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Wanted for Being a Pregnant Teen: A Draconian Approach to Reducing Teen Pregnancy and Prosecuting Statutory Rape

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**WANTED FOR BEING A PREGNANT TEEN:
A DRACONIAN APPROACH TO REDUCING TEEN PREGNANCY AND PROSECUTING
STATUTORY RAPE**

HADDY RIKABI

INTRODUCTION

In 2013, Mississippi likely became the first state to require cord blood testing for any underage mother who gives birth or undergoes an abortion procedure.¹ Under the statute, any individual who provides medical care to a minor under the age of sixteen who gives birth, when the individual reasonably suspects the pregnancy is the product of statutory rape, must collect the umbilical cord and report the birth to law enforcement.² The statute defines “reasonable suspicion of statutory rape” as the mother naming a father who is deceased, is over twenty-one years of age, disputes his paternity, or is unnamed.³ Mississippi enacted this law based on a rationale of reducing teen pregnancy and enhancing the prosecution of statutory rape.⁴ The Mississippi legislature rushed the law into passage with near-unanimous approval, barely considering the law’s constitutionality.⁵ Although the new statute addresses a compelling matter in the public interest, direct enforcement of minors’ sexual relations and parenthood produces too many consequences.

The procedure for blood testing minor mothers in Mississippi’s statute presents a grave encroachment of several rights. Establishing pregnancy as reasonable suspicion to report minors to law enforcement intrudes on sexual and patient privacy rights. This Note marks the numerous flaws in Mississippi’s innovative yet improper approach to enhancing statutory rape law enforcement and reducing teenage pregnancy. Part I analyzes the history

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1 Emily Wagster Pettus, *New Mississippi Law Requires Cord Blood from Some Teen Moms*, USA TODAY (Aug. 2, 2013), <http://www.usatoday.com/story/news/nation/2013/08/02/mississippi-law-cord-blood/2611877/>.

2 MISS. CODE ANN. § 97-5-51(5)(a)(ii) (West 2013). Abortion providers for minor patients under the age of fourteen must also collect the fetal tissue and report the procedure to law enforcement. *Id.* at § 97-5-51-5(a)(i).

3 *Id.* at § 97-5-51(5)(iii).

4 Pettus, *supra* note 1.

5 *Id.*

and development of teen-pregnancy-prevention policies among states and shows how Mississippi's law both follows and deviates from a protectionist view on minor females' sexuality and their societal expectation to become mothers. Part II criticizes the approach of direct criminal enforcement and bodily searches of pregnant minors by observing its violation of rights related to criminal investigation, patient privacy, and genetic privacy laws. Part III proposes that the seizure and blood testing of a mother's placental cord and discarded fetal tissue invade personal bodily property rights. Finally, Part IV argues why searching minor mothers' bodies is a poor policy in reducing teen pregnancy since state programs advancing minors' access to contraceptives have been acclaimed for actually reducing teen pregnancy rates.

I. HISTORY AND PROTECTIVE PURPOSE OF STATUTORY RAPE LAWS

A. Purpose of Statutory Rape Laws

States have historically attempted to prevent sexual abuse of minors through statutory rape criminal laws.⁶ Teenage pregnancy prevention and criminalizing statutory rape are intertwined public interests. In fact, the Supreme Court in *Lawrence v. Texas* emphasized the importance and validity of statutory rape laws before decriminalizing sodomy.⁷ Government interest in promoting economic, social, and medical welfare usually forms the basis for enacting statutory rape laws.⁸ Statutory rape laws also aim to shield minors who are unaware of the harm tied to an abusive, coercive, intimate relationship with an adult.⁹ These laws target the sexual relationship between a minor female and an adult male since this relationship typically produces greater societal harms, including a higher rate of sexually transmitted infections and the risk of impregnating a minor.¹⁰ Establishing paternity may also be a major interest in intervening in minors' sexual relations since less than half of fathers of children born to adolescent mothers are present at the child's birth or identify themselves on birth certificates.¹¹

6 See Rigel Oliveri, Note, *Statutory Rape Law and Enforcement in the Wake of Welfare Reform*, 52 STAN. L. REV. 463 (2000).

7 539 U.S. 558, 569 (2003).

8 Michael M. v. Superior Court of Sonoma Cty., 450 U.S. 464, 470 (1981).

9 See Denise A. Hines & David Finkelhor, *Statutory Sex Crime Relationships Between Juveniles and Adults: A Review of Social Scientific Research*, 12 J. AGGRESSION & VIOLENT BEHAV. 300, 306 (2006).

10 *Id.* at 306-07.

11 A.L. Murray, C. Rosengard, S. Weitzen, C.A. Raker, & M.G. Phipps, *Demographic and Relationship Predictors of Paternity Establishment for Infants Born to Adolescent Mothers*, 25 J. PEDIATRIC & ADOLESCENT GYNECOLOGY 322, 323 (2012).

i. Moral Origins of Statutory Rape Laws

Statutory rape laws are universally accepted in historical common law as a prohibition of premarital sex, but they are an innovation in American criminal law.¹² Since the late nineteenth century, state statutes have criminalized sexual intercourse with minors primarily to protect the purity of girls.¹³ A unique aspect of statutory rape laws is that they permissibly discriminate on gender, particularly in punishing males for violating a girl's virginity.¹⁴ States have consistently applied statutory rape laws against men to prevent them from having sexual relations with girls, but the reason for protection has altered throughout history. The purpose of statutory rape has switched from enforcing morality to improving social and economic conditions.¹⁵ Originally, states intended to punish males who had "ruined" a girl's chastity and desirability for marriage.¹⁶ In the early twentieth century, states retained a moral purpose for statutory rape laws, but focused on rehabilitating promiscuous behavior among youth, especially girls.¹⁷

ii. Economic and Moral Interest in Present Statutory Rape Laws

Teen pregnancy remains a major social issue and motivates today's statutory rape laws. Current state statutory rape laws are the products of mixed economic and morality interests. There is no doubt teen pregnancy depletes resources and causes economic harm to minors. The cost of minors' parenthood in the United States in 2010 was estimated to have been \$9.4 billion.¹⁸ The average taxpayer paid \$1,700 for every child born to a teenage mother that year.¹⁹ Because minor parenthood drains state resources, states may impose tougher sentencing against adult male violators of statutory rape laws due to the risk of teen pregnancy.²⁰

Since the launch of federal welfare programs in the 1960s, states began to focus on socioeconomic reasons for overseeing girls' sexual activities.²¹ In 1961, teenage mothers produced the majority of illegitimate children on welfare rolls.²² In response to a heavier welfare burden, state legislatures nationwide denied welfare to mothers who had the father

12 Statutory rape actually derives from English common law, but no state enacted such a statute until 1850, when California criminalized intercourse with a girl under the age of ten. See Kay L. Levine, *The External Evolution of Criminal Law*, 45 AM. CRIM. L. REV. 1039, 1058 (2008).

13 *Id.* at 1059–60.

14 *See id.* at 1060–61.

15 *Id.* at 1078.

16 *Id.* at 1059–61.

17 *Id.* at 1062. Although these statutes were gender-neutral, boys overwhelmingly received criminal sanctions more often than girls did. Moral sanctions were more common for girls. *Id.* at 1063–64.

18 Stephanie J. Ventura, Brady E. Hamilton, & T.J. Matthews, *National and State Patterns of Teen Births in the United States, 1940–2013*, 64(7) Nat'l Vital Stats. Reps. 1, 2 (2014), http://www.cdc.gov/nchs/data/nvsr/nvsr63/nvsr63_04.pdf.

19 *Id.* at 9.

20 *Superior Court of Sonoma Cty.*, 450 U.S. at 470 (1981).

21 *See Levine, supra* note 12, at 1065.

22 *Id.*

present at home.²³ Some states proposed to criminalize minor parenthood or to sterilize mothers who are minors, but none of these ideas came to fruition.²⁴

In 1996, a wave of states passed stricter statutory rape laws in response to Congress favoring married families in the Personal Responsibility and Work Opportunity Reconciliation Act.²⁵ Many states viewed teen pregnancy as a major social issue that increased costs of providing welfare programs and limiting minors' education and career prospects.²⁶ Many states reformed welfare programs to favor married families²⁷ to comply with the policy of Congress's welfare reform to "prevent and reduce . . . out-of-wedlock pregnancies" and promote "two-parent families."²⁸ One of these incentives was raising the age of consent in order to dissuade older men from fathering children with younger girls.²⁹ Shortly after the passage of welfare reform, several state and local governments raised the age of consent, increased sentencing, and added penalties for violators of statutory rape laws in an attempt to reduce teen motherhood's consumption of federal welfare grants and preserve funds.³⁰

B. *Restrictions on Minors' Self-Regulation of Sexual Activity*

Currently, states have revived morality as their cause for denying minors' access to birth control. The federal government has recently introduced more restrictions on minors' access to contraceptives because of a social fear of girls engaging in sex for pleasure and the risk of teen pregnancy resulting from minors' sexual behavior.³¹ Although minors have the same right to access contraceptives as adults,³² states consistently expect minors' sexual activities to result in parenthood.³³ Half of all states impose conditions or completely prohibit access to contraceptive services, including emergency pills and condoms, to minors.³⁴ Despite most states' reluctance to provide minors access to contraceptives, the

23 *Id.* at 1066 n.121.

24 *Id.*

25 Oliveri, *supra* note 6, at 468.

26 *Id.* at 469–70.

27 See Levine, *supra* note 12, at 1077–78.

28 42 U.S.C. § 601(a)(3)–(4) (2012).

29 Levine, *supra* note 12, at 1079–78.

30 Oliveri, *supra* note 6, at 474–76.

31 Beth A. Burkstrand-Reid, *From Sex for Pleasure to Sex for Parenthood, How the Law Manufactures Mothers*, 65 HASTINGS L.J. 211, 233 (2013).

32 *Carey v. Population Servs. Int'l*, 431 U.S. 678, 694–99 (1977); *Parents United For Better Schools vs. School Dist. Bd. Of Educ.*, 978 F. Supp. 197, 208–09 (E.D. Pa. 1997) (reversing school district's ban on distributing condoms to students). See generally *Planned Parenthood of S.E. Penn. v. Casey*, 505 U.S. 833, 895 (1992); *Tummino v. Hamburg*, 936 F. Supp. 2d 162 (E.D.N.Y. 2013) (invalidating executive order restricting sales of emergency contraceptives to minors).

33 Burkstrand-Reid, *supra* note 31, at 235.

34 GUTTMACHER INST., *State Policies: Minors' Access to Contraceptive Services*, <https://www.guttmacher.org/state-policy/explore/minors-access-contraceptive-services> (Apr. 1, 2016); GUTTMACHER INST., *Publicly Funded Family Planning Services in the United States*, http://www.guttmacher.org/pubs/fb_contraceptive_serv.html (last visited

majority of sexually active high school students use some form of contraceptives.³⁵ Teenagers are also highly likely to use contraceptives for their first sexual experience.³⁶ Restrictions on contraceptives, combined with statutory rape laws, impose a protectionist policy of preventing girls from engaging in sexual activity before they reach maturity, yet prefer girls to gain maturity by becoming mothers.³⁷

C. *Mississippi's Cord Blood Law Deviates from Mainstream Statutory Rape Law Interests*

Mississippi's cord blood law deviates from the common interest of statutory rape laws, which is to prosecute adults who sexually abuse minors. The rationale behind Mississippi's new law is to regulate motherhood and punish sexual abusers, but requiring all pregnant minors to disclose the identity of their sexual partners would affect commonly occurring and legal sexual relationships between minors.

With the third-highest teenage-birth rate in the United States, teenage pregnancy is a prevalent issue in Mississippi.³⁸ The state's political leaders often attempt to shed Mississippi's dubious distinction of having one of the highest teen pregnancy rates in the nation.³⁹ State officials who passed the cord blood law claimed it was necessary to enhance the prosecution of statutory rape.⁴⁰ Mississippi Attorney General Jim Hood, who drafted the statute, hoped the statute would "deter men over the age of [twenty-one] from having sex, particularly with girls [sixteen] years and younger."⁴¹

Requiring a minor mother to disclose the identity of the father does not protect the mother from statutory rape, but rather, punishes the mother for her sexual activity.

Apr. 30, 2016) ("teenagers represented nearly one in four contraceptive clients served by safety-net health centers in 2010).

35 More than a quarter (25.3%) of students reported using birth control pills, IUD, shots, patches, or rings. LAURA KANN ET AL., CTDS. FOR DISEASE CONTROL AND PREVENTION, YOUTH RISK BEHAVIOR SURVEILLANCE – UNITED STATES, 2013, 63 *Surveillance Summaries* 1, 24–27 (2013), <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6304a1.htm>.

36 GLADYS MARTINEZ ET AL., CTDS. FOR DISEASE CONTROL AND PREVENTION, TEENAGERS IN THE UNITED STATES: SEXUAL ACTIVITY, CONTRACEPTIVE USE, AND CHILDBEARING, 2006–2010 NATIONAL SURVEY OF FAMILY GROWTH, 23(31) *VITAL AND HEALTH STATS.* 1, 8–9 (2011), http://www.cdc.gov/nchs/data/series/sr_23/sr23_031.pdf.

37 Nicole Phillis, *When Sixteen Ain't So Sweet: Rethinking the Regulation of Adolescent Sexuality*, 17 *MICH. J. GENDER & L.* 271, 291 (2011).

38 In 2012, there were 46.1 births per 1,000 mothers aged fifteen to nineteen in Mississippi. VENTURA ET AL., *supra* note 18, at 20. New Mexico and Oklahoma, with 47.5 and 47.3 births per capita, respectively, had a succeeding rate of teenage births. *Id.* States with the most teenage births had a birth rate four times higher than the states with the least teenage births. *Id.* at 5. Mississippi has consistently topped teen pregnancy rates in the United States, but has had a reduction in births to minor mothers similar the national rate. OFFICE OF ADOLESCENT HEALTH, *Mississippi Adolescent Reproductive Health Facts, U.S. Dep't of Health & Hum. Servs.*, <http://www.hhs.gov/ash/oah/adolescent-health-topics/reproductive-health/states/ms.html> (last updated Nov. 13, 2014).

39 Politicians in Mississippi commonly emphasize teen pregnancy as a major public concern. For instance, a legislator once proposed to require state universities to develop strategies to reduce teenage pregnancy. Ronni Mott, *Colleges Recruited to Offer Teen-Pregnancy Solutions*, JACKSON FREE PRESS (Feb. 19, 2014), <http://www.jacksonfreepress.com/news/2014/feb/19/colleges-recruited-offer-teen-pregnancy-solutions/>.

40 Jeffrey Hess, *Miss. Turns to Cord Blood to Track Down Statutory Rapists*, NPR (June 3, 2013, 6:10 PM), <http://www.npr.org/blogs/health/2013/06/03/188423215/miss-turns-to-cord-to-track-down-statutory-rapists>.

41 *Id.*

Although the statute's drafters intended to prosecute adult men who sexually abuse teenage girls, the statutory language does not limit mandated disclosures to cases involving the prosecution of adult fathers.⁴² Several state courts have condemned using statutory rape laws to prosecute minors who engage in sexual activity because prosecution would not further the purpose of protecting minors from sexual abuse by adults.⁴³ Sexual relations between one minor under the age of consent and another above the age of consent have become socially acceptable that states provide such an exception for their statutory rape laws known as "Romeo and Juliet Clauses."⁴⁴ Most states provide such an exception to their statutory rape rules to allow sexual relations between one minor above the age of consent and another who is below the age of consent, so long as the age gap is reasonably small.⁴⁵ In addition to preventing minors from being prosecuted for consensual sex, Romeo and Juliet clauses also ensure consistency of enforcement in states that set the age of consent below the age of majority.⁴⁶

The broad span of the Mississippi's cord blood law would also violate its own statutory rape law, which provides a three-year gap exception for sixteen-year-olds and a two-year gap for fourteen-year-olds.⁴⁷ Although Mississippi and other states have reasons in good faith for protecting minors from harm in enacting statutory rape provisions, the cord blood law directly invades minor mothers' medical treatment and violates constitutional protections of privacy.⁴⁸ Perhaps the worst effect of threatening all sexually active minors with prosecution is endangering their health. Mississippi's statute criminalizes minors' parenthood by compelling minors to report the identity of the fathers. Fear of the father's prosecution may convince teenage mothers to forego prenatal care or avoid hospitals for medical treatment.⁴⁹ Removing the privacy of minors' sexual and reproductive activities will produce a chilling effect against seeking medical treatment.⁵⁰

⁴² *Id.*

⁴³ *B.B. v. State*, 659 So. 2d 256 (Fla. 1995) (purpose of statutory rape is to prevent sexual abuse); *In re D.B.*, 950 N.E.2d 528 (Ohio 2011) (statute was "unconstitutionally vague" for allowing prosecution of minors' sexual relations); *State ex rel. Z.C.*, 165 P.3d 1206 (Utah 2007) (prosecuting minors engaging in sex was "absurd"); *In re G.T.*, 758 A.2d 301, 318 (Vt. 2000) (legislature did not intend to prosecute minors through statutory rape law).

⁴⁴ BRITTANY LONGINO SMITH & GLEN A. KERCHER, *ADOLESCENT SEXUAL BEHAVIOR AND THE LAW* 7-10 (2011), http://www.crimevictimsinstitute.org/documents/Adolescent_Behavior_3.1.11.pdf.

⁴⁵ *Id.* at 12 (explaining thirty states' laws that provide an age range exception for statutory rape).

⁴⁶ Joanne Sweeny, *Do Sexting Prosecutions Violate Teenagers' Constitutional Rights?*, 48 *SAN DIEGO L. REV.* 951, 953-54 (2011) (criticizing inconsistency of state laws that list the age of consent is lower than the age used to define child pornography).

⁴⁷ MISS. CODE ANN. § 97-3-95(1)(c)-(d) (2014).

⁴⁸ Policies regulating minors' sexual activity usually accept parenthood for minors. See Phillis, *supra* note 37, at 291.

⁴⁹ Pettus, *supra* note 1 (statement of ACLU of Mississippi legal director Bear Atwood).

⁵⁰ See *Nw. Mem'l Hosp. v. Ashcroft*, 362 F.3d 923, 929 (7th Cir. 2004).

II. REPORTING A MINOR'S PREGNANCY TO LAW ENFORCEMENT VIOLATES PATIENT PRIVACY RIGHTS AND THE FOURTH AMENDMENT

A. Patient Privacy Rights for Pregnant Minors in Criminal Investigations

Mississippi's introduction of mandated reporting of a minor's pregnancy to law enforcement or any third parties without the mother's consent clearly violates an expectation of medical confidentiality.⁵¹ Mandating health providers to conduct a placental cord blood test in order to discover the identity of a pregnant minor's sexual partner violates patients' medical confidentiality rights.⁵² By deputizing physicians and midwives to identify and aid in the prosecution of the fathers of minors' children, Mississippi's law has serious implications for violating a patient's expectation of privacy in a medical setting.

Common law recognizes patients' reasonable expectation of privacy that their medical treatment will remain confidential and their medical providers will not share their records with persons other than for treatment purposes.⁵³ There are instances wherein states may mandate blood testing of the blood cord or newborn baby, but they are only for medical diagnosis and the results are not disclosed to third parties.⁵⁴ For example, all states require genetic screening of newborns for diagnosing genetic diseases and delivering medical treatment.⁵⁵ There are strict limitations on how healthcare providers may handle a patient's personal information outside of medical treatment. Criminal investigation and exigent circumstances in which disclosure benefits the patient are the only exceptions for disclosing confidential information, and the interest in disclosure must exceed the patient's right to privacy.⁵⁶ A criminal-investigation interest must comply with statutes governing patient privacy⁵⁷ or the Fourth Amendment's special needs doctrine.⁵⁸

51 Emily Le Coz, *Mississippi Aims to Curb Teen Pregnancy with Umbilical Blood Law*, REUTERS (June 7, 2013), <http://www.reuters.com/article/2013/06/07/us-usa-mississippi-babies-idUSBRE956oSL20130607>.

52 Pregnancy and sexuality are particularly sensitive and private matters for minors. See *Gruenke v. Seip*, 225 F.3d 290 (3d Cir. 2000) (school's order of a pregnancy test on a student served no rational interest). Government officials cannot publicly disclose a minor's pregnancy or sexuality unless it serves a legitimate interest notified to the minor. See *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995); see also *Wyatt v. Fletcher*, 718 F.3d 496, 515-18 (5th Cir. 2013).

53 *Fairfax Hosp. ex rel. INOVA Health Sys. Hosps., Inc. v. Curtis*, 492 S.E.2d 642, 645 (Va. 1997) (holding healthcare providers have a common law duty to protect patient confidentiality). See also *R.K. v. St. Mary's Medical Ctr., Inc.*, 735 S.E.2d 715, 720 (W.Va. 2012) (explanatory phrase here is strongly encouraged).

54 States with blood testing laws may have concurrent protections against disclosing the results. See *Higgins v. Tex. Dep't of Health Servs.*, 801 F. Supp. 2d 541 (W.D. Tex. 2011).

55 Colin McFerrin, Note, *DNA, Genetic Material, and A Look at Property Rights: Why You May Be Your Brother's Keeper*, 19 TEX. WESLEYAN L. REV. 967, 976-78 (2013).

56 *State v. Baptist Mem'l Hosp.-Golden Triangle*, 726 So. 2d 554, 558-59 (Miss. 1998).

57 *Id.* at 561.

58 *Pierce v. Smith*, 117 F.3d 866, 873 (5th Cir. 1997).

i. Duty of Healthcare Providers to Protect Patient Privacy in Criminal Investigations

State and federal statutes governing the confidentiality of a patient's personal information have strict standards for disclosure to law enforcement. The Health Information Portability and Protection Act (HIPAA) prohibits healthcare providers from releasing confidential patient records.⁵⁹ However, healthcare providers may release patient records for criminal investigations only under a "subpoena, discovery request, or other lawful process."⁶⁰ Some states provide the same law with identical standards for disclosure to law enforcement.⁶¹ HIPAA governs healthcare practices without providing individual rights to patients, so only a federal or state attorney can file for its violation.⁶² The statute prohibits and punishes healthcare providers for unlawfully disclosing patient information without relieving the patient.⁶³

To meet an exception for law enforcement use, the government must pass a two-part test. First, the requested information must be necessary for an investigation and has to be specific and relevant for the crime.⁶⁴ Second, there must be a compelling government interest for obtaining the records that outweighs the patient's privacy interest.⁶⁵ Law enforcement can claim this exception only when judicial or administrative courts have approved the request.⁶⁶ Thus, Mississippi's law cannot authorize a healthcare provider to identify a minor's sexual partner or draw cord blood without court approval. Instead, investigators who wish to obtain a patient's information must either seek a search warrant, subpoena, or administrative court approval.⁶⁷ For an administrative court approval, the evidence sought must relate to a "legitimate law enforcement inquiry," be specific and limited to the purpose sought, and cannot identify the patient.⁶⁸

Healthcare providers who must comply with HIPAA will face complications when attempting to abide by Mississippi's obligation to report a minor's information without a warrant. If a healthcare provider refuses to report a minor patient's pregnancy, he or she faces a \$500 fine and a misdemeanor charge.⁶⁹ In cases where healthcare providers' compliance with both HIPAA and state law becomes impossible, HIPAA supersedes

59 42 U.S.C. § 290dd-2(a) (2016).

60 45 C.F.R. § 164.512(e)(1)(ii) (2016).

61 See, e.g., VA. CODE ANN. § 38.2-613(a) (West 2014); FLA. STAT. ANN. § 456.057.7(a) (West 2013).

62 Sauter v. Bloyd, No. 3:10CV-P720-H, 2010 U.S. Dist. LEXIS 134037, at *5 (W.D. Ky. Dec. 15, 2010).

63 United States v. Stapleton, No. 12-11-ART-(1), 2013 WL 3935104, at *9 (E.D. Ky. July 30, 2013).

64 United States v. Zamora, 408 F. Supp. 2d 295, 298 (S.D. Tex. 2006).

65 United States v. Elliott, 676 F. Supp. 2d 431, 439 (D. Md. 2009).

66 Zamora, 408 F. Supp. 2d at 297-98.

67 45 C.F.R. § 164.512(f)(1)(ii) (2016). If law enforcement fails to obtain information through either of these procedures, they are not liable for HIPAA violations. *Stapleton*, 2013 WL 3935104, at *9.

68 § 164.512(f)(1)(ii)(C).

69 MISS. CODE ANN. § 97-5-51(6) (2013).

conflicting state regulations.⁷⁰ If a healthcare provider fails to obtain a warrant in an attempt to comply with Mississippi's law, the provider violates HIPAA.⁷¹

ii. Patient Privacy in the Fourth Amendment Special Needs Doctrine

Searches of patients' bodies in order to assist law enforcement have been derided as an obliteration of the Fourth Amendment. The Supreme Court used patients' expectation of privacy as the basis for striking down a state hospital's agreement with local prosecutors to share data from drug tests on pregnant adult patients.⁷² In *Ferguson v. City of Charleston*, the Court held unconstitutional the mandatory reporting of patients to prosecutors when drug tests revealed cocaine abuse.⁷³ Generally, medical ethics laws prohibit healthcare providers to transfer confidential patient records used for treatment to law enforcement, unless ethics laws compel disclosure to prevent serious harm to others.⁷⁴

The Fourth Amendment's prohibition of unreasonable searches and seizures prevents a search of a pregnant minor's body to obtain evidence in prosecuting the father. Searching a person suspected of violating the law requires a reasonable suspicion that the person has committed a crime and has substantial "special needs" for which obtaining a warrant and probable cause become "impractical."⁷⁵ There must be a present and real societal harm that is substantial enough to justify warrantless and suspicionless searches.⁷⁶ A substantial need to reduce or prevent a legislatively found problem is the crux of a statutorily mandated search. Statutes mandating searches without a warrant or suspicion are invalid when legislative research fails to find a significant harm cited as the reason for such searches.⁷⁷

iii. A Minor's Pregnancy Alone Cannot Establish Reasonable Suspicion

Federal and state courts have denied that a minor's pregnancy alone authorizes health providers to report a patient as a victim of sexual abuse.⁷⁸ Courts have shielded a minor's pregnancy from disclosure to third parties without her consent because sexual relations receive privacy protection.⁷⁹ Even though there is a possibility of child sex abuse involvement in teen pregnancy, a strong consensus among federal and state courts shows

⁷⁰ *Murphy v. Dulay*, 768 F.3d 1360, 1368 (11th Cir. 2014).

⁷¹ *See id.* at 1377-78.

⁷² *See Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001).

⁷³ *See id.* at 86.

⁷⁴ *See id.* at 81.

⁷⁵ *See Missouri v. McNeely*, 133 S. Ct. 1552, 1500-66 (2013).

⁷⁶ *See Chandler v. Miller*, 520 U.S. 305 (1997).

⁷⁷ *See Lebron v. Sec'y, Fla. Dep't of Children & Families*, 710 F.3d 1202 n.6 (11th Cir. 2013) (data showing welfare funds abuse was insufficient to require drug testing of all welfare beneficiaries).

⁷⁸ *See, e.g., Aid for Women v. Foulston*, 441 F.3d 1101, 1117 (10th Cir. 2006); *Planned Parenthood v. Carter*, 854 N.E.2d 853, 870 (Ind. Ct. App. 2006).

⁷⁹ *See, e.g., C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 180 (3d Cir. 2005) (no privacy violation because disclosure was voluntary); *Planned Parenthood of So. Ariz. v. Lawall*, 307 F.3d 783, 790 (9th Cir. 2002).

states cannot sacrifice privacy protections of minor patients for an enhanced enforcement of statutory rape.⁸⁰

Mandatory reporting of a minor's pregnancy to law enforcement is impossible to enforce without improperly assuming minor females have sexual intercourse exclusively with adult males. Because it is unclear whether an act of sexual abuse produced the pregnancy, some jurisdictions have declined to mandate reporting of sexual child abuse solely due to pregnancy.⁸¹ Pregnancy cannot solely indicate child sex abuse due to the uncertainty that an adult impregnated a minor.⁸² The Third, Ninth, and Tenth Circuit Courts agree with this proposition and require a reasonable suspicion of sexual abuse and a compelling government interest before a healthcare provider reports a minor's pregnancy.⁸³

Although teen pregnancy is a high societal concern, there has been insufficient information drawn to support the suspicion that adult males are the bulk of female minors' sex partners.⁸⁴ A National Campaign to Prevent Teen and Unplanned Pregnancy survey revealed 70% of male sexual partners of teenage girls are only one or two years older than the female.⁸⁵ In contrast to the scare of adults impregnating teenage girls, the risk of pregnancy lowers as the age gap between a female minor and her sex partner lengthens.⁸⁶ Female minors with a sex partner at most two years older have a higher unintended pregnancy rate than those with partners six or more years older.⁸⁷ Since teen pregnancy is more often a product of sexual activity between two minors, there is no heightened justification for lowering a right to privacy for minors. States definitely have a compelling interest in regulating minors' sexual activities, but not to the point of removing minors' protections as patients.⁸⁸

80 See *Carter*, 854 N.E.2d at 876.

81 A Virginia Attorney General opinion restricted reporting sexual abuse due to a minor's pregnancy to when a health provider identifies an adult as the father. See 2014 Op. Va. Att'y Gen. Sept. 12, 2014.

82 Because a minor's pregnancy might have resulted from sexual intercourse with another minor, there is no definite cause of child sexual abuse. See, e.g., *People ex rel. Eichenberger v. Stockton Pregnancy Control Med. Clinic*, 249 Cal. Rptr. 762, 768 (App. 3d 1988); *Planned Parenthood Affiliates of Cal. v. Van De Kamp*, 226 Cal. Rptr. 361, 379–80, (App. 1986) (reporting sexual abuse for minors' sexual activity with individuals of the same age violates minors' sexual privacy rights).

83 See, e.g., *C.N.*, 430 F.3d at 180; *Lawall*, 307 F.3d at 790. The 10th Circuit declined to apply patient privacy rights in whole to minors due to a compelling government interest in protecting minors from sexual abuse. See *Aid for Women*, 441 F.3d at 1120.

84 See Christine E. Kaestle, Donald E. Morisky & Dorothy L. Wiley, *Sexual Intercourse and the Age Difference Between Adolescent Females and Their Romantic Partners*, 34 PERSPS. ON SEXUAL & REPROD. HEALTH 304 (2002).

85 Andy Kopsa, *What Is Mississippi's Strict New Teen-Pregnancy Bill Supposed to Accomplish?*, THE ATLANTIC (June 24, 2013), <http://www.theatlantic.com/politics/archive/2013/06/what-is-mississippi-strict-new-teen-pregnancy-bill-supposed-to-accomplish/277104/>.

86 See Jacqueline E. Darroch, David J. Landry & Selene Oslak, *Age Differences Between Sexual Partners in the United States*, 31 FAM. PLANN. PERSPS. 160, 165 (1999).

87 *Id.*

88 See Caitlin M. Cullitan, *Please Don't Tell My Mom! A Minor's Right to Informational Privacy*, 40 J.L. & EDUC. 417, 427–28 (2011).

Furthermore, there is no special need to aggressively prevent teen pregnancy since the teenage birth rate has declined in Mississippi by nearly 46% from 1991 to 2012, which is close to the nationwide 52% decline rate.⁸⁹ Because there is no purpose in identifying a minor's sexual partner other than enhancing criminal enforcement in Mississippi's statute, an order for healthcare providers to gather and send a minor patient's medical information or sexual history to law enforcement is invalid.

iv. Mandated Cord Blood Tests Intrude on Healthcare Privacy Expectations

When evaluating the invasiveness of a bodily search, the constitutionality of the search can be observed in the method of collecting bodily samples and the extent to which the person subject to a sample collection reasonably expects a reduction of privacy. In *Maryland v. King*, the Court upheld the collection of cheek swab collections because the procedure did not involve "surgical intrusion[s] beneath the skin."⁹⁰ Courts thus consider the entrance of a person's body when measuring whether a search procedure is invasive.⁹¹ The procedure of collecting placental or umbilical cord blood does not actually invade the mother's body. After the mother releases the placenta in afterbirth, attending physicians or midwives collect the umbilical cord.⁹² Then the collector clamps both ends of the cord that connects the placenta to the newborn and pours the blood into a container.⁹³ The mother does not feel anything from the collection of placental blood in addition to pain from afterbirth.⁹⁴ Although this procedure does not seem invasive to the human body, the context of extracting cord blood absent the patient mother's consent violates a reasonable expectation of privacy in a healthcare setting.⁹⁵

Bodily search of an individual is more acceptable when an individual reasonably expects a loss of privacy in the setting where authorities conduct the search.⁹⁶ The reasonable expectation prong does not apply to the retrieval of medical information from patients, especially minors, who do not expect bodily searches for a criminal investigation.⁹⁷ Medical patients, especially minors, do not reasonably expect to have their confidential medical information sent to third parties without their consent.⁹⁸ Because

89 *Mississippi Adolescent Reproductive Health Facts*, OFF. OF ADOLESCENT HEALTH, <http://www.hhs.gov/ash/oah/adolescent-health-topics/reproductive-health/fact-sheets/state.html?s=mississippi> (last updated Nov. 25, 2014).

90 133 S. Ct. 1958, 1963 (2013) (quoting *Winston v. Lee*, 470 U.S. 753, 760 (1984)).

91 See *United States v. Fowlkes*, 770 F.3d 748, 759 (9th Cir. 2014), *aff'd on reh'g* 804 F.3d 954 (9th Cir. 2015).

92 Nat'l Insts. of Health, *Cord Blood Testing*, MEDLINE (Nov. 7, 2014), <http://www.nlm.nih.gov/medlineplus/ency/article/003403.htm>.

93 *Cord Blood Collections*, NAT'L CORD BLOOD PROGRAM <http://www.nationalcordbloodprogram.org/work/collections.html> (last visited Jan. 6, 2014).

94 Nat'l Insts. of Health, *supra* note 92.

95 *Infra* Part III.

96 See *Bd. of Educ. v. Earls*, 536 U.S. 822, 830–31 (2002); *Veronia Sch. Dist. 47J*, 515 U.S. 646 (1995).

97 See *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001).

98 See *Lankford v. City of Hobart*, 27 F.3d 477, 479 (10th Cir. 1994).

patients admitted to hospitals or clinics do not reasonably suspect bodily searches other than medical treatment or diagnosis, there is no basis for conducting a search for the purpose of establishing paternity without the mother's consent.

Both bodily searches of suspected drug addicts in *Ferguson* and of pregnant minors serve public safety interests, but invade patients' privacy and invalidly focus on criminal prosecution. States cannot impose broad, suspicionless searches primarily to enhance criminal enforcement.⁹⁹ There must be a non-criminal, public safety interest and an effective prevention of conduct that counters that interest.¹⁰⁰ Even if the purpose of Mississippi's law is to deter males from engaging in sexual relations with a minor female, reporting a minor's pregnancy ineffectively serves this purpose since males can easily avoid detection by using condoms or engaging in sexual activity that does not lead to impregnation.¹⁰¹

B. A Pregnant Minor Receives a Right to Medical Information Privacy

Privacy rights impose a strict scrutiny test in which a compelling government interest must outweigh an individual's right to privacy for the release of medical information.¹⁰² In jurisdictions that mandate reporting sexual abuse of minors, health providers treating a pregnant minor face a conundrum when choosing between violating a law requiring them to report a reasonable suspicion of child sex abuse and reporting a patient's confidential information without his or her consent. Most, but not all, federal appellate courts recognize that personal medical information is reasonably expected to be private and prohibit providers from disclosing personal information absent a compelling government interest.¹⁰³

Violations of minors' patient-information confidentiality demonstrate a need for greater protection. Medicine is not the only setting that has attempted to violate confidentiality for pregnant minors. This problem has been seen in states with a judicial bypass system for minors requesting an abortion. Judges often report sexual abuse during a proceeding for approving a minor's requested abortion.¹⁰⁴ A pregnant minor should not have to surrender her privacy rights in any setting where she reasonably expects

⁹⁹ *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000).

¹⁰⁰ *Id.* at 47.

¹⁰¹ Martha Kempner, *Can Mississippi Curb Teen Pregnancy and Statutory Rape by Collecting Cord Blood?*, RH REALITY CHECK (June 14, 2013, 12:37 PM), <http://rhrealitycheck.org/article/2013/06/14/mississippi-new-law-collects-umbilical-blood-to-prevent-teen-pregnancy-and-prosecute-statutory-rape/>.

¹⁰² See *Whalen v. Roe*, 429 U.S. 589 (1977) (finding that a compelling government interest is needed to release information reasonably expected to remain private).

¹⁰³ *Anderson v. Romero*, 72 F.3d 518, 522 (7th Cir. 1995) (identifying courts that recognize a constitutional right to privacy for medical information). *But cf.* *Doe v. Wiggington*, 21 F.3d 733, 740 (6th Cir. 1994) (rejecting right to privacy for medical information).

¹⁰⁴ See Amanda Warford, Note, *The Intersection of Kentucky's Abortion Parental-Consent Bypass Law and Mandatory Child-Abuse Reporting Statute: A Judicial Dilemma and Proposed Legislative Solution*, 50 U. LOUISVILLE L. REV. 177 (2011) (criticizing the application of mandatory sexual abuse reporting in private judicial procedures).

confidentiality in receiving medical treatment. The fact that there is no concrete evidence that statutory rape comprises the majority of minor pregnancies proves there is no compelling interest that justifies reporting a minor's pregnancy to law enforcement.¹⁰⁵

III. COLLECTION OF CORD BLOOD AND FETAL TISSUE WITHOUT THE MOTHER'S CONSENT INVADES PROPERTY RIGHTS

Mandating cord blood tests for minor mothers who cannot identify their partners not only disrupts privacy expectations for patients and sexually-active minors, but also removes a right to own and keep private, personal genetic information. Although patients cannot claim organs as property, organs have genetic value that provides legal protection for patients.¹⁰⁶

A. *Property Rights Should Extend to Organs Containing Genetic Information*

Placental cord blood contains important properties, including stem cells and genetic information of the mother and her newborn child.¹⁰⁷ In addition, cord blood contains personal genetic information that belongs to the mother and the child—information that can identify the father.¹⁰⁸ Because of the vital genetic properties of cord blood, there should be strong legal protections against obtaining cord blood without a mother's informed consent.

Although property rights to personal organs are universally unrecognized, some jurisdictions require a patient's consent for the collection of blood and organs.¹⁰⁹ Additionally, a federal statute prohibits the collection of placental cord blood without the informed consent of the donor.¹¹⁰ Congress considered the need for non-coercive donations, cultural sensitivity, and patients' autonomous choice in donating cord blood when it set rules for cord blood donations.¹¹¹ Likewise, states that adopt rules for cord blood donations typically require healthcare providers to obtain the informed consent of a donor.¹¹²

Property rights of body parts are a relatively recent innovation in some jurisdictions, but are influential in strengthening patients' privacy rights. Because organs and genetic

¹⁰⁵ See *Aid for Women v. Foulston*, 441 F.3d 1101, 1108 (10th Cir. 2006).

¹⁰⁶ See Sonia M. Suter, *Disentangling Privacy from Property: Toward a Deeper Understanding of Genetic Privacy*, 72 GEO. WASH. L. REV. 737 (2004).

¹⁰⁷ See Stephen R. Munzer, *The Special Case of Property Rights in Umbilical Cord Blood for Transplantation*, 51 RUTGERS L. REV. 493, 495 (1999).

¹⁰⁸ See *id.*

¹⁰⁹ Only admitted patients can claim a right to consent. *Weldon v. Universal Reagents, Inc.*, 714 N.E.2d 1104, 1109–10 (Ind. Ct. App. 1999); *Patin v. Admins. of Tulane Educ. Fund*, 770 So.2d 816, 818 (La. Ct. App. 2000).

¹¹⁰ Stem Cell Therapeutic and Research Act, 42 U.S.C. § 274k(c) (2014).

¹¹¹ S. REP. NO. 109-129, at 8 (2005).

¹¹² E.g. CONN. GEN. STAT. § 19a-32n (2014); OKLA. STAT. ANN. tit. 63, § 2175(c) (West 2014) (assessment of health risks and religion when informing patients of cord blood donation).

material are natural and lack any unique identification, some courts do not afford property rights over organs or genetics to patients.¹¹³ Organs given for medical treatment or lost during medical treatment cannot have ownership due to their classification as gifts or bodily waste.¹¹⁴ Collection of the placental cord is non-invasive as its removal is part of the normal birthing procedure and may be medical waste, so there is no concern of any organ seizure.¹¹⁵ A minor who is subject to a cord blood test cannot claim property ownership over the placental cord, but she may benefit from a consent requirement and the right to the genetic information contained in the cord blood.

B. *Genetic Privacy Laws Prevent Disclosure of the Minor-Parents' Identities*

The sensitivity of genetic information has led to protections for individuals' disclosure of genetic information. A federal statute prohibits employers from requesting an employee's genetic information and narrows an employer's disclosure of genetic information to law enforcement.¹¹⁶ A few states have adopted genetic privacy statutes that prohibit healthcare providers from disclosing an individual's genetic information without the consent of the owner of that genetic material.¹¹⁷ Some of these states grant absolute property rights to patients who have had products made with their genetic information.¹¹⁸ Genetic information demands privacy protections due to medical technology that enables third parties to easily identify an individual and certain genetic defects that would potentially lead to societal discrimination.¹¹⁹

Since genetic information has the potential to identify an individual through discarded body parts, there should be protections against the collection of bodily products without a patient's consent. Federal circuit courts consider the need for such a protection, but are split on what degree of protection there should be for collecting genetic information.¹²⁰ Although circuit courts have unanimously affirmed the federal government's collection of genetic information for convicted felons, there are varying degrees of tests for analysis.¹²¹ Most courts employ a rational basis test due to the reduced expectations of privacy for convicted felons in the collection and storage of their genetic information being used for monitoring those on probation.¹²² Others apply a balancing test

¹¹³ See, e.g. *Moore v. Regents of Univ. of Cal.*, 793 P.2d 479, 490 (Cal. 1990).

¹¹⁴ *Wash. Univ. v. Catalona*, 490 F.3d 667, 676 (8th Cir. 2007), *cert. denied*, 552 U.S. 1166 (2008).

¹¹⁵ See *id.*

¹¹⁶ 42 U.S.C. § 2000ff-1(b)(1), (6) (2014).

¹¹⁷ E.g., MINN. STAT. § 13.386 (2014); NEV. REV. STAT. ANN. § 629.161 (LexisNexis 2013); N.J. STAT. ANN. § 10:5-43 (West 2014).

¹¹⁸ E.g., ALASKA STAT. § 18.13.010 (2014); IND. CODE § 12-31-2-7 (2012) (patient has rights to intellectual property produced from her genetic material).

¹¹⁹ See *United States v. Kincade*, 379 F.3d 813, 842 (9th Cir. 2004) (Gould, J., concurring); see also *Bearder v. State*, 806 N.W.2d 766, 772 (Minn. 2011) (explanatory parenthetical is recommended here).

¹²⁰ *United States v. Kraklio*, 451 F.3d 922, 924 (8th Cir. 2006).

¹²¹ *Id.*

¹²² See *id.*; *United States v. Sczubelek*, 402 F.3d 175, 182 (3d Cir. 2005), *cert. denied*, 548 U.S. 919 (2006); *Padgett v. Donald*, 401 F.3d 1273, 1277 (11th Cir. 2005), *cert. denied*, 546 U.S. 820 (2005); *Kincade*, 379 F.3d at 832.

that favors the government when there is a special needs interest in using an individual's genetic material.¹²³ While federal courts have upheld the mandated collection of genetic information, they did so for regulating parolees convicted of felonies, who have a lesser expectation of privacy.¹²⁴ The same does not hold for medical patients, especially minors.¹²⁵

Obtaining genetic information through a minor mother's cord blood for a criminal investigation obliterates any sense of confidentiality in a patient-healthcare provider relationship. Patients must know when any of their genetic information taken for medical treatment will be shared with third parties, unless there are overriding government interests related to public health and safety.¹²⁶ Even though the placental cord is biological waste or an abandoned body part, the act of acquiring private genetic information for criminal investigation is a fearful thought that should need a patient's consent.

Some jurisdictions hold that patients have a right to notice when healthcare providers use their body parts and genetic information for any purpose that may disclose private information to third parties.¹²⁷ The Arizona Court of Appeals heard a challenge to a professor's collection and distribution of blood samples of tribal members to third-party researchers in *Havasupai Tribe v. Arizona Board of Regents*.¹²⁸ The plaintiff claimed the practice violated an Arizona statute requiring notice to patients for disclosing an individual's genetic information for non-medical use.¹²⁹ The court evaded the question of whether there was a violation of genetic privacy rights when it found the plaintiffs failed to serve notice to the defendants on time.¹³⁰ However, the case demonstrates a need for protections against disclosing medically obtained genetic information to third parties.¹³¹ In *Bearder v. State*, the Minnesota Supreme Court relied on a genetic privacy statute in requiring a patient's informed consent when healthcare providers use a newborn's genetic information for purposes other than genetic screening.¹³² Parents reasonably expect healthcare providers to collect genetic information of their newborn since federal and state laws require genetic screening, but providers may not divert from using the information outside of medical treatment.¹³³

123 See *Nicholas v. Goord*, 430 F.3d 652, 666 (2d Cir. 2005); *Green v. Berge*, 354 F.3d 675, 667 (7th Cir. 2004); *Groceman v. U.S. Dep't of Justice*, 354 F.3d 411, 413 (5th Cir. 2004); *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir. 2003).

124 *Samson v. California*, 547 U.S. 843, 852 (2006).

125 Patients do not consent to have their property taken once they are admitted into a hospital. *United States v. Neely*, 345 F.3d 366, 369–70 (5th Cir. 2003).

126 See *Big Ridge, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 715 F.3d 631, 657 (7th Cir. 2013).

127 See *Bearder v. State*, 806 N.W.2d 766, 775 (Minn. 2011).

128 204 P.3d 1063, 1066–67 (Ariz. Ct. App. 2008).

129 *Id.* at 1068–69.

130 *Id.* at 1066.

131 Michelle Huckaby Lewis, *Laboratory Specimens and Genetic Privacy: Evolution of Legal Theory*, 41 J.L. MED. & ETHICS 65, 67 (2013).

132 806 N.W.2d at 771–74.

133 *Id.* at 770–71.

Although the Arizona and Minnesota cases depended on statutes recognizing an individual's ownership of genetic information, the Fourth Amendment also prohibits obtaining confidential medical information from patients for general law enforcement.¹³⁴ Patients who give their blood or any genetic information for medical treatment setting must reasonably know when there is a criminal investigation purpose for the collection.¹³⁵ Interests in protecting patients' genetic information privacy rights clearly override any state interest in obtaining information on a minor's sexual activity.

Seizure of a placenta mandated by statute also complicates the doctor-patient relationship between medical providers and pregnant minors.¹³⁶ Proponents of the Mississippi statute claim search and seizure of umbilical cord blood raises no privacy concerns because the organ is "discarded," but invading patient privacy is an unacceptable risk of this law.¹³⁷ Drawing a minor patient's cord blood solely to prosecute her partner is highly invasive and complicates a minor's expectations in healthcare.¹³⁸

IV. REPORTING TEENAGERS' PREGNANCIES IS NEEDLESS DUE TO THE SUCCESS OF OTHER LESS INTRUSIVE, LOW-COST POLICIES

A. *The High Monetary Cost of Enforcing Mississippi's Statute*

While most states have significantly reduced teenage-pregnancy rates, the introduction of cord blood testing and directly regulating paternity among minors seems excessive. Most states have significantly reduced their teenage pregnancy rates within the last decade, particularly with younger teenagers aged fifteen to seventeen years of age.¹³⁹ Within this period, teenage birth rates were reduced by at least 35% in a handful of states.¹⁴⁰ The success in decreasing births to minor mothers has been attributed to policies that promote sexual education and minors' knowledge of contraceptive use.¹⁴¹ Policies educating minors on sexuality already have proven to be a more appealing solution than

¹³⁴ *Ferguson v. City of Charleston (Ferguson I)*, 532 U.S. 67, 83-84 (2001).

¹³⁵ *Reedy v. Evanson*, 615 F.3d 197, 229-30 (3d Cir. 2010) (citing *Ferguson v. City of Charleston (Ferguson II)*, 308 F.3d 380, 397 (4th Cir. 2002)).

¹³⁶ See MISS. CODE ANN. § 97-5-51(5) (West 2013).

¹³⁷ Debra Cassens Weiss, *DNA of Babies Born to Teens Under 16 Will Be Collected for Paternity Tests Under New State Law*, ABA JOURNAL (Aug. 5, 2013, 11:40 AM), http://www.abajournal.com/news/article/miss_battles_statutory_rape_with_collection_of_umbilical_cord_blood/.

¹³⁸ Bodily searches of patients for purposes other than aiding medical treatment has been held to violate patients' reasonable expectation of privacy. See *Ferguson*, 532 U.S. at 79 n. 15 (citations omitted).

¹³⁹ The national teenage birth rate in this age group has been steadily declining since 2007. VENTURA ET AL., *supra* note 18, at 2-3.

¹⁴⁰ *Id.* at 5.

¹⁴¹ States with comprehensive sexual education policies that include instructing minors how to use contraceptives have seen comparatively lower teenage birth rates than states with a flat abstinence policy. See Pamela K. Kohler, Lisa E. Manhart, & William E. Lafferty, *Abstinence-Only and Comprehensive Sex Education and the Initiation of Sexual Activity and Teen Pregnancy*, 42 J. ADOLESCENT HEALTH 344, 349 (2008).

the elevated monetary expense and violation of minors' privacy in tracking down every father of children born to minors.

The high cost of cord blood paternity testing and the effect of minors avoiding healthcare treatment for pregnancy bring an unwarranted health policy for minors. Cord blood storage carries a high price tag in addition to DNA testing. Private companies specializing in cord blood banking have the exclusivity of setting prices since few public banks have yet to be established.¹⁴² Storing cord blood at these private banks costs thousands of dollars annually, with an annual storage payment that costs \$2,895 per year.¹⁴³ DNA testing through cord blood has an estimated price of \$1,000 per procedure.¹⁴⁴ The cost of cord blood drawing, banking, and testing only adds to the cost of a minor's motherhood, not to mention the steep expense of childbirth.

Mississippi's statute does not mention who will pay for the cost of the DNA procedure, banking, or any expense related to investigating a minor's pregnancy.¹⁴⁵ The state has not decided who should pay the high cost of storing cord blood and performing DNA tests. The Mississippi State Medical Examiner's Office issued regulations for the law, but never assigned who pays the cost of cord blood collection and storage.¹⁴⁶ The Mississippi Legislature enacted a grant to promote cord blood donations a year after the passage of the statute, but expressly prohibited the state from compensating cord blood drawing for genetic testing.¹⁴⁷ The statute's absence of any cost designation may permit state or local officials to either defer the total cost to the patient or to split the cost of the entire procedure with the patient, which will further deter pregnant minors from seeking prenatal medical attention.¹⁴⁸ Furthermore, placing the cost of cord blood testing onto minors would violate a patient's expectation of expenses related to her pregnancy treatment; it would be unethical to surprise a minor patient with the burden of paying the cost of complying with a governmental healthcare policy.¹⁴⁹

¹⁴² See Seema Mohapatra, *Cutting the Cord to Private Cord Blood Banking: Encouraging Compensation for Public Cord Blood Donations after Flynn v. Holder*, 84 U. COLO. L. REV. 933, 950 (2013).

¹⁴³ *Id.*

¹⁴⁴ *Miss. Law Requires Cord Blood to Be Collected from Teen Moms*, CBS NEWS (Aug. 2, 2013 5:22 PM), <http://www.cbsnews.com/news/miss-law-requires-cord-blood-to-be-collected-from-teen-moms/>.

¹⁴⁵ *Id.*

¹⁴⁶ 31-504 MISS. CODE R. § 1.1 (LexisNexis 2013).

¹⁴⁷ The statute authorizing grants to promote cord blood donations expressly prohibits using funds from that grant for DNA testing. MISS. CODE ANN. § 41-129-1(4) (2016).

¹⁴⁸ Brett Baulsir, *Mississippi Law Aimed at 'Preventing' Teen Pregnancy Misses the Mark*, NETWORK FOR PUB. HEALTH L. (Oct. 1, 2013, 12:31 PM), https://www.networkforphl.org/the_network_blog/2013/10/01/280/mississippi_law_aimed_at_preventing_teen_pregnancy_misses_the_mark.

¹⁴⁹ Several states prohibit added expenses for cord blood collection without the patient's consent. See, e.g., ARIZ. REV. STAT. ANN. § 32-3210 (2015); 210 ILL. COMP. STAT. 85/6.21 (2014).

B. Comprehensive Sexual Education and Expanding Access to Contraceptives to Minors Is a More Effective Solution to Reducing Teen Pregnancy

Instead of spending resources on excessively checking on minors' sexual activity, states should be more open to educating minors and increasing minors' access to contraceptives. State subsidized distribution of contraceptives is a low expense and a proven method of reducing teen pregnancy.¹⁵⁰ Such policies, which enable minors and educate them about their sexuality, have the highest success rate.¹⁵¹ For instance, California experienced its greatest teenage birth rate decline when it enacted a comprehensive sexual education program that instructed students on how to use contraceptives.¹⁵² Policies enabling minors to gain sexual experience should be expanded rather than redacted to effectively reduce teen pregnancy.¹⁵³

The most effective strategy to reduce teenage birth rates is expanding minors' access to contraceptives. For rural states like Mississippi, the cost of contraceptives and the limited access to health clinics obviates the prevention of teenage pregnancy, which explains why rural areas have a higher teenage birth rate than urban areas.¹⁵⁴ In solving the issue of minors' access to contraceptives, state and local programs that provide low-cost or free contraceptives saw their teenage birth rates fall at a drastic level. For instance, a privately-funded program in Colorado that provided intrauterine contraceptives to minors reduced the teenage birth rate by 40% in four years.¹⁵⁵ A pilot program distributing free contraceptives to minors aged fifteen to seventeen years of age initiated by Washington University in the Greater St. Louis region greatly decreased the local teenage birth rate.¹⁵⁶ Participants in this program who accepted low-cost contraceptives cut the teenage birth rate by 75%.¹⁵⁷ Increasing minors' knowledge about using and ability to afford contraceptives should be integrated in states' teenage pregnancy prevention policies. Finally, the concern of minors becoming sexually active at a younger age is nonexistent

150 See Zhou Yang & Laura M. Gaydos, *Reasons for and Challenges of Recent Increases in Teen Birth Rates: A Study of Family Planning Service Policies and Demographic Changes at the State Level*, 46 J. ADOLESCENT HEALTH 517 (2010) (holding that state Medicaid subsidies for contraceptives to teenagers).

151 See generally Pamela K. Kohler et al., *supra* note 141, at 348 (2008).

152 Heather D. Boonstra, *Winning Campaign: California's Concerted Effort To Reduce Its Teen Pregnancy Rate*, 13 GUTTMACHER POL'Y REV. 18 n.2 (2010).

153 Sexually active minors are less likely to seek medical assistance for pregnancy in response to harder regulations on contraceptives since they fear repercussions for admitting to violating age of consent laws. Phillis, *supra* note 37, at 295-97.

154 See Laura Sessions Stepp, *Rural America Has a Teen Pregnancy Problem*, CNN (Feb. 27, 2013), <http://www.cnn.com/2013/02/27/opinion/stepp-teenage-pregnancies/>.

155 Caitlin Schmidt, *Colorado Teen Birthrate Drops 40% with Low-Cost Birth Control*, CNN (July 10, 2014), <http://www.cnn.com/2014/07/10/health/colorado-teen-pregnancy/index.html>.

156 Gina M. Secura et al., *Provision of No-Cost, Long-Acting Contraception and Teenage Pregnancy*, 371 NEW ENG. J. MED. 1316 (2015), <http://www.nejm.org/doi/full/10.1056/NEJMoa1400506#t=articleTop>.

157 *Id.*

since minors who have access to contraceptives at an earlier age do not alter their sexual behavior.¹⁵⁸

One obstacle to comprehensive sexual education curriculum is the adamant resistance of one of the more effective means of reducing teenage pregnancy. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) established a federal grant program that has incentivized states to teach an abstinence-only sexual education.¹⁵⁹ States accepting this grant must exclusively instruct students of the physical, sociological, and psychological harms of pre-marital sexual conduct and negatively portray contraceptives by depicting them as inferior to abstaining from sex in preventing pregnancy.¹⁶⁰ Thirty-seven states in fiscal year 2011 accepted this grant; six of those that applied had not applied the previous year.¹⁶¹ Abstinence-only curriculum is popular among public schools due to parents' and students' objection to content that is sexually explicit or offensive to their religion.¹⁶² If parents feel concerned about schools instructing their children to use contraceptives or the schools' usage of sexually explicit material, schools may provide an option for parents or students to withdraw from the lesson.¹⁶³

Recent national policy recognizes a sexually active youth audience, yet still promotes abstinence. In 2010, the federal government introduced the Personal Responsibility Education Program (PREP), which granted states monetary aid to teach condom and contraceptive use in addition to abstinence in order to prevent and reduce pregnancy for women less than twenty-one years of age.¹⁶⁴ States accepting this grant must include medically accurate and age appropriate instruction.¹⁶⁵ Through the 2014 Congressional fiscal year, this program financially aided states to train youth for financial

158 Minors who first have sex at fifteen years of age have a similar contraceptive use as seventeen and eighteen year olds. Lawrence B. Finer & Jesse M. Philbin, *Sexual Initiation, Contraceptive Use, and Pregnancy Among Young Adolescents*, 131 PEDIATRICS 886, 889 (2013). Minors under thirteen years of age considerably use contraceptives less often, but the minute amount of sexually active minors in this age group is too small to warrant such an interest in prevention. *Id.*

159 42 U.S.C. § 710 (2012); Hazel Glenn Beh & Milton Diamond, *The Failure of Abstinence-Only Education: Minors Have a Right to Honest Talk About Sex*, 15 COLUM. J. GENDER & L. 12, 28–29 (2006).

160 *Id.* at 36–38. Although participating states may present a viewpoint against using contraceptives, they must rationally relate to promoting abstinence. States' free use of an abstinence-only curriculum has produced conflicting results on what is appropriate. See *Gonzalez ex rel. Gonzalez v. Sch. Bd.*, 571 F. Supp. 2d 1257, 1270 (S.D. Fla. 2008) (excluding gay rights student group unrelated to sexual education). Cf. *Caudillo ex rel. Caudillo v. Lubbock Indep. Sch. Dist.*, 311 F. Supp. 2d 550 (N.D. Tex. 2004) (finding that a school may exclude a gay-rights student group due to its sexual content).

161 *State by State Decisions Fiscal Year 2011 Edition: The Personal Responsibility Education Program and Title V Abstinence-Only Program*, SEXUALITY INFO. & EDUC. COUNCIL OF U.S., <http://www.siecus.org/index.cfm?fuseaction=Page.ViewPage&PageID=1272> (last visited Jan. 6, 2014).

162 See *Brown v. Hot, Sexy and Safer Prod., Inc.*, 68 F.3d 525, 529 (1st Cir. 1995), cert. denied, 516 U.S. 1159 (sexual content); *Parker v. Hurley*, 474 F. Supp. 2d 261, 263 (D. Mass. 2007) (religious objection).

163 *Leebaert v. Harrington*, 332 F.3d 134, 136 (2d Cir. 2003).

164 42 U.S.C. § 713(b)(2)(B) (2012).

165 *Id.*

literacy, education, and healthy sexual relationships, and promoted sexual abstinence.¹⁶⁶ Only two states, Indiana and North Dakota, opted out of PREP participation.¹⁶⁷

Although most states readily accepted comprehensive sexual education, local school districts varyingly interpret curriculum standards.¹⁶⁸ When Mississippi introduced the option for public schools to include birth control methods and contraceptives into their sexual education curriculum, less than half of the school districts adopted a comprehensive sexual education program.¹⁶⁹ On the contrary, a poll from the Center for Mississippi Health Policy demonstrated a majority of parents prefer a curriculum that teaches students how to use contraceptives.¹⁷⁰ Public schools' obstruction to instruct students how to use contraceptives ignores the reality of teenagers' active sexuality; Mississippi teenagers are more sexually active than the nationwide average.¹⁷¹ Surprisingly, Mississippi teenagers are more likely to use condoms, which demonstrates a necessity for instructing contraceptive use.¹⁷² Despite teenagers' experience with contraceptives, Mississippi bars schools with an abstinence-plus curriculum from demonstrating how to use condoms and contraceptives, although it permits a discussion on birth control.¹⁷³ The statute prohibiting contraceptives demonstrations has, in fact, been enforced at least once.¹⁷⁴ Since Mississippi's teenage population is among the most engaged in sexual activity and contraceptive usage, the state's teenage-pregnancy-prevention policy should reflect reality rather than appeal. Officials should focus on preparing teenagers to actively prevent teenage pregnancy, not threaten to remove their rights.

¹⁶⁶ 42 U.S.C. § 713(b)(C).

¹⁶⁷ Sexuality Information and Education Council of the United States, *supra* note 160.

¹⁶⁸ Kelly Percival & Emily Sharpe, *Sex Education in Schools*, 13 GEO. J. GENDER & L. 425, 426 (2012).

¹⁶⁹ Alana Semuels, *Sex education stumbles in Mississippi*, L.A. TIMES (Apr. 2, 2014), <http://articles.latimes.com/2014/apr/02/nation/la-na-ms-teen-pregnancy-20140403>. Mississippi does not give any special treatment for a school district's choice of abstinence-only or "abstinence-plus" curriculum, but it does set abstinence-only as the default and requires all schools to dissuade students from engaging in sexual activity. MISS. CODE ANN. § 37-13-171(2) (West 2014).

¹⁷⁰ Sarah Carr, *Sex Education in Mississippi: Will a New Law Lower Teen Pregnancy Rates?*, TIME (Sept. 21, 2012), <http://nation.time.com/2012/09/21/sex-education-in-mississippi-will-a-new-law-lower-teen-pregnancy-rates/>.

¹⁷¹ A 2011 poll revealed Mississippi high school students were the third most sexually active, with 53.3% of females and 62.5% of males reporting ever had a sexual partner. DANICE K. EATON ET AL., CENTS. FOR DISEASE CONTROL, YOUTH RISK BEHAVIOR SURVEILLANCE – UNITED STATES 2011, 61(4) Surveillance Summaries 1,110–11 (2012), <http://www.cdc.gov/mmwr/pdf/ss/ss6104.pdf>. Nationwide, 47.4% of teenagers in the same age group were sexually active. *Id.* at 24.

¹⁷² According to a poll, 64.6% of Mississippi teenagers used a condom in their last reported sexual experience, compared to the median of 59.9% among states. *Id.* at 115.

¹⁷³ MISS. CODE ANN. § 37-13-171(3) (West 2014).

¹⁷⁴ Carl Smith, *Teacher Suspended After Condom Demonstration*, DISPATCH (Nov. 19, 2015, 10:23 AM.), <http://www.cdispatch.com/news/article.asp?aid=46391> (high school teacher suspended after she permitted a student to demonstrate condom use with a cucumber as part of a presentation on sexology).

CONCLUSION

In developing a policy regulating minors' sexual activity, states should be aware of the sensitivity and importance of confidentiality in medical care. Mississippi's plan to remove its status as having one of the highest teenage pregnancy rates fails to acknowledge minors' needs for sexual education and their vulnerability to perceive government intervention as punishment. For this reason, criminalization is an inappropriate approach to reducing teenage pregnancy. Reducing the cost of minors' access to contraceptives has proven to dramatically decrease teenage birth rates, but many states are unwilling to implement this solution due to social controversy.¹⁷⁵ States need to understand that teenage pregnancy must be treated as a medical concern instead of a criminal matter. Because teenage pregnancy has declined in recent years due to teenagers' autonomous prevention of parenthood, there is no reason for Mississippi or any other jurisdiction to deprive minors' sexual and medical privacy.¹⁷⁶

¹⁷⁵ See Percival & Sharpe, *supra* note 167, at 433.

¹⁷⁶ See Heather D. Boonstra, *What Is Behind the Declines in Teen Pregnancy Rates?*, 17(3) GUTTMACHER POL. REV. 15, 20 (2014).