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Shaky Science: Shaken Baby Syndrome and Its Disproportionate Impact on False Convictions of Women of Color

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SHAKY SCIENCE: SHAKEN BABY SYNDROME AND ITS DISPROPORTIONATE IMPACT ON FALSE CONVICTIONS OF WOMEN OF COLOR

ABSTRACT

Shaken Baby Syndrome (SBS) is a controversial diagnosis and an even more controversial basis for conviction. The syndrome is questioned by scientists and doctors who have yet to come to a consensus on its diagnosis. Courts have permitted SBS evidence to be admitted in criminal trials, and many people have been convicted solely on the basis of this controversial diagnosis. This Note seeks to analyze the history of SBS, the conflicts in the medical and scientific community, standards of evidence that permit its admission in court, and how all of these factors converge in a way that disproportionately impacts women of color, especially Black women.

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INTRODUCTION

Shaken Baby Syndrome (SBS) is a problematic basis for convictions and is accepted unevenly in state courts as evidence, resulting in wrongful convictions that disproportionately impact women of

color, especially Black women.¹ SBS has no place in courtrooms as evidence for several reasons. The first is that it is not settled science and should therefore not be permitted in court.² SBS is a relatively new diagnosis in the medical field and doctors and scientists have not come to a consensus on the syndrome.³ Diagnosis is one of the aspects that experts disagree on and that can result in juries delivering wrongful convictions.⁴

SBS is often diagnosed after a medical triad of symptoms is found.⁵ However, experts disagree on whether shaking can cause those symptoms.⁶ Experts also disagree about how quickly observable symptoms appear after the alleged shaking of a child occurs.⁷ Both of these scientific disagreements can lead to persons being prosecuted when either the child was never shaken at all or it was shaken by someone other than the person being prosecuted.⁸ Experts on both sides of the SBS debate have testified in courts and this has led to a similar confusion in courts about how to handle SBS.⁹ The solution is clear: science without consensus has no place in a courtroom where its use often results in devastating wrongful convictions¹⁰ and lifetime consequences for those wrongfully accused.¹¹

Relevant case law also fails to provide a solution to the problem of SBS in criminal trials.¹² The Supreme Court has previously addressed SBS in *Cavazos v. Smith* in which it upheld the state court's conviction of a grandmother who was accused of murdering her

1. See Elizabeth Webster & Jody Miller, *Gendering and Racializing Wrongful Conviction: Intersectionality, "Normal Crimes," and Women's Experiences of Miscarriages of Justice*, 78 ALB. L. REV. 973, 973 (2014); Robert J. Goodwin, *Fifty Years of Frye in Alabama: The Continuing Debate Over Adopting the Test Established in Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 35 CUMB. L. REV. 231, 234–35 (2004).

2. See Joseph Shapiro, *Rethinking Shaken Baby Syndrome*, NPR (June 29, 2011, 12:00 AM), <https://www.npr.org/2011/06/29/137471992/rethinking-shaken-baby-syndrome#:~:text=The%20dispute%20over%20shaken%20baby,innocent%22people%20go%20to%20prison> [<https://perma.cc/AM5X-LXPV>].

3. Sandeep Narang, *A Daubert Analysis of Abusive Head Trauma/Shaken Baby Syndrome*, 11 HOUS. J. HEALTH L. & POL'Y 505, 529 (2011).

4. See Eza Bella Zakirova, *Shaken Baby Syndrome: As a Controversy in Wrongful Conviction Cases*, 81 ALB. L. REV. 1027, 1029 (2017).

5. *Id.* at 1044.

6. See, e.g., *id.* at 1043.

7. See Deborah Tuerkheimer, *Science-Dependent Prosecution and the Problem of Epistemic Contingency: A Study of Shaken Baby Syndrome*, 62 ALA. L. REV. 513, 517 (2011).

8. See *id.*

9. *Id.* at 523–26.

10. Zakirova, *supra* note 4, at 1037.

11. *Id.* ("From 1984 to 2005, half of wrongful conviction cases on SBS grounds involved murder charges.")

12. See, e.g., *Cavazos v. Smith*, 565 U.S. 1 (2011); *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

grandson, reversing the Ninth Circuit's decision.¹³ The case illustrated many of the shortcomings in charging someone based on SBS evidence and expert testimony.¹⁴ It also illustrated many of the flaws in the science of SBS.¹⁵ A strong dissent by Justice Ginsburg questioned the merits of the scientific evidence of SBS, pointing to the lack of consensus in the scientific community and pointing out many of the evidentiary discrepancies in the facts of the case, indicating that the issue may not be settled in the Supreme Court.¹⁶

Other relevant case law concerns the evidentiary standards used by federal and state courts.¹⁷ Some states use a *Daubert* standard for scientific evidence while other states apply the *Frye* standard.¹⁸ Federal courts apply *Daubert* in ascertaining admissible scientific evidence.¹⁹ Scholars disagree on which standard is stricter but depending on the standard used, SBS evidence may or may not be admitted.²⁰ There is a discrepancy in the evidence standards throughout the United States that allows SBS to be permitted in some criminal courts while other courts exclude it.²¹ This is a direct result of state courts using a different evidentiary standard from each other and from federal courts.²² Therefore, a person's likelihood of being wrongfully convicted on SBS grounds depends greatly on which state they are being tried in.²³ A person charged in North Carolina may face a totally different result from a person charged in California, even if the facts of the case are identical.²⁴ This is a result of the different evidence standards.

While SBS as a basis for prosecution can result in wrongful convictions for anyone, women of color are especially vulnerable to being wrongfully convicted on SBS grounds.²⁵ Women face stereotypes

13. *Cavazos*, 565 U.S. at 2–3, 9.

14. *Id.* at 6–7.

15. *See id.*

16. *Id.* at 10–11, 13–14, 17.

17. Goodwin, *supra* note 1, at 234–35.

18. *Id.*

19. *Id.* at 233.

20. *See, e.g., id.* at 233, 283–84.

21. *See id.* at 267–68.

22. *See id.*

23. *See* Goodwin, *supra* note 1, at 260.

24. *See, e.g., id.* at 291.

25. *Cf.* Andrea L. Lewis & Sara L. Sommervold, *Death, but Is It Murder? The Role of Stereotypes and Cultural Perceptions in the Wrongful Convictions of Women*, 78 ALB. L. REV. 1035, 1041, 1050 (2014) (describing flawed mother stereotypes present in the criminal justice system and pointing to shaken baby syndrome as a crime susceptible to stereotype-driven theories); Dorothy E. Roberts, *Unshackling Black Motherhood*, 95 MICH. L. REV. 938, 950 (1997) (describing stereotypes imposed on Black mothers as bad mothers).

about femininity and motherhood when on trial for any type of child abuse or harm.²⁶ Black people and other people of color face racism that dehumanizes and perpetuates their oppression.²⁷ Black women are confronted with the intersection of racism and sexism when they are accused of harming a child.²⁸ Stereotypes about women as mothers often shape the narrative around trials of women.²⁹ White women on trial for hurting a child are characterized as insane.³⁰ They are given the benefit of the doubt because white women can more easily achieve the pinnacle of good societal motherhood.³¹ Black women do not have this luxury. When Black women are on trial for harming a child, the narrative centers around them being bad mothers.³² They are characterized as violent and promiscuous.³³ While these racist and sexist narratives have no basis in fact, they very much influence jurors, prosecutors, police, judges, and other actors in the criminal justice system.³⁴ This leaves Black women far more vulnerable to convictions on faulty SBS evidence that are influenced by these stereotypes.³⁵

I. MEDICAL BACKGROUND AND SCIENTIFIC CONFLICTS ABOUT SHAKEN BABY SYNDROME

A. *History*

Shaken Baby Syndrome (SBS) has a relatively recent history as a form of child abuse;³⁶ child abuse was not recognized by society and the medical community until the mid-twentieth century.³⁷ The literature varies on who first discovered and diagnosed SBS.³⁸ Some credit Dr. Norman Guthkelch, a British pediatric neurosurgeon, who discussed the condition in an article in 1971.³⁹ Guthkelch conducted a study in which he examined 23 children suspected of being abused and concluded that they may receive subdural hematomas resulting

26. See Lewis & Sommervold, *supra* note 25, at 1040–41.

27. Roberts, *supra* note 25, at 946.

28. *Id.* at 950.

29. Lewis & Sommervold, *supra* note 25, at 1040–41.

30. See *id.* at 1041.

31. See *id.*

32. See *id.*

33. Roberts, *supra* note 25, at 950.

34. See, e.g., Lewis & Sommervold, *supra* note 25, at 1042, 1046, 1048.

35. See *id.* at 1050, 1054; Roberts, *supra* note 25, at 950.

36. See Narang, *supra* note 3, at 527.

37. *Id.* at 523.

38. E.g., I. Blumenthal, *Shaken Baby Syndrome*, 78 POSTGRAD MED. J. 732, 732 (2002).

39. Zakirova, *supra* note 4, at 1027.

in SBS as a consequence of that abuse.⁴⁰ Guthkelch reported that these types of injuries may occur from shaking a child.⁴¹ Subdural hematomas had been studied before but this was one of the first studies connecting them to trauma, especially that of shaking.⁴²

Another doctor often credited with the discovery of SBS is Dr. John Caffey, an American radiologist.⁴³ Caffey's work predates that of Guthkelch; Caffey published a report in 1946 linking subdural hemorrhages to trauma, but not yet arguing these were abusive injuries.⁴⁴ Pediatrician C. Henry Kempe was one of the first doctors to suggest that abuse was the cause of subdural hemorrhages and head traumas in 1962, naming his diagnosis "Battered-Child Syndrome."⁴⁵ It was not until 1974 that Caffey came up with the term "whiplash shaken infant syndrome," a more direct diagnosis of what we today know as SBS.⁴⁶ Caffey ultimately published a report in 1974 in which he claimed that the injuries he and his colleagues had observed were a result of whiplash or shaking.⁴⁷

B. Diagnosing Shaken Baby Syndrome

One of the issues with SBS as a diagnosis is that it is so difficult to definitively diagnose.⁴⁸ There is not a consensus on what symptoms are indicative of a confident SBS diagnosis.⁴⁹ This uncertainty contributes to inconsistency within the courts as well, as judges and lawyers similarly struggle with what constitutes an abusive crime instead of a tragic medical condition.⁵⁰ The most common symptoms doctors, and consequently prosecutors and judges, have come to rely on is the classic triad: "retinal hemorrhages (bleeding of the inside surface of the back of the eye); subdural hemorrhages (bleeding between the hard outer layer and the spongy membranes that surround the brain); and cerebral edema (brain swelling)."⁵¹ It is worth noting that the presence of other signs of abuse, like fractured skulls or other bones which one might assume would result from violent shaking, are not required for an SBS diagnosis.⁵²

40. *Id.* at 1028.

41. *Id.*

42. Narang, *supra* note 3, at 528.

43. Blumenthal, *supra* note 38, at 732.

44. Narang, *supra* note 3, at 526.

45. *Id.* at 527.

46. Blumenthal, *supra* note 38, at 732.

47. Narang, *supra* note 3, at 528.

48. *See* Zakirova, *supra* note 4, at 1029.

49. Shapiro, *supra* note 2.

50. *See* Zakirova, *supra* note 4, at 1029.

51. *Id.* at 1027.

52. *See* Narang, *supra* note 3, at 574.

Others argue that an SBS diagnosis is more thorough than the triad and involves extensive examination and medical history, with one doctor even insisting that, “[a] multidisciplinary approach that involves careful review of psychosocial and investigative details is ideal.”⁵³ While this approach would be, as Narang says, “ideal,”⁵⁴ it is not a realistic reflection of the busy social worker, emergency room doctor, and prosecutor who are unlikely to engage in that type of investigation.⁵⁵ Other sources that suggest a reliance on the triad for an SBS diagnosis are thus more convincing, as well as evidence that prosecutors require only the presence of the triad to charge a caretaker with abuse or murder.⁵⁶

A presumption of criminal abuse follows a diagnosis of SBS.⁵⁷ Once a doctor has decided that the child in their care is suffering from SBS, or has determined that a deceased child is a victim of fatal SBS, that doctor contacts social services and the police.⁵⁸ Doctors are mandated reporters for child abuse and must report if they suspect any abuse has occurred.⁵⁹ The official medical and scientific definitions of SBS have concerning implications from a legal perspective.⁶⁰ For example, Mayo Clinic defines SBS as “a serious brain injury resulting from forcefully shaking an infant or toddler.”⁶¹ Cleveland Clinic similarly defines SBS as “a type of brain injury that occurs when a baby or toddler is shaken violently.”⁶² Both of these definitions, unlike other medical definitions, are almost literally a diagnosis of a crime.⁶³ They directly state abusive violence has occurred and they imply intent.⁶⁴ Because of these presumptions, it is incredibly difficult to argue innocence: “[i]n essence, SBS is a medical diagnosis of murder.”⁶⁵

53. *Id.* at 571.

54. *Id.*

55. *See, e.g.,* Zakirova, *supra* note 4, at 1042.

56. *E.g.,* Tuerkheimer, *supra* note 7, at 515–16.

57. *See* Zakirova, *supra* note 4, at 1033.

58. Tuerkheimer, *supra* note 7, at 514.

59. Wilbur Smith, *Suspected Child Abuse*, 9 *AMA J. ETHICS* 747, 748 (Nov. 2007).

60. *See* Tuerkheimer, *supra* note 7, at 516.

61. *Shaken Baby Syndrome*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/shaken-baby-syndrome/symptoms-causes/syc-20366619> [<https://perma.cc/CYV9-DUBB>] (last visited Nov. 18, 2022).

62. *Shaken Baby Syndrome*, CLEVELAND CLINIC, <https://my.clevelandclinic.org/health/diseases/13779-shaken-baby-syndrome> [<https://perma.cc/V9US-QDRH>] (last visited Nov. 18, 2022).

63. *See* Tuerkheimer, *supra* note 7, at 515–16.

64. *Id.* at 552.

65. *Id.* at 516.

C. The Scientific Controversy of Shaken Baby Syndrome

The presence of the triad is a real medical issue.⁶⁶ Doctors and scientists agree on this.⁶⁷ Where medical professionals begin to disagree is whether the triad means that the child presenting with SBS symptoms is a victim of abuse.⁶⁸ Other medical conditions may also cause the same symptoms.⁶⁹ Additionally, while a child may have suffered from some sort of head trauma, there are important questions of intentional harm instead of an accident.⁷⁰ An SBS diagnosis, as discussed above, almost immediately eliminates these other possibilities in the eyes of the law.⁷¹ There are further conflicts over whether, even if the cause was possibly abuse, that the last person with the child (who is often criminally charged) was the person who committed the alleged abuse.⁷²

Other medical conditions aside from SBS often display the same symptoms as SBS which can and does result in misdiagnosis.⁷³ Sudden Infant Death Syndrome is sometimes misdiagnosed as SBS, along with Venous Sinus Thrombosis and Hypoxic Brain Damage.⁷⁴ Sickle cell anemia is another medical condition that has been misdiagnosed as SBS.⁷⁵ There are documented cases of children who suffered from each of these diseases who were misdiagnosed with SBS.⁷⁶ Because of the nature of a diagnosis of SBS in which it is assumed that the child was abused or murdered, these misdiagnoses can have devastating consequences for parents or other caretakers of the child who end up criminally charged and even wrongfully convicted.⁷⁷ Additionally, forces other than shaking can cause the injuries of the classic triad.⁷⁸ Force is a common issue in dispute in the courtroom when SBS is brought into evidence.⁷⁹ Experts argue over the degree of force necessary to cause the injuries often seen in alleged SBS cases as often mere shaking would not generate enough force to cause the injuries.⁸⁰

66. See Narang, *supra* note 3, at 570–71.

67. See, e.g., *id.* at 570.

68. See *id.* at 587.

69. Zakirova, *supra* note 4, at 1029.

70. Shapiro, *supra* note 2.

71. See *supra* Section I.B.

72. See Tuerkheimer, *supra* note 7, at 529–31.

73. Zakirova, *supra* note 4, at 1029.

74. *Id.*

75. *Id.* at 1030.

76. See, e.g., *id.* at 1029–30.

77. See *id.* at 1032.

78. Tuerkheimer, *supra* note 7, at 554.

79. See George L. Blum, *Admissibility, Sufficiency, and Other Issues Concerning Expert Evidence to Prove or Disprove Shaken Baby Syndrome*, 16 A.L.R.7TH ART. 5 1, 1 (2016).

80. See *id.* at 4.

Aside from misdiagnosis, another issue with SBS and how it translates into the courtroom is that a child suffering from the condition may have undergone a lucid interval.⁸¹ When a child is diagnosed with SBS, it is usually assumed that the last person with the child is the perpetrator of the abuse that resulted in the injury.⁸² When doctors testify about SBS, like the definitional issues illustrated above, the testimony often places the blame solely on the last person with the child.⁸³ SBS or other neurological conditions like it may have a period of time between when the injury occurred and the onset of symptoms in which the child may behave completely normally.⁸⁴ That time of lucidity could last up to seventy-two hours in which a child may appear fine or show some symptoms of neurological deficiency but not the extreme symptoms of SBS.⁸⁵ This testimony ignores the existence of possible lucid intervals between the injury of the child and the manifestation of symptoms.⁸⁶ That lucid interval can be the difference between a wrongful conviction and a verdict of not guilty.⁸⁷

D. Conflicts in the Medical and Scientific Community

Scientists are very split on whether SBS is flawed or legitimate science.⁸⁸ Because of this split, the courts are similarly struggling with SBS as grounds for convictions.⁸⁹ Some scientists and doctors are staunchly in favor of SBS as a legitimate diagnosis.⁹⁰ Others are firmly against SBS as a medical diagnosis and are concerned about the implications it has in the courtroom.⁹¹ Both arguments are compelling, but from a legal perspective, science that is not definitive has no place in deciding the future of people accused of child abuse or murder.

Dr. Sandeep Narang is one scientist who firmly supports SBS as a legitimate diagnosis.⁹² Narang attempts to undermine the

81. Tuerkheimer, *supra* note 7, at 517.

82. *See id.* at 516.

83. Edward J. Imwinkelried, *Shaken Baby Syndrome: A Genuine Battle of the Scientific (And Non-Scientific) Experts*, 46 NO. 1 CRIM. L. BULL. ART. 6 1, 5 (2010).

84. *See* Tuerkheimer, *supra* note 7, at 517.

85. *See* Deborah Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 WASH. U. L. REV. 1, 18 (2009).

86. *See* Tuerkheimer, *supra* note 7, at 517.

87. *See* Tuerkheimer, *supra* note 85, at 53.

88. *E.g.*, Shapiro, *supra* note 2.

89. *See, e.g.*, Narang, *supra* note 3, at 590; Tuerkheimer, *supra* note 7, at 547.

90. *See, e.g.*, Narang, *supra* note 3, at 590.

91. *See, e.g.*, Tuerkheimer, *supra* note 7, at 547.

92. *See* Narang, *supra* note 3, at 595.

arguments of those who question SBS and addresses the concerns of lawyers and doctors alike.⁹³ He points out that there is extensive literature on the subject of SBS and argues that opposing viewpoints are based on anecdotal evidence; he insists that the primary cause of SBS symptoms is trauma.⁹⁴ Narang further goes into each symptom of the classic triad and argues that those symptoms are unique to a child being forcefully shaken.⁹⁵ He fails to discuss the myriad of cases of those symptoms being mistaken for SBS when in fact they were caused by another condition.⁹⁶

Others who support the science of SBS go so far as to call critiques a “[m]anufactured [c]ontrovers[y].”⁹⁷ SBS is sometimes characterized as “[l]itigation-driven science,” meaning science that seeks to find answers that match up with one side in litigation while downplaying the other side.⁹⁸ Critics of SBS sometimes use this description while proponents firmly reject it and insist that the evidence against SBS is litigation based.⁹⁹ Critics especially deride the dissent in *Cavazos*, discussed below, saying that the Supreme Court was fooled by the supposed SBS controversy.¹⁰⁰ The controversy, these critics argue, has been manufactured despite forty years of sound science supporting SBS diagnoses.¹⁰¹ These criticisms fail to adequately discuss the plethora of false SBS diagnoses, as well as the overturned convictions of those alleged to have harmed their children because of an SBS diagnosis.¹⁰²

Others, like Deborah Tuerkheimer and Eza Bella Zakirova are more skeptical of SBS and express concerns about its implications in the criminal justice system.¹⁰³ They point out the issues with misdiagnoses and questions about the medical science of SBS, while also expressing worry about the possibility of wrongful convictions due to SBS diagnoses.¹⁰⁴ Zakirova points out that juries and courts who are not well-versed in science or medicine are likely to be persuaded by an SBS argument without considering other causes of

93. *See id.* at 577.

94. *See id.* at 534.

95. *See id.* at 571.

96. *See id.*

97. Joëlle Anne Moreno & Brian Holmgren, *The Supreme Court Screws Up the Science: There Is No Abusive Head Trauma/Shaken Baby Syndrome “Scientific” Controversy*, 2013 UTAH L. REV. 1357, 1357 (2013).

98. *Id.* at 1358.

99. *See id.*

100. *See id.* at 1366.

101. *See id.* at 1362.

102. *See id.*

103. *See* Tuerkheimer, *supra* note 7, at 547; Zakirova, *supra* note 4, at 1034.

104. *See* Tuerkheimer, *supra* note 7, at 542; Zakirova, *supra* note 4, at 1027.

injuries.¹⁰⁵ As mentioned above, many SBS convictions rely on the presence of the classic triad.¹⁰⁶ However, advancements in science have indicated that the triad may result from “forces other than shaking.”¹⁰⁷ There are often doubts about whether shaking a child can even generate enough force to cause the injuries displayed.¹⁰⁸ All of these things call into question the science of SBS and the subsequent convictions that are based on that science.

Both of these arguments can be true. There are definitely cases where a person shakes a child or otherwise abuses a child resulting in death.¹⁰⁹ However, there are also many documented instances where a child experiences trauma or death that is not a result of being shaken or abused but is still diagnosed with SBS.¹¹⁰ This has resulted in caretakers and parents being wrongfully convicted after a medical professional mistakenly diagnosed SBS and a prosecutor trusted that diagnosis in pursuing criminal charges.¹¹¹ The science of SBS is still questionable in many instances¹¹² and should therefore not be the sole basis of a conviction as has happened many times. The trauma of losing a child should never be accompanied by the trauma of a false conviction.

II. PERTINENT CASE LAW

A. *Standard of Proof for Scientific Evidence*

Daubert v. Merrell Dow Pharmaceuticals is the prevailing scientific evidentiary standard for federal cases.¹¹³ Under *Daubert*, petitioners were children suffering from birth defects who called experts willing to testify that a drug taken by petitioners’ mothers caused the defects; respondents similarly called experts who testified that the drug did not cause the defects.¹¹⁴ Under *Daubert*, the trial judge has the discretion in letting scientific evidence into the court as

105. See Zakirova, *supra* note 4, at 1034.

106. See Narang, *supra* note 3, at 571.

107. Tuerkheimer, *supra* note 7, at 516.

108. See Blum, *supra* note 79, at 4.

109. See Tuerkheimer, *supra* note 7, at 525.

110. See Will Storr, ‘We believe you harmed your child’: the war over shaken baby convictions, THE GUARDIAN (Dec. 8, 2017, 1:00 PM), <https://www.theguardian.com/news/2017/dec/08/shaken-baby-syndrome-war-over-convictions> [<https://perma.cc/6RY2-ZUEM>].

111. See *id.*

112. See *id.*

113. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 579 (1993).

114. *Id.* at 582.

long as it is relevant and reliable.¹¹⁵ The Court states that for evidence to be admitted as scientific knowledge, “an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation—*i.e.*, ‘good grounds,’ based on what is known. In short, the requirement that an expert’s testimony pertain to ‘scientific knowledge’ establishes a standard of evidentiary reliability.”¹¹⁶ The Court requires two elements for expert testimony and scientific evidence: that the testimony or evidence is scientific knowledge and that it will help the trier of fact understand or determine a fact in issue.¹¹⁷

The Supreme Court held that the previous standard, under *Frye*, was superseded by the Federal Rules of Evidence.¹¹⁸ Rule 702, under the Federal Rules of Evidence, adopted the standard under *Daubert*.¹¹⁹ Rule 702 permits an expert to testify if

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.¹²⁰

However, this standard, and that in *Daubert*, applies only to federal cases.¹²¹ State courts, where many SBS cases are heard, are not required to follow Rule 702 or *Daubert*.¹²² Furthermore, as illustrated above, the science of Shaken Baby Syndrome is not settled¹²³ and should not be admitted under the Federal Rules of Evidence or *Daubert*.

B. Inconsistent Application of Evidence Standards

Even if doctors and other experts are permitted under Rule 702 and *Daubert* to testify about SBS given the individual judge’s discretion, there is an inconsistency in the scientific evidentiary standard

115. *Id.* at 579–80.

116. *Id.* at 590.

117. *Id.* at 592.

118. *Id.* at 587.

119. FED. R. EVID. 702.

120. *Id.*

121. *See id.*

122. *See id.*

123. *See Storr, supra* note 110.

between state and federal courts.¹²⁴ As stated above, *Daubert* and Rule 702 apply only to federal cases.¹²⁵ While many states do follow the Federal Rules of Evidence and *Daubert*, they do not have to follow those standards;¹²⁶ several states instead follow the standard set forth by the D.C. Circuit Court in *Frye v. United States*.¹²⁷

Under *Frye*, the standard for accepting scientific evidence is that “the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.”¹²⁸ This standard is considered less strict by some scholars than that of *Daubert* and is followed by several states.¹²⁹ Other scholars believe that *Daubert* is less strict than *Frye* and allows any manner of evidence into court.¹³⁰ Therefore cases involving SBS may have completely different results depending on the state in which the trial is held.¹³¹ Some states may allow SBS evidence in the court while others may reject it due to the difference in evidentiary standards.¹³²

Critics of these low evidentiary standards argue that courts are mistakenly allowing untested forensic science into court.¹³³ Furthermore, *Daubert* or whatever *Daubert*-like test applied by states tends to be stricter about scientific expert testimony in civil cases than in criminal ones.¹³⁴ SBS cases are criminal cases and, as discussed in Part I of this Note, are sometimes diagnosed via faulty forensic evidence.¹³⁵ These discrepancies in the admission of expert testimony serve to illustrate the ways those accused of SBS may receive vastly different trials and can contribute to wrongful convictions.

C. SBS Evidence Addressed by the Supreme Court

The Supreme Court has addressed the merits of SBS as admissible evidence in *Cavazos v. Smith*.¹³⁶ The case concerns a woman named Shirley Ree Smith who was accused and convicted of shaking

124. See *Daubert*, 509 U.S. at 579; *Frye v. U.S.*, 293 F. 1013, 1014 (1923).

125. See FED. R. EVID. 702.

126. See Goodwin, *supra* note 1, at 231.

127. See *id.*

128. *Frye*, 293 F. at 1014.

129. See Goodwin, *supra* note 1, at 232.

130. See Jessica G. Cino, *An Uncivil Action: Criminalizing Daubert in Procedure and Practice to Avoid Wrongful Convictions*, 119 W. VA. L. REV. 651, 662 (2016).

131. See Goodwin, *supra* note 1, at 233–34.

132. See *id.*

133. See, e.g., Cino, *supra* note 130, at 665.

134. See *id.*

135. *Zakirova*, *supra* note 4, at 1034.

136. See *Cavazos v. Smith*, 565 U.S. 1, 5–6 (2011).

her grandchild to death.¹³⁷ Smith stated that she believed the child had fallen off the couch, but later admitted to jostling him.¹³⁸ Three experts testified at the trial that the child had the classic triad of SBS and that he died from being shaken.¹³⁹ The defense offered two experts who testified that the injuries were not consistent with the child being shaken.¹⁴⁰ The California Court of Appeal affirmed Smith's conviction;¹⁴¹ the Ninth Circuit reversed because it questioned the SBS evidence.¹⁴² The per curiam opinion upheld the admission of SBS evidence.¹⁴³ The decision rested on the argument that a jury has the authority to determine whether or not admitted evidence is enough to convict and that the jury did that in this case.¹⁴⁴ The majority also declined to address the merits of SBS evidence, instead deferring entirely to the jury verdict and the state courts.¹⁴⁵

However, the dissent by Justice Ginsburg, joined by Justices Breyer and Sotomayor, raised important evidentiary issues in the area of SBS and its admissibility in criminal trials.¹⁴⁶ Ginsburg began by pointing out that the Court really had no business hearing the case because there is no issue of law to settle and that the Ninth Circuit's decision should have stood.¹⁴⁷ Justice Ginsburg then questioned the evidence used to convict Smith, highlighting inconsistencies in the medical examiner reports as well as the lack of a history of abuse by the defendant.¹⁴⁸ Justice Ginsburg also offered a different interpretation on admissibility of scientific evidence, agreeing with the lower court interpretation and arguing that SBS has become a questionable scientific diagnosis.¹⁴⁹ Ginsburg stated, "[w]hat is now known about shaken baby syndrome (SBS) casts grave doubt on the charge leveled against Smith"¹⁵⁰ Ginsburg cited several studies about SBS and the uncertainties of the science around it.¹⁵¹ Furthermore, Ginsburg's dissent indicates that SBS is not a settled issue for all members of the Court and leaves precedent open for future challenges.

137. *See id.* at 2–3.

138. *Id.* at 3.

139. *Id.*

140. *Id.* at 5.

141. *Id.*

142. *Cavazos*, 565 U.S. at 6.

143. *See id.* at 2.

144. *Id.* at 8.

145. *Id.*

146. *See id.* at 14–15.

147. *See id.* at 9.

148. *Cavazos*, 565 U.S. at 11.

149. *See id.* at 13.

150. *Id.* at 11.

151. *Id.* at 13–14.

III. COURT SPLITS OVER SHAKEN BABY SYNDROME

State courts engage with Shaken Baby Syndrome differently depending on the state.¹⁵² As shown in Part II, the evidentiary standard used by a state determines whether SBS testimony is admissible in court and this is not a unified decision across states.¹⁵³ Furthermore, some states have overturned SBS convictions on the basis of its questionable science while other states uphold the convictions of those charged with an SBS related offense.¹⁵⁴

Wisconsin is one state in which judges have reevaluated the science behind SBS and overturned convictions.¹⁵⁵ Audrey Edmunds was convicted of murder in 1996 after the testimony of an expert stated that she had shaken a child to death.¹⁵⁶ Her conviction was overturned and a new trial was ordered in 2008 after an appeals court held “that ‘a shift in mainstream medical opinion’ had cast doubt on whether shaking could have caused the brain injury” in the child.¹⁵⁷ Another case out of Wisconsin, that of Quentin Louis, was challenged and a new trial was ordered after the court “concluded that the real controversy was not fully tried, since the jury did not learn about challenges to the science of SBS” among other things.¹⁵⁸ These cases indicate that in Wisconsin courts, a person accused of harming a child through SBS may have a better chance than in other states. They also suggest that Wisconsin courts are questioning SBS and its admissibility in court.

Another case, this time in North Carolina, was dismissed by the judge in 2007 after the jury found Mary Roach guilty of murdering a child by shaking the child.¹⁵⁹ This case involved a possible lucid interval by the child, as discussed in Part I.¹⁶⁰ Both the trial judge and the appeals court held that the evidence of child abuse from shaking was insufficient.¹⁶¹ This case demonstrates that some courts in North Carolina have also begun to question the evidence of SBS and have gone so far as to overturn jury convictions.¹⁶² Other states,

152. See Goodwin, *supra* note 1, at 231.

153. See *id.* at 232.

154. Tuerkheimer, *supra* note 7, at 524–26.

155. *Id.* at 518.

156. *Audrey Edmunds: Eleven years in prison as a result of erroneous medical testimony*, NW. PRITZKER SCH. L.: BLUHM LEGAL CLINIC CTR. ON WRONGFUL CONVICTIONS, <https://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/wi/audrey-edmunds.html> [<https://perma.cc/Q2YQ-THGL>] (last visited Nov. 18, 2022).

157. *Id.*

158. Tuerkheimer, *supra* note 7, at 531.

159. *Id.* at 530.

160. *State v. Roach*, 200 N.C. App. 322, 322 (2009).

161. *Id.*

162. See *id.*

including Alabama, Georgia, Illinois, and Arizona have similarly overturned convictions or acquitted an accused of charges based on Shaken Baby Syndrome.¹⁶³ These states question SBS evidence and do not always admit it in court.¹⁶⁴

Other states have not made similar progress with regards to the admissibility of SBS evidence.¹⁶⁵ California is one state that has allowed convictions based on uncertain SBS testimony.¹⁶⁶ *Cavazos v. Smith* is one such case out of California in which the accused was convicted on SBS evidence that, upon appeal, Justice Ginsburg found unconvincing.¹⁶⁷ In Smith's case, Smith was watching her seven-week-old grandson and said he fell off the couch; she later stated that she jostled him when he became unresponsive.¹⁶⁸ Smith was convicted after the expert testimony of three doctors despite having no history of being abusive and despite some clear doubts in the case, as discussed above.¹⁶⁹ Another case out of California, *People v. Servin*, involved a possible lucid period in the child as well as evidence that the defendant was not the only person with the child over the time period when the injuries occurred.¹⁷⁰

Similar cases out of Texas, those of Cynthia Cash and Zavian Thomas, show an unwillingness to question the admissibility of SBS.¹⁷¹ In Thomas' case, defense experts testified that the child's injuries were due to another medical condition.¹⁷² The appeals court noted that SBS science was contested but nevertheless upheld Thomas' conviction.¹⁷³ In Cash's case, years after her conviction for murdering a child diagnosed with SBS the autopsy report changed cause of death to undetermined due to questions about the evidence of shaking.¹⁷⁴ Her appeal was denied regardless.¹⁷⁵

Each of these cases indicates a disparity in how defendants accused of harming a child by shaking it are treated based on the state in which the alleged crime occurred.¹⁷⁶ The cases further indicate splits in appeals courts on how to treat convictions from SBS

163. See Tuerkheimer, *supra* note 7, at 529–30.

164. See *id.*

165. See *id.* at 525.

166. See *id.*

167. *Cavazos v. Smith*, 565 U.S. 1, 12–13 (2011).

168. *Id.* at 2–3.

169. *Id.* at 5.

170. See *People v. Servin*, No. B205748, 2009 WL 2036727, at *1 (L.A. Cnty. Sup. Ct. July 15, 2009).

171. See Tuerkheimer, *supra* note 7, at 525–27.

172. *Id.* at 525.

173. *Id.* at 526.

174. *Id.* at 527.

175. *Id.*

176. See *id.* at 525–26.

expert testimony.¹⁷⁷ Some appeals courts are willing to overturn convictions and order new trials while others uphold convictions.¹⁷⁸ These decisions are based, at least in part, on the court's opinion on SBS evidence.¹⁷⁹

IV. HOW WOMEN OF COLOR ARE MORE VULNERABLE TO WRONGFUL CONVICTIONS, SPECIFICALLY SHAKEN BABY SYNDROME CONVICTIONS

Women of color are more vulnerable to wrongful convictions,¹⁸⁰ specifically wrongful convictions based on Shaken Baby Syndrome.¹⁸¹ Black and Brown women face stereotypical perceptions of motherhood in society and are more likely to be victimized by the criminal justice system.¹⁸² Furthermore, perceptions of women of color in the courtroom are incredibly negative as compared to similarly situated white women.¹⁸³ Women of color are also under-represented in exoneration while being over-represented in convictions.¹⁸⁴ All of these factors indicate that women of color are uniquely disadvantaged when facing a false SBS charge and are therefore more likely to be the victims of a wrongful conviction.

A. *No Crime Wrongful Convictions*

There are two categories of wrongful convictions: no crime convictions and "real crime, wrong perpetrator" convictions.¹⁸⁵ Real crime, wrong perpetrator means exactly what it sounds like: a crime did occur but the wrong person was convicted of that crime.¹⁸⁶ It is what people most often think of when they hear about wrongful convictions.¹⁸⁷ Some children diagnosed accurately with SBS may have caretakers who belong in this category of wrongful conviction.¹⁸⁸ Children who have been shaken may then have a lucid interval, as

177. See Tuerkheimer, *supra* note 7, at 528.

178. See *id.* at 527–28.

179. See *id.* at 528.

180. See Tope Fadiran Charlton, *The Impossibility of The Good Black Mother*, TIME (Jan. 21, 2014 2:45 AM), <https://time.com/1311/the-impossibility-of-the-good-black-mother> [<https://perma.cc/4U28-WH75>].

181. See Lewis & Sommervold, *supra* note 25, at 1036.

182. See Charlton, *supra* note 180.

183. See *id.*

184. See Lewis & Sommervold, *supra* note 25, at 1047.

185. Jessica S. Henry, *Smoke but No Fire: When Innocent People Are Wrongly Convicted of Crimes That Never Happened*, 55 AM. CRIM. L. REV. 665, 666 (2018).

186. *Id.*

187. *Id.*

188. See Tuerkheimer, *supra* note 85, at 18.

discussed above, before displaying symptoms.¹⁸⁹ In these cases, the person who is most often accused of child abuse is the person last with the child; but if a lucid interval had occurred, then the real perpetrator could have been someone else.¹⁹⁰ That would result in a real crime, wrong perpetrator conviction.¹⁹¹

The other category, no crime convictions, is the one that SBS most often falls into.¹⁹² These wrongful convictions occur when someone is convicted of a crime that never actually occurred: “Nearly one-third of exonerations involve the wrongful conviction of an innocent person for a crime that never actually happened.”¹⁹³ Often a tragic event is mistaken for a crime and then an individual is prosecuted.¹⁹⁴ Some examples of this type of wrongful conviction include the accidental death of a child being misidentified as murder like SBS, accidental fires labeled as arson, or deaths by suicide misidentified as a criminal act.¹⁹⁵

No crime convictions can occur for several reasons, one being “tunnel vision” on behalf of the police.¹⁹⁶ This happens when police assume that a crime has been committed and refuse, consciously or unconsciously, to consider other alternatives.¹⁹⁷ It is defined as “the social, organizational, and psychological tendencies ‘that lead actors in the criminal justice system to ‘focus on a suspect, select and filter the evidence that will ‘build a case’ for conviction, while ignoring or suppressing evidence that points away from guilt.’”¹⁹⁸ In cases involving an injured or deceased child, when an officer assumes that SBS is the cause, it is difficult to convince them otherwise, even when other things may have caused the injuries.¹⁹⁹ The police are not the only actors that may fall victim to “tunnel vision”; prosecutors and others in the criminal justice system may ruthlessly pursue what they believe to be justice because of the belief that a crime has been committed, even where one has not.²⁰⁰ “Tunnel vision” can be even more catastrophic for women of color accused of killing or abusing a child diagnosed with SBS because, as explained below,

189. *Id.*

190. *See id.*

191. *See Henry, supra* note 185, at 666.

192. *See id.* at 676.

193. *Id.* at 665.

194. *Id.* at 676.

195. *Id.* at 676–78.

196. *Id.* at 678–79.

197. Henry, *supra* note 185, at 679.

198. John B. Gould, Julia Carrano, Richard A. Leo & Katie Hail-Jares, *Predicting Erroneous Convictions*, 99 IOWA L. REV. 471, 504 (2014).

199. *See Henry, supra* note 185, at 676.

200. *Id.* at 675.

societal perceptions of women of color can be detrimental to their chances of a fair trial in a courtroom.²⁰¹

B. Perceptions of Women in the Courtroom

Women are more likely to be wrongfully convicted in no crime convictions while men are more likely to be wrongfully convicted of real crime, wrong perpetrator crimes.²⁰² SBS is usually a no crime wrongful conviction case.²⁰³ Some data shows that white women are more likely to be wrongfully convicted of crimes against children than African American women; this data does not break down into types of crimes against children, such as SBS.²⁰⁴ Furthermore, men are more likely than women to be accused of SBS.²⁰⁵ However, other studies suggest that men and women are equally as likely to shake their child but that men are more likely to confess.²⁰⁶ None of this data addresses the specific stereotypes and injustices faced by Black women when they are accused of shaking a child.²⁰⁷ Stereotypes and societal perceptions about women as mothers and caretakers of children contribute to false convictions of murder after SBS charges have been brought.²⁰⁸ These stereotypes and cultural myths can be even more detrimental for Black women.²⁰⁹

When women are charged with child abuse or murder, as in SBS cases, they are seen as challenging cultural norms about women, especially norms about women as mothers or caretakers.²¹⁰ There are two narratives that dominate when a woman is on trial for child abuse or murder of a child.²¹¹ One is the idea of the “bad’ mother” and the other is the “mad’ mother.”²¹² Both of these narratives are a result of societal perceptions of women as good mothers and safe caretakers to children.²¹³ Those perceptions are disrupted when a

201. See *infra* notes 204, 236–38 and accompanying text.

202. See Lewis & Sommervold, *supra* note 25, at 1039.

203. Henry, *supra* note 185, at 691, 694.

204. See Webster & Miller, *supra* note 1, at 984–85.

205. *Study: Men More Likely to Be Accused of Shaking Infants*, NW. NOW (Aug. 27, 2013), <https://news.northwestern.edu/stories/2013/08/the-medill-justice-projects-study-shows-men-far-more-likely-than-women-to-be-accused-of-violently-shaking-infants> [<https://perma.cc/DF3J-SLXN>].

206. See Debra Esernio-Jenssen, Julia Tai & Sylvia Kodsí, *Abusive head trauma in children: a comparison of male and female perpetrators*, PEDIATRICS (Mar. 7, 2011), <https://pubmed.ncbi.nlm.nih.gov/21382943> [<https://perma.cc/H36D-Y4MC>].

207. See, e.g., *id.*

208. See Lewis & Sommervold, *supra* note 25, at 1042.

209. See Henry, *supra* note 185, at 693.

210. Lewis & Sommervold, *supra* note 25, at 1040.

211. *Id.* at 1041.

212. *Id.*

213. *Id.* at 1039–40.

woman is accused of harming a child.²¹⁴ A woman on trial for harming a child faces a double bind: “She is uniquely scrutinized by the public and by the criminal justice system not only to ascertain whether she committed the crime that she was accused of committing, but also to determine whether . . . she should be punished for shirking her duties as a woman and as a natural caregiver.”²¹⁵

The mad mother is defined as, “the superior caretaker who has conformed to traditional gender roles but merely committed an irrational act because she was mentally ill”²¹⁶ This narrative of a mother who kills or harms a child is more socially acceptable than the “bad mother” because the “mad mother” is an otherwise good mother who has become mentally ill.²¹⁷ She has not completely violated societal understandings of women because she can blame her misdeed on mental illness, something over which she had limited agency.²¹⁸

A bad mother “is a cold, callous woman incapable of caregiving and therefore nonfeminine. The bad mother falls into the cultural archetype of the Female Monster.”²¹⁹ This version of a mother is castigated by society because she thoroughly breaks gendered expectations of motherhood.²²⁰ The bad mother has not had an unintentional mental crisis; she has chosen to intentionally harm a child in her care.²²¹ The bad mother narrative is most often invoked for especially heinous crimes.²²² SBS is one of those crimes which would likely result in a narrative of a bad mother due to the graphic nature of violently shaking a child. Furthermore, as is explained below, Black women are more likely to be portrayed and stereotyped as the bad mother in cases of child death or abuse.²²³ White women are less subject to blame due to being described as mentally ill when they are alleged to have harmed their children while Black women are demonized as morally corrupt mothers who made the choice to hurt their child.²²⁴ This rhetoric can further criminalize a Black woman who has been wrongfully charged with murder or abuse from SBS.²²⁵

214. *Id.* at 1041.

215. *Id.* at 1046.

216. Lewis & Sommervold, *supra* note 25, at 1041.

217. *See id.*

218. *Id.* at 1041–42.

219. *Id.* at 1041.

220. *See id.* at 1046.

221. *See* Lewis & Sommervold, *supra* note 25, at 1041–42.

222. *Id.* at 1041.

223. *See infra* notes 233–37 and accompanying text.

224. *See* Webster & Miller, *supra* note 1, at 1029–30.

225. *See id.*; Henry, *supra* note 185, at 696.

C. Wrongful Convictions of Women of Color

Nicole Harris is just one example of a Black woman whose motherhood was put on trial when she was wrongly convicted of the murder of her toddler.²²⁶ While Harris was not accused of shaking her child, the way her trial played out illustrates how Black women accused of harming their child by shaking are vulnerable to negative perceptions and stereotypes of Black motherhood in the courtroom.²²⁷ It also illustrates the no crime wrongful conviction phenomenon discussed above.²²⁸ Harris' child died accidentally after asphyxiating in his bed sheets.²²⁹ She was then accused of murdering her child and police engaged in tunnel vision, assuming only that a crime was committed and that Harris was culpable.²³⁰ During Harris' trial, her motherhood was front and center, with the prosecutor saying, "[s]he doesn't stand up for her family She's not the mother the defense wants to present to you."²³¹ Harris was portrayed as the "bad mother" and was subsequently wrongfully convicted.²³² Women of color, such as Harris, are vulnerable to wrongful convictions and, as studies show, are also under-represented in exonerations.²³³

Women of color are under-represented in exonerations of wrongfully convicted persons: "Women of color make up over half of the female state and federal prison population, but only 35% of female exonerees"²³⁴ There are also fewer exonerated women than men.²³⁵ This means that even when women of color are wrongfully convicted, they are less likely than men or white women to be exonerated. White women made up fifty-nine percent of exonerations while Black women made up only 31.4 percent of exonerations, even though Black women are disproportionately represented in the prison population.²³⁶ This is indicative of a system more willing to acknowledge the innocence of white women than Black women. When women are convicted in SBS cases, they are understood as either bad mothers or mad mothers.²³⁷ White women are more likely

226. See Webster & Miller, *supra* note 1, at 975–76.

227. See *id.* at 973, 982.

228. See *id.* at 973.

229. *Id.*

230. See Lewis & Sommervold, *supra* note 25, at 1047; Henry, *supra* note 185, at 678–79.

231. Webster & Miller, *supra* note 1, at 974.

232. *Id.* at 973–74, 976.

233. Henry, *supra* note 185, at 692–93.

234. Webster & Miller, *supra* note 1, at 985.

235. *Id.*

236. *Id.* at 986.

237. See Lewis & Sommervold, *supra* note 25, at 1041.

to be understood as mad mothers and this likely contributes to their over-representation in exonerations.²³⁸

There is also a motherhood component to wrongful convictions of women with children that emerges during the investigation and trial.²³⁹ When a child is injured or deceased, mothers become almost immediate targets for investigation, more so than anyone else.²⁴⁰ They are also far more likely to be charged and convicted under failure to protect laws.²⁴¹ This is likely because of the societal perceptions of women as mothers.²⁴²

Women are also disproportionately under-represented in exonerations for no crime wrongful convictions, the type of wrongful conviction most likely to occur in SBS cases.²⁴³ All of this demonstrates that wrongful convictions have both a gendered and racial component. Women are under-represented in exonerations.²⁴⁴ People of color are over-represented in wrongful convictions.²⁴⁵ Women of color experience the intersection of the racial and gendered impacts of wrongful convictions in which they are over-represented in prisons and under-represented in exonerations.²⁴⁶

D. SBS and Black Women as “Bad Mothers”

Black women and white women are portrayed drastically differently in terms of their motherhood.²⁴⁷ Amongst societal expectations of motherhood, there is a concept called the “cult of true womanhood” to which women are expected to aspire in order to be perceived as good mothers and women.²⁴⁸ The characteristics of the “true” woman are “piety, purity, submissiveness, and domesticity.”²⁴⁹ White women are the women most likely to achieve this perception of womanhood and motherhood.²⁵⁰ This is why white women who are charged with abuse or murder of a child are more likely to be characterized as the more forgivable mad mother and not the bad mother.²⁵¹ Black

238. See Webster & Miller, *supra* note 1, at 1029–30.

239. Lewis & Sommervold, *supra* note 25, at 1050.

240. *Id.* at 1042–43.

241. Webster & Miller, *supra* note 1, at 1004.

242. Henry, *supra* note 185, at 693–94.

243. Lewis & Sommervold, *supra* note 25, at 1050.

244. See *id.* at 1036.

245. See Webster & Miller, *supra* note 1, at 994.

246. *Id.* at 983–84.

247. PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 173 (2d ed. 2000).

248. *Id.* at 72.

249. *Id.*

250. *Id.*

251. See Lewis & Sommervold, *supra* note 25, at 1041.

women are subject to a completely different perception.²⁵² The cult of true womanhood is completely unavailable to Black women because of prevailing stereotypes about Black women.²⁵³

Black women, in both historical and modern contexts, are denied the positive image of a good mother.²⁵⁴ The image of Black motherhood as a bad motherhood dates back to slavery: Black women were denied being seen as embodying piety and purity because white slave owners frequently raped Black women who were then blamed and portrayed as promiscuous.²⁵⁵ Black women are not seen as embodying submissiveness because of the stereotype of the angry Black woman.²⁵⁶ Black women are not seen as domestic because they have had to work outside the home, instead of being able to be homemakers.²⁵⁷ Even when Black women have focused on motherhood and raising children, they have been characterized as “welfare queen[s].”²⁵⁸ These perceptions encourage a conviction when Black women are charged with harming a child.²⁵⁹

A dominant conception of Black motherhood is that of the “matriarch.”²⁶⁰ The matriarch is considered “overly aggressive” and “unfeminine”; the opposite of the good and virtuous mother.²⁶¹ The stereotype of the matriarch particularly captures the attitudes prevalent in courtrooms when a woman is on trial for harming a child.²⁶² This idea holds that “African-American women who failed to fulfill their traditional ‘womanly’ duties at home contributed to social problems in Black civil society.”²⁶³ This perception blames Black women for things outside of their control and for anything detrimental to their children.²⁶⁴ When an idea exists that Black women are already responsible for anything negative in their communities, that blame is exacerbated when they are personally accused of hurting a child.²⁶⁵

Even within Black communities, Black women are pressured to sacrifice everything for their children: “[M]any African-American

252. See COLLINS, *supra* note 247, at 72.

253. *Id.*

254. See Charlton, *supra* note 180.

255. ANGE-MARIE HANCOCK, THE POLITICS OF DISGUST: THE PUBLIC IDENTITY OF THE WELFARE QUEEN 30–31 (2004).

256. See *id.* at 60.

257. *Id.* at 28.

258. *Id.* at 24.

259. See Webster & Miller, *supra* note 1, at 973, 994.

260. See COLLINS, *supra* note 247, at 75.

261. *Id.*

262. See Lewis & Sommervold, *supra* note 25, at 1041.

263. See COLLINS, *supra* note 247, at 75 (citation omitted).

264. See *id.*

265. See *id.*

thinkers tend to glorify Black motherhood.”²⁶⁶ When a Black mother breaks that norm and is accused of harming a child, she is not supported within her community and is condemned by harmful perceptions of Black motherhood by society at large.²⁶⁷ Furthermore, Black women are often denied political agency to reject these stereotypes: “The public identity of the ‘welfare queen,’ a product of the political culture, effectively stymied single, poor Black mothers’ empowered participation in the public sphere”²⁶⁸ Factors like limiting and negative perceptions of Black motherhood and the consequences, such as being denied political power to contest those stereotypes, all contribute to the particular vulnerability of Black women to false accusations and wrongful convictions of child abuse and murder from SBS.²⁶⁹

CONCLUSION

Shaken Baby Syndrome should not be used in a criminal trial to convict any person. It is questionable science and doctors and scientists have not come to a consensus on its diagnosis.²⁷⁰ An SBS diagnosis also inherently implies criminality which is another reason it should be treated with caution in the criminal justice system.²⁷¹ When doctors and scientists disagree about a topic, courts should wait until a clear consensus is reached by a majority of experts before bringing that science into the courtroom. Furthermore, states do not apply SBS science equally.²⁷² States use different evidentiary standards from each other and from federal courts.²⁷³ This results in SBS evidence being admitted in some courts and excluded from others, even where the evidence is exactly the same.²⁷⁴

Furthermore, women of color and Black women specifically are especially vulnerable to wrongful convictions from SBS evidence.²⁷⁵ Stereotypes and racism within the criminal justice system results in the targeting of people of color for serious crimes.²⁷⁶ Black women face both racist and sexist stereotypes about their role as women

266. See COLLINS, *supra* note 247, at 174.

267. See Lewis & Sommervold, *supra* note 25, at 1041.

268. See HANCOCK, *supra* note 255, at 27.

269. See *id.* at 17; Lewis & Sommervold, *supra* note 25, at 1042.

270. Shapiro, *supra* note 2.

271. See Tuerkheimer, *supra* note 7, at 533–34.

272. *Id.* at 521–22.

273. See Goodwin, *supra* note 1, at 278–79.

274. See *id.* at 233–34.

275. Webster & Miller, *supra* note 1, at 981, 1029.

276. *Id.* at 1032.

and mothers.²⁷⁷ Actors within the criminal justice system are not immune to those stereotypes.²⁷⁸ This leads to a particular vulnerability of Black women to wrongful SBS convictions.²⁷⁹

Possible solutions to the issue of SBS wrongful convictions are varied. Courts should refuse to allow SBS evidence to be admitted into criminal trials. Convictions should never rest solely on SBS evidence or testimony. Furthermore, evidentiary standards should become more uniform across the states so that faulty science is excluded from criminal trials. Every single SBS conviction should be reexamined. While there are cases of people shaking a child to death or severe injury,²⁸⁰ there are also many cases of people wrongfully convicted on the basis of bad science²⁸¹ and those cases should be reexamined immediately. There is no justification for permitting bad science to continue to be admitted into courtrooms when there are clear unjust and racist consequences.

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277. Lewis & Sommervold, *supra* note 25, at 1041 (referring to common stereotypes of women on trial).

278. *Id.* at 1042–43.

279. *See* Webster & Miller, *supra* note 1, at 984.

280. Lewis & Sommervold, *supra* note 25, at 1039.

281. Henry, *supra* note 185, at 676–77.

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