners because he wanted 24/7 access to his patients.<sup>32</sup> He experimented on the same three women for *four years*.<sup>33</sup> The experimental procedures required the women to be bent forward, nearly upside down, for long periods of time.<sup>34</sup> Dr. Sims decided not to use a numbing technique because he believed Black people did not experience pain in the same way that white people did.<sup>35</sup>

There are deep linkages with American gynecology and slavery.<sup>36</sup> As slaves, the reproductive health of Black women was a pertinent issue for their masters. The infant mortality rate was high during slavery because Black mothers had poor nutrition and performed hard labor while pregnant.<sup>37</sup> “In the South, an estimated 50% of enslaved infants were stillborn or died within the first year of life.”<sup>38</sup> Aside from infant mortality, some Black women were infertile.<sup>39</sup> The Abolition of the Slave Trade Act of 1807 banned slave trading throughout the British colonies.<sup>40</sup> Thus, slave masters depended on their female slaves to create new slaves.<sup>41</sup> Slave masters hired physicians to determine why their slaves were infertile or unable to birth healthy babies,<sup>42</sup> leading physicians to experiment on infertile slaves in an attempt to understand and potentially cure the slaves’ infertility.<sup>43</sup> But the experimenting did not stop with surgery. Many of today’s common reproductive procedures were also discovered by

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31. *Id.*

32. Brynn Holland, *The ‘Father of Modern Gynecology’ Performed Shocking Experiments on Slaves*, HIST. (Dec. 4, 2018), <https://www.history.com/news/the-father-of-modern-gynecology-performed-shocking-experiments-on-slaves> [<https://perma.cc/YBR8-P4U>].

33. *Id.*

34. *Id.*

35. *Id.*

36. Deirdre Cooper Owens & Sharla M. Fett, *Black Maternal and Infant Health: Historical Legacies of Slavery*, 109 AM. J. PUB. HEALTH 1342, 1342 (2019).

37. *Id.* at 1343.

38. *Id.*

39. *Id.*

40. H.R. Res. 272, 110th Cong. (2007). This Resolution commemorates the 200<sup>th</sup> anniversary of the abolition of the transatlantic slave trade.

41. Owens & Fett, *supra* note 36.

42. *Id.*

43. *Id.* Physicians were brought in to perform treatments and to provide owners with a better understanding of the female body. See Marie Jenkins Schwartz, “Good Breeders,” SLATE (Aug. 24, 2015, 10:50 AM), <https://slate.com/human-interest/2015/08/how-enslaved-womens-sexual-health-was-contested-in-the-antebellum-south.html> [<https://perma.cc/2AX3-TG9K>]. For example, slave owners did not realize conception required a woman to have sex during ovulation. *Id.*

43. Owens & Fett, *supra* note 36.

physicians experimenting on slaves.<sup>44</sup> For example, the cesarean section was pioneered by Francois Marie Prevost's experimentation on slaves.<sup>45</sup>

## 2. *Control of Black Women's Bodies After Slavery: Forced Sterilization and Eugenics*

After slavery, Black laborers were no longer in demand, which caused many physicians to channel their energy into erasing the Black population entirely.<sup>46</sup> For instance, birth control was created as a way to control the growth of the Black population.<sup>47</sup> Dr. Margaret Sanger, the mother of family planning and reproductive freedom, strongly encouraged the use of reproductive technology to limit Black women's reproductive freedom.<sup>48</sup> Throughout the early 1900s, many groups advocated for compulsory sterilization of Black women.<sup>49</sup> States passed sterilization statutes to allow physicians to sterilize patients even if unnecessary or not desired by the patient.<sup>50</sup> The victims of these practices were usually the mentally disabled, unmarried mothers, poor people, and people of color.<sup>51</sup>

In *Buck v. Bell*, the Supreme Court of the United States held that Virginia's eugenics statute was constitutional.<sup>52</sup> But fifteen years later, in *Skinner v. Oklahoma*, the Court held Oklahoma's eugenics statute violated the Equal Protection Clause of the Fourteenth Amendment.<sup>53</sup> Justice Douglas, writing for the majority in *Skinner*, expressed the danger of forced sterilization: "The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause

44. *Id.*

45. *Id.*

46. *See generally*, Owens & Fett, *supra* note 36.

47. Randall, *supra* note 22, at 202.

48. *Id.*

49. *Id.* at 202–03. Advocate groups believed limiting the reproduction of the Black population would reduce the number of welfare recipients. Ana Romero-Bosch, *Lessons in Legal History—Eugenics & Genetics*, 11 MICH. ST. U. J. MED. & L. 89, 95 (2007). Eugenics is "the practice or advocacy of controlled selective breeding of human populations (as by sterilization) to improve the population's genetic composition." *Eugenics*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/eugenics> [<https://perma.cc/4JVQ-DMWF>].

50. Romero-Bosch, *supra* note 49, at 96; Lisa Ko, *Unwanted Sterilization and Eugenics Programs in the United States*, PBS (Jan. 29, 2016), <https://www.pbs.org/independentlens/blog/unwanted-sterilization-and-eugenics-programs-in-the-united-states/> [<https://perma.cc/B9VA-JL75>].

51. Ko, *supra* note 50.

52. *See generally* *Buck v. Bell*, 274 U.S. 200 (1927). Justice Oliver Wendall Holmes wrote, "Three generations of imbeciles are enough." *Id.* at 207.

53. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

races or types which are inimical to the dominant group to wither and disappear.”<sup>54</sup> By the 1940s, the eugenics movement had lost a lot of support, but forced sterilization continued.<sup>55</sup> Each year, over 100,000 people were sterilized.<sup>56</sup> During the 1960s, planning clinics were prevalent in Black communities to ensure abortions were easily accessible.<sup>57</sup> Some doctors went even further and would only perform abortions for Black women if they consented to sterilization.<sup>58</sup>

### 3. Segregation’s Effect on Black Women’s Health

Following the Civil War, hospitals discriminated against Black patients.<sup>59</sup> The few Black people who were treated rarely received attentive care.<sup>60</sup> Moreover, healthcare facilities designated for Black people were inferior to facilities for whites.<sup>61</sup> Black facilities were not equipped with the necessary tools to care for the patients.<sup>62</sup> Although facilities for whites enjoyed the advancement of modern medicine, facilities for Black people remained in the same condition.<sup>63</sup> The end of slavery also created a new issue for Black people. During slavery, Black people relied on their slave owners to provide healthcare.<sup>64</sup> Without the slavery system, most Black people did not have the resources to pay for healthcare.<sup>65</sup> Thus, many

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54. *Id.*

55. Ko, *supra* note 50.

56. *Relf v. Weinberger*, 372 F. Supp. 1196, 1099 (D.D.C. 1974). Mary Alice and Minnie Relf, Black sisters, were sterilized at the ages of fourteen and twelve, respectively. *Relf Sisters’ Involuntary Sterilization Sparks Lawsuit, Reform in Alabama*, EQUAL JUST. INITIATIVE, <https://calendar.eji.org/racial-injustice/jun/27>. [<https://perma.cc/W3H5-TGYT>]. Their mother believed she was giving consent for birth control, but later found out her daughters had undergone surgery. *Id.*

57. Randall, *supra* note 22, at 203.

58. *Id.*

59. Kevin Outterson, *Tragedy and Remedy: Reparations for Disparities in Black Health*, 9 DEPAUL J. HEALTH CARE L. 735, 757 (2005).

60. *See id.* at 751–63.

61. Kerri L. Hunkele, *Segregation in United States Healthcare: From Reconstruction to Deluxe Jim Crow 18–19* (2014) (honors thesis, Univ. of New Hampshire) (on file with the University of New Hampshire Scholars’ Repository).

62. *Id.* at 16–19.

63. Outterson, *supra* note 59, at 738.

64. *Id.* at 749.

65. *Id.* at 751.

medical professionals were unwilling to serve Black patients.<sup>66</sup> Black women were forced to turn to midwives for reproductive care.<sup>67</sup>

Today, Black women find it difficult to trust medical professionals because they have historically never respected Black women's bodies. Whether or not their physicians feel the same way as Dr. Sanger or Dr. Sims, the distrust remains. This barrier prevents effective communication, which leads to poor treatment. Doctors who believe Black women can endure more pain may prolong necessary treatment or surgeries. Overt racism was a major problem in the country in the 20th century.<sup>68</sup> Black people were not allowed in many hospitals because of conscious, intentional racism.<sup>69</sup> Although overt racism is not the norm anymore, implicit biases still very much exist and greatly affect patient care. For those physicians that still carry misperceptions about Black women's bodies, either consciously or through societal assumptions of racial stereotypes, it may influence how they care for their Black patients.<sup>70</sup>

*B. Impact—Public Insurance, Medicaid, Contributes to the Quality-of-Care Disparities Between Black Women and White Women.*

Although Black women from all types of economic backgrounds are experiencing poor reproductive healthcare, Black women on public insurance face additional biases. Along with the stigmas of being a Black woman, they are always faced with the stereotypes of being a Medicaid recipient. By definition, those on Medicaid either fall into a low-income bracket or have a certain qualifying disease. Only certain physicians will treat patients on Medicaid,<sup>71</sup> and typically, these physicians provide the bare-minimum care. Women with high-risk pregnancies may have to go to

66. *Id.*

67. David Barton Smith, *The Politics of Racial Disparities: Desegregating the Hospitals in Jackson, Mississippi*, 83 MILBANK Q. 247, 250 (2005). Today, many Black women have returned to using midwives and doulas for their reproductive care. Ann M. Simmons, *Black Doulas, Midwives and Reproductive Health Advocates Step Up in Response to Rising Black Maternal Deaths*, L.A. TIMES (Oct. 26, 2017, 3:00 AM), <https://www.latimes.com/nation/la-na-global-black-midwives-20171026-story.html> [https://perma.cc/8RHH-BEM7].

68. DONALD A. BARR, HEALTH DISPARITIES IN THE UNITED STATES: SOCIAL CLASS, RACE, ETHNICITY, AND THE SOCIAL DETERMINANTS OF HEALTH 230 (3d ed. 2019).

69. *Id.*

70. SACKS, *supra* note 23.

71. See Sumit Agarwal, Opinion, *Physicians Who Refuse to Accept Medicaid Patients Breach Their Contract with Society*, STAT (Dec. 28, 2017), <https://www.statnews.com/2017/12/28/medicaid-physicians-social-contract/> [https://perma.cc/9QK9-FXE8].

other physicians outside of their insurance network to receive the care they need. Although the Equal Protection Clause prohibits unequal treatment, many state insurances treat Medicaid recipients differently by preventing them from receiving the same procedures as Black women on private insurance.

*1. Patients with State/Public Insurance are Seen Negatively by Physicians, Which Affects Their Treatment.*

Many physicians already resent Medicaid patients because of the “bureaucratic hassles of Medicaid.”<sup>72</sup> As soon as they walk in for treatment, state insurance beneficiaries (which include 21% of Black women)<sup>73</sup> are seen as a burden to medical professionals. For example, in New York, a pregnant Medicaid patient must meet with a health educator, HIV counselor,<sup>74</sup> nutritionist, social worker, and financial officer before the healthcare provider is reimbursed from the state.<sup>75</sup> The responsibilities imposed on medical personnel deter them from spending more time with Black patients, aside from what is minimally necessary.<sup>76</sup> But healthcare professionals cannot cut corners—the consequences could be fatal.<sup>77</sup>

Physicians’ implicit biases about public healthcare recipients affect the level of care Black women receive on all fronts. Not only are physicians reluctant to “go the extra mile,” but recent studies show physicians spend less time with Black patients, underestimate the severity of Black patients’ pain, disregard their symptoms, and even ignore their complaints.<sup>78</sup> Whether the lack of care is intentional or accidental, Black maternal death

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72. *Id.*

73. *Women of Color More Likely to be Uninsured or Covered by Medicaid*, KAISER FAM. FOUND. (Nov. 12, 2013), <https://www.kff.org/womens-health-policy/slide/women-of-color-more-likely-to-be-uninsured-or-covered-by-medicaid-2012/> [<https://perma.cc/M2HP-TYSJ>].

74. The Author did not examine whether private insurance companies have similar requirements.

75. KHIARA M. BRIDGES, *REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION* 85 (2011).

76. See Tara Culp-Ressler, *Challenging Medical Racism and Physicians’ Preference for White Patients*, THINKPROGRESS (Feb. 23, 2015, 2:15 PM), <https://thinkprogress.org/challenging-medical-racism-and-physicians-preference-for-white-patients-59bec589df88/> [<https://perma.cc/4ZVZ-XN82>].

77. See DAVID A. ANSELL, *THE DEATH GAP: HOW INEQUALITY KILLS* 113 (Univ. of Chi. Press 2017).

78. MiQuel Davies, *Racism in Health Care – For Black Women Who Become Pregnant, It’s a Matter of Life and Death*, NAT’L WOMEN’S L. CTR. (April 13, 2018), <https://nwlc.org/blog/racism-in-health-care-for-black-women-who-become-pregnant-its-a-matter-of-life-and-death/> [<https://perma.cc/AUS5-U67F>]; see also Brinlee, *supra* note 4.

rates are on the rise because of such dismissive behavior.<sup>79</sup> Medicaid and state insurance recipients, for the most part, are members of the poor community and struggle to advocate for better care for themselves.<sup>80</sup> In addition, some state insurance plans do not provide money for postpartum care.<sup>81</sup> With more than half of Black maternal deaths occurring in the postpartum period, not having insurance to cover postpartum care is a significant problem.<sup>82</sup>

*2. Pregnant Black Women Who Are Uninsured Face a Unique Set of Problems in Addition to Implicit Biases.*

Since the passage of the Affordable Care Act, the number of uninsured new Black mothers has decreased significantly from 20% to 12%.<sup>83</sup> Compared to white women, Black women are more likely to be uninsured when they become pregnant.<sup>84</sup> Because of their status, pregnant Black women often start prenatal care later and go to fewer checkups.<sup>85</sup> Black women without healthcare typically do not visit the doctor for primary care visits.<sup>86</sup> For most uninsured women, their first pre-natal appointment is the first time they have been to the doctor in years.<sup>87</sup> “For a lot of [Black]

79. *Reproductive Health: Pregnancy Mortality Surveillance System*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 4, 2020), [https://www.cdc.gov/reproductivehealth/maternal-mortality/pregnancy-mortality-surveillance-system.htm?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Freproductivehealth%2Fmaternalinfanthealth%2Fpregnancy-mortality-surveillance-system.htm](https://www.cdc.gov/reproductivehealth/maternal-mortality/pregnancy-mortality-surveillance-system.htm?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Freproductivehealth%2Fmaternalinfanthealth%2Fpregnancy-mortality-surveillance-system.htm) [https://perma.cc/2YRP-E4KE].

80. Davies, *supra* note 78.

81. *Id.*

82. *Id.*

83. Emily M. Johnston et al., *Racial Disparities in Uninsurance Among New Mothers Following the Affordable Care Act*, URB. INST. (July 2019), [https://www.urban.org/sites/default/files/publication/100693/racial\\_disparities\\_in\\_uninsurance\\_among\\_new\\_mothers\\_following\\_the\\_affordable\\_care\\_act\\_0.pdf](https://www.urban.org/sites/default/files/publication/100693/racial_disparities_in_uninsurance_among_new_mothers_following_the_affordable_care_act_0.pdf) [https://perma.cc/X4RL-KZ9K]; *Black Women Experience Pervasive Disparities*, *supra* note 17. In every state except Wyoming, the percentage of Black women with insurance increased after the Affordable Care Act was passed. *Millions of Women Have Gained Health Insurance Coverage Thanks to the Affordable Care Act*, NAT’L WOMEN’S L. CENTER (Apr. 11, 2018), <https://nwlc.org/resources/millions-of-women-have-gained-health-insurance-coverage-thanks-to-the-affordable-care-act/> [https://perma.cc/MYS9-6LA6]. The North Carolina General Assembly voted not to expand Medicaid for five years in a row. The expansion would provide insurance to over 500,000 people. *Expanding Medicaid in NC*, N.C. JUST. CTR., <https://www.ncjustice.org/projects/health-advocacy-project/medicaid-expansion/expanding-medicaid-in-nc/> [http://perma.cc/F69K-7W2W].

84. Davies, *supra* note 78.

85. *Id.*

86. *Id.*

87. Brinlee, *supra* note 4.

women, sometimes, the OBGYN, nurse midwife, or whoever they're seeing for reproductive health care is the only provider they'll see that year."<sup>88</sup> This may cause further complications during pregnancy if the mother has a pre-existing condition that has not been treated.

For pregnant Black women who are also uninsured, they may not feel comfortable advocating for themselves when they receive inadequate care. Many uninsured, pregnant Black women receive their reproductive care from nonprofit organizations such as Planned Parenthood.<sup>89</sup> Recent funding cuts affecting these organizations prevent Black women from receiving necessary reproductive healthcare throughout their pregnancy.<sup>90</sup> Without regular visits to a physician, it is easier for complications to go unnoticed until the actual birth. Some physicians mistakenly believe that Black women are lazy or cannot care for their children.<sup>91</sup> As a result, uninsured Black women report feeling judged by their physicians and often hesitate to seek prenatal care.<sup>92</sup>

## II. PREGNANT BLACK WOMEN RECEIVE A LOWER QUALITY OF REPRODUCTIVE CARE THAN PREGNANT WHITE WOMEN, AND THE MEDICAL PROFESSION CANNOT SHOW WHY THE IMPACT HAPPENS.

Black women are 243% more likely to die from complications related to pregnancy or childbirth than all other women.<sup>93</sup> Between 2011 and 2013, forty-four Black women died for every 100,000 births.<sup>94</sup> Approximately 60% of Black maternal deaths were preventable.<sup>95</sup> Across the board, Black

88. *Id.*

89. *Id.*

90. *Id.*

91. SACKS, *supra* note 23, at 97.

92. *Id.*

93. Nina Martin & Renee Montagne, *Black Mothers Keep Dying After Giving Birth. Shalon Irving's Story Explains Why*, NPR (Dec. 7, 2017, 7:51 PM), <https://www.npr.org/2017/12/07/568948782/black-mothers-keep-dying-after-giving-birth-shalon-irvings-story-explains-why> [<http://perma.cc/3SMM-X7YX>].

94. *Id.* This number varies by state. *Id.* "In New York City, for example, [B]lack mothers are 12 times more likely to die than white mothers, according to the most recent data . . ." *Id.*

95. Associated Press, *U.S. Pregnancy Deaths Are Up, Especially Among Black Women*, NBC NEWS (May 9, 2019, 12:26 PM), <https://www.nbcnews.com/news/nbcblk/us-pregnancy-deaths-are-especially-among-black-women-n1003806> [<https://perma.cc/8CMF-LK7G>]. Black women die during childbirth usually because of excessive bleeding, extraordinarily high blood pressure, cardiomyopathy, or infection. Patti Neighmond, *Why Racial Gaps in Maternal Mortality Persist*, WUNC 91.5: N.C. PUB. RADIO (May 10, 2019), <https://www.wu.nc.org/post/why-racial-gaps-maternal-mortality-persist> [<https://perma.cc/B485-4DAP>].

women have expressed that their doctors are not attentive, do not listen, and lack the same compassion they have for white patients.<sup>96</sup>

*A. Studies Show There is Not a Scientific Reason to Explain Why Black Women are More Likely to Die From Childbirth Than White Women.*

*1. Biology is Not the Problem*

Some argue that biological differences, and not implicit bias, are the reason more Black women die in childbirth.<sup>97</sup> However, studies show that there is no genetic reason for the large disparity in Black mothers dying in childbirth versus white mothers.<sup>98</sup> Genetically, Black women and white women are mostly similar,<sup>99</sup> although Black women tend to experience obesity, high blood pressure, and cardiac disease more than white women.<sup>100</sup> But any argument that Black women's predisposition to these diseases is the reason for the high rate of maternal deaths is flawed. First, not every Black mother that died during childbirth or from pregnancy complications had a history with these diseases.<sup>101</sup> Second, pregnant Black women with these diseases can still have a healthy pregnancy and birthing experience if physicians monitor the disease closely and give their patients adequate attention.<sup>102</sup>

*2. Sociological and Economic Factors are Part of the Problem*

The issue is not the patient's race, but the racism shown to the patient. Racism causes stress on pregnant Black women which leads to health issues such as high blood pressure.<sup>103</sup> Additionally, race can influence where Black women live or their class distinction, which indirectly affects their

96. Brinlee, *supra* note 4.

97. Martin & Montagne, *supra* note 93.

98. *Id.*; see also Ruqaiyah Yearby, *Breaking the Cycle of Unequal Treatment with Health Care Reform: Acknowledging and Addressing the Continuation of Racial Bias*, 44 CONN. L. REV. 1281, 1294 (2012).

99. Neighmond, *supra* note 95.

100. Martin & Montagne, *supra* note 93.

101. Bridges, *supra* note 75. For example, Kyira Johnson did not have any pre-existing conditions and birthed her first son via C-section. See discussion *infra* Part III.A.

102. Neighmond, *supra* note 95.

103. Stress contributes to risk factors known to cause high blood pressure. *Managing Stress to Control High Blood Pressure*, AM. HEART ASS'N (Oct. 31, 2016), <https://www.heart.org/en/health-topics/high-blood-pressure/changes-you-can-make-to-manage-high-blood-pressure/managing-stress-to-control-high-blood-pressure> [<https://perma.cc/2AKR-3BCE>].

quality of medical care.<sup>104</sup> “[I]f race plays a role in racial disparities, it is because race ‘is a powerful determinant of the location and life-destinies of individuals within the class structure of the [United States] society.’”<sup>105</sup> There is a significant variation in the quality of hospitals in the areas where most Black women live compared to hospitals where white women are treated.<sup>106</sup> Hospitals in poorer areas are not equipped with the equipment to handle high-risk pregnancies.<sup>107</sup> Thus, if there is something wrong with the baby, Black mothers either have to go to another facility (which may not accept their insurance) or settle for inadequate care.<sup>108</sup>

Reports of the disproportionate maternal deaths of Black women often offend physicians, especially those who believe they provide excellent patient care. Therefore, it is not surprising that medical professionals attempt to provide another answer for this discrepancy. However, physicians are likely offending their patients because of their implicit biases.

*B. Physicians’ Implicit Biases Indirectly Cause the Poor Health of Pregnant Black Women, Regardless of Their Age or Social Status.*

Interpersonal biases are the “conscious (explicit) and/or unconscious (implicit) use of prejudice in interactions between individuals.”<sup>109</sup> In 1985, the Secretary of Health and Human Services issued the Heckler Report.<sup>110</sup> The report exposed the continued existence of racial disparities in healthcare, even after the passage of Title VI of the Civil Rights Act of 1964.<sup>111</sup> Almost two decades after the Heckler Report, the Institute of Medicine released a study (IOM study) concluding that some physicians are still influenced by the race of their patients.<sup>112</sup> The IOM study showed that regardless of wealth, age, or educational status, Black patients receive a

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104. See, e.g., *id.*

105. Yearby, *supra* note 98, at 129495 (quoting Nancy Krieger & Mary Bassett, *The Health of Black Folk: Disease, Class, and Ideology in Science*, MONTHLY REV., July–Aug. 1986, at 74, 74).

106. Neighmond, *supra* note 95.

107. Martin & Montagne, *supra* note 93.

108. Bridges, *supra* note 75, at 85.

109. Yearby, *supra* note 98, at 1296.

110. *Id.* at 1291.

111. 42 U.S.C. § 2000d. Title VI says: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” *Id.*

112. BARR, *supra* note 68, at 230.

lower quality of healthcare.<sup>113</sup> The National Healthcare Disparities Report (NHDR) reached the same conclusions from the Heckler Report.<sup>114</sup>

Physicians' interpersonal biases are most evident with pregnant Black women; these biases cause delayed diagnoses and missed opportunities to catch warning signs.<sup>115</sup> Communication is a vital part of the doctor-patient relationship. During initial doctor's appointments, patients complete intake questionnaires about medical history and current symptoms. Doctors use this information to diagnose patients and determine which tests they need. This process is disrupted if the doctor does not take the patient seriously, dismisses the patient's pain, or fails to listen well enough to diagnose or treat the health concern. Additionally, Black women are not receiving "effective interventions" to prevent maternal mortality.<sup>116</sup> Maternal deaths of Black women usually occur from excessive bleeding, extraordinarily high blood pressure, cardiomyopathy,<sup>117</sup> or infection.<sup>118</sup> But when Black women express concerns to their physicians, they often feel like their complaints are not taken seriously or respected.<sup>119</sup> When warning signs occur, such as high blood pressure throughout the pregnancy or consistent pains, physicians do not adequately respond.<sup>120</sup>

Implicit biases based on racist ideologies continue to dictate how pregnant Black women are seen by physicians.<sup>121</sup> "Historically racist ideology and practices continue to dictate how [B]lack women are treated, so even when [Black women] present with resources and access [they] are treated no differently than if [they] had no access or resources because [they] are still [B]lack."<sup>122</sup> Black women have consistently reported that their physicians equate being Black with being poor, illiterate, disobedient, and undeserving.<sup>123</sup> These perceptions lead to victim-blaming and judgment from medical professionals, instead of the compassionate and competent healthcare that pregnant Black women deserve.<sup>124</sup>

113. *Id.* at 228.

114. Yearby, *supra* note 98, at 1291.

115. Neighmond, *supra* note 95.

116. *Id.*

117. Cardiomyopathy is associated with weakening of the heart muscle. *Cardiomyopathy*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/heartdisease/cardiomyopathy.htm> [<https://perma.cc/2NQH-TA5D>].

118. Neighmond, *supra* note 95.

119. *Id.*

120. *Id.*

121. Brinlee, *supra* note 4.

122. *Id.*

123. Martin & Montagne, *supra* note 93.

124. *Id.*

1. *Jurisprudential Theories Can Explain Physicians' Implicit Biases*<sup>125</sup>

A brief jurisprudential analysis provides some understanding for why physicians have implicit biases toward pregnant Black women and how those biases shape the reasonable standard of medical care in today's healthcare system. There are seven schools of jurisprudential thought, this section will only focus on the historical perspective, sociological, and command schools of thought.<sup>126</sup>

Using the historical perspective, implicit biases of physicians about Black women can be traced back to the treatment of Black women in the past. The Black woman's body was mutilated and experimented on because they were considered less than human, a belief evidenced by the popular opinion of the time that Black people did not feel pain.<sup>127</sup> Their bodies, even while pregnant, were not respected. Today, we have the Family Medical Leave Act and Pregnancy Discrimination Act to protect pregnant women.<sup>128</sup> No such protection existed at that time. To the contrary, enslaved Black women were exploited for their manual labor while pregnant.<sup>129</sup>

Under a sociological analysis, American political theorist Iris Young identified five faces of oppression that exist in today's society.<sup>130</sup> Under one of those faces—cultural imperialism—the ruling class makes their

125. Jurisprudence, the philosophy of law, seeks to “reveal the historical, moral, and culture basis” for a legal concept. *Jurisprudence*, LEGAL INFO. INST., <https://www.law.cornel.edu/wex/jurisprudence> [<https://perma.cc/3PB3-LYZ4>].

126. *Jurisprudential Thought*, MYEDUCATOR, <https://app.myeducator.com/reader/web/831/dl5dt/v6353/> [<https://perma.cc/8SDM-QQU7>].

127. Using slaves for medical experiments was not a crime; the only legal requirement was consent from the slave owner because the slaves were their “property.” The doctors were either their owners or received consent from the slave owners. Holland, *supra* note 32; *see also* discussion *supra* part I.A.

128. *What to Expect When You're Expecting (and After the Birth of Your Child)...at Work*, OFF. ASSISTANT SEC'Y FOR ADMIN. & MGMT., <https://www.dol.gov/agencies/oasam/civil-rights-center/internal/policies/pregnancy-discrimination> [<https://perma.cc/35SY-GLGT>] [hereinafter *What to Expect When You're Expecting*].

129. *See* discussion Part I, *supra*.

130. Iris Marion Young, *Five Faces of Oppression*, in DIVERSITY, SOC. JUST., & INCLUSIVE EXCELLENCE: TRANSDISCIPLINARY & GLOB. PERSPS. 3, 13–28 (Seth N. Asumah & Mechthild Nagel eds., 2014), [https://www.vumc.org/faculty/sites/default/files/Diversity%20and%20Inclusion/Social\\_Justice\\_and\\_Inclusive\\_Excellence\\_. . . \\_ \(Part\\_I\\_Doing\\_Diversity\\_for\\_Cultural\\_Competence\\_Social\\_Justice\\_and\\_Incl. . .\).pdf](https://www.vumc.org/faculty/sites/default/files/Diversity%20and%20Inclusion/Social_Justice_and_Inclusive_Excellence_. . . _ (Part_I_Doing_Diversity_for_Cultural_Competence_Social_Justice_and_Incl. . .).pdf) [<https://perma.cc/TF9C-TZCS>]. The five types of oppression are exploitation, marginalization, powerlessness, cultural imperialism, and violence. *Id.*

culture the norm.<sup>131</sup> Here, the ruling class of white male physicians has made it the norm to ignore the concerns of Black female patients. This apathy has been passed on and the cycle continues to affect Black women today. As patients, many Black women feel powerless when their doctors refuse to listen to their concerns. When their doctors do not listen or refuse to treat their problems, Black women have to either internally deal with their medical issue or find another doctor to listen to their concerns. For Black women with limited resources, finding another doctor is rarely an option. The doctor's dismissal of the concern may convince the patient her problem is insignificant, even if it is not. After being dismissed several times, the patient will likely not express her concerns, creating a culture of silence.<sup>132</sup>

Moreover, under the command school of thought, the ruling class influences society, and their needs are the only ones of concern.<sup>133</sup> Thus, ruling class dictates what constitutes the reasonable standard of care. That standard is not only important to Black women's quality of healthcare but also to their potential legal remedies for breach of that established standard. Therefore, in the legal realm, Black women must overcome "reasonableness" as it is defined by white men.

### III. MEDICAL MALPRACTICE AND WRONGFUL DEATH CLAIMS ARE INADEQUATE SAFEGUARDS.

Medical malpractice is the "failure of a physician to exercise that degree of care and skill ordinarily employed by the medical profession under similar conditions and circumstances."<sup>134</sup> The plaintiff must prove the ordinary elements of negligence: duty, breach, causation, and damages.<sup>135</sup> Part of a physician's duty is to provide their patient the necessary care and attention based on the known exigencies associated with the patient.<sup>136</sup> An unfortunate result does not necessarily mean the physician deviated from the accepted medical standard of care.<sup>137</sup> Doctors

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131. *Id.*

132. *Id.* The oppressed group, pregnant Black women, will stop speaking about their concerns.

133. *Id.*

134. RICHARD E. SHANDELL ET AL., *THE PREPARATION AND TRIAL OF MEDICAL MALPRACTICE CASES* §1.01 (L. J. Press, rev. ed. 2013).

135. *Id.*

136. *Bellomy v. United States*, 888 F. Supp. 760, 766 (S.D.W. Va. 1995).

137. SHANDELL ET AL., *supra* note 134. Stated another way, the plaintiff must prove that the "physician undertook a mode or form of treatment which a reasonable prudent member of the medical profession would not have taken under the same or similar circumstances." *Bradley v. Rogers*, 879 S.W.2d 947, 953 (Tex. App. 1994).

may use their personal judgment, but must act reasonably.<sup>138</sup> Additionally, the doctor's conduct must be a substantial factor in the injury or death of the patient to have a claim.<sup>139</sup> Typically, doctors are deemed negligent if their course of treatment was clearly outside of the acceptable alternatives.<sup>140</sup>

Wrongful death lawsuits are similar to medical malpractice cases.<sup>141</sup> Wrongful death lawsuits are broader than medical malpractice claims because they encompass claims outside the medical context.<sup>142</sup> Establishing a wrongful death cause of action requires a tort (either negligence or another wrongful act), death, and damages.<sup>143</sup> To prove a wrongful death claim based on medical malpractice, the plaintiff must first prove the elements of medical malpractice.<sup>144</sup>

Because the law provides a skewed definition of reasonableness, proving legal liability is nearly impossible. Still, many Black women and their families have tried to conquer this hurdle.

#### I. Johnson v. Cedars-Sinai Medical Center

On April 12, 2016, Kyira Johnson lost her life eleven hours after giving birth via cesarean section.<sup>145</sup> Shortly after giving birth, Kyira's husband discovered blood in her catheter.<sup>146</sup> The doctors ordered several labs and a CT scan.<sup>147</sup> But Kyira sat for hours without medical attention.<sup>148</sup> Kyira and

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138. SHANDELL ET AL., *supra* note 134.

139. *Bradley*, 879 S.W.2d at 953. Courts use several tests to determine proximate cause such as "reasonably probable" or "more likely than not."

140. *See id.*

141. *What is the Difference Between Medical Malpractice and Wrongful Death*, BC&G L. FIRM, <https://www.medmalfirm.com/news-and-updates/difference-medical-malpractice-and-wrongful-death/> [<https://perma.cc/6CA6-PPB5>].

142. *Id.*

143. *Lattimore v. Dickey*, 191 Cal. Rptr. 3d 766, 773 (2015).

144. *Id.*

145. *Better Data and Better Outcomes: Reducing Maternal Mortality in the U.S.: Hearing on H.R. 1318 Before the H. Subcomm. on Health of the H. Comm. on Energy and Com.*, 115th Cong. 24–27 (2018) (statement of Charles Johnson IV, Founder, 4Kira4Moms) [hereinafter *Better and Data Better Outcomes*].

146. Complaint for Damages at 3, *Johnson v. Cedars-Sinai Med. Ctr.*, 2018 Cal. Super. Lexis 4607 (2018) (No. BC 655107).

147. Elizabeth Chuck, 'An Amazing First Step': Advocates Hail Congress's Maternal Mortality Prevention Bill, NBC NEWS (Dec. 19, 2018), <https://www.nbcnews.com/news/us-news/amazing-first-step-advocates-hail-congress-s-maternal-mortality-prevention-n948951> [<https://perma.cc/KYW8-9WGD>].

148. *Better Data and Better Outcomes*, *supra* note 145, at 26.

her husband, Charles, did not receive help until *ten hours later*.<sup>149</sup> By the time Kyira was taken to surgery, it was too late. Her abdomen was filled with three liters of blood.<sup>150</sup> On her deathbed, Kyira expressed the same sentiments of so many Black mothers—her doctors were not listening.<sup>151</sup> Charles is currently in a legal battle with Cedars-Sinai Medical Center.<sup>152</sup> Charles alleges the doctors' actions—or lack thereof—directly and proximately caused his wife's death.<sup>153</sup> This case is currently pending, but the trial court already granted summary judgment in favor of one of the named physicians.<sup>154</sup> The court found that Dr. Kashanchi's conduct did not breach the standard of care.<sup>155</sup>

## 2. Smith v. Planned Parenthood

Two women, Smith and McMorris, sued Planned Parenthood of the St. Louis Region after the physicians at the facility allegedly inserted a laminaria<sup>156</sup> into Smith's cervix and falsely imprisoned McMorris until she paid for her consultation.<sup>157</sup> Both women visited the Planned Parenthood to receive counseling about their pregnancies.<sup>158</sup> Smith did not specify whether or not she wanted an abortion, but McMorris adamantly stated she did not want an abortion.<sup>159</sup> Planned Parenthood attempted to persuade/induce both women to abort their babies despite their opposition.<sup>160</sup> The physicians refused to remove the laminaria and Smith developed an infection from the laminaria.<sup>161</sup> In their complaint, the women alleged the doctors wanted to deprive racial and economic minorities of their right to bear children.<sup>162</sup> Complaints filed in Missouri require an

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149. *Id.*

150. *Id.*; Complaint for Damages, *supra* note 146, at 8.

151. *Id.*

152. See generally Complaint for Damages at 1, Johnson v. Cedars-Sinai Med. Ctr., 2018 Cal. Super. Lexis 4607 (2018) (No. BC 655107).

153. *Id.* at 14.

154. Johnson v. Cedars-Sinai Med. Ctr., 2018 Cal. Super. Lexis 4607 at \*4607 (2018).

155. *Id.* Dr. Kashanchi did not participate in Kyira's post-delivery treatment. *Id.*

156. Laminaria is inserted into the cervix to help soften the cervix and force dilation. *Surgical Abortion (Second Trimester)*, UCLA HEALTH, <https://www.uclahealth.org/obgyn/surgical-abortion-second-trimester> [<https://perma.cc/T2JD-MBVY>]. Once inserted, the laminaria stays inside the cervix overnight. *Id.*

157. Smith v. Planned Parenthood, 225 F.R.D. 233, 244 (E.D. Mo. 2004).

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 236.

162. *Id.* at 244.

affidavit (health care affidavit) from a healthcare provider that states the defendant physician's actions fell below the professional standard of care.<sup>163</sup> The plaintiffs failed to comply with the affidavit requirement; the defendant's motion to dismiss was denied without prejudice for forty-five days to allow the plaintiff to file the necessary affidavit, but the defendant's motion to sever the two plaintiffs' complaints was granted.<sup>164</sup> Again, Black women could not bring a successful claim because of a procedural measure created by medical professionals.

The obstacle Black women face when they assert a medical malpractice or wrongful death case is overcoming the reasonable standard of care determined by the members of the medical profession. Unless the reasonable standard of care is adjusted to address discrimination, Black women will continue losing these types of cases. Because "reasonableness" is defined by the physicians in the profession, physicians will have to change their views on racial discrimination. Specifically, treating all patients the same regardless of their race must become regular practice in healthcare. One way to do that would be to add a rule to the Medical Code of Ethics by which every physician is bound.

#### IV. ALTERNATIVE PRACTICE & REMEDIES THAT CAN BE IMPLEMENTED TO COMBAT IMPLICIT BIASES

Recognizing the current Black maternal crisis, some hospitals have taken the initiative to develop programs to combat the issue. In *Just Medicine: A Cure for Racial Inequality in American Health Care*, Dayna Bowen Matthew proposes stereotype negation training as a possible solution.<sup>165</sup> Stereotype negation training is designed to help address negative stereotypes as they form.<sup>166</sup> Studies have shown many of the attitudes and beliefs about patients that are Black women can be remedied if the physician is willing to invest "intention, attention, and time."<sup>167</sup> As the rate of Black women dying from childbirth and pregnancy complications continues to rise, the need for an intervention is long overdue. Relying solely on physicians to "check their biases at the door" has been

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163. *Id.* at 237. The Missouri statute makes it even harder for patients to win medical malpractice claims. North Carolina does not require a health care affidavit. N.C. GEN. STAT. § 90-21.12 (2019).

164. *Smith*, 225 F.R.D. at 246. The plaintiffs failed to timely file the amended complaint. *Smith v. Planned Parenthood*, 2005 U.S. Dist. Lexis 25125 at \*1 (E.D. Mo. Oct. 26, 2005).

165. DAYNA BOWEN MATTHEW, *JUST MEDICINE: A CURE FOR RACIAL INEQUALITY IN AMERICAN HEALTH CARE* 159 (2015).

166. *Id.*

167. *Id.*

ineffective. The first step is to address that implicit biases exist,<sup>168</sup> and everyone has them.

#### A. Professional Conduct

##### 1. Medical Students

Another strategy is to address stereotypes early in the training of future physicians—medical students—to ensure they do not carry such misconceptions into their practices.<sup>169</sup> Recently, the Association of American Medical Colleges, administrator of the Medical College Admission Test (MCAT), has indicated a desire to test students on situations involving implicit bias.<sup>170</sup> The goal is to make medical students aware of their personal biases.<sup>171</sup> Once medical students are aware of their biases, they can make sure their biases do not interfere with patient care. “Medical students must learn to recognize and appropriately address gender and cultural biases in themselves and others, and in the process of healthcare delivery.”<sup>172</sup> The Department of Health and Human Services developed the Culturally and Linguistically Appropriate Services in Health Care standards (CLAS standards) for medical professionals to use to address implicit bias.<sup>173</sup> The CLAS standards ensure that medical facilities’ faculty members demonstrate a certain level of understanding of patients’ different cultures and beliefs.<sup>174</sup> Unfortunately, because CLAS standards are not mandatory; medical facilities are only “encouraged” to adopt the standards.<sup>175</sup> A study conducted three years after the CLAS standards were created revealed that very few of the facilities in the country had adopted the standards.<sup>176</sup>

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168. Yearby, *supra* note 98, at 1320.

169. AUGUSTUS A. WHITE III WITH DAVID CHANOFF, *SEEING PATIENTS: UNCONSCIOUS BIAS IN HEALTH CARE* (2011).

170. MATTHEW, *supra* note 165, at 176.

171. *Id.*

172. SADE KOSOKO-LASAKI ET AL., *CULTURAL PROFICIENCY IN ADDRESSING HEALTH DISPARITIES* 79 (2008) (quoting *Functions and Structure of a Medical School: Standards for Accreditation of Medical Education Programs Leading to the M.D. Degree*, LIAISON COMM. ON MED. EDUC. 10 (2008), [https://med.fsu.edu/sites/default/files/userFiles/file/FacultyDevelopment\\_Functions\\_and\\_Structure\\_of\\_a\\_Medical\\_School.pdf](https://med.fsu.edu/sites/default/files/userFiles/file/FacultyDevelopment_Functions_and_Structure_of_a_Medical_School.pdf) [<https://perma.cc/A3EV-QDJM>]).

173. MATTHEW, *supra* note 165, at 179.

174. *Id.*

175. *Id.*

176. *Id.* at 180.

## 2. *AMA Should Amend the Code of Medical Ethics*

Lawyers have rules of professional conduct that must be followed to avoid professional discipline. In 2016, the American Bar Association (ABA) amended Model Rule 8.4 to expand the scope of the rule and the protected classes.<sup>177</sup> Now, Rule 8.4 prohibits “discrimination on the basis of race . . . in conduct related to the practice of law.”<sup>178</sup> Many states, including North Carolina, have not yet adopted Rule 8.4.<sup>179</sup> Like the ABA, the American Medical Association (AMA) has established Codes of Medical Ethics.<sup>180</sup> But, unlike the ABA, the AMA does not have a rule specifically addressing implicit biases.<sup>181</sup>

The AMA aims to enact polices that aid in the reduction of healthcare disparities.<sup>182</sup> Part of that initiative is ensuring medical professionals are treating all of their patients equally.<sup>183</sup> Implementing a rule similar to ABA Rule 8.4 would help further that goal. Granted, most medical professionals take a variation of the Hippocratic oath that prohibits racial discrimination.<sup>184</sup> But the professional rules are a constant reminder of a physician’s ethical duties. Furthermore, a specific ethical rule would give Black women a route to ensure physicians are professionally disciplined. Eventually, that professional discipline could result in the loss of the practitioner’s license<sup>185</sup> and prevent doctors from committing further

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177. Kristine A. Kubes et al., *The Evolution of Model Rule 8.4: Working to Eliminate Bias, Discrimination, and Harassment in the Practice of Law*, A.B.A. (Mar. 12, 2019), [https://www.americanbar.org/groups/construction\\_industry/publications/under\\_construction/2019/spring/model-rule-8-4/](https://www.americanbar.org/groups/construction_industry/publications/under_construction/2019/spring/model-rule-8-4/) [<https://perma.cc/26H5-HQ8C>].

178. *Id.*

179. *Id.*

180. See *Code of Medical Ethics Opinion 1.1.1*, AM. MED. ASS’N, <https://www.ama-assn.org/delivering-care/ethics/code-medical-ethics-overview>. [<https://perma.cc/8PNW-55LW>].

181. See CODE OF MED. ETHICS: PRINCIPLES OF MED. ETHICS (AM. MED. ASS’N 2001). The closest thing is Principle I, which requires physicians to provide care “with compassion and respect for human dignity and rights.” *Id.*

182. *Reducing Disparities in Health Care*, AMA, <https://www.ama-assn.org/delivering-care/patient-support-advocacy/reducing-disparities-health-care> [<https://perma.cc/C9GX-WB2V>].

183. *Id.*

184. Sarah Boden, *A New Hippocratic Oath Asks Doctors to Fight Racial Injustice and Misinformation*, NPR (Nov. 4, 2020, 11:14 AM), <https://www.npr.org/sections/health-shots/2020/11/04/929233492/a-new-hippocratic-oath-asks-doctors-to-fight-racial-injustice-and-misinformation> [<https://perma.cc/6VJT-LDCK>].

185. See generally *4 Most Common Reasons Doctors Lose Their License and Career*, BUS. WOMAN MEDIA (Aug. 28, 2019), <https://www.thebusinesswomanmedia.com/4-common-reasons-doctors-lose-license-career/> [<https://perma.cc/C6XF-JNRP>].

discriminatory acts. Additionally, incorporating such a rule would help close the racial gap in the currently biased standard of care for malpractice claims.

*B. Congressional Action*<sup>186</sup>

Congresswomen Alma Adams and Lauren Underwood<sup>187</sup> launched the Black Maternal Health Caucus in 2019.<sup>188</sup> The caucus's goal was to improve Black maternal health outcomes by making Black maternal healthcare a national priority.<sup>189</sup> As a Black mother, Representative Adams feels personally invested in saving Black women: "Black women are dying of preventable, pregnancy-related complications at an alarming rate, and as [a] Black mother and grandmother, it's personal to me . . . . Maternal mortality disproportionately impacts Black women, and I started this caucus . . . to find culturally-competent solutions specific to the Black community."<sup>190</sup> The first action of the caucus was the introduction of the Maternal Care Access and Reducing Emergencies Act (CARE Act) in 2019, by then-Senator Kamala Harris.<sup>191</sup> The CARE Act, if passed, would create a training program for medical students to address implicit biases.<sup>192</sup>

Next, in early 2020, the Black Maternal Health Caucus, along with then-Senator Harris, introduced the Black Maternal Health Momnibus Act

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186. The Preventing Maternal Deaths Act, passed by Congress in 2018, established Maternal Mortality Review Committees to study pregnancy-related deaths and develop plans to prevent future pregnancy-related deaths. However, this act was not created specifically to address Black maternal deaths. Press Release, Diana Degette, U.S. Rep. for Colo., House of Representatives, Bipartisan Bill to Prevent Maternal Deaths Passes U.S. House, (Dec. 11, 2018), <https://degette.house.gov/media-center/press-releases/bipartisan-bill-to-prevent-maternal-deaths-passes-us-house> [<https://perma.cc/6F73-SSC9>].

187. Congresswoman Alma Adams represents North Carolina's 12th district. Congresswoman Lauren Underwood represents Illinois' 14th district.

188. Press Release, Alma Adams, U.S. Rep. for N.C., House of Representatives, Congresswomen Adams and Underwood Launch Black Maternal Health Caucus (Apr. 9, 2019), <https://adams.house.gov/media-center/press-releases/congresswomen-adams-and-underwood-launch-black-maternal-health-caucus> [<https://perma.cc/W32U-Q4PU>].

189. *Id.*

190. Rachel Frazin, *Dem Lawmakers Form Black Maternal Health Caucus*, THE HILL (Apr. 9, 2019 10:36 AM), <https://thehill.com/homenews/house/438004-dem-reps-form-black-maternal-health-caucus> [<https://perma.cc/47C2-HH5L>].

191. Press Release, Kamala Harris, U.S. Sen. for Cal., U.S. Senate, Harris Reintroduces Legislation Addressing Black Maternal Mortality Crisis (May 22, 2019), <https://www.harris.senate.gov/news/press-releases/harris-reintroduces-legislation-addressing-black-maternal-mortality-crisis> [<https://perma.cc/G6SL-B8AD>].

192. *Id.*

of 2020 (the Momnibus Act).<sup>193</sup> The Momnibus Act focuses on improving data collection to better understand why there is a Black maternal crisis and addresses social and economic factors contributing to the crisis.<sup>194</sup> Many of the economic factors preventing Black women from receiving adequate healthcare are also addressed in the Momnibus Act.<sup>195</sup> For example, if passed, the legislation would alleviate housing and transportation stressors that contribute to poor health in Black women.<sup>196</sup> Additionally, this legislation does not address only the “typical” pregnant Black woman; under the Momnibus Act, nearly every type of woman is covered, including incarcerated women, veterans, poor women, working women, and women with mental health issues.<sup>197</sup> Since the Momnibus Act was introduced, Planned Parenthood has advocated for Congress to act swiftly and pass it.<sup>198</sup> Unfortunately, the most recent action taken by Congress was on July 13, 2020, when the House delegated the matter to the Subcommittee on Health.<sup>199</sup>

A more drastic approach, compared to the Momnibus Act, would be to eliminate private insurance altogether. Eliminating the distinction between public and private insurance is the best way to prevent the lackluster treatment of Medicare patients. Removing the distinction means that medical professionals do not have the option to discriminate against a patient based on their insurance. For Black women currently on Medicaid, this does not eliminate every implicit bias against them, but it does remove one hurdle. Black women cannot change how a physician may feel about them because of their race. However, Congress can prevent physicians from discriminating against Black women in at least one aspect.

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193. *About the Black Maternal Health Momnibus Act of 2020*, BLACK MATERNAL HEALTH CAUCUS, <https://blackmaternalhealthcaucus-underwood.house.gov/Momnibus> [<https://perma.cc/KP4K-5JBY>].

194. *Id.*

195. *See* discussion *supra* part II.A.b.

196. *About the Black Maternal Health Momnibus Act of 2020*, *supra* note 193.

197. *Id.*

198. *Black Maternal Health Week: Planned Parenthood Calls on Congress to Endorse the Black Maternal Health Momnibus Act of 2020*, PLANNED PARENTHOOD (Apr. 13, 2020) <https://www.plannedparenthood.org/about-us/newsroom/press-releases/black-maternal-health-week-planned-parenthood-calls-on-congress-to-endorse-the-black-maternal-health-momnibus-act-of-2020> [<https://perma.cc/6LUU-L6NV>].

199. H.R. 6142, 116th Cong. (2020). It will be interesting to see what progress, if any, will occur now that Kamala Harris has been elected Vice President of the United States.

*1. Legal Remedies: Private Cause of Action Under Title VI*

Hospitals receiving federal money, which includes any hospital serving Medicaid recipients, must abide by Title VI of the Civil Rights Act.<sup>200</sup> In *Alexander v. Sandoval*, the United States Supreme Court held that private individuals could not initiate disparate-impact lawsuits under Title VI.<sup>201</sup> However, section 1557 of the Affordable Care Act allows individuals to bring a disparate-impact claim, essentially overruling *Alexander v. Sandoval*.<sup>202</sup> A Title VI claim is a slightly better route for Black women affected by implicit bias, compared to a wrongful death or medical malpractice claim. Patients can easily show disparities in their medical care. The AMA has admitted that the healthcare system has a problem providing adequate care for minorities in general.<sup>203</sup> Medical studies and statistics also show there is a difference in the treatment of Black women.<sup>204</sup> Additionally, Black women themselves can attest to their experiences with their physicians.

Hospitals cannot assert an explanation for the discrimination. As discussed above, there is no *medical* explanation for the number of Black women dying during and immediately after childbirth. Although a Title VI claim does not require overcoming the “reasonable person” standard, it does come with other challenges. Currently, physicians are not included in the scope of the Title VI Civil Rights Act.<sup>205</sup> Thus, patients have to sue the hospitals instead of their treating physicians.<sup>206</sup> Showing that an entity, such as a hospital, is discriminatory is hard—in order to do so the claimant would have to show that there is a pattern of discrimination. This pattern would be displayed by Black women coming forward who can attribute their discrimination to the hospital and not to their individual physician. Claimants would need Black women, formerly cared for at the hospital, who can attribute their discrimination to the hospital and not to their individual physician.

The ACA does provide some hope for Black women who want to sue their physicians. There is broad language in the ACA that “suggests that civil rights protection under Title VI now extends to . . . Medicaid physicians.”<sup>207</sup> Black women need Section 1557 of the ACA to bring a

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200. Chandra et al., *supra* note 20.

201. *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001).

202. Chandra et al., *supra* note 20.

203. *See Reducing Disparities in Health Care*, *supra* note 182.

204. Martin & Montagne, *supra* note 93.

205. Chandra et al., *supra* note 20, at 1043.

206. *Id.*

207. *Id.*

successful Title VI claim. Without the ACA, patients would be unable to initiate a claim themselves or get redress from their treating physicians. Since Section 1557 was enacted in 2010, it has been enforced by the Office for Civil Rights.<sup>208</sup> In 2020, parts of Section 1557 were revised, but none of the revisions affect racial discrimination suits.<sup>209</sup>

#### CONCLUSION

Despite the advancement of medicine, Black mothers and their infants are still dying at a higher rate than white women.<sup>210</sup> The problem affects Black women from every economic background and with varying levels of education.<sup>211</sup> Racism and physicians' personal biases kill Black women and their children. Medical professionals do not want to admit that implicit biases affect their patient care. In reality, physicians' perceptions of the situation are irrelevant. Black women have been voicing their concerns and asking for help their entire lives. It is time for society to try a different approach and finally start listening to Black women, but the strength of Black women is being used against them. The narrative that Black women are strong, although correct, causes physicians to downplay their complaints. Instead of treating pregnant Black women like pregnant white women are treated, physicians often ignore Black women until it is too late.

For hundreds of thousands of Black women, their doctors' implicit biases were deadly.<sup>212</sup> A mother in Nebraska repeatedly informed her doctor that she felt like she was having a heart attack.<sup>213</sup> Her complaints were ignored and not addressed until she actually suffered another heart attack.<sup>214</sup> Modern gynecology is closely tied to slavery, but until recently, no one has acknowledged it.<sup>215</sup> Pregnant Black women suffered while white physicians were praised as heroes.<sup>216</sup> Black women have literally been crying out for help since slavery, begging for their doctors to just listen.

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208. Off. for Civ. Rts., *Section 1557 of the Patient Protection and Affordable Care Act*, U.S. DEP'T HEALTH & HUM. SERVS., <https://www.hhs.gov/civil-rights/for-individuals/section-1557/index.html> [<https://perma.cc/9Y9S-TZ6H>].

209. *Id.*

210. Williams, *supra* note 3.

211. Martin & Montagne, *supra* note 93.

212. *Id.*

213. *Id.*

214. *Id.*

215. Owens & Fett, *supra* note 36.

216. *Id.*

Today's medical professionals have the opportunity to change the narrative. Instead, they continue to not listen and to devalue Black women.<sup>217</sup>

Even after several studies have put the medical profession on notice of a detrimental problem, nothing has changed. Medical professionals should not blame the disproportionate number of Black women dying on pre-existing conditions. Instead, they should look past the pre-existing conditions, that are exacerbated by pregnancy, and get to the root of the problem—the flawed healthcare system.<sup>218</sup> The pre-existing condition argument has been proven inaccurate.<sup>219</sup> The answer is simple: racism is the problem. Physicians have preconceived notions about Black women. As soon as a Black woman walks into a doctor's office, she is fighting an uphill battle. Various obstacles stand in the way of her receiving adequate care, including her gender, her insurance, the appearance of her hair,<sup>220</sup> and, of course, the color of her skin. Fortunately, people can change, and stereotypes can be proven wrong. According to Marsha Jones, director of a reproductive justice organization in Texas, "If we would lean on the voices, experiences, traditions, leadership, and ingenuity of [B]lack women to create solutions and strategies, we would begin to successfully address this issue."<sup>221</sup>

For society to move forward and give pregnant Black women the reproductive healthcare they deserve, medical professionals have to listen to Black women. Had my mother's doctor listened to her about her uneasy feeling during her pregnancy with my brother, my brother could have been spared the trauma and undue hardship of multiple heart surgeries in the first twenty years of his life.

*Kenya Glover\**

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217. Martin & Montagne, *supra* note 93.

218. Neighmond, *supra* note 95.

219. Bridges, *supra* note 75.

220. Martin & Montagne, *supra* note 93. A mother in Arizona reported that her doctor believed she smoked marijuana because of the way she wore her hair and was reluctant to treat her pain. *Id.*

221. Brinlee, *supra* note 4.

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