

# U.S. PRISONS' LACTOSE INTOLERANCE: LACTATION AND INCARCERATED WOMEN'S EIGHTH AMENDMENT RIGHT TO BREAST PUMPS

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## ABSTRACT

*For the past 20 years, the U.S. government has made continuous efforts to encourage mothers to breastfeed and express breast milk for their infant children. Despite overwhelming consensus about the benefits of breastfeeding and breast milk, tens of thousands of incarcerated women in the United States are regularly denied the ability to express breast milk while separated from their children. Prisons prohibit incarcerated women's use of breast pumps and argue that a woman's decision to breastfeed does not qualify as a "serious medical need." Yet U.S. courts' interpretation of a "serious medical need" that qualifies for Eighth Amendment protection has been flawed from the outset. This Article proposes that incarcerated women possess a constitutional right to access breast pumps due to lactation—the female body's physical and hormonal response to pregnancy and childbirth—and not due to a decision to breastfeed. As a result, a request to express breast milk and to use any necessary medical devices in prison would rise to the level of a serious medical need—one that cannot be ignored without violating a woman's Eighth Amendment right to adequate healthcare.*

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## I. INTRODUCTION

Jane was 34 weeks pregnant.<sup>1</sup> Sitting in the visiting room of an Illinois state prison, Jane watched as a fellow mother, who arrived for visiting hours, breastfed her infant. As much as Jane wanted to provide for her own baby, she knew she would not be taught how

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1. This story is adapted from Maya Schenwar, *Female Prisoners’ Babies Shouldn’t Be Sentenced to Life Without Breast Milk*, THE GUARDIAN (Oct. 22, 2013), <https://www.theguardian.com/commentisfree/2013/oct/22/women-prison-babies-no-breast-pump> [<https://perma.cc/SR7K-M4E5>]. A fictional name is used for the purpose of this article.

to breastfeed or express breast milk before her impending due date. Instead, within 24 hours of giving birth, Jane's child would be taken from her. With no infant to nurse and no access to a breast pump, her breasts would swell with excess milk, causing tremendous pain.<sup>2</sup> As a result, Jane could endure several days of uncomfortably full breasts, frequent leaking, plugged ducts, inflammation, fever, and serious breast infections.<sup>3</sup> Worse, her child would never benefit from her breast milk because Jane's body would stop producing milk long before her release. With only two and a half months of time left to serve, the Illinois Department of Corrections had sentenced Jane's baby to a life without breast milk.

For the past 20 years, the U.S. government,<sup>4</sup> together with the backing of the international<sup>5</sup> and American medical communities,<sup>6</sup> has made continuous efforts to encourage mothers to breastfeed and express breast milk for their infant children.<sup>7</sup> Despite the

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2. See LA LECHE LEAGUE INT'L, *THE WOMANLY ART OF BREASTFEEDING* 98–99, 385–88, 413 (8th ed. 2010); Hilary Hammell, *The International Human Right to Safe and Humane Treatment During Pregnancy and a Theory for its Application in U.S. Courts*, 33 *WOMEN'S RTS. L. REP.* 244, 267–68 n.169 (2012).

3. LA LECHE LEAGUE INT'L, *supra* note 2, at 385–88, 413.

4. See OFFICE OF THE SURGEON GEN., *THE SURGEON GENERAL'S CALL TO ACTION TO SUPPORT BREASTFEEDING* iii (2011), [https://www.ncbi.nlm.nih.gov/books/NBK52682/pdf/Bookshelf\\_NBK52682.pdf](https://www.ncbi.nlm.nih.gov/books/NBK52682/pdf/Bookshelf_NBK52682.pdf) [<https://perma.cc/35DW-FCX4>] (documenting “a society-wide approach to support mothers and babies who are breastfeeding”).

5. See, e.g., G.A. Res. 65/229, United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (Dec. 21, 2010), [https://www.unodc.org/documents/justice-and-prison-reform/Bangkok\\_Rules\\_ENG\\_22032015.pdf](https://www.unodc.org/documents/justice-and-prison-reform/Bangkok_Rules_ENG_22032015.pdf) [<https://perma.cc/RW47-PTPV>]. The Bangkok Rules dedicate a number of provisions to nursing, incarcerated women. Rule 42 places an obligation on the prison regime to “be flexible enough to respond to the needs of . . . nursing mothers.” *Id.* at 15. Rule 48 states that “[w]omen prisoners shall not be discouraged from breastfeeding their children, unless there are specific health reasons to do so.” *Id.* at 17. In addition, the Bangkok Rules call for “facilities and materials required to meet women’s specific hygiene needs.” *Id.* at 9. The World Health Organization has expressly identified the failure to “promote, protect and support” breastfeeding as a “harmful health care practice.” WORLD HEALTH ORGANIZATION, *WHO TECHNICAL CONSULTATION ON POSTPARTUM AND POSTNATAL CARE* 1, 3, 6 (2010) (revising its guidance on postpartum and postnatal care to advise key decisionmakers “on the content and timing of the core care that should be offered to all women”).

6. The American Academy of Pediatrics and the U.S. Surgeon General have repeatedly and strongly supported breastfeeding, considering it “a public health issue and not only a lifestyle choice.” *Am. Acad. Pediatrics, Breastfeeding and the Use of Human Milk*, 129 *PEDIATRIC* 827, 827 (2012), <http://pediatrics.aappublications.org/content/pediatrics/129/3/e827.full.pdf> [<https://perma.cc/TFZ3-5MTE>]; see also OFFICE OF THE SURGEON GEN., *supra* note 4, at v. Prominent medical organizations recommend “exclusive breastfeeding for about six months, followed by continued breastfeeding . . . for one year or longer.” *Am. Acad. Pediatrics, supra*.

7. In this Article, I distinguish the verb “to breastfeed” from “to express.” See Meghan Boone, *Lactation Law*, 106 *CAL. L. REV.* 1827, 1830 n.11 (2018) (“There is a distinction to be made between breastfeeding, which is the physical act of feeding a child directly from the breast, and lactation, which is the formation and secretion of milk by the breast and is (most often) a physiological response to a recent pregnancy and/or birth.”). This distinction is crucial to understanding the need to express breast milk.

overwhelming consensus about the benefits of breastfeeding and breast milk,<sup>8</sup> tens of thousands of incarcerated women in the United States are regularly denied the ability to breastfeed and express breast milk in prison while separated from their children.<sup>9</sup> Prisons prohibit incarcerated women’s use of breast pumps and justify their position by arguing that a woman’s decision to breastfeed does not qualify as a “serious medical need,” the legal standard for obtaining access to adequate healthcare while incarcerated.<sup>10</sup>

Yet courts’ interpretation of a “serious medical need” that qualifies for Eighth Amendment protection has been flawed from the outset. Courts mislabel lactation—and the rights, or lack of rights, that flow from it—as a process that requires a woman’s affirmative decision to breastfeed.<sup>11</sup> Any medical professional or postpartum woman knows, however, that the conflation of lactation and breastfeeding is a false one. Lactation is the body’s physical response to pregnancy and to childbirth.<sup>12</sup> Breastfeeding, on the other hand, is the mother’s decision to feed her infant from the breast for a certain amount of time.<sup>13</sup> Regardless of the decision to breastfeed, lactation will occur.<sup>14</sup> Just as normal,

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8. Expressing breast milk provides significant nutritional, physical, and psychological benefits to the infant and mother. See Marcy Karin & Robin Runge, *Breastfeeding and a New Type of Employment Law*, 63 CATH. U. L. REV. 329, 332–33 (2014); see also *Breastfeeding (Policy Statement)*, AM. ACAD. FAMILY PHYSICIANS, <https://www.aafp.org/about/policies/all/breastfeeding.html> [<https://perma.cc/BFW8-8EAE>] (last visited Apr. 16, 2020) (recommending that mothers breastfeed for at least the first six months because breast milk provides infants with medical and developmental benefits not provided by formula). Encouraging breastfeeding and breast milk expression also has added financial value, with projected savings of up to \$13 billion in public health costs. See U.S. BREASTFEEDING COMM., WORKPLACE ACCOMMODATIONS TO SUPPORT AND PROTECT BREASTFEEDING 3 (2010), <http://www.usbreastfeeding.org/p/cm/ld/fid=196> [<https://perma.cc/YNS3-BLTM>] (predicting that \$13 billion of direct health care costs would be saved annually if 90% of women were able to breastfeed, according to medical recommendations); see also Shana M. Christup, *Breastfeeding in the American Workplace*, 9 AM. U. J. GENDER SOC. POL’Y & L. 471, 477 (2001) (observing that U.S. health care costs increase by more than one billion dollars every year due to a rise in the incidence of four childhood medical disorders related to decreased levels of breastfeeding).

9. See, e.g., Schenwar, *supra* note 1. Incarcerated women are not the only ones prohibited from using breast pumps in prison. Even prison employees have been forced to express breast milk in prison parking lots or smuggle breast pumps into work, piece-by-piece. See Natalie Kitroeff, *‘A Pumping Conspiracy’: Why Workers Smuggled Breast Pumps into Prison*, N.Y. TIMES (Dec. 31, 2018), <https://www.nytimes.com/2018/12/31/business/breast-feeding-discrimination-pregnancy.html> [<https://perma.cc/979N-P36A>].

10. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); see, e.g., *Villegas v. Metro. Gov’t of Nashville & Davidson Cty.*, 709 F.3d 563, 579–80 (6th Cir. 2013) (determining that the plaintiff had not demonstrated the obviousness of any medical needs caused by lactation).

11. See, e.g., *Barrash v. Bowen*, 846 F.2d 927, 931–32 (4th Cir. 1988) (classifying breastfeeding as solely “young mothers wishing to nurse little babies”); *Southerland v. Thigpen*, 784 F.2d 713, 717 (5th Cir. 1986) (characterizing the plaintiff’s claim only in terms of her desire to breastfeed and concluding that the “[l]oss of freedom of choice” is an “inherent incident of confinement”).

12. See *infra* text accompanying notes 34–41.

13. See *supra* text accompanying note 7.

14. See *id.*

physiological processes like menstruation qualify as medical conditions with serious medical needs and thus require necessary medical devices, so too does lactation.<sup>15</sup>

Due to ignorance—willful or otherwise—of lactation and women’s resulting needs found in academic scholarship, the courts, and the criminal legal system, mistaken legal analysis persists, especially as it concerns the rights of incarcerated women.<sup>16</sup> Despite the medical community’s extensive research and awareness of the medical needs of lactating women,<sup>17</sup> U.S. prisons are largely failing to meet those needs as well as the broader needs inherent in pregnancy and postpartum care.<sup>18</sup> This Article proposes that incarcerated women possess an Eighth Amendment right to access breast pumps due to *lactation*, the female body’s physical and hormonal response to pregnancy and childbirth, not due to a *decision to breastfeed*.<sup>19</sup> Under this framework, a request to express breast milk and use any necessary medical devices in prison rises to the level of a serious medical need that cannot be ignored without violating a woman’s Eighth Amendment right to adequate healthcare.

Women outside of prison have won significant lactation rights with the enactment of an amendment to the Fair Labor Standards Act (FLSA), establishing break time for nursing mothers and mandating that certain employers provide employees with time, space, and

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15. See *EEOC v. Houston Funding II, Ltd.*, 717 F.3d 425, 430 (5th Cir. 2013) (“[A]s both menstruation and lactation are aspects of female physiology that are affected by pregnancy, each seems readily to fit into a reasonable definition of ‘pregnancy, childbirth, or related medical conditions.’”); *infra* text accompanying note 26.

16. See, e.g., Deborah Ahrens, *Incarcerated Childbirth and Broader “Birth Control”: Autonomy, Regulation, and the State*, 80 MO. L. REV. 1, 5–6 (2015) (arguing that the many “challenges and constraints” experienced by incarcerated, pregnant women and new mothers need to be brought “to the forefront in the academic discussion”).

17. See, e.g., OFFICE OF THE SURGEON GEN., *supra* note 4, at 13.

18. See Victoria Law, *U.S. Prisons and Jails Are Threatening the Lives of Pregnant Women and Babies*, IN THESE TIMES (Sept. 28, 2015), <http://inthesetimes.com/article/18410/u.s.-prisons-are-threatening-the-lives-of-pregnant-mothers-and-newborns> [<https://perma.cc/X4CE-J6ZT>]; see also Robin Levi, *Creating the “Bad Mother”: How the U.S. Approach to Pregnancy in Prisons Violates the Right to Be a Mother*, 18 UCLA WOMEN’S L.J. 1, 27 (2010).

19. This Article is narrowly limited to analysis of lactation as it occurs in cisgender women in connection to the female body’s natural response to the reproductive process, often pregnancy and childbirth. However, lactation is not limited to cisgender women. A small percentage of cisgender men are able to lactate, although male nipples must be stimulated to lactate. See Laura Shanley, *Milkmen: Fathers Who Breastfeed*, UNASSISTED CHILDBIRTH, <https://www.unassistedchildbirth.com/inspiration/milkmen-fathers-who-breastfeed/> [<https://perma.cc/2ZXN-48UN>] (last visited Nov. 7, 2020). In addition, the male body is unable to produce the quantity of milk produced by the female body and is not able to respond as quickly to a baby’s nutritional needs. *Id.* Trans men, trans women, and non-binary or genderqueer people are also physiologically capable of lactation and even breastfeeding or chestfeeding, as the practice is sometimes called outside of cisgender women. See Trevor MacDonald, *How I Learned to Be a Breastfeeding Dad*, HUFFPOST BLOG (June 29, 2012), [https://www.huffpost.com/entry/how-i-learned-to-be-a-bre\\_b\\_1452392](https://www.huffpost.com/entry/how-i-learned-to-be-a-bre_b_1452392) [<https://perma.cc/349M-86L7>]. Most who are not cisgender women will use hormone replacement therapy, supplementation tools, and certain medications to induce lactation. See *id.* A small percentage of cisgender women who cannot lactate naturally employ the same or similar tools. See Tamar Reisman & Zil Goldstein, *Case Report: Induced Lactation in a Transgender Woman*, 3 TRANSGENDER HEALTH 24, 24–26 (2018).

storage facilities to express breast milk while on the job.<sup>20</sup> There is no language in the break time provision, nor in the greater FLSA, that explicitly prohibits incarcerated women who work while in prison from receiving the same rights.<sup>21</sup>

Due to the complicated history of incarcerated people’s labor rights vis-à-vis the FLSA,<sup>22</sup> however, courts have not yet recognized that incarcerated people can demand any of the rights in the Act, including, most recently, the break time provision. The FLSA was neither drafted nor enacted—at least, not explicitly—to protect prison laborers.<sup>23</sup> Instead, Congress designed the law “to protect the working blue-collar class,” which was suffering in the face of the Great Depression.<sup>24</sup> Most courts rely on Congress’s historical purpose in passing the FLSA to deny wages and other employee rights to incarcerated people.<sup>25</sup> The specific purpose and passage of the break time provision, though, suggest that Congress opened the door to women’s lactation rights, especially for women who work.

Recently, Congress explicitly identified incarcerated women’s reproductive health needs in the Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act (“First Step Act”), which mandated the provision of feminine hygiene products for incarcerated women.<sup>26</sup> In doing so, Congress affirmed that prisons have an obligation to provide healthcare products for incarcerated women during menstruation, agreeing with the federal courts’ “serious medical need” jurisprudence under the Eighth Amendment, which mandates prisons provide necessary medical devices.<sup>27</sup>

Similarly, the Eighth Amendment compels prisons to allow incarcerated women to access healthcare products related to lactation, resulting in a medical need Congress has already acknowledged by enacting the break time provision. Although incarcerated women are not expressly prohibited from the break time provision’s benefits,<sup>28</sup> the right

20. See Fair Labor Standards Act, 29 U.S.C. § 207(r)(1) (2012). In 2010, Congress enacted this provision as part of the Affordable Care Act, which amended section 207 of the FLSA. In this Article, I will refer to this section as the break time provision.

21. See *id.*; see also Patrice A. Fulcher, *Emancipate the FLSA: Transform the Harsh Economic Reality of Working Inmates*, 27 J. C.R. & ECON. DEV. 679, 682 (2015) (“[W]orking inmates were not specifically included or excluded in the FLSA.”).

22. See 29 U.S.C. §§ 207(r)(1), 213, 214(a) (2018); see also Fulcher, *supra* note 21, at 697–702 (documenting the approaches of various circuits to prisoner suits demanding labor rights under the FLSA since its enactment); James K. Haslam, *Prison Labor Under State Direction: Do Inmates Have the Right to FLSA Coverage and Minimum Wage?*, 1994 B.Y.U. L. REV. 369, 371 (1994) (“[N]o court since 1984 has categorically ruled out the possibility of FLSA coverage for working prisoners.”); Mathew J. Lang, *The Search for a Workable Standard for When Fair Labor Standards Act Coverage Should Be Extended to Prisoner Workers*, 5 U. PA. J. LAB. & EMP. L. 191, 191 (2002).

23. See Fulcher, *supra* note 21, at 682.

24. *Id.* at 679.

25. *Id.* at 698 (“[C]ourts describe the proposal of prisoners being considered as traditional employees as ‘too outlandish to occur to anyone when the legislation was under consideration by Congress.’”) (quoting *Loving v. Johnson*, 455 F.3d 562, 563 (5th Cir. 2006)).

26. First Step Act, 18 U.S.C. § 4042 (2018) (mandating that the Director of the Bureau of Prisons make tampons and sanitary napkins available to prisoners for free).

27. See *infra* Part III.

28. See Fulcher, *supra* note 21, at 697–702.

to express breast milk should not be actionable only when a woman works. Instead, the right to express breast milk should derive from a woman's medical need caused by lactation. Accessing a breast pump is a constitutional right via the Eighth Amendment's "medical needs" jurisprudence, granting incarcerated people access to adequate healthcare, which includes necessary medical devices. To enforce this constitutional mandate, the First Step Act must be amended to provide incarcerated women with access to breast pumps, recognizing this medical device as necessary for a lactating woman's health.

This Article examines an incarcerated woman's right to express breast milk for her infant child.<sup>29</sup> Part II will examine the current realities of incarcerated women who give birth in prison and are prohibited from breastfeeding or expressing breast milk. Part III will explain the interpretation of prisoners' medical needs under the Eighth Amendment's "cruel and unusual punishments" jurisprudence. Part IV will demonstrate the U.S. courts' misunderstanding of lactation through caselaw, especially noting its comparison to incarcerated men's medical needs. Part V will assess recent legislation that suggests congressional support for extending the right to access breast pumps to incarcerated women. Part VI will propose a solution for providing incarcerated women with the right to express breast milk by amending the First Step Act, and Part VII will rebut future arguments to such an amendment.

## II.

### THE REALITIES OF LACTATION IN PRISON

Women who have given birth while incarcerated tell harrowing stories of prison staff who refused to heed their cries for medical help after experiencing their water breaking, severe pain, bleeding, or cramping.<sup>30</sup> Once in the hospital, women have little say regarding the procedures used during childbirth and prison and medical staff often do not obtain informed consent.<sup>31</sup> Within 24 to 48 hours of birth, prison officials usually take the infant from the mother.<sup>32</sup> Some prison systems do not allow incarcerated women to breastfeed their infant at all.<sup>33</sup>

The lack of a fundamental right to express breast milk in prison affects a significant portion of the U.S. prison population. As of 2017, 225,060 women were incarcerated, and more than 60% of women in state prisons had a child under the age of 18.<sup>34</sup> The most

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29. Consistent with Congress's break time provision, the analysis here is limited to an incarcerated woman's right to express breast milk for her infant children under the age of one. *See* 29 U.S.C. § 207(r)(1)(a).

30. *See* Levi, *supra* note 18, at 38.

31. *See id.* at 40.

32. *See* Law, *supra* note 18.

33. *See* Victoria Law, *Being Behind Bars Makes It Difficult—and Sometimes Impossible—for New Moms to Breastfeed*, REWIRE NEWS (Sept. 18, 2017), <https://rewire.news/article/2017/09/18/behind-bars-makes-difficult-sometimes-impossible-new-moms-breastfeed/> [https://perma.cc/9UR2-8CGK].

34. *See* THE SENTENCING PROJECT, FACT SHEET: INCARCERATED WOMEN AND GIRLS 1980–2016, 1 (May 2018), [www.sentencingproject.org/wp-content/uploads/2016/02/Incarcerated-Women-and-Girls.pdf](http://www.sentencingproject.org/wp-content/uploads/2016/02/Incarcerated-Women-and-Girls.pdf) [https://perma.cc/D95H-9BG6].

recent official data documenting pregnant, incarcerated women dates back to 2004, when the Bureau of Justice Statistics revealed that four percent of state and three percent of federally incarcerated women were pregnant when admitted to prison.<sup>35</sup> Based on this data, about 10,000 children are born in prison every year.<sup>36</sup> In actuality, the number of children denied breast milk is likely greater, considering the additional infants whose mothers, while lactating, became incarcerated within their first year of life.<sup>37</sup> In addition, because the majority of incarcerated women are people of color, Black and brown infants are disproportionately affected by the denial of these accommodations.<sup>38</sup>

The physical, emotional, and mental tolls that pregnancy and subsequently, lactation, exact on a woman's body are numerous and well-documented.<sup>39</sup> Lactation does not begin based upon a woman's conscious decision or act but instead is the body's natural response to fluctuating levels of hormones after childbirth.<sup>40</sup> Within days the woman's breasts will independently fill with milk.<sup>41</sup> Without the opportunity to breastfeed her infant, a new mother must express breast milk at least every few hours to avoid painful side effects,<sup>42</sup> including uncomfortably full breasts, frequent leaking, plugged ducts, inflammation, fever, and serious breast infections, known as mastitis, which can require surgery or be fatal if not treated.<sup>43</sup> The inability to express breast milk can prevent a lactating woman from

35. LAURA M. MARUSCHAK, BUREAU OF JUS. STAT, MEDICAL PROBLEMS OF PRISONERS 4 (2004), <https://www.bjs.gov/content/pub/pdf/mpp.pdf> [<https://perma.cc/U9LW-SDZ9>].

36. Schenwar, *supra* note 1.

37. *See id.* (“For prisoners, the denial of the right to breastfeed is systemic.”).

38. In 2017, the imprisonment rate was 92 per 100,000 for Black women and 67 per 100,000 for Latinx women, significantly higher than the imprisonment rate of 49 per 100,000 for white women. *See* THE SENTENCING PROJECT, INCARCERATED WOMEN AND GIRLS (June 6, 2019), <https://www.sentencingproject.org/publications/incarcerated-women-and-girls/> [<https://perma.cc/7RHH-2AXC>].

39. Common side effects of pregnancy include morning sickness, fatigue, leg cramps, constipation, hemorrhoids, frequent urination, varicose veins, mood swings, heartburn, yeast infections, bleeding gums, stuffy nose, edema, and stretch marks. Am. Acad. Fam. Pediatrics, *Taking Care of You and Your Baby While You're Pregnant*, FAMILYDOCTOR.ORG (Sept. 7, 2017), <https://familydoctor.org/taking-care-of-you-and-your-baby-while-youre-pregnant/> [<https://perma.cc/TU4K-8U2G>]. Common side effects after giving birth, known to last at least six weeks, include perineum soreness, afterbirth pains, vaginal bleeding, breast engorgement, nipple pain, hemorrhoids, constipation, urinary incontinence or leaking, fatigue, weight loss, hair thinning, and postpartum depression. *Your Body After Baby: The First 6 Weeks*, MARCH OF DIMES (July 2018), <https://www.marchofdimes.org/pregnancy/your-body-after-baby-the-first-6-weeks.aspx> [<https://perma.cc/4RVZ-BFWX>] [hereinafter *Your Body After Baby*].

40. Anna Edgar, *Anatomy of a Working Breast*, 22 NEW BEGINNINGS 44, 62–84 (8th ed. 2005).

41. *Id.*

42. *See* Nicole Kennedy Orozco, *Pumping at Work: Protection from Lactation Discrimination in the Workplace*, 71 OHIO ST. L.J. 1281, 1284 n.24 (2010) (“In addition to drying up of the milk supply and discomfort, a woman may experience plugged ducts and breast infections if unable to breastfeed or otherwise express milk for an extended period of time.”) (citing GALE PRYOR & KATHLEEN HUGGINS, NURSING MOTHER, WORKING MOTHER 127 (2007)).

43. *See* LA LECHE LEAGUE INT'L, *supra* note 2; Hammell, *supra* note 2, at 267–68 n.169; *Mastitis*, ASK DR. SEARS, <https://www.askdrsears.com/topics/feeding-eating/breastfeeding/common-problems/mastitis> [<https://perma.cc/8296-D3R7>] (last visited July 27, 2020) (“A breast infection can become a breast abscess that requires surgical draining.”).



sleeping without pain.<sup>44</sup> Even if a woman decides not to breastfeed her child, her breasts will swell significantly, a condition known as engorgement.<sup>45</sup> After several days, the breasts will gradually cease milk production.<sup>46</sup>

Regardless of a woman's method of feeding her infant—whether by direct nursing, expressing breast milk for bottle feeding or formula, or some combination of feeding methods—the physical process of lactation will most likely occur after birth.<sup>47</sup> This process necessitates relief, which is only obtained by nursing or expressing via a breast pump.<sup>48</sup> Without access to medical devices that express breast milk, incarcerated women face the physical consequences of not being able to relieve their body's physiological response to childbirth in addition to the anguish of being without their child.<sup>49</sup>

### III.

#### THE SUPREME COURT'S EIGHTH AMENDMENT STANDARD: A "SERIOUS MEDICAL NEED"

Originally, U.S. courts held that the Cruel and Unusual Punishments Clause of the Eighth Amendment only prohibited certain types of punishment.<sup>50</sup> Today, courts have

44. See *Mastitis*, *supra* note 43 (discouraging women from sleeping on their stomach or their sides to prevent and treat mastitis); Tara Haelle, *Women Who Have to Delay Pumping Risk Painful Breast Engorgement*, NAT'L PUB. RADIO (May 26, 2016), <https://www.npr.org/sections/health-shots/2016/05/26/479288270/women-who-have-to-delay-pumping-risk-painful-breast-engorgement> [<https://perma.cc/F4G7-MPYU>] (describing engorgement like “having two hot, sweaty bowling balls strapped to [your] chest” and “two boulders . . . grafted to [your] chest tissue”); Teresa Pitman, *How to Prevent and Treat Mastitis*, TODAY'S PARENT (Oct. 10, 2017), <https://www.todaysparent.com/baby/breastfeeding/breastfeeding-how-to-prevent-and-treat-plugged-ducts/> [<https://perma.cc/ES2X-KTR>] (noting that sleeping on your stomach can be a contributing factor to a breast infection).

45. See AM. ACAD. OF PEDIATRICS, NEW MOTHER'S GUIDE TO BREASTFEEDING 149–50 (Joan Younger Meek ed., 2d ed. 2011); Sonya Kujawa-Myles, Joy Noel-Weiss, Sandra Dunn, Wendy Peterson & Kermaline Jean Cotterman, *Maternal Intravenous Fluids and Postpartum Breast Changes: A Pilot Observational Study*, 10 INT'L BREASTFEEDING J. 1, 8 (2015), <https://internationalbreastfeedingjournal.biomedcentral.com/articles/10.1186/s13006-015-0043-8> [<https://perma.cc/KS9X-3ZAY>].

46. See *Your Body After Baby*, *supra* note 39.

47. A small percentage of women do not lactate naturally or do not produce sufficient milk for their infant. See *infra* text accompanying note 178.

48. See Hammell, *supra* note 2, at 267–68.

49. See Schenwar, *supra* note 1; see, e.g., *Safar v. Tingle*, 178 F. Supp. 3d 338, 345 (E.D. Va. 2016) (“Ms. Safar suffered severe mental anguish from being separated from her children . . . and suffered physical pain from the jail’s denial of her request to use a breast pump. . . . [T]he [prison] experience rendered her unable to nurse her infant son for more than a year.”), *aff’d on other grounds*, *rev’d*, 859 F.3d 241 (4th Cir. 2017). Like Ms. Safar, the majority of incarcerated women have little access to their children due to prisons’ limitations on visiting hours and prison locations that are too far from their children.

50. U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor *cruel and unusual punishments inflicted*.”) (emphasis added). As an example of how far Eighth Amendment jurisprudence has come, the Supreme Court held in *In re Kemmler* that execution by the electric chair was constitutional, given that it was not “manifestly cruel and unusual,” unlike “burning at the stake, crucifixion, breaking on the wheel, or the like.” 136 U.S. 436, 446 (1890).

extended this phrase's meaning to include broader and more contemporary notions of dignity for all people, including prisoners.<sup>51</sup> Incarcerated men and women now have an established constitutional right to access adequate medical care, including medical equipment, via the Eighth Amendment.<sup>52</sup> The constitutional jurisprudence of serious medical needs empowers incarcerated women to demand access to breast pumps by bringing Eighth Amendment claims for inadequate medical treatment because lactation, the body's physical response to pregnancy and childbirth, is a medical condition, causing health needs that the government must address.<sup>53</sup>

### A. *Setting the Standard in Prison: Estelle v. Gamble*

In the 1976 landmark case of *Estelle v. Gamble*, Mr. Gamble, an incarcerated man, injured his back while performing mandatory prison work.<sup>54</sup> After months of complaining of severe pain, being ignored by prison staff, and subjected to solitary confinement due to his refusal to return to work, Mr. Gamble sued the Texas Department of Corrections for inadequate medical treatment in violation of the Eighth Amendment.<sup>55</sup>

In analyzing Mr. Gamble's claim, the Supreme Court defined dignity broadly, setting the standard for incarcerated people's claims of inadequate medical care.<sup>56</sup> First, the Court extended constitutional protection to prisoners without adequate healthcare, recognizing that the Eighth Amendment obligated the government to meet the medical needs of incarcerated people.<sup>57</sup> The Court recognized that prisons, and by extension the government, bear the duty of treating the medical needs of prisoners because prisoners have no alternative method of obtaining healthcare.<sup>58</sup> Second, the Court created the standard for incarcerated plaintiffs' future Eighth Amendment claims, concluding that the Eighth Amendment's Cruel and Unusual Punishments Clause prohibited "deliberate indifference" toward a legitimate medical need.<sup>59</sup>

After *Estelle*, "deliberate indifference to serious medical needs" of incarcerated people became synonymous with the "unnecessary and wanton infliction of pain" prohibited by the Eighth Amendment.<sup>60</sup> The Court did not, however, clearly define "deliberate indifference" by prison staff or the "serious medical need" of a prisoner. Instead, the Court

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51. See, e.g., *Estelle v. Gamble*, 429 U.S. 97, 102–05 (1976).

52. See *id.* at 103.

53. See *EEOC v. Houston Funding II, Ltd.*, 717 F.3d 425, 428 (5th Cir. 2013) (recognizing lactation as a medical condition); see also Edgar, *supra* note 40, at 47 (describing lactation as a hormonal and physiological response beginning during pregnancy and continuing postpartum).

54. See *Estelle*, 429 U.S. at 98–99.

55. See *id.* at 98–101.

56. See *id.* at 102–05; Estalyn Marquis, "Nothing Less than the Dignity of Man": Women Prisoners, Reproductive Health, and Unequal Access to Justice Under the Eighth Amendment, 106 CAL. L. REV. 203, 211 (2018).

57. *Estelle*, 429 U.S. at 103.

58. *Id.*

59. *Id.* at 104. As noted earlier, this was quite a departure from the traditional interpretation of the right. See *supra* text accompanying note 50.

60. *Estelle*, 429 U.S. at 104.

suggested a successful claim of “deliberate indifference” could theoretically derive from three different situations: (1) prison staff’s indifferent reaction to a prisoner’s medical condition; (2) intentional denial or delay of access to medical care; or (3) intentional interference with prescribed medical treatment.<sup>61</sup>

*B. Clarifying “Deliberate Indifference” in Farmer v. Brennan*

The Court refined the meaning of “deliberate indifference” in *Farmer v. Brennan*,<sup>62</sup> the second groundbreaking case clarifying prisoners’ rights to adequate care under the Eighth Amendment. In 1989, Ms. Farmer, a trans woman,<sup>63</sup> was incarcerated with the general population of incarcerated men at the U.S. Penitentiary in Terre Haute, Indiana.<sup>64</sup> Within two weeks, Ms. Farmer was beaten and raped by another incarcerated person.<sup>65</sup> She sued, arguing that the prison’s failure to protect her physical safety amounted to “deliberate indifference” and violated her Eighth Amendment rights.<sup>66</sup>

The Court clarified the requisite elements of “deliberate indifference” for inadequate medical care claims in prison under the Eighth Amendment.<sup>67</sup> First, the prisoner must demonstrate, from an objective perspective, that the lack of medical care was “sufficiently serious.”<sup>68</sup> Courts have further qualified a “serious” medical need as requiring either a physician’s diagnosis of treatment or a need so clear that anyone would recognize that it necessitated medical attention.<sup>69</sup> Second, the accused prison official must possess a mentality of “deliberate indifference” to that incarcerated person’s health, a subjective determination.<sup>70</sup> Refusing to create an objective test, the Court instead held that “deliberate indifference” occurs when a prison official “knows of and disregards an excessive risk to inmate health or safety.”<sup>71</sup> In other words, the Court required that the prison official be aware of facts from which an inference of a serious medical need could be drawn, draw the inference, and actively ignore the resulting risk to the incarcerated person.<sup>72</sup>

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61. *Id.* at 104–05.

62. 511 U.S. 825 (1994).

63. Throughout the case, Ms. Farmer is referred to as “transsexual.” *See, e.g., id.* at 828. Today, “trans woman” is considered an inclusive term and “[m]any [male-to-female] transgender people prefer the term.” *Transgender FAQ*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/transgender-faq> [<https://perma.cc/5H6F-58P3>] (last visited Nov. 5, 2020).

64. *Farmer*, 511 U.S. at 830.

65. *Id.*

66. *Id.* at 831.

67. *Id.* at 834.

68. *Id.* (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)).

69. *See, e.g.,* *Blackmore v. Kalamazoo County*, 390 F.3d 890, 897 (6th Cir. 2004); *Wynn v. Southward*, 251 F.3d 588, 593 (7th Cir. 2001); *Aswegan v. Henry*, 49 F.3d 461, 464 (8th Cir. 1995); *Hill v. Dekalb Reg’l Youth Det. Ctr.*, 40 F.3d 1176, 1187 (11th Cir. 1994); *Gaudreault v. Municipality of Salem*, 923 F.2d 203, 208 (1st Cir. 1990) (per curiam); *Monmouth Cty. Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987); *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980).

70. *See Farmer*, 511 U.S. at 834 (requiring “a sufficiently culpable state of mind”) (quoting *Wilson*, 501 U.S. at 297)).

71. *Id.* at 837–39.

72. *Id.* at 837.

*Farmer*'s holding rightly received criticism. Specifically, the subjective standard for "deliberate indifference" endangers prisoners because it allows prison staff to overlook serious medical concerns.<sup>73</sup> Although evidence that a medical need was "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past" may qualify for Eighth Amendment protection, the prison official can rebut the pervasive or well-documented knowledge about a serious medical need by showing that "the obvious escaped them."<sup>74</sup> In the context of lactation and women's reproductive needs, this is an excessively high bar to meet because courts and prisons have mischaracterized these needs for so long.<sup>75</sup>

C. *The Myth of "Similarly Situated" Men and Women Concerning Reproductive Medical Needs*

The *Farmer* test invites additional objection because it allows future courts to engage in a "similarly situated" analysis, which is particularly problematic in cases involving incarcerated women's reproductive rights.<sup>76</sup> Taken from the Fourteenth Amendment and equal protection caselaw, a similarly situated analysis requires the government to treat similarly situated people alike.<sup>77</sup> Scholars have rightly criticized the inadequacy of such an analysis because many issues concerning reproductive health, like pregnancy, childbirth, and lactation, are unique to women and simply cannot be compared to a man's medical condition.<sup>78</sup> A review of caselaw confirms that when a man-to-woman comparison is unavailable, the courts routinely deny the plaintiff's Eighth Amendment claim.<sup>79</sup> In addition, courts more often than not fail to hold prison officials liable for claims involving women's reproductive health.<sup>80</sup>

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73. See Marquis, *supra* note 56, at 214 n.76 (surveying scholarship critiquing application of an intent-based requirement in the Eighth Amendment context).

74. *Farmer*, 511 U.S. at 842.

75. See *infra* Part IV.a.

76. See Marquis, *supra* note 56, at 216–27. Marquis observes that an implicit "similarly situated" requirement informs both the objective and subjective prongs of the "deliberate indifference" standard and argues that such a requirement is inappropriate in the context of reproductive health care. *Id.*

77. See *Tigner v. Texas*, 310 U.S. 141, 147 (1940) ("The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."); see also *Women Prisoners v. District of Columbia*, 93 F.3d 910, 924 (D.C. Cir. 1996) ("Equal Protection . . . requires States to treat similarly situated persons alike."); Giovanna Shay, *Similarly Situated*, 18 GEO. MASON L. REV. 581, 583–86 (2011) (discussing the history of the oft-used phrase, "similarly situated").

78. See CATHERINE MACKINNON, *WOMEN'S LIVES, MEN'S LAWS* 127 (2005) (observing the inadequacy of equality jurisprudence and "gender-neutral" classifications in redressing issues unique to women, including reproductive health).

79. See Marquis, *supra* note 56, at 216. There is ample evidence of this type of sexism ingrained throughout the legal system—from claims involving domestic violence, rape, and sexual assault to reproductive and family-related torts. For example, in tort law, courts often fail "to provide full compensation for reproductive injuries relating to pregnancy, childbirth and fertility." Martha Chammallas, *Feminist Legal Theory and Tort Law*, in RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE 386–405 (Robin West & Cynthia Bowman eds., 2019).

80. See Marquis, *supra* note 56.

As this standard develops, courts continue to compare incarcerated men with incarcerated women, despite vastly different medical needs concerning reproduction.<sup>81</sup> The case of Juana Villegas illustrates the skepticism with which the courts treat women's health-related needs when compared with men's claims. In *Villegas*, Juana Villegas sued local government authorities for the treatment she received during childbirth and postpartum recovery while incarcerated.<sup>82</sup> She argued, in part, that the government's denial of a breast pump amounted to deliberate indifference.<sup>83</sup>

Overruling the district court on this issue, the Sixth Circuit attempted to distinguish Ms. Villegas's need to access a breast pump from the medical needs of the incarcerated male plaintiffs in *Byrd v. Wilson* and *Boretti v. Wiscomb*, which the lower court had relied upon in granting summary judgment to Ms. Villegas.<sup>84</sup> Using a "similarly situated" analysis, the court reasoned that Mr. Byrd had been "diagnosed" for his medical condition, cirrhosis, after which "medication and a . . . diet were prescribed."<sup>85</sup> Similarly, Mr. Boretti received a "treatment plan" for a gunshot wound from a physician at a prison infirmary.<sup>86</sup> Ms. Villegas, on the other hand, received no such formal diagnosis or treatment plan from a medical professional for the breast pump after she had given birth. Instead, the court explained, hospital staff had merely "handed [Ms. Villegas] a breast pump as she was being discharged," an act that seemed, in the court's opinion, to fall short of the formal treatment and diagnosis received by Mr. Byrd and Mr. Boretti.<sup>87</sup> Thus, the court's decision ultimately hinged on formal proof of a medical need, but that formality should be irrelevant if the medical need is obvious.

Going forward, courts must recognize that when considering lactation and a woman's subsequent need to express breast milk, "similarly situated" men and women cannot be compared.<sup>88</sup> Lactation is often tied to the female body's unique response to the reproductive process and, thus, cannot be analyzed under the traditional framework of similarly situated medical needs.<sup>89</sup>

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81. See *infra* Part IV.e; see also *Villegas v. Metro. Gov't of Nashville & Davidson Cty.*, 709 F.3d 563, 570–80 (6th Cir. 2013) (distinguishing the plaintiff's need to access a breast pump from the medical needs of the incarcerated male plaintiffs in *Byrd v. Wilson*, 701 F.2d 592, 594–95 (6th Cir. 1983) and *Boretti v. Wiscomb*, 930 F.2d 1150 (6th Cir. 1991), wherein the plaintiffs successfully obtained medical equipment and medicine after proffering evidence of a medical diagnosis or treatment plan).

82. See *Villegas*, 709 F.3d at 566.

83. See *id.* at 578–79.

84. See *id.* at 579; *Byrd*, 701 F.2d at 592, 594–95; *Boretti*, 930 F.2d at 1150.

85. See *Villegas*, 709 F.3d at 579 (quoting *Byrd*, 701 F.2d at 594–95).

86. *Id.* (citing *Boretti*, 930 F.2d at 1151).

87. *Id.*

88. See, e.g., Marcia L. McCormick, *Gender, Family, and Work*, 30 HOFSTRA LAB. & EMPL. L.J. 309, 331 (2013) ("Women and men are not necessarily similarly situated physically or socially when it comes to issues surrounding pregnancy, birth, or caring for a newborn. Thus, it is probably not a surprise that the laws that prohibit sex discrimination have not necessarily been considered to address discrimination against breastfeeding mothers or to require accommodation of breastfeeding.").

89. See *supra* text accompanying note 19.

*D. Eighth Amendment Protection for Lactation's "Serious Medical Need"*

Despite difficulties with the *Farmer* test, lactation falls squarely within the Supreme Court's definition of a condition with serious medical needs that prisons must adequately treat.<sup>90</sup> However, courts have not yet recognized lactation as creating a "serious medical need" under the Eighth Amendment for two main reasons: the effects of imprecise language in court opinions and ignorance of the science surrounding childbirth and lactation.

Courts erroneously use "breastfeeding" as the umbrella term for both a woman's choice to nurse her child and the physiological response of the female body as it prepares breast milk for an infant.<sup>91</sup> The term "breastfeeding," when correctly used, refers to a mother's parenting decision to directly nurse her child.<sup>92</sup> The act of directly breastfeeding a child is described as nursing or suckling. Lactation, on the other hand, is a medical term describing the mammary glands' creation of breast milk<sup>93</sup> and is "the body's physiological response to pregnancy and childbirth."<sup>94</sup> A woman's lactation needs can be relieved either by nursing her child or by expressing or "pumping" breast milk for a child's later consumption through manual or tool-assisted means.

Framing and interpreting an incarcerated woman's need for a breast pump as deriving from lactation removes the "perceived element of 'choice'"<sup>95</sup> traditionally associated with breastfeeding. Lactation more readily empowers incarcerated women to assert their Eighth Amendment rights. Courts should focus on lactation, not on breastfeeding, because an incarcerated woman's request to express breast milk is a medical need, not merely a wish.<sup>96</sup>

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90. Elsewhere in the United States, courts have upheld lactation-based discrimination claims on grounds that lactation is a physiological condition incidental to pregnancy. *See, e.g., Allen v. Totes/Isotoner Corp.*, 915 N.E.2d 622, 629–30 (Ohio 2009) (O'Connor, J., concurring) (equating discrimination on the basis of lactation with discrimination on the basis of pregnancy under Ohio's Fair Employment Practices Act, as amended by Ohio's Pregnancy Discrimination Act); *see also EEOC v. Houston Funding II, Ltd.*, 717 F.3d 425, 428 (5th Cir. 2013) (finding that lactation is a related medical condition of pregnancy for purposes of the federal Pregnancy Discrimination Act because "[i]t is undisputed . . . that lactation is a physiological result of being pregnant and bearing a child").

91. *See Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (finding that a woman's decision to breast-feed does not qualify as a "serious medical need"); *infra* text accompanying note 96.

92. *See Orozco, supra* note 42, at 1312.

93. *See Allen*, 915 N.E.2d at 630 (O'Connor, J., concurring) (citing 1 RUSS, FREEMAN & MCQUADE, ATTORNEYS MEDICAL ADVISOR § 4:5 (2008)).

94. Orozco, *supra* note 42, at 1312.

95. Boone, *supra* note 7, at 1832.

96. *See Barrash v. Bowen*, 846 F.2d 927, 931–32 (4th Cir. 1988) (reasoning that "[o]ne can draw no valid comparison between people, male and female, suffering extended incapacity from illness or injury and young mothers wishing to nurse little babies" and denying the plaintiff's pay during maternity leave on that basis); *see also Martinez v. N.B.C., Inc.*, 49 F. Supp. 2d 305, 306, 311 (S.D.N.Y. 1999) (characterizing the plaintiff's request for a breast pump as "her *desire* to pump breast milk" and, as a result, finding that the plaintiff failed to plead a prima facie case of sex-plus discrimination) (emphasis added).

Because lactation is a physiological response to pregnancy and childbirth, not a choice,<sup>97</sup> an incarcerated woman's need to express breast milk is a serious medical need—one that the government has an obligation to address pursuant to the Eighth Amendment right to adequate healthcare.<sup>98</sup> This right includes access to necessary medical devices.<sup>99</sup>

#### IV.

##### EARLY ATTEMPTS AT LITIGATING LACTATION IN THE COURTROOM

Incarcerated women have attempted to win the right to use breast pumps while in prison using the Eighth Amendment in addition to a variety of other legal strategies, such as suing law enforcement and prison officials for civil remedies, violations of tort, and additional constitutional claims.<sup>100</sup> Most have been unsuccessful because courts fail to understand the difference between lactation and breastfeeding and, as a result, mischaracterize a woman's medical need to express breast milk as a "desire" to breastfeed, disqualifying its status as a "serious medical need."<sup>101</sup>

##### A. *The Traditional Approach: The Working Woman's Right to Breastfeed*

Courts have struggled to define if, and to what extent, women have a right to *breastfeed* their children, which has wrongly informed later caselaw about women's related right

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97. See *Allen*, 915 N.E.2d at 630 (O'Connor, J., concurring) ("[L]actation obviously is linked to breastfeeding. But given the physiological aspects of lactation, I have little trouble concluding that lactation also has a clear, undeniable nexus with pregnancy and with childbirth. Therefore, it necessarily follows that lactation is 'because of or on the basis of pregnancy.'" (quoting H.R. Rep. No. 95-948, at 13 (1978))).

98. See, e.g., *EEOC v. Houston Funding II, Ltd.*, 717 F.3d 425, 428 (5th Cir. 2013) (recognizing lactation as a medical condition).

99. See *Gilmore v. Hodges*, 738 F.3d 266, 277 (11th Cir. 2013) ("[T]he deprivation of a medical device necessary to remedy a serious medical condition violates the Constitution."); see also *Lemay v. Winchester*, 382 F. App'x 698, 704 (10th Cir. 2010) (allowing the incarcerated plaintiff's Eighth Amendment claims to go forward after the prison failed to refill his insulin pump).

100. See, e.g., *Glatz v. Marshall Cty. Sheriff Office*, No. 16-1152, 2016 U.S. Dist. LEXIS 89196, at \*1–2 (C.D. Ill. July 11, 2016) (alleging a violation of 42 U.S.C. § 1983 and intentional infliction of emotional distress for denying the plaintiff's request for a breast pump while incarcerated, which resulted in a painful mastitis infection); *Shroff v. Spellman*, No. 07-cv-01466-REB-KMT, 2009 U.S. Dist. LEXIS 8860, at \*8 (D. Colo. Jan. 27, 2009) (asserting "a claim for an unconstitutional deprivation of [the plaintiffs'] liberty interest in familial association" under the Fourteenth Amendment, after the plaintiff had been denied the right to use a breast pump while incarcerated), *aff'd*, 604 F.3d 1179 (10th Cir. 2010); *Pobursky v. Madera County*, 1:07-CV-0611 AWI DLB, 2007 U.S. Dist. LEXIS 95432, at \*3–4 (E.D. Cal. Dec. 21, 2007) (bringing a cause of action under the Fourteenth Amendment for failing to treat the medical needs of a plaintiff who requested a breast pump).

101. See, e.g., *Glatz*, 2016 U.S. Dist. LEXIS 89196, at \*2 (granting the defendant's motion to dismiss on claims alleging a violation of 42 U.S.C. § 1983 and intentional infliction of emotional distress); *Pobursky v. Madera County*, 1:07-CV-0611 AWI DLB, 2010 U.S. Dist. LEXIS 105471, at \*20 (E.D. Cal. Oct. 4, 2010) (dismissing with prejudice the plaintiff's Fourteenth Amendment claim); *Shroff*, 2009 U.S. Dist. LEXIS 8860, at \*8 (granting summary judgment to prison staff on a Fourteenth Amendment claim), *aff'd*, 604 F.3d 1179 (10th Cir. 2010).

to express breast milk.<sup>102</sup> The first and most significant case about a woman's right to breastfeed her child occurred in 1981 in *Dike v. School Board of Orange County*.<sup>103</sup> Janice Dike, a kindergarten teacher, had returned to her job after having a baby.<sup>104</sup> Committed to breastfeeding, Ms. Dike had arranged for someone to bring her infant to school during her free lunch period so that she could nurse her child.<sup>105</sup> After three months of this practice, the school principal informed Ms. Dike that she would have to stop due to a school board directive banning teachers from bringing children to work.<sup>106</sup> After her infant developed an allergy to formula, Ms. Dike sued, arguing that she had a constitutional right to breastfeed her child.<sup>107</sup>

Striking a progressive tone, the court in *Dike* determined that a woman's fundamental personal liberty granted her the right to breastfeed her child via the Fourteenth Amendment.<sup>108</sup> The court analogized a woman's right to be free from state infringement in her decisions regarding breastfeeding to decisions involving marriage, childbirth, and other areas of family life.<sup>109</sup>

To balance Ms. Dike's right to breastfeed with her employer's needs, the court remanded the case to the lower court to decide whether her employer's refusal to allow her to breastfeed "further[ed] sufficiently important state interests."<sup>110</sup> The court in *Dike* advised the lower court to ensure that the employer's interests were sufficiently strong and that the school board's regulations were narrowly drawn such that the employer was justified in interfering with Ms. Dike's right to breastfeed.<sup>111</sup>

Unfortunately, future use of *Dike's* holding has proven largely unsuccessful in the prison context. The balancing of prison and prisoner interests often restricts women's ability to breastfeed or express milk, as courts generally find that the prison's interests outweigh those of the prisoner.<sup>112</sup>

### B. *A New Plaintiff: The Incarcerated Woman*

Only five years after *Dike*, the Fifth Circuit again addressed whether a woman had a constitutional right to breastfeed her child. This time, the woman was in prison. In *Southerland v. Thigpen*,<sup>113</sup> Diane Southerland gave birth to her son while incarcerated and

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102. *But see Houston Funding*, 717 F.3d at 428 (recognizing lactation as a medical condition, stating that "[i]t is undisputed . . . that lactation is a physiological result of being pregnant and bearing a child.>").

103. 650 F.2d 783 (5th Cir. 1981), *overruled by* *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997).

104. *Dike*, 650 F.2d at 784.

105. *Id.* at 784–85.

106. *Id.* at 785.

107. *Id.*

108. *See id.* at 785–87; *see also* Levi, *supra* note 18, at 47–48 n.252.

109. *See Dike*, 650 F.2d at 786.

110. *Id.* at 787.

111. *Id.*

112. *See* Boone, *supra* note 7, at 1835 n.34.

113. 784 F.2d 713 (5th Cir. 1986).



immediately began to nurse him.<sup>114</sup> When prison officials attempted to return Ms. Southerland to prison without her son, she filed a preliminary injunction, arguing that, as held in *Dike*, both she and her son had a fundamental interest in her *decision* to breastfeed.<sup>115</sup>

The court and Ms. Southerland framed her claim through the lens of the Fourteenth Amendment, implicitly categorizing breastfeeding as a “personal choice” made in the context of her “family life.”<sup>116</sup> Despite acknowledging that Ms. Southerland’s son had a “special interest in breast-feeding,”<sup>117</sup> the court dismissed her claim, holding that breastfeeding “is not compatible with the objectives of the penal system.”<sup>118</sup> In the court’s eyes, multiple obstacles stood in the way of allowing Ms. Southerland to breastfeed. The system’s goals of deterrence and retribution would not be met if Ms. Southerland was temporarily allowed to return home to breastfeed her child or if the facility attempted to house her infant.<sup>119</sup> Moreover, such accommodation might undermine internal security and present budgetary concerns associated with providing proper facilities and resources for housing infants.<sup>120</sup> Although the court’s consideration of the prison’s legitimate interests was not inappropriate, the court viewed Ms. Southerland’s claim only in terms of her desire to breastfeed, concluding that the “[l]oss of freedom of *choice*” is an “inherent incident of confinement.”<sup>121</sup>

Instead of narrowly focusing on the act of nursing, the courts in *Southerland* and *Dike* should have recognized the plaintiff’s medical needs and rights resulting from lactation. These two cases set the tone for future courts, causing them to conflate the issues surrounding breastfeeding, breast milk expression, and lactation, and wrongly blinding judges to the reality that the decision to breastfeed, at its core, originates from a woman’s medical needs stemming from lactation.<sup>122</sup>

### *C. Inappropriate Balancing: Women’s (Disappearing) Lactation Rights*

Without awareness of women’s valid lactation needs, courts persisted down the path of narrowly assessing a woman’s right to breastfeed her child, defining it as a want rather than a need. In 1984, Ms. Barrash, a Social Security Administration employee, requested six months of maternity leave without pay after the birth of her second child.<sup>123</sup> The Social Security Administration, after being told to deny more leave-without-pay requests, granted

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114. *Id.* at 714.

115. *Id.* at 715, 717.

116. *Id.* at 716 (quoting *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)).

117. *Id.* at 718.

118. *Id.* at 716–17.

119. *Id.* at 717.

120. *Id.*

121. *Id.* (emphasis added) (quoting *Bell v. Wolfish*, 441 U.S. 520, 537 (1979)).

122. See *supra* text accompanying notes 91 & 96.

123. See *Barrash v. Bowen*, 846 F.2d 927, 928 (4th Cir. 1988).

Ms. Barrash only six weeks of leave.<sup>124</sup> Ms. Barrash refused to return to work before the end of six months and was eventually fired.<sup>125</sup>

Ms. Barrash argued that her employer violated her constitutional and contractual rights as an employee when they refused to grant her leave without pay.<sup>126</sup> On the basis of the available facts, it does not appear that Ms. Barrash used the word “lactation” in her leave request.<sup>127</sup> Instead, she based her claim on three separate notes from two physicians who both recommended a full six months of leave for medical reasons, mainly to breast-feed.<sup>128</sup> She also argued that she had previously been granted six months of leave without pay for her first child for the express purpose of breastfeeding.<sup>129</sup> Unrecognized by the court, her argument implied that the circumstances surrounding pregnancy and childbirth, including lactation, create medical needs that must be recognized by society, especially women’s employers.<sup>130</sup> In support of her claim that the new policy discouraging leave without pay had a disparate impact on women, Ms. Barrash introduced data that pregnant women and new mothers’ requests for long-term leave were increasingly denied while requests from male employees for long-term leave were often granted.<sup>131</sup>

In the court’s opinion, Ms. Barrash’s “need” came up short after applying both a similarly situated analysis and the employer-employee balancing test used in *Farmer and Dike*.<sup>132</sup> First, after refusing to examine Ms. Barrash’s data, the court tersely stated that it could not fairly compare a male employee with a medical condition to “young mothers wishing to nurse little babies.”<sup>133</sup> The court dismissed Ms. Barrash’s implicit basis for requesting leave—namely, to meet her medical lactation needs—by rejecting the idea that lactation, when not properly taken care of, was incapacitating for postpartum women.<sup>134</sup>

Second, the court engaged in an employer-employee balancing test; unlike the *Dike* court, the *Barrash* court failed to establish parameters to limit the employer’s needs, only

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124. *Id.*

125. *Id.* at 929.

126. *Id.* at 928.

127. *Id.* (“[T]he plaintiff . . . requested a full six months leave without pay in order that she might provide breast-feeding for the baby.”).

128. *Id.*

129. *Id.*

130. *See id.*

131. *Id.* at 931 (“There was data showing that several women received maternity leave without pay of six months or more in 1983. The figure declined in 1984, and no such extended leaves were granted in 1985. Those figures were compared with figures showing that the number of men on sick leave of six months or more increased over the same three year period.”).

132. *Id.* at 931–32.

133. *Id.* (emphasis added); Nancy Ehrenreich & Jamie Siebrase, *Breastfeeding on a Nickel and Dime: Why the Affordable Care Act’s Nursing Mothers Amendment Won’t Help Low-Wage Workers*, 20 MICH. J. RACE & L. 65, 107 n.36 (2014) (noting that *Barrash*’s comparison between breastfeeding females and injured or ill males “suggests that [the court] sees the need of an infant for breast milk as far less pressing than the need of a worker . . . to recover from an injury, however minor or serious that injury might be”).

134. *See Barrash*, 846 F.2d at 931 (finding that data on the frequency of female employee’s maternity leave is not comparable with data on men’s sick leave because “[t]he men were incapacitated, while the women were not”); *supra* text accompanying notes 42–44.

noting that an employer has “some duty” to accommodate young mothers’ needs.<sup>135</sup> Ignoring the connection between Ms. Barrash’s desire to breastfeed and her medical needs from lactation, the court determined that her employer had met its duty by granting six weeks of leave without pay.<sup>136</sup> Unfortunately, *Barrash* demonstrates the courts’ tendency to prioritize another party’s interests over a woman’s via a balancing test that, in practice, does not actually consider a woman’s legitimate medical needs.

#### *D. Courts’ Failure to Recognize the Crucial Difference Between Breastfeeding and Lactation*

The above-mentioned traditional cases are no longer relevant to current cases about breast pumps because they focus upon a woman’s right to breastfeed, not a woman’s right to express breast milk.<sup>137</sup> Yet they still incorrectly inform modern courts’ analysis. When contemporary plaintiffs began to assert a *medical need* to express breast milk as opposed to a *choice* to breastfeed, courts looked to precedent and neglected to recognize the difference between lactation and breastfeeding, leading to the improper line of reasoning still seen today.

The conflation of these two issues—the choice to breastfeed and the medical need resulting from lactation—started with *Berrios-Berrios v. Thornburg*.<sup>138</sup> Two days after giving birth while incarcerated, Ms. Berrios was separated from her infant daughter, Zulena.<sup>139</sup> Despite the separation, Ms. Berrios remained determined to breastfeed Zulena as much as possible and to provide Zulena’s caretaker with expressed breast milk.<sup>140</sup> Ms. Berrios made two subsequent requests to prison staff: (1) to allow Ms. Berrios to breastfeed Zulena during normal visitation hours and (2) to allow Ms. Berrios to express breast milk with a breast pump,<sup>141</sup> store the milk in the prison’s unit refrigerator, and arrange to have the pumped milk provided to Zulena’s caretaker on a daily basis.<sup>142</sup>

Granting Ms. Berrios’s request to breastfeed during visitation hours, the court relied heavily upon the reasoning in *Dike* and *Southerland*, acknowledging Ms. Berrios’s “fundamental interest . . . in her *desire* to breast-feed.”<sup>143</sup> The court recognized incarcerated women’s rights, even if in a small way, by viewing breastfeeding as a parenting choice. As a result, they supported Ms. Berrios’s interest over the prison’s interest and allowed her to nurse her child during visiting hours.<sup>144</sup> And yet, the court denied Ms. Berrios’s

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135. See *Barrash*, 846 F.2d at 932.

136. *Id.* at 931–32.

137. See Orozco, *supra* note 42, at 1313 (“When one focuses on lactation . . . rather than what has been seen as a parental choice on how to best nourish a baby, the earlier breastfeeding cases in which women sought extended leave to breastfeed become readily distinguishable from the modern ‘pumping’ cases.”).

138. 716 F. Supp. 987 (E.D. Ky. 1989).

139. *Id.* at 988.

140. *Id.*

141. Ms. Berrios communicated that she would provide her own breast pump. *Id.*

142. *Id.*

143. *Id.* (emphasis added).

144. See *id.* at 990–91.

second request, pointing to significant legal, financial, and security concerns the prison would face if it allowed Ms. Berrios to store her breast milk at the facility.<sup>145</sup> The court explained that, because the facility housed at least 50 pregnant incarcerated women at a time, the storage and delivery of milk to caretakers would be a “costly and monumental task” for prison officials.<sup>146</sup> Moreover, allowing supplies into the prison presented a security concern, and exposing prison staff to negligence claims for spoiled or tainted breast milk presented legal concerns.<sup>147</sup>

Despite granting Ms. Berrios’ request to breastfeed, *Berrios-Berrios* commits the same error in analysis because it derives a woman’s right to express breast milk from her choice to breastfeed, not her medical need. The court failed to realize that, by granting Ms. Berrios’s breastfeeding request, she would continue lactating and would have an ongoing medical need to express breast milk during non-visiting hours. Although *Berrios-Berrios* appears to be a success on its face, its line of reasoning caused courts to fall even further behind in their misunderstanding of the medical needs of lactating women.<sup>148</sup>

### *E. Lactation and the Eighth-Amendment-Approved Medical Device: Breast Pumps*

When the courts’ attention turn to lactation needs rather than breastfeeding, an easily administrable solution appears: breast pumps. The Eighth Amendment right, as laid out in the Supreme Court’s jurisprudence, provides incarcerated people with access to adequate healthcare, including necessary medical devices.<sup>149</sup> Breast pumps qualify as a necessary medical device because they treat a lactating woman’s serious medical need to express breast milk in order to avoid painful side effects, including infection. If the attention remains on women’s breastfeeding, however, courts will continue to view the issue of expressing milk as a parenting choice. Without a focus on lactation, the Eighth Amendment right is obscured.

#### *I. Villegas: No Prescription, No Right?*

*Villegas* provides an example of how courts today apply the “deliberate indifference” standard to categorize incarcerated women’s medical needs for a breast pump as insufficient under the Eighth Amendment.<sup>150</sup> In particular, courts routinely deny such claims

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145. *Id.* at 990.

146. *Id.*

147. *Id.*

148. *See, e.g.*, *Shroff v. Spellman*, No. 07-cv-01466-REB-KMT, 2009 U.S. Dist. LEXIS 8860, at \*8 (D. Colo. Jan. 27, 2009) (analyzing the prison staff’s denial of the right to use a breast pump while incarcerated as an alleged “unconstitutional deprivation of [her] liberty interest in familial association” under the Fourteenth Amendment), *aff’d*, 604 F.3d 1179 (10th Cir. 2010). *But see* *Pobursky v. Madera County*, 1:07-CV-0611 AWI DLB, 2007 U.S. Dist. LEXIS 95432, at \*58 (E.D. Cal. Dec. 21, 2007) (denying a motion to dismiss where prison staff “caused a serious risk to [the plaintiff’s] health by refusing to allow her to use a breast pump” while incarcerated).

149. *See supra* text accompanying note 99. The terms “medical devices” and “medical supplies” are used interchangeably throughout this Article.

150. *See Villegas v. Metro. Gov’t of Nashville & Davidson Cty.*, 709 F.3d 563 (6th Cir. 2013).

when women lack a prescription or formal treatment plan for the device, or when their need is not found to be obvious enough that anyone would recognize it. In 2008, Juana Villegas, who was nine months pregnant, was arrested for driving without a valid driver's license.<sup>151</sup> Three days later, while still in police custody, Ms. Villegas gave birth in a local hospital, which provided her with a breast pump.<sup>152</sup> When Ms. Villegas was discharged, police prohibited her from bringing the breast pump, citing general safety concerns and the jail's policy, wherein a breast pump did not qualify as a "critical medical device."<sup>153</sup>

The Sixth Circuit ruled against Ms. Villegas's deliberate indifference claim on appeal, arguing that because the breast pump was simply given to Ms. Villegas at the hospital, it was not part of a physician's formal diagnosis and so, did not treat a serious medical need.<sup>154</sup> Engaging in an implicit similarly situated analysis, the court compared Ms. Villegas's claim to the claim pled in *Byrd*, in which a male plaintiff was prescribed medication and a strict diet after receiving a diagnosis of cirrhosis of the liver, but did not receive either when he returned to jail.<sup>155</sup> After applying the *Estelle* test, the *Byrd* court held with little trouble that the male plaintiff had sufficiently alleged a claim for deliberate indifference of his medical needs because he had been formally diagnosed with a medical condition and prescribed a responsive treatment plan.<sup>156</sup> The court's unnecessarily narrow and formal interpretation of "diagnosis," "prescription," and "treatment plan" guided its decisions to grant the male plaintiff's Eighth Amendment complaint and deny Ms. Villegas's complaint.<sup>157</sup>

The court's analysis demonstrates the similarly situated test's inadequacy when examining women's lactation needs. Although medical professionals may write a prescription for a breast pump to ensure the patient receives reimbursement from their health insurance provider, breast pumps are available for over-the-counter purchase in retail stores and online nearly all over the world.<sup>158</sup> The district court had correctly reasoned that the hospital staff's provision of a breast pump effectively amounted to a prescription, which

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151. *Id.* at 566.

152. *Id.* at 567.

153. *Id.*

154. *Id.* at 579; *see also* *Pace v. Fauver*, 479 F. Supp. 456, 458 (D.N.J. 1979) ("A 'serious' medical need may fairly be regarded as *one that has been diagnosed by a physician as requiring treatment* or one that is so obvious that a lay person would easily recognize the necessity for a doctor's attention.") (emphasis added) (citing *Hampton v. Holmesburg Prison Officials*, 546 F.2d 1077, 1081 (3d Cir. 1976)).

155. *See Villegas*, 709 F.3d at 579 (citing *Byrd v. Wilson*, 701 F.2d 592, 594–95 (6th Cir. 1983)).

156. *Byrd*, 701 F.2d at 595.

157. Courts have interpreted women's need for feminine hygiene products less strictly, without requiring a prescription. *See* text accompanying note 184.

158. Breast pumps were first patented in the mid-19th century and have been available on the open market for at least the last 25 years. For instance, in 1991, Medela, a Swiss manufacturer, sold "its first electric-powered, vacuum-operated breast pump—a pump not intended for in-hospital use—in the U.S." Megan Garber, *A Brief History of Breast Pumps*, THE ATLANTIC (Oct. 21, 2013), <https://www.theatlantic.com/technology/archive/2013/10/a-brief-history-of-breast-pumps/280728/> [<https://perma.cc/42KV-GYFS>].

prison officials cannot simply ignore.<sup>159</sup> Indeed, prison staff do not possess the discretion to do so, even if the plaintiff lacks a “formal” prescription.<sup>160</sup>

In addition, although physicians, nurses, and lactation consultants may discuss a formal plan involving a breast pump with a new mother, this consultation is not mandatory, especially if the mother has previously given birth.<sup>161</sup> In contrast, Mr. Byrd was diagnosed with a specific medical issue—post-hepatic type cirrhosis of the liver, which a layperson would struggle to recognize, much less treat with a specialized plan.<sup>162</sup> Requiring a treatment plan from Mr. Byrd, who needs a prescription to meet his individual needs, is logical. Requiring the same from Ms. Villegas, who requires a medical device that can be obtained on Amazon, is illogical, especially when considering the comparable burdens. Obtaining a specific prescribed medication is more burdensome than a readily-available breast pump, and yet the more difficult request is honored while the more basic and obvious request is not. The court’s requirements of Ms. Villegas are also at odds with the Eighth Amendment’s overarching goal to provide prisoners with adequate healthcare because, unlike a diagnosis of cirrhosis, physicians do not diagnose or treat lactation. Nor is it discussed at the same point in every woman’s pregnancy or postpartum recovery.

The first part of the court’s analysis of Ms. Villegas’ medical-needs claim reveals the court’s profound misunderstanding of the science of lactation and the way in which medical professionals communicate with new mothers about breast pumps.<sup>163</sup> The need to relieve oneself through breastfeeding or expressing breast milk is not framed as part of an individual or “prescribed treatment plan” at any point in a woman’s pregnancy or postpartum life.<sup>164</sup> Instead, medical professionals generally explain to women that a woman’s body will be in a state of lactation for varying amounts of time throughout pregnancy and

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159. See *Villegas v. Metro. Gov’t of Nashville & Davidson Cty.*, 789 F. Supp. 2d 896, 917 (D. Tenn. 2011).

160. See *id.* (“In any event, with [the hospital] staff’s provision of the breast pump . . . the [prison] officers lacked the discretion to refuse the breast pump.”).

161. Sharon Radzysinski & Lynn Clark Callister, *Health Professionals’ Attitudes and Beliefs About Breastfeeding*, 24 J. PERINATAL EDUC. 105–06 (2015) (“[T]here was a gap between knowledge [of the benefits of breastfeeding] and actually recommending and encouraging breastfeeding in clinical practice. . . . For [women] who were undecided [about breastfeeding], most clinicians stated that they recommended breastfeeding . . . but did not ‘push it.’ . . . The pediatric residents in the study indicated that they never considered discussing infant feeding with mothers.”); see also Michelle Farfel, *5 Things Your Hospital Lactation Consultant Wishes You Knew*, LUCKY BABY LACTATION SERVS. (Jan. 30, 2017), <https://www.luckybabylactation.com/single-post/2017/01/30/5-things-your-hospital-lactation-consultant-wishes-you-knew> [<https://perma.cc/DC82-S34N>] (noting that inadequate staffing of lactation consultants leads to disparities in care).

162. *Byrd*, 701 F.2d at 594.

163. See *Villegas*, 709 F.3d at 578–79.

164. *Id.* at 569.

the early years of an infant's life.<sup>165</sup> A woman's lactation needs may be continuously discussed with medical professionals over the course of several months.<sup>166</sup> As a result, courts are wrong to expect all incarcerated women to provide the same evidence—either a prescription for a breast pump or a treatment plan that explicitly includes a breast pump.

## 2. *Postpartum Lactation: Not Obvious Enough?*

Without a prescription or treatment plan, the *Villegas* court then turned to the question of whether Ms. Villegas's need for a breast pump was so obvious that a layperson would have recognized it, another valid avenue to obtain Eighth Amendment protection under *Farmer*.<sup>167</sup> The court summarily dismissed this as well, explaining that Ms. Villegas did not point to a sufficient number of organizations and individuals to prove the obviousness of the need, even though Ms. Villegas had an obstetrician-gynecologist and a psychiatrist testify in support.<sup>168</sup>

This analysis concerning obvious or non-obvious medical needs alludes to a requirement that a certain sub-section of society recognize the need as obvious but fails to outline this requirement with specificity.<sup>169</sup> Does the plaintiff need to convince the court that 100% of laypeople would recognize the need? Or does a simple majority—over 50%, for example—suffice? The answer to this question has the power to qualify lactation as a medical condition with obvious medical needs. Indeed, today's parents, especially those who are 40 or younger—meaning, those who grew up with breast pumps readily available in retail stores—and those who are mothers, likely understand that breast pumps fulfill an obvious medical need caused by lactation. This knowledge appears to be even more obvious in the context of incarcerated women who are separated from their children for long periods of time. If incarcerated women do not have access to their infant children multiple

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165. See Jill R. Demirci, Debra L. Bogen, Cynthia Holland, Jill A. Tarr, Doris Rubio, Jie Li, Marianne Nemecek & Judy C. Chang, *Characteristics of Breastfeeding Discussions at the Initial Prenatal Visit*, 122 *OBSTETRICS & GYNECOLOGY* 1263, 1263 (2013) (“The American College of Obstetricians and Gynecologists . . . published an opinion for the delivery of prenatal breastfeeding education by obstetrician-gynecologists, recommending that this start at the first prenatal appointment and be reinforced and expanded on in subsequent visits.”); see also *An Overview of Breastfeeding*, AM. PREGNANCY ASS'N (May 16, 2017), <https://americanpregnancy.org/breastfeeding/breastfeeding-overview/> [<https://perma.cc/5EDX-XZ6Y>] (describing the three different stages of lactation and various types of milk produced).

166. See Maura Sheehy, *When to Call a Lactation Consultant*, PARENTS (2012), <https://www.parents.com/baby/breastfeeding/problems/when-to-call-a-lactation-consultant/> [<https://perma.cc/4RXA-98YP>] (explaining the many reasons mothers might contact a lactation consultant, including learning about feeding strategies for premature infants, multiples, and infants with serious medical conditions as well as information on how to transition to solid foods).

167. See *Villegas*, 709 F.3d at 579–80; see also *Farmer v. Brennan*, 511 U.S. 825, 836–37 (1994).

168. See *Villegas*, 709 F.3d at 579–80.

169. See *id.* (“Unlike her shackling claim, where Plaintiff pointed to specific statements by outside organizations and testimony from Defendant’s officer, Plaintiff on this claim has only pointed to the opinion testimony of [a gynecologist] and [a psychiatrist]. . . . Therefore, Plaintiff has failed to produce sufficient evidence to make out the objective component of her breast pump claim.”).

times on a daily basis, they will be unable to breastfeed and naturally need to relieve lactation in another way, most often via breast milk expression. Given the frequency of pregnancy in prison, prison staff must possess general knowledge about a new mother's medical needs, only one of which is needs stemming from lactation.<sup>170</sup> If prison staff truly do not possess this knowledge, they must be trained on women's postpartum needs such that lactation becomes part of staff's general knowledge. It is unfair to require women to prove the obviousness of a need when the courts have failed to hold the U.S. prison system accountable to its constitutional mandate to provide for incarcerated people's basic medical needs.

### 3. *The Future of Pumping in Prison*

Unfortunately, courts examining subsequent claims involving breast pumps have largely followed *Villegas* in denying incarcerated women access to breast pumps.<sup>171</sup> In 2016, for example, a court affirmed the dismissal of an incarcerated woman's medical indifference claim concerning a breast pump on the grounds that the plaintiff failed to prove that a policy or practice of the prison caused her not to receive a breast pump.<sup>172</sup>

After giving birth while incarcerated, Ms. Mendiola-Martinez did not receive a breast pump because no one at the hospital prescribed or gave her one.<sup>173</sup> This omission, she argued, was a violation of her Eighth Amendment right to receive necessary equipment for her medical needs.<sup>174</sup> The lower court, citing *Villegas*, opined that Ms. Mendiola-Martinez failed to either proffer a prescription for the breast pump or demonstrate that the need for a breast pump would have been obvious to a layperson.<sup>175</sup> The lower court, while attempting to distance itself from *Villegas*, nonetheless used the *Villegas* standard to deny Ms. Mendiola-Martinez access to this necessary equipment. Here, the lower court stated that Ms. Mendiola-Martinez failed to demonstrate the obviousness of her need; yet, she claimed that her breasts were leaking—due to the plaintiffs' refusal to allow her to breastfeed—while in open court receiving her sentence. How can incarcerated women successfully prove that the need for a breast pump is obvious when courts seemingly ignore the physical, conspicuous effects of the need?<sup>176</sup>

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170. See *supra* Section II and text accompanying notes 34–38.

171. *Villegas*, 709 F.3d at 563; see, e.g., *Mendiola-Martinez v. Arpaio*, 836 F.3d 1239, 1258–59 (9th Cir. 2016). But see *New Mexico Prisoner Obtains Court Order to Allow Breastfeeding*, PRISON NEWS (Apr. 2, 2018), <https://www.prisonlegalnews.org/news/2018/apr/2/new-mexico-prisoner-obtains-court-order-allow-breastfeeding/> [<https://perma.cc/5EZ9-D3KQ>] (deciding that an incarcerated woman who had given birth in prison had the right to express and send breast milk to her infant unless she violated prison rules).

172. *Mendiola-Martinez*, 836 F.3d at 1258.

173. See *id.* at 1244.

174. See *id.* at 1246.

175. See *Mendiola-Martinez v. Arpaio*, No. CV11-02512-PHX-DGC, 2014 U.S. Dist. LEXIS 7748, at \*18 (D. Ariz. Jan. 22, 2014).

176. Ultimately, the appellate court acknowledged that Ms. Mendiola-Martinez's argument relied on an omission and held that she did not adequately prove any underlying theory for the omission of the prison staff. Thus, the prison was not liable. See *Mendiola-Martinez*, 836 F.3d at 1259.



Despite more than 20 years of medical research, experience, advocacy, and public education surrounding breastfeeding and lactation, both domestically and internationally,<sup>177</sup> courts like *Villegas* blindly maintain that lactation does not create an obvious medical need. Yet the scientific need to express breast milk extends to almost all postpartum women.<sup>178</sup> Indeed, the need for a breast pump has become so common that upon leaving the hospital, new mothers are sometimes given a pump as a complimentary gift.<sup>179</sup> Because medical professionals know that lactation is a hormonal, physical response to childbirth, the conversations between postpartum women and their medical providers center on lactation's effects on a woman's body and effective treatments for painful symptoms.<sup>180</sup> There is no need to discuss whether lactation will occur—it is obvious that it almost always

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177. Breastfeeding has recently come into the global spotlight as a human rights issue. Multiple bodies of the United Nations issued a statement that a child's right to the highest level of healthcare includes the right to breastfeed. *See, e.g.,* U.N., Joint Statement in Support of Increased Efforts to Promote, Support and Protect Breast-feeding, Statement Submitted By Special Rapporteurs on the Right to Food, Right to Health, the Working Group on Discrimination Against Women in Law and in Practice, and the Committee on the Rights of the Child, (Nov. 22, 2016), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20871&LangID=E> [<https://perma.cc/W95C-TNG2>]. The Convention on the Rights of the Child calls upon States Parties to take appropriate measures to provide adequate postpartum healthcare for mothers. Convention on the Rights of the Child art. 24(2)(d), Nov. 20, 1989, 1577 U.N.T.S. 3, [https://treaties.un.org/doc/Treaties/1990/09/19900902%2003-14%20AM/Ch\\_IV\\_11p.pdf](https://treaties.un.org/doc/Treaties/1990/09/19900902%2003-14%20AM/Ch_IV_11p.pdf) [<https://perma.cc/2MMX-RDNC>]. A total of 196 countries are States Parties to the Convention. The United States is the sole United Nations member state that has only signed the Convention. *See Status of Ratification Interactive Dashboard*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM'R, <http://indicators.ohchr.org/> [<https://perma.cc/RMZ7-VSNK>] (last visited June 12, 2020).

178. Some postpartum women cannot produce sufficient breast milk. Experts still disagree as to the percentage of women estimated to be in this group. One figure asserts that one to five percent of women suffer from insufficient glandular tissue, a breast condition associated with the inability to produce breast milk. *See* Nara Schoenberg, *Some Mothers Can't Breast-Feed*, CHI. TRIB. (Apr. 3, 2013), <https://www.chicagotribune.com/lifestyles/ct-xpm-2013-04-03-sc-health-0403-breast-feeding-20130403-story.html> [<https://perma.cc/UDP8-XU5R>]; *see also* Marianne Neifert, Sandra De-Marzo, Joy Seacat, David Young, Marilyn Leff & Miriam Orleans, *The Influence of Breast Surgery, Breast Appearance, and Pregnancy-Induced Breast Changes on Lactation Sufficiency as Measured by Infant Weight Gain*, 17 BIRTH 31 (1990). Some medical professionals assert that insufficient milk supply is a much rarer occurrence, estimating it affects less than one percent of women. *See* Pamela Morrison, *How Often Does Breastfeeding Really Fail?*, LA LECHE LEAGUE INT'L (Nov. 12, 2018), <https://www.llli.org/how-often-does-breastfeeding-really-fail/> [<https://perma.cc/3Y62-4JRZ>].

179. *See* Garber, *supra* note 158.

180. Medical professionals generally inform new mothers that they can determine whether to continue lactation (known as exclusive breastfeeding), continue lactation on a smaller scale (known by various terms, including combination feeding or supplementary feeding), or gradually end lactation completely. *See* Todd Wolynn, *Breastfeeding—So Easy Even a Doctor Can Support It*, 6 BREASTFEEDING MED. 345 (2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3192361/> [<https://perma.cc/S5QP-997G>] (referring to the possible options as “100% breast, 100% formula, or somewhere in between”); *see also* Anne Smith, *Lactation Suppression*, BREASTFEEDING BASICS, <https://www.breastfeedingbasics.com/articles/lactation-suppression> [<https://perma.cc/YW5C-TKZY>] (last visited June 12, 2020) (explaining that women with a full supply of breast milk may need up to three weeks to stop lactation via natural methods); *Mixing Milk*, LA LECHE LEAGUE INT'L, <https://www.llli.org/breastfeeding-info/mixing-milk/> [<https://perma.cc/F49L-SHRV>] (last visited June 12, 2020) (noting a possible need to supplement a breastfed baby's diet when separated from its mother or when a mother's supply is insufficient).

will.<sup>181</sup> Research over the last 20 years concerning lactation and breastfeeding from the medical community, public interest organizations, and policymakers demonstrate a burgeoning consensus: Lactation is an obvious medical condition.<sup>182</sup> When courts ignore the significant amount of scientific and medical information about lactation, they unfairly hold incarcerated women accountable for the courts' ongoing misunderstanding.<sup>183</sup>

Interestingly, courts do not find all women's medical needs insufficient under the Eighth Amendment standard. Prior to the enactment of the First Step Act, courts regularly mandated the provision of feminine hygiene products to incarcerated women as necessary equipment for meeting a serious medical need.<sup>184</sup> Courts may have recognized women's menstrual needs because they never perceived an element of choice in whether a woman menstruated. Moreover, the layperson, man or woman, is aware of women's menstruation cycles. As a result, feminine hygiene products are more likely to be viewed as required medical supplies. Educating prisons, courts, and the public about the role of breast pumps as necessary equipment that meets the medical needs of lactating women is a crucial step toward increasing adequate care for incarcerated, lactating women. Greater awareness may in turn lead to congressional action mandating the use of breast pumps in prisons, much like feminine hygiene products.

## V.

### CONGRESS SPEAKS—THE BREAK TIME PROVISION AND THE FIRST STEP ACT

Congress has recently acted to address women's medical needs related to reproduction in two different contexts: working women in the break time provision and incarcerated women in the First Step Act.<sup>185</sup> The break time provision imposes a duty on employers to provide time, space, and storage facilities to lactating employees who need to express milk

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181. *See supra* text accompanying note 178.

182. *See supra* text accompanying notes 4, 6, and 8.

183. *See supra* text accompanying notes 4, 6, and 8. Numerous federal government agencies are tasked with collecting data, researching and tracking infant feeding practices, and working with medical professionals and local and state governments to promote breastfeeding on a national scale, including the Department of Health and Human Services, the Department of Agriculture, and the Centers for Disease Control and Prevention. *See* Resources Library, CTR. DISEASE CONTROL, <https://www.cdc.gov/breastfeeding/resources/index.htm> [<https://perma.cc/N9G5-KZGE>] (last visited Aug. 12, 2020). The Academy of Breastfeeding Medicine publishes a medical journal, *Breastfeeding Medicine*, which contains "evidence-based research and explores the immediate and long-term outcomes of breastfeeding, including its epidemiologic, physiologic, and psychological benefits." *Breastfeeding Medicine: Aims & Scope*, MARY ANN LIEBERT, INC., <https://home.liebertpub.com/publications/breastfeeding-medicine/173/overview> [<https://perma.cc/4WXX-J6WX>] (last visited Aug. 10, 2020).

184. *See, e.g.,* Chavarriaga v. N.J. Dep't of Corr., 806 F.3d 210, 235 (3d Cir. 2015) (reversing the lower court's dismissal of the plaintiff's Eighth Amendment claim for the denial of sanitary napkins while she was menstruating); *see also* Ferris v. County of Kennebec, 44 F. Supp. 2d 62, 67 (D. Me. 1999) (denying the defendants' motion to dismiss the plaintiff's Eighth Amendment claim because the plaintiff had established deliberate indifference to her serious medical needs, in part due to the refusal to provide sanitary napkins).

185. *See* First Step Act, 18 U.S.C. § 611(a)–(c) (2018); Fair Labor Standards Act, 29 U.S.C. § 207(r)(1) (2012).

while at work.<sup>186</sup> The First Step Act instructs prisons to provide incarcerated women with healthcare products, specifically pads and tampons, to meet the medical needs of menstruation.<sup>187</sup> These two issues have not yet been conjoined to allow incarcerated women to use additional healthcare products for medical needs resulting from lactation.

#### A. Legislative History of the Break Time Provision

Prior to the enactment of the break time provision, women attempted, albeit unsuccessfully, to demand the right to breastfeed or express breast milk under Title VII of the Civil Rights Act of 1964,<sup>188</sup> the Pregnancy Discrimination Act,<sup>189</sup> the Family and Medical Leave Act,<sup>190</sup> and the Americans with Disabilities Act.<sup>191</sup> Under these frameworks, courts did not consider lactation a “pregnancy-related medical condition,” nor did they consider breastfeeding women similarly situated to men, thereby upholding their differential treatment under Title VII.<sup>192</sup>

The break time provision is the culmination of almost 15 years of work that sought to give lactating and nursing mothers more protection. In 1998, Representative Carolyn B. Maloney of New York introduced the New Mothers’ Breastfeeding Promotion and Protection Act,<sup>193</sup> which required employers provide unpaid leave to lactating employees to breastfeed or express breast milk.<sup>194</sup> Despite reintroduction into Congress for many years, the bill never progressed out of committee.<sup>195</sup> Fortunately, the Affordable Care Act<sup>196</sup>

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186. See Fair Labor Standards Act, § 207(r)(1).

187. 18 U.S.C. § 611(a)–(c).

188. 42 U.S.C. § 2000e (2006).

189. *Id.* § 2000e(k).

190. 29 U.S.C. § 2601 (2006).

191. 42 U.S.C. § 12101 (1994); see Ehrenreich & Siebrase, *supra* note 133, at 72 (noting that federal courts have almost uniformly concluded that breastfeeding is not protected under either the Pregnancy Discrimination Act or Title VII); Karin & Runge, *supra* note 8, at 340–46 (surveying unsuccessful breastfeeding claims under each of these respective statutes).

192. Ehrenreich & Siebrase, *supra* note 133, at 73.

193. See Karin & Runge, *supra* note 8, at 342.

194. See H.R. 3531, 105th Cong. § 6 (1998) (“A lactating mother . . . shall . . . be given up to one hour in each eight hour work day . . . to express milk for a child.”).

195. See Orozco, *supra* note 42, at 1292; see also Breastfeeding Promotion Act of 2007, H.R. 2236, 110th Cong. (2007); Pregnancy Discrimination Act Amendments of 2005, H.R. 2122, 109th Cong. (2005); Breastfeeding Promotion Act, H.R. 2790, 108th Cong. (2003); Pregnancy Discrimination Act Amendments of 2003, S.418, 108th Cong. (2003); Breastfeeding Promotion Act, H.R. 285, 107th Cong. (2001); Pregnancy Discrimination Act Amendments of 2001, S.256, 107th Cong. (2001); Pregnancy Discrimination Act Amendments of 2000, H.R. 3861, 106th Cong. (2000); Pregnancy Discrimination Act Amendments of 2000, S.3023, 106th Cong. (2000); Pregnancy Discrimination Act Amendments of 1999, H.R. 1478, 106th Cong. (1999); New Mothers’ Breastfeeding Promotion Act of 1998, H.R. 3531, 105th Cong. (1998).

196. Patient Protection and Affordable Care Act (Affordable Care Act), 42 U.S.C. § 18001 (2010).

provided the perfect opportunity for a similar provision mandating accommodation for expressing breast milk in the workplace.<sup>197</sup>

### *B. Protections Under the Break Time Provision*

In 2010, Congress enacted the break time provision as part of the Affordable Care Act.<sup>198</sup> The provision amends the FLSA and requires employers to provide break time and space for nursing mothers to express breast milk for children less than one year old.<sup>199</sup> The employer cannot mandate when the employee expresses breast milk; rather, it is simply when she “has need” to express milk.<sup>200</sup> The employee is not paid for the time she spends expressing milk.<sup>201</sup>

Employers must also create a space for employees to express milk that meets the legislative standard. The space must be private, other than a bathroom, where employees can feel comfortable expressing breast milk without concerns about unwanted intrusions.<sup>202</sup>

The break time provision aims to protect all employees, but largely benefits only those paid on an hourly basis.<sup>203</sup> Employees without overtime requirements under Section 213 of the FLSA do not have the right to demand accommodation.<sup>204</sup> The Department of Labor, which administers and enforces the provision,<sup>205</sup> nonetheless encourages all employers to provide break time for nursing mothers, regardless of a legal right to employer accommodation.<sup>206</sup>

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197. See Orozco, *supra* note 42, at 1293 (mentioning that a nursing amendment “slipped into” the 2009 Health Care Reform Bill, amending the FLSA to establish requirements nearly identical to those proposed in the stalled Breastfeeding Promotion Act).

198. 42 U.S.C. § 18001; see Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. 80,073 (Dec. 21, 2010).

199. See 42 U.S.C. § 18001; 29 U.S.C. § 207(r)(1) (2012).

200. 29 U.S.C. § 207(r)(1)(a) (2012). *But see* Kierstin Jodway, *Pumping 9 to 5: Why the FLSA’s Provisions Provide Illusory Protections for Breastfeeding Moms in the Workplace*, 4 BELMONT L. REV. 217, 225 (2017) (explaining that the Department of Health and Human Services’ recommendation that employers provide employees with 15-minute breaks every three hours is insufficient for mothers who exclusively feed their infants breast milk, and noting that nothing in the FLSA prohibits employers from limiting break times even further).

201. 29 U.S.C. § 207(r)(2).

202. See *id.* § 207(r)(1)(b).

203. See 29 U.S.C. § 213(b) (2018); Ehrenreich & Siebrase, *supra* note 133, at 86 (highlighting that because the break time provision amends Section 207 of the FLSA, it does not apply to employees who are exempt from overtime requirements under Section 213). As of late 2018, 21 states and the District of Columbia enacted legislation extending the benefits of the break time provision to women who receive annual salaries. See Kitroeff, *supra* note 9.

204. See *supra* text accompanying note 196.

205. See Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. 79,947, 80,073 (Dec. 21, 2010).

206. See *id.* at 80,074.

### C. Qualifying as “Employees”<sup>207</sup>

A lactating, incarcerated woman must first qualify as an “employee” under the FLSA to claim the protection of the break time provision.<sup>208</sup> The FLSA’s definition of employee never explicitly mentions nor exempts incarcerated workers.<sup>209</sup> In addition, neither Congress nor the Supreme Court has offered any clear guidance regarding the interpretation of prisoner protections under the Act. The question of employment protections’ application to prisoners has largely been left to lower courts’ interpretation. Despite federal rulings in favor of increased labor protections for people in prison,<sup>210</sup> modern caselaw affords few employee rights to incarcerated people. In short, courts have determined that no employee-employer relationship exists in detention because “the relationship . . . is non-market and non-economic in nature.”<sup>211</sup>

The majority of women work for the duration of their incarceration.<sup>212</sup> Incarcerated women are subject to compulsory work with few exceptions.<sup>213</sup> Although women outside of prison who are pregnant or have recently given birth are placed on paid leave, pregnant women who are incarcerated are often compelled to work.<sup>214</sup>

207. Some scholars argue for incarcerated people’s rights as “employees” under the National Labor Relations Act and National Labor Relations Board. *See, e.g.*, Kara Goad, *Columbia University and Incarcerated Labor Unions Under the National Labor Relations Act*, 103 CORNELL L. REV. 177, 196 (2017). I do not address this legislation because the break time provision became a part of the FLSA.

208. “Employee” is defined as “any individual employed by an employer.” 29 U.S.C. § 203(e)(1) (2012).

209. *See* Haslam, *supra* note 22, at 374.

210. *See, e.g.*, *Hale v. Arizona*, 967 F.2d 1356, 1359 (9th Cir. 1992) (applying the FLSA to inmate workers who were thus entitled to the federal minimum wage); *Watson v. Graves*, 909 F.2d 1549, 1554–55 (5th Cir. 1990) (finding an employment relationship where a Louisiana sheriff sent men incarcerated at a local jail to his son-in-law’s construction company); *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 14 (2d Cir. 1984). *Carter* was the first federal ruling in favor of a working incarcerated person’s protection under statutory law, adopting the economic reality test in *Bonnette*. 735 F.2d at 12 (citing *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983)). Using the economic reality test, *Carter* held that “an inmate may be entitled under the law to receive the federal minimum wage from an outside employer.” 735 F.2d at 8.

211. Whitney Bennis, “Free” Labor: The Law of Prison Labor, ON LABOR (May 28, 2015), <https://onlabor.org/free-labor-the-law-of-prison-labor/> [<https://perma.cc/VY8F-DGD4>] (citing Noah Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 878 (2008)).

212. *See Section III: Prison Economy*, PRISON POL’Y INITIATIVE, <https://www.prisonpolicy.org/prisonindex/prisonlabor.html> [<https://perma.cc/3TS3-Q2CX>] (last visited Apr. 20, 2020) (reporting that 100% of able-bodied federal prisoners are required to work while incarcerated); *see also* Zatz, *supra* note 211, at 868 n.30 (documenting that at least half of those currently incarcerated, including men and women, work in some capacity).

213. The Thirteenth Amendment states, “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” U.S. CONST. amend. XIII, § 1 (emphasis added); *see* Whitney Bennis, *American Slavery, Reinvented*, THE ATLANTIC (Sept. 21, 2015), <https://www.theatlantic.com/business/archive/2015/09/prison-labor-in-america/406177/> [<https://perma.cc/CW3Q-5CXT>] (“With few exceptions, inmates are required to work if cleared by medical professionals at the prison.”).

214. *See* Levi, *supra* note 18, at 29–30.

The rights in the break time provision could easily extend to lactating, incarcerated women. A significant percentage of incarcerated women are employed,<sup>215</sup> and Congress chose plain statutory language that does not rule out rights for working mothers who are incarcerated. Congress also contemplated the needs of women's employers. For example, Congress balanced a woman's need for time to express breast milk with the employer's financial interests through a compromise that break time would be unpaid.<sup>216</sup> This compromise creates a fair relationship that could easily be replicated in the prison context. The break time provision also dignified lactating mothers by empowering them with the right to express breast milk outside of a bathroom, regardless of the burden such a right might place on employers to build and maintain necessary facilities.<sup>217</sup> Prisons—as the sole employer and source of adequate healthcare for lactating, incarcerated women—should likewise bear the burden of establishing sufficient spaces for expressing breast milk.

Although an incarcerated woman's right to express breast milk does not depend on her status as an employee, the break time provision is crucial for the development of incarcerated women's lactation rights because it recognizes women's entitlement to time and facilities in order to express breast milk. It also provides a useful template for the Bureau of Prisons to use in meeting incarcerated women's lactation needs.

The break time provision is a constructive step forward in that it gives working women the "positive right" to demand lactation accommodation.<sup>218</sup> Unfortunately, because the break time provision's benefits have not yet been judicially extended to working incarcerated women, the provision can only serve as a possible indication of congressional intent to extend similar rights to incarcerated women. Additionally, even if courts extend the break time provision's rights to incarcerated women, the provision cannot serve as the sole solution because it makes lactation accommodation dependent upon an incarcerated woman's employment status instead of her constitutional Eighth Amendment right.

#### *D. The First Step Act*

The First Step Act, signed into law on December 20, 2018, is a mammoth criminal legal reform effort to decrease recidivism rates in part by providing incarcerated people

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215. *See supra* text accompanying note 212.

216. *See* 29 U.S.C. § 207(r)(2) (dictating that "[a]n employer shall not be required to compensate an employee receiving reasonable break time under paragraph (1) for any work time spent for such purpose").

217. *See* 29 U.S.C. § 207(r)(1)(b) (requiring an employer to provide "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk").

218. Ehrenreich & Siebrase, *supra* note 133, at 73.

with useful job skills.<sup>219</sup> Although principally focused on rehabilitation,<sup>220</sup> at least in theory,<sup>221</sup> many of its provisions aim to improve prisoners' quality of life during incarceration, with a specific emphasis on women.<sup>222</sup> The First Step Act's underlying motivations reasonably support expanding its reach to provide incarcerated women with access to breast pumps while in prison.

Multiple provisions of the Act work in concert to bolster the argument that the Bureau of Prisons is not adequately meeting women's medical needs, especially the needs of postpartum women, and that Congress intends to improve conditions for incarcerated women going forward. In fact, when debating the First Step Act, one representative expressly stated that “[t]he treatment of incarcerated women is particularly glaring during pregnancy, delivery, and postpartum.”<sup>223</sup>

The First Step Act requires that prisons provide feminine hygiene products, namely pads and tampons, to incarcerated women without charge.<sup>224</sup> The legislative history and contemporaneous news coverage are largely silent concerning the impetus behind this section of the statute, entitled, “Healthcare Products.”<sup>225</sup> Despite the future financial cost to the Bureau of Prisons, there is no evidence of congressional debate on this topic—perhaps because many congressional representatives assumed that these healthcare products were already provided in prison.<sup>226</sup> In other words, feminine hygiene products for incarcerated women seemed like such necessary and obvious medical supplies that, regardless of

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219. First Step Act, 18 U.S.C. § 1 (2018); CONG. RES. SERV., R45558, THE FIRST STEP ACT OF 2018: AN OVERVIEW 1–3 (2019).

220. See Ames Grawert, *What Is the First Step Act—and What’s Happening with It?*, BRENNAN CTR. FOR JUST. (June 23, 2020), <https://www.brennancenter.org/our-work/research-reports/what-first-step-act-and-whats-happening-it> [<https://perma.cc/E64L-QMGJ>] (encouraging rehabilitation by improving available programming about drug treatment, drug education, and second languages, and providing vocational training and behavioral therapy).

221. Notably, then-Senator Kamala Harris criticized the bill “for not applying all of the sentencing reforms retroactively, not going far enough in applying earned good-time credits, failing to crack down on the private-prison industry, and not reining in the use of electronic monitoring.” Michelle Mark, *Critics Are Warning that the Criminal-Justice-Reform Bill Being Hailed as a Bipartisan Victory Doesn’t Go Nearly Far Enough*, BUS. INSIDER (Dec. 19, 2018), <https://www.businessinsider.com/justice-reform-advocates-warn-first-step-act-is-just-the-start-2018-12> [<https://perma.cc/V39C-3WRJ>].

222. As passed, the First Step Act prohibits the use of restraints on pregnant prisoners, aims to place prisoners closer to families, allows home confinement for low-risk prisoners, and provides certain healthcare products to women free of charge. See CONG. RES. SERV., *supra* note 219, at 17–20.

223. 115 CONG. REC. H4313 (daily ed. May 22, 2018) (statement of Rep. Bass).

224. First Step Act, 18 U.S.C. § 4042 (2018).

225. See *id.*

226. See *Decarceration Nation: First Step Act* (May 21, 2018) (downloaded using iTunes).

political affiliation, no one attempted to oppose their provision in the face of such overwhelming backing.<sup>227</sup>

Although there is no evidence that Congress discussed the possibility of providing breast pumps to incarcerated women, this silence does not necessarily imply that congressional intent for such accommodation does not exist. Similar to Congress's realization that incarcerated women did not have sufficient access to feminine hygiene products, the silence about breast pumps likely signals congressmembers' ignorance that incarcerated women are prohibited from accessing medical supplies necessary to meet lactation needs. As with feminine hygiene products, advocates of lactation rights may only need to point out that the necessary medical supplies are not being provided to motivate congressmembers to amend the Act in the original spirit of the enacted legislation. The main purpose of the subsection concerning feminine hygiene products is that it be done "for free, in a quantity that is appropriate to the healthcare needs of each prisoner."<sup>228</sup> Using this line of reasoning for breast pumps, one breast pump would suffice for each prisoner. It is even possible that breast pumps be shared among incarcerated women because women would likely be expressing milk at different times of day and for varying durations. Indeed, it is more logical for the Act to include breast pumps alongside feminine hygiene products because they fulfill the same constitutional right that incarcerated women possess by providing for their medical needs.

On a broader scale, three additional provisions of the Act that aim to improve overall healthcare standards during incarceration—many of which directly touch upon pregnant and postpartum women's needs—suggest Congress may approve of requiring prisons to provide breast pumps to incarcerated women. First, the Act compels the Bureau of Prisons and the U.S. Marshals Service to design and implement adequate training to teach prison staff about the medical needs of pregnant and postpartum incarcerated women.<sup>229</sup> Second, the Act requires the Bureau of Prisons and the Bureau of Justice Statistics to track the number of incarcerated women who are also a parent or guardian.<sup>230</sup> Third, the Act advocates for the transfer of incarcerated men and women to institutions closer to their release

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227. *See id.*; *see also* *Roll Call Vote 115th Congress—2nd Session*, U.S. SENATE, [https://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=115&session=2&vote=00271](https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=115&session=2&vote=00271) [<https://perma.cc/3VU7-WW42>] (last visited Aug. 19, 2020) (documenting that 87 of 100 senators—47 Democrats, 38 Republicans, and two Independents—voted in favor of the First Step Act's passage on December 18, 2018).

228. First Step Act, 18 U.S.C. § 611(a) (2018).

229. *See* 18 U.S.C. § 4322(f)(1) (requiring training guidelines on the use of restraints on female prisoners during pregnancy, labor, and postpartum recovery and the identification of symptoms of pregnancy that require immediate referral to a healthcare professional).

230. *See* First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5246 § 611(a)(7).



residence as long as they are participating in a recidivism reduction program and satisfy certain eligibility criteria.<sup>231</sup>

The above-mentioned provisions in the First Step Act and Congress's earlier enactment of the break time provision demonstrate Congress's growing awareness of incarcerated people's needs, which in turn address women's reproductive and medical needs. Although this legislation represents progress, these provisions are not sufficient to safeguard incarcerated women's interests. If truly unaware, Congress and the courts must be educated on medical needs stemming from lactation, and then Congress must amend the First Step Act to adequately protect lactating, incarcerated women.

## VI.

### REVISITING THE FIRST STEP ACT—A POSSIBLE SOLUTION

With the recent enactment of the First Step Act, Congress recognized that incarcerated women have medical needs that cannot continue to be ignored. However, Congress failed to recognize that a specific subset of women—women who give birth while in prison and women who enter the prison system while lactating—have additional medical needs related to lactation that must also be accommodated. A simple amendment to the Act's "Healthcare Products" section could resolve this problem, providing incarcerated women with the right to access and use breast pumps, consistent with Congress's intent to accommodate incarcerated women's medical needs. The revised amendment should read as follows:

The healthcare products described in this subsection are tampons, sanitary napkins, *and breast pumps*.

If Congress enacted the proposed amendment, the break time provision could serve as a guideline for incarcerated women's rights to access breast pumps.<sup>232</sup> For example, by the terms of the break time provision, an employer cannot mandate at what time an employee expresses breast milk.<sup>233</sup> Instead, it is simply when the employee "has need."<sup>234</sup> Similarly, an incarcerated woman should, within reason, be able to express milk on her own schedule and in accordance with her need. As a significant portion of incarcerated

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231. See 18 U.S.C. § 3632(d)(2) ("A prisoner who is successfully participating in an evidence-based recidivism reduction program shall be considered by the Bureau of Prisons for placement in a facility closer to the prisoner's release residence upon request from the prisoner and subject to—(a) bed availability at the transfer facility; (b) the prisoner's security designation; and (c) the recommendation from the warden of the prison at which the prisoner is incarcerated at the time of making the request.").

232. The Bureau of Prisons could use the break time provision's language in its future regulation interpreting the amendment to the First Step Act. I suggest the following language: "For lactating women, the prison shall provide reasonable time for a woman to express breast milk for her nursing child for one year after the child's birth each time such woman has need to express the milk; adequate storage facilities; and a place, other than a bathroom, that is shielded from view and free from intrusion. Nothing in this subsection shall preempt a State law that provides greater rights to lactating women than the protections provided for under this subsection."

233. See Fair Labor Standards Act, 29 U.S.C. § 207(r)(1)(a) (2012).

234. *Id.*

people work while in prison, this could similarly apply in the context of the new amendment.

## VII.

### COUNTERARGUMENTS FROM CASE LAW AND EXPERIENCE

If Congress enacted the proposed amendment, the arguments for restricting incarcerated women's access to breast pumps—largely financial and security-minded—would fail.

Although additional space and refrigeration would accompany the right to express breast milk in prison, such a move would not be so expensive as to outweigh the benefits of allowing incarcerated women to express milk. Prisons already have industrial refrigeration, so the financial burden would be slight.<sup>235</sup> In fact, it would likely cost the government less in the long run to provide breast pumps to incarcerated women than it does to prohibit breast pumps.<sup>236</sup> Initial research shows that a significant amount of taxpayer dollars provides incarcerated and low-income women expensive, alternative routes of feeding their infants as opposed to access and education on breastfeeding and expressing breast milk. When mothers are prevented from feeding their infants breast milk, the infant must receive nutrition in another way. Because the majority of incarcerated women are low-income, they, and likely the guardians of their children for the duration of the mother's incarceration, qualify for the Special Supplemental Nutrition Program for Women, Infants and Children ("WIC"), which provides free formula.<sup>237</sup> Although in the minority, there are state correctional facilities that provide incarcerated women with access to the

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235. See Emily Baron Cadloff, *Women in Prison Are Fighting for the Right to Breastfeed—and So Far, It's Not Going Well*, ROMPER (July 28, 2017), <https://www.romper.com/p/women-in-prison-are-fighting-for-the-right-to-breastfeed-so-far-its-not-going-well-72803> [<https://perma.cc/RL8K-MB8U>] (arguing that a lack of policies, not infrastructure, contributes to the prison system's failure to support nursing mothers).

236. See Adam Looney & Nicholas Turner, *Work and Opportunity Before and After Incarceration*, BROOKINGS INST. 8 (Mar. 2018), [https://www.brookings.edu/wpcontent/uploads/2018/03/es\\_20180314\\_looneyincarceration\\_final.pdf](https://www.brookings.edu/wpcontent/uploads/2018/03/es_20180314_looneyincarceration_final.pdf) [<https://perma.cc/TP3D-HDYU>] ("Two years prior to the year they entered prison, 56 percent of individuals have essentially no annual earnings . . . and average earnings (among those who worked) was \$12,780."). A full cost-benefit analysis is beyond the scope of this Article, but initial research shows that it is unlikely that the cost of implementing a breast pump provision would outweigh the benefits.

237. According to the official WIC website, an applicant qualifies for the WIC program on the basis of income as long as gross annual income is less than \$31,284 for a family of two. See generally *Frequently Asked Questions About WIC*, USDA FOOD & NUTRITION SERV., <https://www.fns.usda.gov/wic/frequently-asked-questions-about-wic> [<https://perma.cc/PBZ6-Y2TF>] (last visited Apr. 14, 2020). As of 2015, 72% of incarcerated women received an annual income of less than \$22,500. See Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*, PRISON POL'Y INITIATIVE (July 9, 2015), <https://www.prisonpolicy.org/reports/income.html> [<https://perma.cc/2MYU-EX9R>]. During the 2009 fiscal year, infant formula alone cost the federal government \$850 million. This was the most expensive food category of the entire WIC program. Costs continue to rise. See CONG. RES. SERV., R44115, A PRIMER ON WIC: THE SPECIAL SUPPLEMENTAL NUTRITION PROGRAM FOR WOMEN, INFANTS, AND CHILDREN 15 (2017); Karin & Runge, *supra* note 8, at 333.

necessary equipment to express and store breast milk.<sup>238</sup> These policies have significant room for improvement, but they demonstrate that meeting women's lactation needs while incarcerated is possible.<sup>239</sup> Legislative debate on the proposed amendment would allow for Congress to conduct further cost-benefit analysis.

In addition, an amendment would cut down significantly on the current costs of litigation associated with lactation. Courts and prisons would no longer have to finance litigation debating whether a prison's failure to provide breast pumps is warranted or whether the Eighth Amendment affords incarcerated women access to breast pumps.<sup>240</sup> Instead, incarcerated women would have a statutory entitlement to a necessary medical device, and in a manner that is cost-effective for American taxpayers.

Requiring the provision of breast pumps at prison facilities would address security and safety concerns that accompany breast pumps moving in and out of the prison system.<sup>241</sup> Prison staff would not have to worry about contraband or weapons being hidden in the machinery of breast pumps, associated supplies, or the bags that contain them.<sup>242</sup> In the past, correctional facilities argued that feminine hygiene products, particularly tampons, could hide contraband.<sup>243</sup> Once the item creating the risk is controlled by the prison, as is now the case with feminine hygiene products, the amount of risk to the facility

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238. See Malcolm Burnley, *Staying Connected: Moms Who Pump in Prison*, NEXT CITY (Feb. 4, 2019), <https://nextcity.org/features/view/staying-connected-moms-who-pump-in-prison> [https://perma.cc/X3CD-GHRH] (“[T]here are more than 10 but fewer than 20 lactation programs in jails across the nation which allow moms in custody to pump for their kids.”); see also Operations Manual, CAL. DEP’T CORR. & REHAB. § 54045.19 (Jan. 1, 2020), <https://www.cdcr.ca.gov/regulations/wp-content/uploads/sites/171/2020/03/2020-DOM-02.27.20.pdf> [https://perma.cc/P5QE-472B] (“Offenders shall be informed of the benefits of breastfeeding. . . . Offenders who choose to breastfeed their baby shall be allowed access to a breast pump and refrigerator/freezer to store the pumped milk.”).

239. Tangentially, the prison system has already demonstrated its ability to make large-scale changes to meet the particular needs of incarcerated women. At least nine states now offer prison nurseries, which allow incarcerated women to keep their infants with them for up to three years. See Sarah Yager, *Prison Born*, THE ATLANTIC, July–Aug. 2015, <https://www.theatlantic.com/magazine/archive/2015/07/prison-born/395297/> [https://perma.cc/2S89-FAYF] (last visited Aug. 31, 2020).

240. Litigation does not often yield speedy results, due in part to disagreements, time-consuming reversals, and remands between lower and reviewing courts. See, e.g., *Villegas v. Metro. Gov’t of Nashville & Davidson Cty.*, 709 F.3d 563, 567 (6th Cir. 2013).

241. See, e.g., *id.* (observing that prison staff cited “safety concerns” as justification for not allowing the plaintiff to take the breast pump that hospital staff had provided her back to jail).

242. See, e.g., *Berrios-Berrios v. Thornburg*, 716 F. Supp. 987, 990 (E.D. Ky. 1989) (“[D]ifficult considerations of security factors must be taken into account whenever materials are coming in and out of prisoner-access areas. Among these security factors that must be considered is determining how prison officials could check the breast milk and other paraphernalia needed for expressing and storing breast milk for contraband on a continuing basis.”).

243. See, e.g., *Leverette v. Bell*, 247 F.3d 160, 163 (4th Cir. 2001) (regarding an associate warden receiving a tip that a correctional employee was using a tampon to smuggle marijuana into the prison); see also Amy Fettig, *Arizona Needs Laws that Protect Women Prisoners’ Menstrual Health*, ACLU BLOG (Feb. 9, 2018), <https://www.aclu.org/blog/prisoners-rights/women-prison/arizona-needs-laws-protect-women-prisoners-menstrual-health> [https://perma.cc/7L25-QSXL] (outlining litigation efforts in response to incarcerated women’s denial of tampons because prison staff allege they are a “security risk”).

decreases tremendously. Break times themselves, even if they are permitted in accordance with an individual's "need," do not add increased concern for security in a prison facility. Incarcerated people today have many unique and individual medical needs that are successfully treated within the confines of the prison. An incarcerated woman's need to access a designated space to express breast milk is no more of a security risk than another incarcerated person's need to check their insulin level or obtain medication in accordance with a strict timetable.

Procedurally—and similar to the new approach to feminine hygiene products made explicit by the First Step Act<sup>244</sup>—prison staff should be required to react to a woman's communicated need for the device. Prison officials should not be relieved of any burden to train their staff on recognizing incarcerated pregnant and postpartum women's medical needs, only one of which is a breast pump. Yet holding prison officials liable for their failure to respond to an incarcerated woman's voiced need removes the official's ability to later claim that no medical need existed.

### VIII. CONCLUSION

Despite jurisprudence outlining a prisoner's right to adequate medical care under the Eighth Amendment of the Constitution, lactating incarcerated women continue to suffer behind bars because the serious medical need produced by lactation is incorrectly labeled as a breastfeeding choice. Examining a woman's need to express breast milk through the scientific lens of lactation instead of the sociological and cultural lens of breastfeeding directs courts to reconsider women's true medical needs during pregnancy and after childbirth.

Congress can easily empower incarcerated women with their Eighth Amendment right by amending the First Step Act, mirroring the rights Congress gave to working women through the break time provision. The First Step Act recently identified the need to provide incarcerated women with feminine hygiene products. Requiring access to breast pumps, then, is aligned with the Act's original spirit because, like feminine hygiene products, breast pumps meet a lactating woman's medical need by providing a necessary medical device. Giving thousands of incarcerated women access to breast pumps would finally recognize lactation as a medical condition that creates a "serious medical need" and would fulfill the government's obligation to afford women their constitutional right to adequate healthcare under the Eighth Amendment.

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244. 18 U.S.C. § 4042; see Rexanah P. Wyse, *How the First Step Act Can Have Lasting Impacts on Women in the Criminal Justice System*, MEDIUM (Feb. 4, 2019), <https://medium.com/the-new-leader/how-the-first-step-act-can-have-lasting-impacts-on-women-in-the-criminal-justice-system-752374249c7c> [<https://perma.cc/59MC-MKF7>] ("Prior to the passage of the FIRST STEP Act . . . menstruating incarcerated women were required to ask permission from correctional staff to visit the health services department just to request extra tampons or sanitary napkins. Requests for extra products were not always granted.").