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## Breastfeeding on a Nickel and a Dime: Why the Affordable Care Act's Nursing Mothers Amendment Won't Help Low-Wage Workers

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## BREASTFEEDING ON A NICKEL AND A DIME: WHY THE AFFORDABLE CARE ACT'S NURSING MOTHERS AMENDMENT WON'T HELP LOW-WAGE WORKERS

Nancy Ehrenreich\* with Jamie Siebrase\*\*

*As part of the Patient Protection and Affordable Care Act of 2010 (also known as “Obamacare”), Congress passed a new law requiring employers to provide accommodation to working mothers who want to express breast milk while at work. This accommodation requirement is a step forward from the preceding legal regime, under which federal courts consistently found that “lactation discrimination” did not constitute sex discrimination. But this Article predicts that the new law will nevertheless fall short of guaranteeing all women the ability to work while breastfeeding. The generality of the Act’s brief provisions, along with the broad discretion it assigns to employers to determine the details of the accommodation provided, make it likely that class- and race-inflected attitudes towards both breastfeeding and women’s roles will influence employer (and possibly judicial) decisions in this area. Examining psychological studies of popular attitudes towards breastfeeding, as well as the history of women’s relationships to work, this Article concludes that both are likely to negatively affect low-income women seeking accommodation under the Act, perhaps especially those who are African-American. In short, the new law could lead to a two-tiered system of breastfeeding access, encouraging employers to grant generous accommodations to economically privileged women and increasing the social pressure on low-income women to breastfeed, without meaningfully improving the latter group’s ability to do so.*

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## INTRODUCTION

Even though accommodating breastfeeding actually saves employers money,<sup>1</sup> they frequently retaliate against or fire employees for breastfeeding or pumping breast milk at work—or even for merely *asking* to nurse or pump.<sup>2</sup> And even though the Pregnancy Discrimination Act (PDA)<sup>3</sup> defines unequal treatment of pregnant women as sex discrimination, federal

1. Employers who accommodate breastfeeding benefit from fewer health claims, reduced training budgets, and lower direct and indirect costs of missed days from work. Marsha Walker, *Breastfeeding and Employment: Making It Work*, WIC ESSENTIALS NEWSLETTER, June 2011, <http://www.ibreastfeeding.com/newsletter/newsletter/2011/06/breastfeeding-and-employment-making-it-work>. See also, Sarah Andrews, *Lactation Breaks in the Workplace: What Employers Need to Know About the Nursing Mothers Amendment to the FLSA*, 30 HOFSTRA LABOR & EMP. L. J. 121, 149–55 (2012) (noting various benefits for employers and describing money savings by CIGNA); Rona Cohen et al., *Comparison of Maternal Absenteeism and Infant Illness Rates Among Breast-feeding and Formula-feeding Women in Two Corporations*, 10 AM. J. HEALTH PROMOTION 148, 153 (1995) (“[W]omen who breast-feed their babies are less likely to be absent from work because of baby-related illnesses and less likely to have long absences when they do miss work. . .”).

2. See, e.g., *EEOC v. Houston Funding II, Ltd.*, 118 Fair Empl. Prac. Cas. (BNA) 891 (2013).

3. The PDA amended Title VII of the Civil Rights Act of 1964, the central federal statute governing sex, race, and other types of discrimination in the workplace. It defines discrimination on the basis of pregnancy or “related medical conditions” as sex discrimination. 42 U.S.C. § 2000e(k).

courts have consistently rejected suits seeking redress for lactation discrimination.<sup>4</sup> Breastfeeding, the courts have held, is not a “pregnancy-related medical condition” under the PDA, and breastfeeding discrimination is not illegal under Title VII because lactating women are not similarly situated to men.<sup>5</sup>

Moreover, while it may appear to some that the Patient Protection and Affordable Care Act of 2010 (ACA)—also known as “Obamacare”—could make these holdings obsolete, this Article maintains that it won’t. In its Reasonable Break Time for Nursing Mothers provision (amending the Fair Labor Standards Act), the ACA changes federal employment law’s approach to lactation from a formal equality, “sameness” model (giving women only the right to be treated the same as similarly situated men), to a substantive equality, “difference” model (mandating accommodation of lactation at work).<sup>6</sup> As such, the new law seems to promise a solution to the breastfeeding problem—preventing formalistic judicial applications of the sameness/difference distinction within equality jurisprudence by establishing, by law, that equality in this area requires *recognition* of difference.<sup>7</sup>

Nevertheless, while the ACA represents a salutary development in the law (for the reasons just stated), this Article argues that heralding the new statute as the death knell for breastfeeding discrimination in the workplace would be premature. Instead, there is every reason to expect that commonly held assumptions about breastfeeding, breasts, and women’s appropriate relationships to work will negatively impact employer, employee,

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4. There has been some discussion of terminology here. As Nicole Orozco notes, “[b]ecause lactation is the body’s natural physical response to pregnancy, unlike the parental choice to breastfeed, lactation is more clearly [seen as] related to pregnancy,” Nicole Kennedy Orozco, *Pumping at Work: Protection from Lactation Discrimination in the Workplace*, 71 OHIO ST. L.J. 1281, 1313 (2010). See discussion of whether lactation is “related” to pregnancy, *infra* Part I. However, because that insight is tangential to the material covered here, I will use the two terms interchangeably. Thus, the terms “lactation discrimination” and “breastfeeding discrimination” will both be used to refer to discrimination against women who seek to express milk or breastfeed at work as well as to discrimination against women because of the mere physiological fact that they are lactating.

5. See *infra* Part I.

6. 29 U.S.C. § 207(r)(1) (2014). Specifically, the statute amends the Fair Labor Standards Act to require employers to provide lactating employees both a private place in which to breastfeed or pump milk and reasonable (unpaid) break time to do so. See *infra* Part II(B). Nearly half the states have also passed workplace breastfeeding statutes, Orozco, *supra* note 4, at 1291, but this Article will focus on the federal law.

7. In requiring affirmative accommodation of breastfeeding (an activity engaged in only by women), the statute implicitly recognizes women as differently situated from men and as entitled to differential treatment—sometimes referred to as “special” treatment. On the distinction between sameness- and difference-based definitions of discrimination, see generally MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 39-44 (2d ed., 2003). See also *Cal. Sav. and Loan v. Guerra*, 479 U.S. 272, 286 (1987) (holding that a pregnancy disability leave statute does not violate Title VII).

and judicial behavior under the new federal accommodation regime.<sup>8</sup> The result could be perpetuation of an already-emerging two-tiered system of access to breastfeeding for working women.

The Reasonable Break Time for Nursing Mothers provision delegates broad discretion to employers to tailor accommodations to their employees' needs.<sup>9</sup> While this approach might seem at first blush to be the best way to assure appropriate treatment of each individual woman, such broad discretion could also allow cultural bias<sup>10</sup> against breastfeeding workers to produce cramped and ungenerous accommodations. Focusing on how race- and class-bias—as well as material economic realities—might affect the operation of the new breastfeeding system “on the ground,” this Article concludes that the turn to accommodation is unlikely to significantly improve the ability of low-wage workers to breastfeed while continuing to work—if they choose to do so.

As the “if” in the previous sentence implies, the complexities of existing cultural beliefs and economic realities suggest the need for caution in framing policy goals in this area. A policy assessment of the issue of breastfeeding and work must consider how race and class status affect the assumptions about, preferences of, and mothering norms imposed upon, different types of women. And it must reject simplistic accounts that ignore the impact of race, class, and gender on the options available to breastfeeding workers.<sup>11</sup> Thus, my concern in this Article is *not* to convince women

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8. Legal opinions about lactation, like legal opinions about pregnancy, abortion, and other aspects of women's reproductive lives, can be understood as the products of complex and often unconscious assumptions about women's bodies, roles, and relationships to the workplace. See generally, Nancy Ehrenreich, *Introduction*, in *THE REPRODUCTIVE RIGHTS READER: LAW, MEDICINE, & THE CONSTRUCTION OF MOTHERHOOD* 7-9 (Nancy Ehrenreich ed., 2008) (discussing impact of stereotypes on reproductive rights law). Judicial holdings on breastfeeding at work reflect and participate in larger social conversations, and social struggles, about women's place in society. Thus, socially constructed notions of embodiment and entitlement are likely to affect the law's interpretation, regardless of whether future cases are governed by formal equality or substantive equality norms.

9. See *infra* Part II(B)(1).

10. By “cultural bias,” I mean to include both conscious and unconscious attitudes, as well as both direct and indirect impacts of such attitudes. Direct impacts can flow from explicitly negative assumptions about certain categories of people (e.g., women who breastfeed are not good workers). Indirect impacts can result when attitudes that are not explicitly negative or pejorative nevertheless lead to harmful treatment of individuals or to structural inequality (e.g., breastfeeding is a sexual activity that should not be done in public). On cognitive, or unconscious, bias, see Linda H. Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 *STAN. L. REV.* 1161, 1182-88 (1995) (describing how unconscious stereotyping can affect decisions in employment context); David Oppenheimer, *Negligent Discrimination*, 141 *U. PA. L. REV.* 899, 903-15 (1993) (describing studies finding a high prevalence of unconscious racism among whites consciously committed to non-discrimination). On specific attitudes towards breastfeeding and women who breastfeed, see *infra* Part II(A).

11. See *infra* Part II(B)(3) (noting the likely negative impact of the ACA on low-income women, and focusing in particular on African-American women).

to breastfeed (or, for that matter, not to breastfeed).<sup>12</sup> Nor is it to encourage women to choose one or the other of the two (equally inadequate) options many currently have (and are likely to continue to have): either to stay at work and forego breastfeeding or to forego working and breastfeed.<sup>13</sup> Rather, my concern is to increase the possibility that each woman will be able to do what she thinks is best for herself, her child, and her family—and to examine the barriers to achieving that goal.

In addition to identifying the potential impact that cultural attitudes about breastfeeding could have on various stake holders under the ACA, this Article also notes that, to the extent the statute fails to significantly assist low-income women, it will perpetuate a longstanding labor regime that has often forced such women to sacrifice the broader well-being<sup>14</sup> of their families in order to feed them. As will be discussed further below, there is a significant risk that the new regime will have the effect of increasing social pressure on such women to breastfeed, without meaningfully improving their ability to do so.<sup>15</sup> In fact, the pro-breastfeeding stance of the ACA might ultimately *negatively* affect the autonomy, safety, and health of low-income mothers and their children.

Of course, to the extent that the new law has such disparately negative impacts on low-income workers, it will have a disparately negative racial impact as well. Since low-income groups in the United States are disproportionately (although not predominantly) of color,<sup>16</sup> to say that the law will not help low-income women is also to say that it will be of limited utility to many women of color. Focusing on the ACA's likely impact on low-income African-American women, this Article also highlights the racialization of attitudes about bodies, work, and gender roles, noting various ways that such racialization could impact the ability (and possibly the desire) of Black mothers to combine breastfeeding and work.

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12. While breastfeeding has many benefits for mother and infant, *see generally* KAREN M. KEDROWSKI & MICHAEL E. LIPSCOMB, BREASTFEEDING RIGHTS IN THE UNITED STATES 8-14 (2008) (describing those benefits), some authors have suggested that those benefits might be overstated. *See, e.g.,* JOAN B. WOLF, IS BREAST BEST? TAKING ON THE BREASTFEEDING EXPERTS AND THE NEW HIGH STAKES OF MOTHERHOOD 21-45 (2011). And in any event, as this Article will discuss, decisions about breastfeeding, especially for working mothers, are multifaceted, complex and highly individual.

13. *See* discussion, *infra* Part III(A).

14. As *they* define "well-being," of course.

15. *See infra* Part III(B).

16. The majority of individuals living below the poverty line are "non-Hispanic whites" but far from the majority of whites are poor, with just 12.7% of whites living below the poverty line. In contrast, African-Americans, who represent approximately 13% of the U.S. population, account for 27.2% of the poor, while 25.6% of the poor are Latinas/os. Drew DeSilver, Who's Poor in America? 50 Years into the "War on Poverty," a Data Portrait, Pew Research Center, available at <http://www.pewresearch.org/fact-tank/2014/01/13/whos-poor-in-america-50-years-into-the-war-on-poverty-a-data-portrait/>.

Three likely dynamics form the basis for this Article's prediction that low-income women will not benefit significantly from the ACA. First, cultural attitudes about lactation (to be discussed further below), while broadly detrimental to breastfeeding women as a group, might be particularly harmful to low-wage women, affecting both their choices about breastfeeding (perhaps especially the choices of African-American women) and their treatment by employers and judges. Second, to the extent that such biases result in restrictive interpretations of the ACA, the financial impact on low-income women will be particularly detrimental.<sup>17</sup> As a result of these first two dynamics, the ultimate (and ironic) impact of the new law might be a two-tiered system in which the women it is designed to aid actually have significantly less ability to breastfeed than higher-income working women.

Third, the formal state embrace of breastfeeding represented by the statute risks becoming part of the already-extant disciplinary system under which low-income women are surveilled and regulated to determine whether they live up to governmental standards of good mothering—standards that often fail to take their constraints, concerns, and circumstances into account.<sup>18</sup> As Angela Davis has noted (in discussing contraception), rights granted to economically privileged, white women have a way of morphing into duties when applied to low-income women of color.<sup>19</sup> Thus, the real possibility exists that poor women who bottle feed, perhaps especially those stigmatized by “racialized perceptions of mothering,”<sup>20</sup> will be judged to have neglected their children at the same time that both financial realities and cultural attitudes might make it more difficult and/or less appealing for them (as compared to economically privileged, European-American women) to breastfeed.<sup>21</sup>

For all three of these reasons—cultural bias, material realities, and stigma—observers concerned about both equal access to work and equal rights for mothers should be wary of complacency about the impact of the ACA. Vigilance, continued activism, and additional law reform will be needed to assure that all working mothers who desire to breastfeed have meaningful opportunities to do so under the new regulatory regime.

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17. See *infra* Part II(A)(4) and Part III(A)(3).

18. On the state surveillance and regulation of poor women, see generally, ANGE-MARIE HANCOCK, *THE POLITICS OF DISGUST: THE PUBLIC IDENTITY OF THE WELFARE QUEEN* (2004) (analyzing rhetoric and content of the Clinton-era welfare reforms); DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 172–76 (1997) (discussing racial bias in prosecution of pregnant women for drug use); CAROL B. STACK, *ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY* 124–27 (1974) (describing how child-fostering and other traditional Black practices have been misunderstood by welfare workers as parental irresponsibility).

19. ANGELA Y. DAVIS, *WOMEN, RACE, & CLASS* 221 (1981).

20. BERNICE L. HAUSMAN, *MOTHER'S MILK: BREASTFEEDING CONTROVERSIES IN AMERICAN CULTURE* 46 (2003).

21. See, e.g., discussion, *infra* notes 197–205 and accompanying text.

Part II of this Article provides an overview of the accommodation approach introduced by the ACA, briefly comparing the prior formal equality regime of Title VII and the PDA with the current one. It also summarizes the two main arguments courts have proffered to support their position that breastfeeding discrimination does not violate Title VII and/or the PDA. Those arguments, I suggest, are so strained (and punitive) that they raise the distinct possibility that cultural attitudes towards lactation and women's roles—perhaps operating unconsciously—influenced the reasoning and results of at least some of these decisions. This Article maintains that there is little reason to doubt that such attitudes will contribute to problematic interpretations of the ACA as well.

Accordingly, Parts III and IV identify two different types of cultural content that may have influenced the earlier generation of lactation discrimination cases and are likely to affect interpretations of the new statute: attitudes about breastfeeding and attitudes about the appropriate relationship of women to work. Part III first surveys the psychological findings on prevailing attitudes towards lactating women and breastfeeding. Those attitudes, I argue, construct breastfeeding as fundamentally incompatible with work. They also are likely to have an inflated negative effect on low-income (perhaps especially African-American) women, intersecting in harmful ways with prevailing stereotypes of such women.

Part III next identifies aspects of the ACA's rule framework that create the space in which culture is likely to play a role, as well as ways in which prevailing attitudes about breastfeeding might cause cramped interpretations of particular provisions of the statute. Moreover, this Part argues, the narrow interpretations of the statute made possible by its gaps,<sup>22</sup> as well as the employer violations of the law made possible by the statute's weak enforcement mechanism, are likely to have a disparately negative impact on low-income workers. This section also notes that, if low-income women do not find combining work *and* breastfeeding to be a viable option, their financial situations will probably preclude staying home to breastfeed. Thus, the financial incentives likely to be created by a narrow interpretation of the ACA could produce a full-fledged two-tiered system, wherein privileged women are more able (as compared to economically marginalized women)<sup>23</sup> both to combine work and breastfeeding *and* to nurse *without* working (if they so desire).<sup>24</sup>

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22. Of course, language always leaves room for interpretation, and by suggesting that gaps in this statute invite cultural attitudes to influence judicial outcomes, I do not mean to suggest that (for example) a rule-intensive revision of the law would eliminate the role of culture in producing legal meaning.

23. The terms "economically marginalized" and "marginalized" are used in this Article to refer to those who are poor, low-income, of color, and/or working class.

24. There are some data that support the validity of this assumption: "African-American mothers of infants have higher rates of labor force participation (66%) than their non-Hispanic white (57%), Latina (45%) and Asian/Pacific Islander (56%) sisters, which may explain their lower rates of breastfeeding, especially if they are not in professional positions with considerable

Part IV discusses a second set of cultural understandings that are likely to influence employer and judicial interpretations of the ACA, thereby contributing to entrenchment of the two-tiered system of breastfeeding access predicted here. That two-tiered outcome, if it comes to pass, will replicate the labor roles that have historically been assigned to economically privileged and low-income women, respectively. It is well known by now that until the 1970s some women were routinely excluded from the workplace. It is also well known, but less frequently mentioned, that others have instead historically been considered appropriate (if inadequate) workers and have been discouraged from staying home with their children. Thus, although feminists like myself often say that the workplace is structured around a “male” model that didn’t change to accommodate (privileged) women when they entered the economic sphere, it might not be too far of a stretch to suggest that the modern industrialized workplace was actually designed *with low-income women in mind*—that it is explicitly structured to appropriate the labor of such women (and their male counterparts), at the expense of their families.

Thus, Part IV discusses how stereotypes about low-income women as both workers and mothers have obscured and legitimated their economic exploitation for centuries. It also predicts that such stereotypes will similarly obscure and legitimate the negative impacts of the ACA, making limited accommodations seem appropriate in low-income workplaces and allowing the resulting lower breastfeeding rates in such families to be dismissed as evidence of inadequate mothering. In short, the ACA will convey the message that breastfeeding is good mothering at the same time as it prevents (or at least fails to enable) precisely the women who are so often stereotyped as bad mothers from engaging in it. Lastly, Part V draws some brief conclusions.

#### I. THE MOVE FROM FORMAL EQUALITY TO ACCOMMODATION

The ACA represents a significant change in the federal government’s approach to regulating employers’ treatment of women who choose to breastfeed while employed. As noted above, before the passage of the Act, federal regulation related to breastfeeding was accomplished primarily through the formal equality regime of Title VII and the PDA.<sup>25</sup> Under those statutes, women workers are entitled only to protection from differential treatment—from being treated differently than similarly situated

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autonomy.” KEDROWSKI & LIPSCOMB, *supra* note 12, at 17. Moreover, “one of the primary predictors of the duration of breastfeeding is when a woman returns to work.” *Id.* at 66. “Studies of employed women find that those with the most professional autonomy are best able to balance the competing needs of breastfeeding and outside employment.” *Id.* at 71.

25. Lactation discrimination cases have also been litigated under the ADA and the FMLA. See, e.g., *Bond v. Sterling, Inc.*, 997 F. Supp. 306 (N.D.N.Y. 1998) (holding that a mother was not terminated for taking leave under the FMLA); *Martinez v. N.B.C., Inc.*, 49 F. Supp.2d 305 (S.D.N.Y. 1999) (holding that breastfeeding is not a disability covered by the ADA).

men. They have no right to demand lactation accommodation from their employers. In contrast, the ACA creates a positive right to accommodation, imposing affirmative duties on employers to address certain needs of breastfeeding women. Especially given the courts' cramped interpretation of the "equal treatment" right under Title VII and the PDA, this turn to a substantive equality approach is a positive development. But, as will be discussed further below, it is not a panacea.<sup>26</sup>

The first component of the formal equality regime, Title VII, prohibits discrimination on the basis of sex in the terms and conditions of work. The second component, the PDA, defines "on the basis of sex" to include treatment based on pregnancy or "related medical conditions."<sup>27</sup> Yet federal courts have almost uniformly concluded that neither provision protects women from being fired, harassed, or retaliated against for breastfeeding or pumping breast milk at work.<sup>28</sup> Breastfeeding, they hold, is not a "pregnancy-related medical condition" under the PDA, and breastfeeding women are not "similarly situated" to men, making their differential treatment permissible under Title VII. In so holding, the courts rely on the infamous case of *General Electric Co. v. Gilbert*<sup>29</sup>—the case that Congress passed the PDA to overturn.<sup>30</sup> Using the same warped (and widely discredited) version of equal treatment reasoning that the Supreme Court used in *Gilbert*, they rule that breastfeeding discrimination does not constitute sex discrimination, because lactation is an activity unique to women. Thus, breastfeeding-based employment actions do not differen-

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26. See *infra*, this Part, Part II(B) and Part III(B).

27. The PDA provides:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.

Pregnancy Discrimination Act, 42 U.S.C.A. § 2000e(k) (1978).

28. See, e.g., cases discussed *infra* at notes 31–42. By "breastfeeding discrimination," I mean suffering harassment, retaliation, or tangible employment action because of breastfeeding or pumping breast milk, or seeking to do so, at work.

29. 429 U.S. 125 (1976).

30. For a critique of courts' application of the *Gilbert* reasoning in the breastfeeding context, see Camille Hébert, *The Causal Relationship of Sex, Pregnancy, Lactation, and Breastfeeding and the Meaning of "Because of Sex" under Title VII*, 12 GEO. J. GENDER & L. 119, 130–36 (2011); see also *infra*, notes 39–43 and accompanying text; Judith G. Greenberg, "The Pregnancy Discrimination Act: Legitimizing Discrimination Against Pregnant Women in the Workforce," 50 ME. L. REV. 226, 234–36 (1998).

tially treat similarly situated employees, but rather differentially treat two different groups of people—those who breastfeed and those who do not.<sup>31</sup>

A brief look at some of the leading Title VII/PDA cases gives a flavor of the type of treatment women who feed breast milk often receive in the workplace, as well as a sense of the courts' uncharitable reactions to their claims. In one of the most well-known cases, *Wallace v. Pyro Mining Co.*,<sup>32</sup> the plaintiff's infant actually faced health issues that required her to breastfeed.<sup>33</sup> Martha Rene Wallace, an accounting clerk, requested six weeks unpaid leave because her baby was refusing to take a bottle. When her employer denied her request, she chose to stay home rather than compromise her infant's health—and was subsequently fired. The district court granted summary judgment to the defendant, stating that "Pyro's decision does not deny anyone personal leave on the basis of sex—it merely removes one situation, breastfeeding, from those for which personal leave will be granted."<sup>34</sup> To qualify under the PDA, the court asserted, a medical condition must be incapacitating (to the woman).<sup>35</sup> There is no "valid comparison," the court went on, "between incapacitated workers and 'young mothers wishing to nurse little babies'"<sup>36</sup>—a rather striking characterization in a case where the plaintiff claimed that her child would essentially *starve* if she were not able to breastfeed. The Sixth Circuit affirmed, holding that because breastfeeding is not a "medical necessity" Pyro's policy of not granting personal leave for breastfeeding did not constitute sex discrimination in violation of the PDA.

In *Martinez v. NBC*,<sup>37</sup> the plaintiff was an associate producer at MSNBC Cable. She alleged that her employer had failed to provide her a safe and secure place to express milk and that, when she complained about co-workers repeatedly entering the office where she was pumping, she was

31. See, e.g., *Jacobson v. Regent Assisted Living, Inc.*, No. CV-98-564-ST, 1999 WL 373790, at \*29-30 (D. Or. Apr. 9, 1999); *Barrash v. Bowen*, 846 F. 2d 927, 931-32 (4th Cir. 1988).

32. 951 F.2d 351 (6th Cir. 1991) (unpublished table decision).

33. See also *McNill v. N.Y.C. Dep't of Corr.*, 950 F. Supp. 564, 569-71 (S.D.N.Y. 1996) (holding that employer's refusal to grant employee leave to nurse her infant with cleft palate is not governed by PDA).

34. *Wallace v. Pyro Mining Co.*, 789 F. Supp. 867, 869 (W.D. Ky. 1990).

35. *Id.*

36. *Id.* at 870 (quoting *Barrash*, 846 F.2d at 931-32). The full quote from *Barrash* is instructive: "One 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." The court's comparison clearly suggests that it sees the need of an infant for breast milk as far less pressing than the need of a worker, male or female, to recover from an injury, however minor or serious that injury may be. Otherwise, the employer's disparate treatment of the two would certainly suggest the possibility of sex discrimination. See also *KEDROWSKI & LIPSCOMB*, *supra* note 12, at 76 (noting that *Barrash* has been cited by breastfeeding advocates "as an example of courts and judges that are hostile to a woman's decision to breastfeed.").

37. 49 F. Supp. 2d 305 (S.D.N.Y. 1999).

subjected to retaliatory schedule changes, demotion, and verbal harassment. The district court for the Southern District of New York granted defendant's motion for summary judgment, holding that, "[t]he drawing of distinctions among persons of one gender on the basis of criteria that are immaterial to the other . . . is not the sort of behavior covered by Title VII."<sup>38</sup> "As there were and could be no men with the same characteristic [as the plaintiff]," the court said, "all that is left, assuming the truth of Martinez's allegations, is a work environment hostile to breast pumping, not a work environment that subjected women to treatment less favorable than was meted out to men."<sup>39</sup> Citing the much-maligned *Gilbert* case, the court therefore concluded that there could be no finding of sex discrimination.<sup>40</sup>

As Camille Hébert has pointed out, the doctrinal reasoning used in the lactation cases that rely upon *Gilbert* is seriously flawed.<sup>41</sup> It is ludicrous to suggest, for example, that discrimination based on a trait unique to women does not constitute sex discrimination: "[I]f an employer refused to hire persons with penises, it would be difficult for the employer to defend its action on the ground that it could not have discriminated against men because generally only men and not women have penises."<sup>42</sup> Similarly, while many courts simply state with virtually no explanation that lactation is not a medical condition related to pregnancy,<sup>43</sup> such formalistic interpretations ignore the underlying goal of the PDA (and Title VII)—to provide women equal employment opportunity. It makes just as much sense (and is fairer and more consistent with Title VII's underlying purposes) to conclude as the court did in *EEOC v. Houston Funding II, Ltd.*,<sup>44</sup> that since lactation is a physiological result of pregnancy and childbirth, it should be considered to be covered by the PDA. Moreover, the inclusive language of the statute ("The terms 'because of sex' or 'on the basis of sex' include, *but are not limited to*, because of or on the basis of pregnancy, childbirth, or related medical conditions . . . "<sup>45</sup>) strongly suggests that Congress intended a generous interpretation of the provision's scope.

Given the incredibly strained judicial interpretations of formal equality principles present in the Title VII/PDA cases, the ACA's move to a

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38. *Id.* at 309.

39. *Id.* at 311.

40. *Id.* at 310-11. *See also* Barrash v. Bowen, 846 F.2d 927, 932 (4th Cir. 1988) ("Any limitation upon the liberality with which leave without pay had been granted in earlier years would have an adverse impact upon young mothers wishing to nurse their babies for six months, but that is not the kind of disparate impact that would invalidate the [narrowing of the leave] rule, for it shows no less favorable treatment of women than of men.").

41. Hébert, *supra* note 30, at 144-45.

42. *Id.*

43. *See, e.g.*, Wallace v. Pyro Mining Co., 789 F. Supp. 867, 869 (W.D.Ky. 1990).

44. 717 F.3d 425, 428 (5th Cir. 2013).

45. Pregnancy Discrimination Act, 42 U.S.C.A. § 2000e(k) (1978) (emphasis added).

substantive equality model, imposing affirmative duties on employers to accommodate the needs of breastfeeding women, is clearly a salutary one for women who wish to combine work and breastfeeding.<sup>46</sup> By defining women's rights in terms of equality of results rather than equality of opportunity, the ACA implicitly acknowledges that requiring only that women be treated the same as men makes men's needs the standard for fair treatment. Moreover, by specifically recognizing women's difference as *entitling* them to certain treatment, the new law limits the courts' ability to use formalistic doctrinal analysis to conclude that such difference *precludes* a finding of discrimination.

But an accommodation approach is not a panacea, as experience has shown. First, to the extent that accommodation requirements and other substantive equality rules are premised (implicitly, if not explicitly) on the notion that women are different from men (thus deserving different treatment), in a liberal society dedicated to formal equality understandings of discrimination they can generate resentment from both co-workers and employers.<sup>47</sup> Existing as they do in a formal equality society in which legal doctrine (as well as much popular opinion) sees formally equal treatment as the paradigm of fairness, substantive equality provisions have the potential to be perceived as illegitimate "special treatment" or "reverse discrimination."<sup>48</sup> In addition, as Rachel Arnow-Richman has noted, formal equality ways of thinking have a tendency to bleed into accommodation regimes, diluting their effect.<sup>49</sup> Thus, there is a significant risk that the rights created by the ACA will not be interpreted expansively, by either employers or the courts. Lastly, an accommodation approach elides the need for more fundamental change, suggesting that piecemeal accommodation of particular needs is sufficient to provide real equality to women workers. As Colleen Sheppard has noted, "Designing workplace objectives around an ideal worker who has a man's body and men's traditional immunity from family caregiving discriminates against women. Eliminating that

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46. The formal equality model requires only that women be treated the same as men, whereas a substantive equality approach seeks not to assure that women are subjected to exactly the same treatment as men but rather that they are treated as is required to produce the result of equal access to the workplace. However, neither of these two approaches *guarantees* good results, for each is subject to interpretation. See generally, CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 110–16 (1979) (discussing the indeterminacy of these two approaches to defining discrimination).

47. See Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1151–54 (1986).

48. In her still-relevant critique of antidiscrimination law, Catharine MacKinnon discusses this objection and shows why "reverse discrimination" labeling is an inevitable result of the prevailing "differences"-based notion of equality. MACKINNON, *supra* note 46 at 118–19.

49. Rachel Arnow-Richman, *Accommodation Subverted: The Future of Work/Family Initiatives in a "Me, Inc." World*, 12 TEX. J. WOMEN & L. 345, 362 (2003).

ideal is not ‘accommodation’; it is the minimum requirement for gender equality.”<sup>50</sup>

In addition to the shortcomings just identified, and even though the ACA represents a positive change from the formal equality regime, negative cultural understandings of breastfeeding are likely to preclude the sort of expansive interpretation of the statute that would be necessary (along with literal expansion of statutory rights) to provide meaningful access to breastfeeding by all women who work. In fact, the nearly comical arguments that courts have marshaled to defend their interpretations of Title VII, combined with the harmful concrete impact that those rulings have had on women, strongly suggest that a powerful cultural component may have influenced the reasoning and outcomes of many of the Title VII/PDA cases.<sup>51</sup> And there is no reason to think that the influence of cultural attitudes about breastfeeding will be eliminated (or even lessened, necessarily) under an accommodation regime.

## II. THE ACA AND ATTITUDES TOWARDS BREASTFEEDING

*To the degree that the realization of rights is always dependent on a supporting culture, the continuing possibility of breastfeeding rights cannot be disentangled from what they mean in the day to day consciousness of various actors who affect decisions of whether or not to breastfeed.*

– Karen M. Kedrowski & Michael E. Lipscomb<sup>52</sup>

The scope and substance of the rights created by the new federal law will affect a variety of different actors. The law will affect women’s decisions about whether to try to combine work and breastfeeding, employers’ decisions about what accommodations to afford to their workers, judges’ decisions about women’s and employers’ rights and responsibilities in this area, and women’s decisions about whether to try to combine work and breastfeeding. Because the ACA gives wide discretion to employers to decide the parameters of the federal mandate, cultural attitudes are likely to play a significant role in their accommodation decisions—and in judges’

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50. COLLEEN SHEPPARD, INCLUSIVE LAW: THE RELATIONAL DIMENSIONS OF SYSTEMIC DISCRIMINATION IN CANADA 26 (2010). Similarly, accommodating breastfeeding by giving nursing women a pass on jury duty, as ten states do, KEDROWSKI & LIPSCOMB, *supra* note 12, at 97, is a much less transformative approach to that issue than accommodating all adults primarily responsible for young children (as six states do, *id.*) or restructuring courthouses and trial schedules so as to allow nursing mothers to serve on juries (not to mention allowing nursing lawyers to participate in trials). *Cf id.*, at 113 (endorsing Hawaii’s approach, which defines nursing as a civil right and prohibits employers from forbidding employees from doing it).

51. *See, e.g.*, cases discussed in text at notes 32–40 and 61–63.

52. KEDROWSKI & LIPSCOMB, *supra* note 12, at 115.

assessment of those decisions.<sup>53</sup> And employees' awareness of the wide employer discretion in this area will in turn affect their decisions about whether to try to combine breastfeeding and work.<sup>54</sup> Hence, there is plenty of room under the statute for cultural attitudes about breastfeeding to have an impact. Section A of this Part describes the prevailing cultural attitudes towards breastfeeding that could influence decision makers in this area. Section B looks closely at the new statute to identify gaps and ambiguities in its provisions where cultural attitudes could easily play a role in the law's interpretation. Along with economic realities, those attitudes are especially likely to impact the ability of working class and low-income women to combine work and breastfeeding.

### A. Cultural Attitudes Towards Breastfeeding

A variety of cultural understandings combine to construct breastfeeding as incompatible with work. Those understandings could very well have contributed to the prevailing legal view that breastfeeding discrimination is not sex discrimination—and are likely to affect rulings under the new ACA as well. A systematic (but unscientific) canvass of the psychological literature on attitudes towards breastfeeding reveals three cultural attitudes that are particularly relevant to the discussion here: (1) distrust; (2) aversion; and (3) sexualization. All of these attitudes, I argue, make breastfeeding seem incompatible with work.

Breastfeeding women are likely to be *distrusted* at work—in that they're seen as less competent and less committed than other employees.<sup>55</sup> They're likely to be treated with *aversion* in the sense that breastfeeding is commonly seen as gross and unseemly—and therefore as something that should only be done in private.<sup>56</sup> Breastfeeding is also highly *sexualized*, so that North Americans apparently have a very hard time separating the society's hypersexualization of the female breast from the bodily function of lactation.<sup>57</sup> For all these reasons, breastfeeding attitudes make the practice seem incompatible with work.

#### 1. Distrust

A key prevailing assumption about women who breastfeed or pump at work—and about pregnant women in general—is that they are undedi-

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53. To the extent that texts are never determinate, culture, of course, infuses all statutory interpretation. But the generality of the ACA's accommodation mandate makes the likelihood of cultural influence on its application a particularly important consideration.

54. For example, awareness of certain cultural conceptions of breastfeeding might affect women's comfort levels in asking for accommodation.

55. See *infra* Part II(A)(1).

56. See *infra* Part II(A)(2).

57. See *infra* Part II(A)(3).

cated, incompetent, and inappropriate workers.<sup>58</sup> One survey of the literature on attitudes towards pregnant (not breastfeeding) workers found that they are seen as “more emotional, irrational and less committed to their jobs than [their] non-pregnant counterparts.”<sup>59</sup> Similar conclusions have been reached about attitudes towards breastfeeding women.<sup>60</sup> The following statement by the court in *Barrash v. Bowen* is evidence of such a disparaging attitude: “[T]he measure of any duty of reasonable accommodation,” the court declaims, “is not the same as the measure of the mother’s right to care for her child as she pleases.”<sup>61</sup> This statement evinces the court’s belief that the plaintiff is inappropriately—and selfishly—putting the interests of her child ahead of those of her employer. Such distrustful attitudes towards pregnant and lactating women (similar to those applied to women who menstruate, by the way<sup>62</sup>) construct motherhood in general and nursing in particular as incompatible with being a good worker.<sup>63</sup>

## 2. Aversion

Psychological studies about views on lactation have also found that, “[P]eople perceive breastfeeding as largely negative, sexual, something that animals do, and worthy of disgust.”<sup>64</sup> At a minimum, many people see it as unseemly, distasteful—something you do in the privacy of your own home.<sup>65</sup> Perhaps the reader will remember the episode of the television

58. Perhaps this stereotype is not surprising, given that mothers in general are distrusted at work. See generally JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 70 (2000) [hereinafter WILLIAMS, UNBENDING GENDER] (noting that “women find that if they perform as ideal workers, they are condemned as bad mothers; [but] if they observe the norm of parental care, they are condemned as bad workers. Mothers can’t win.”).

59. Helen M. Pattison, *Pregnancy and employment: the perceptions and beliefs of fellow workers*,” 15 J. REPRO. & INFANT PSYCH. 303, 303 (1997).

60. See Susan E. Huhta, Elizabeth S. Westfall, & Joan C. Williams, *Looking Forward and Back: Using the Pregnancy Discrimination Act and Discriminatory Gender/Pregnancy Stereotyping to Challenge Discrimination Against New Mothers*, 7 EMP. RTS. & EMP. POL’Y J. 303, 316–21 (2003).

61. *Barrash v. Bowen*, 846 F.2d 927, 932 (4th Cir. 1988). For further discussion of this quote, see *infra*, text accompanying note 219.

62. See Tomi-Ann Roberts, Jamie L. Goldenberg, Cathleen Power, & Tom Pyszcznski, “Feminine Protection”: *The Effects of Menstruation on Attitudes Towards Women*, 26 PSYCH. OF WOMEN QTRLY 131 (2002) (discussing negative social attitudes associated with menstruation and menstruating women.).

63. Of course, to the extent that these stereotypes are applied to menstruation as well, they construct *femaleness*—or at least being a fertile female—as incompatible with work. Thus, not only being a mother but being a *potential* mother triggers distrust.

64. Michele Acker, *Breast is Best. . . But Not Everywhere: Ambivalent Sexism and Attitudes Toward Private and Public Breastfeeding*, 61 SEX ROLES 476, 479 (2009).

65. These attitudes are shared by women as well as men. “[W]omen were more likely than men to respond that they would be ‘offended’ or ‘highly offended’ if they saw a woman’s breast and nipple exposed while breastfeeding, or her abdomen was showing, or they saw a

sitcom, *Friends*, where Ross is revolted at the very thought of drinking breast milk. Or maybe some readers heard about the flap over “Baby Gaga” ice cream, made with breast milk<sup>66</sup>—and sold without the pop star’s permission. The Lady (usually so decorum-resisting) was apparently revolted,<sup>67</sup> and threatened to sue.<sup>68</sup>

In addition to this recurring aversion to breast milk, however, most people also know that it is good for babies.<sup>69</sup> Thus, as one researcher summarized, the public’s view is that: “The ideal mother breastfeeds, but not if we have to see it.”<sup>70</sup> Note, however, that the average infant needs to feed every two to three hours.<sup>71</sup> So, if breastfeeding (or pumping) should only be done in private, then a breastfeeding worker is a complete oxymoron.<sup>72</sup> This prevailing attitude of aversion towards lactation by definition constructs breastfeeding as incompatible with work. It also likely makes many employers and employees loathe to discuss the practice. And, whereas judges and employers might not be likely to openly express aversion, this commonly held attitude might nevertheless unconsciously impact their decisions.

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woman breastfeeding a toddler.” KEDROWSKI & LIPSCOMB, *supra* note 12, at 45. *See also id.*, at 37 (“One survey found that one-quarter of mothers who decided to bottle feed did so because breastfeeding is ‘embarrassing.’”).

66. Bill Chappell, *Breast Milk Ice Cream Back on Sale; Lady Gaga May Sue*, NPR INTERNATIONAL NEWS (March 9, 2011, 11:40AM), <http://www.npr.org/blogs/thetwo-way/2011/03/09/134389930/breast-milk-ice-cream-back-on-sale-lady-gaga-may-sue> (“Lady Gaga had her attorneys fire off a letter to tell the shop to cease and desist from using the Baby Gaga name. The letter calls the ice cream made from breast milk ‘deliberately provocative and, to many people, nausea-inducing,’ and accuses the store of unfairly cashing in on [Gaga’s] name and image.”).

67. *Id.*

68. *Id.*

69. *See* Rebecca D. Williams, *Breast-Feeding Best Bet for Babies*, FDA CONSUMER MAGAZINE, Oct. 1995, [http://www.bpni.org/Article/Breast-Feeding\\_Best\\_Bet\\_for\\_Babies.pdf](http://www.bpni.org/Article/Breast-Feeding_Best_Bet_for_Babies.pdf). *But see* JOAN B. WOLF, IS BREAST BEST?: TAKING ON THE BREASTFEEDING EXPERTS AND THE NEW HIGH STAKES OF MOTHERHOOD 21-45 (2010). Wolf argues that women with a safe water source can safely feed formula, and that the pressure to breastfeed “say[s] more about infatuation with personal responsibility and perfect mothering in America than about the concrete benefits of the breast.” Description of *id.*, available at <http://www.amazon.com/Breast-Best-Breastfeeding-Motherhood-Biopolitics/dp/0814794815>. It is beyond the scope of this Article to take sides in this debate about the merits of breastfeeding. This Article proceeds on the assumption that each woman is capable of making the appropriate decision for her family and that breastfeeding should be accessible to any working woman who prefers to breastfeed her child.

70. Acker, *supra* note 64, at 488.

71. *Id.* at 477.

72. Unless, of course, the workplace is transformed into a site that readily and routinely accommodates breastfeeding employees. *But see supra*, note 50 and accompanying text, for discussion of the inherent limitations to accommodation as a means of producing a truly inclusive working environment.

## 3. Sexualization

Popular revulsion towards breastfeeding might be related to the hypersexualization of the breast in mainstream U.S. culture. The breast is so sexualized here that it's quite difficult for people to see breastfeeding as primarily reproductive rather than sexual. The intrepid reader can search Craigslist and find dozens of individuals seeking breastfeeding women for sexual encounters.<sup>73</sup> Breastfeeding pornography is also very popular.<sup>74</sup> Moving to more public reactions, on Google one can find countless newspaper and television items about women being harassed for breastfeeding in public, with the harassers justifying their behavior by using words like "indecent" and "flaunting" and the like.<sup>75</sup> My own personal favorite example is the case of the woman harassed by employees in a Target store in Houston<sup>76</sup> for breastfeeding in a store aisle, as opposed to in the dressing room. The Target store's policy allows breastfeeding only if it is "discreet" (even though the applicable state law giving women the right to breastfeed in public doesn't require "discreetness").<sup>77</sup> The woman reported that, when she called the Target corporate headquarters to complain, she "was told by guest relations [that] 'just because it's a woman's legal right to nurse a baby in public doesn't mean she should walk around the store flaunting it.'"<sup>78</sup>

In short, the hypersexualization of the breast in U.S. culture makes breastfeeding a fraught and disturbing practice to many people. Witness, for example, the hoopla over the recent *Time Magazine* cover story about

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73. See generally, Alison Bartlett, *Maternal Sexuality and Breastfeeding*, 5 SEX EDUCATION 67, 75-6 (2005) (discussing lactation pornography).

74. *Id.* (arguing that emergence of lactation pornography has relegated maternal sexuality to realm of the immoral). As Bartlett's piece implicitly suggests, it is not male sexual interest in lactation *per se* that is problematic, but rather the pornographic (as opposed to erotic) nature and tone of that sexualization in its current form. Cf. INA MAY GASKIN, *SPIRITUAL MIDWIFERY* (2003) (containing many non-pornographic descriptions of couples' use of erotic sexuality as a mechanism for facilitating labor and birth).

75. See, e.g., Bettina Forbes, CLC, *Target Employees Bully Breastfeeding Mom Despite Corporate Policy*, BEST FOR BABES FOUNDATION, <https://www.bestforbabes.org/target-employees-bully-breastfeeding-mom-despite-corporate-policy>.

76. Michelle Hickman, *Mom Organizing Target International Nurse-In to Take Place December 28th*, HUFFINGTON POST, (Dec 19, 2011), [http://www.huffingtonpost.com/2011/12/19/target-nurse-in\\_n\\_1158595.html](http://www.huffingtonpost.com/2011/12/19/target-nurse-in_n_1158595.html).

77. Tex. Health Code Ann. § 165.002 (1995) (allowing woman to breastfeed her child in any location where she is authorized to be). In fact, "discreetness" is apparently a necessary ingredient for many politicians considering statutes that create a right to breastfeed in public. See KEDROWSKI & LIPSCOMB, *supra* note 12, at 99 (describing frequent battles over whether such statutes should require that public breastfeeding should be done "discreetly").

78. Bonnie Rochman, FAMILY MATTERS, *The Nurse-In: Why Breast-Feeding Mothers are Mad at Target*, TIME MAGAZINE (Dec. 27, 2011), <http://healthland.time.com/2011/12/27/the-nurse-in-why-breast-feeding-moms-are-mad-at-target/>.

women who nurse their children to age three or four.<sup>79</sup> Of course, the cover photo itself—presenting the mother in a sexy outfit and the boy in commando-style garb (complete with black boots) and a demanding pose—has been (appropriately) criticized for sexualizing (in a pornographic way) the interaction between the mother and son pictured.<sup>80</sup> More to my point, comments on the *Time* blog following the piece repeatedly excoriated women who breastfeed past infancy as (sexually) indulging themselves—and even accused them of engaging in incest.<sup>81</sup> One of the most noteworthy quotes from the blogosphere about women breastfeeding in public is this one: “[If] [y]ou want to pull your breasts out in a supermarket[,] I’m going [to go] all strip club on you. Might even pull out some dirty singles and toss them at you. Supermarkets are for shopping, strip clubs are for breasts popping out in public.”<sup>82</sup> This quote vividly illustrates the equation of women’s bodies with their sexuality, and of sexuality with women’s subordination. Public nudity (even for nursing) appropriately elicits harassment, and degrading male consumption is the only legitimate public use of breasts.

In light of these attitudes, it is interesting to note that as many as 36% of women who forego breastfeeding do so because of lack of support from the child’s father.<sup>83</sup> It would be elucidating to know how often that lack of support relates to a father’s concern with public displays of his partner’s breasts. For example, Kedrowski and Lipscomb describe an incident in which a man assaulted another man on a beach for “ogling” his breastfeeding wife.<sup>84</sup> One study found that 71% of men whose children are breastfed, and 78% of those whose infants feed from bottles, believe that public nursing is not acceptable.<sup>85</sup> In other words, the vast majority of fathers hold attitudes that make it extremely difficult for women to combine breastfeeding and work (not to mention breastfeeding and shopping,

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79. Kate Pickert, *The Man Who Remade Motherhood*, 179 TIME MAGAZINE 32 (May 21, 2012), available at <http://content.time.com/time/magazine/article/0,9171,2114427,00.html>.

80. *Id.* at comments after article. (The comments to this article are no longer available online, but the author affirms that the statements in the text about those comments are true and correct based upon her reading of them at the time when they were available.) Ironically, however, even breastfeeding advocates have been guilty of conflating breastfeeding with adult sexual interactions. Consider this excerpt from *Mothering* magazine: “I’m in love with the little guy, head over heels, what can I do. He can get my bra off faster than anyone I ever met, no hands at all, just a hungry look.” KEDROWSKI & LIPSCOMB, *supra* note 12, at 24 (citing Rebecca Kukla, *Ethics and Ideology in Breastfeeding Advocacy Campaigns*, 21 HYPATIA 157 (2006)).

81. See Pickert, *supra* note 79, at comments after article. (Although the comments to this article are no longer available online, the author affirms that they contained several statements equating breastfeeding with self-indulgence and/or incest.)

82. *Id.* (Although the comments to this article are no longer available online, the author affirms that she copied the quote in the text directly from those comments into the article.)

83. KEDROWSKI & LIPSCOMB, *supra* note 12, at 36.

84. *Id.* at 35.

85. *Id.* at 37.

going out to dinner, or any other public activity). Lest men be unfairly blamed for low breastfeeding rates, however, it is important to note that men are *more* likely to support breastfeeding in public than women.<sup>86</sup>

The idea that breastfeeding is a self-indulgent maternal practice that inappropriately sexualizes her children—and herself, when done in public—has generated intrusive governmental interventions into women’s families. Children have been taken from their mothers for breastfeeding beyond whatever age a social worker deemed appropriate.<sup>87</sup> In one case, “authorities connected the mother’s nursing of a two-year-old child with her supposedly excessive sexual encounters with men (all previous to her daughter’s birth . . . ).”<sup>88</sup> Both were seen as signs of oversexualization. Thus, the sexualization of the breast can lead inexorably—and dangerously—to the regulation of people with breasts—especially those who are mothers.

Turning to the workplace, to the extent that cultural attitudes define breastfeeding as a sexual activity that should not be done in public, they necessarily construct it as incompatible with work. When shared (perhaps unconsciously) by employers, such attitudes could lead to stingy accommodation policies that make it hard for workers to combine employment with breastfeeding. To the extent that they have such an impact, these attitudes will continue a long history of the sexualization of women’s bodies operating to justify exclusion of them from the workplace (and the public sphere in general)<sup>89</sup>—and harassment of them when they’re there.<sup>90</sup>

These cultural attitudes are also likely to influence judicial decisions about breastfeeding under the new accommodation mandate, just as they likely did under the previous regime. While judges may be more circumspect about openly expressing sexualized views than employers are, the hostile and punitive tone of many judicial opinions in this area<sup>91</sup> raises the question of whether the cultural sexualization of lactation might sometimes unconsciously influence them as well.

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86. *Id.* at 38 (citing Li Rouwei et. al., *Public Beliefs and Breastfeeding Politics in Various Settings*, 104 J. AM. DIETETIC ASSN. 1162 (2004)).

87. *See, e.g.*, HAUSMAN, *supra* note 20, at 81 (four-year-old child taken from her mother because she was still nursing).

88. *Id.* at 83.

89. *See, e.g.*, Suzanne E. Tallichet, *Gendered Relations in the Mines and the Division of Labor Underground*, 9 GENDER & SOCIETY 697, 698-99 (1995).

90. *See, e.g.*, *Robinson v. Jacksonville Shipyards, Inc.*, 760 F.Supp. 1486, 1494 (Fla. Dist. Ct. 1991).

91. *See generally*, Hébert, *supra* note 30, and cases discussed therein (describing cases in detail).

## 4. Negative Impact on Low-Income Women

All three of these cultural attitudes—distrust, aversion, and sexualization—are likely to have yet more significant impacts on the treatment of and decisions by low-income women who want to breastfeed and work. For example, to the extent that breastfeeding is associated with under-commitment or incompetence at work, that cultural attitude makes low-income women (and perhaps especially African-American women) who breastfeed particularly vulnerable to being treated with distrust. Laziness and poor work habits are already central to the stereotyping of such women,<sup>92</sup> so breastfeeding will only exacerbate that effect. In addition, to the extent that African-American women are frequently depicted in the U.S. cultural imagination as animal-like, physically unappealing, and over-sexed,<sup>93</sup> the attitudes of aversion and sexualization are likely to be exaggerated when directed at such women as well.

Finally, the sexualization of the breast also likely makes breastfeeding at work especially dangerous and unappealing for African-American women. As Bernice Hausman puts it, “[B]lack women’s complex relation to sexuality and embodied experience, mediated by hundreds of years of negative stereotyping that connects black women’s bodies to exoticism, animality, and service, works against their taking up a practice like breastfeeding.”<sup>94</sup> The bodies of such women have been treated as sexually available to men (especially white men) ever since slavery.<sup>95</sup> And even today, such women have to deal with racial bias in rape law,<sup>96</sup> racialized

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92. See Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L. J. 274, 283-86 (single, poor women are seen as lazy people and as irresponsible, even dangerous, mothers); Ivy Kennelly, “*That Single-Mother Element*”: *How White Employers Typify Black Women*, 13 GENDER & SOC’Y 168, 179-85 (1999) (stating that white employers tend to associate Black women with single-motherhood, and to assume that they lack good work ethics). Truly revealing (and disturbing) is Kennelly’s finding that, even when white employers viewed their Black female employees as hard workers (noting, for example, that they were desperate for money), those employers still did not necessarily see such women as *good* workers. As one employer put it, “it is more of a need-to-work situation than it is a real true work ethic.” *Id.* at 182.

93. See, e.g., PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, & THE POLITICS OF EMPOWERMENT* (1999); JOANE NAGEL, *RACE, ETHNICITY, & SEXUALITY: INTIMATE INTERSECTIONS, FORBIDDEN FRONTIERS* (2003); Patricia J. Williams, *My Best White Friend*, THE NEW YORKER, March 4, 1996, at 94, 97.

94. HAUSMAN, *supra* note 20, at 44.

95. ROBERTS, *supra* note 18, AT 10-12 (1997).

96. Historically, there were no legal consequences for sexually assaulting enslaved African-American women, and the view of such women as unrapeable persists to this day. Roxanne Donovan & Michelle Williams, *Living at the Intersection: The Effects of Racism and Sexism on Black Rape Survivors*, 25 WOMEN & THERAPY 95, 96-7 (2002) (reporting studies finding that college students considering hypothetical scenarios are less likely to find that rape occurred or to hold the perpetrator accountable when the victim is a Black woman). In making this point, I do not mean to deny, of course, that racial bias against *men* of color also affects rape prosecutions today. See Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 587-88 (2009) (discussing racial bias against men of color in rape prosecutions).

harassment in the workplace,<sup>97</sup> and the exoticizing gaze.<sup>98</sup> Thus, the sexualization of the breast may have a particularly pernicious impact on the experiences of African-American women who breastfeed, as well as on their decisions about whether to do so while working.<sup>99</sup>

In summary, all three of the prevailing cultural attitudes about breastfeeding—distrust, aversion, and sexualization—construct the practice as incompatible with working. Accordingly, breastfeeding or pumping breast milk at work are likely to elicit negative and even hostile reactions from employers, co-workers, and/or judges who, consciously or unconsciously, see such behavior as inappropriate. Yet, as the next section recounts, the accommodation rights accorded women by the ACA are somewhat limited, only generally defined, left to the discretion of the employer, and quite weakly enforced. Given the cultural attitudes described above, and in light of those limitations in the statute, it is unlikely that the rights the statute creates will receive the broad and flexible interpretations necessary to assure that the women the law supposedly benefits can successfully combine nursing and work.

#### B. *Practical Realities: the Limited Potential of the ACA's Accommodation Mandate*

The statutory framing of the rights created by the new federal law will affect employers' decisions about what accommodations to afford to their workers, judges' future decisions about the scope and substance of those rights, and women's decisions about whether to try to combine

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97. On the combined effects of racial and sexual harassment on African-American women workers, see NiCole T. Buchanan & Louise F. Fitzgerald, *Effects of Racial and Sexual Harassment on Work and the Psychological Well-Being of African American Women*, 13 J. OF OCCUPATIONAL HEALTH PSYCH. 137 (2008).

98. See generally COLLINS, *supra* note 93, at 72-84 (describing stereotypes of Black women). See also ANNE MCCLINTOCK, *IMPERIAL LEATHER: RACE, GENDER AND SEXUALITY IN THE COLONIAL CONTEXT* (1995).

99. "Current stereotypes link breastfeeding to an exhibitionistic female sexuality, and historic stereotypes portray black women as excessively lascivious; put together, these cultural discourses make it difficult for black women to breastfeed even today, should they want to, without risking public censure. Formula feeding emerges as a way to make the culturally perceived sexual status of the black female body a non-issue in black mothering." HAUSMAN, *supra* note 20, at 45 (citations omitted). Thus, as Hausman's comment suggests, the sexualization of the breast can make breastfeeding a complicated issue for African-American women (and perhaps also for other women of color, as well as low-income white women). If such women (and/or their family and friends) think it is either dangerous or inappropriate to breastfeed in public, then breastfeeding becomes an especially burdensome undertaking—not only at work, but also in other arenas of life. Significantly limiting the woman's physical liberty (requiring her to seek a private room when she is, say, out to dinner, or at a party, or in a movie theatre), it thereby severely constricts not only her work options, but her social life as well.

work and breastfeeding.<sup>100</sup> Cultural attitudes are likely to play a significant role in all three of those types of decisions.

Subsection 1 shows that the new regime gives immense discretion to employers to decide what accommodations to provide. That broad discretion invites the influence of cultural factors in such decisions. Subsection 2 discusses how the ACA's weak enforcement mechanism makes it easy for employers to violate statutory strictures or interpret them extremely narrowly, if prompted to do so by negative cultural attitudes towards lactating employees. Each of those two sections also identifies some of the ways in which particular attitudes towards breastfeeding might enter into the interpretation of particular provisions of the law. Subsection 3 notes the disparate impact that both cultural influences and economic realities are likely to have on decisions made by lactating employees (especially low-income women and African-American women) under the new regime. The combined message of these subsections is: It is highly likely that the accommodation approach will have only a limited impact on the ability of low-income workers to combine breastfeeding and work.

Before turning to those discussions, however, a few general comments about the Reasonable Break Time for Nursing Mothers provision are in order.<sup>101</sup> Because it amends the Fair Labor Standards Act (FLSA), the statute falls under the jurisdiction of the Department of Labor. The Department has not issued regulations under the law, but its Wage and Hours Division (WHD) has provided a "fact sheet" and "frequently asked questions" with details about how the division interprets the amendment.<sup>102</sup> The break time provision exempts workplaces under fifty employees if compliance would impose an undue hardship "by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business."<sup>103</sup> Since it amends Section 207 of the FLSA, the provision does not apply to employees who are exempt from overtime requirements under Section 213 of that statute.<sup>104</sup> Thus, the new right to accommodation will principally affect hourly employees, not salaried workers.<sup>105</sup> However, to the extent that the law legitimates the idea that employers should support

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100. For example, awareness of certain cultural conceptions of breastfeeding might affect women's comfort level in asking for accommodation.

101. For a useful overview of the accommodations required under the law, see Andrews, *supra* note 1, at 128-30.

102. U.S. Wage and Hour Div., Fact Sheet #73: "Break Time for Nursing Mothers under the FLSA," U.S. Dept of Lab., available at <http://www.dol.gov/whd/regs/compliance/whd673.pdf>.

103. 29 U.S.C.A. § 207(r)(3) (West, Westlaw through 2010).

104. 29 U.S.C. § 213(b).

105. Of course, since salaried workers do not have to account for every moment of their working day, they already have significantly more flexibility as to break time than do hourly workers. Throughout this Article, the likely impact of the Reasonable Break Time for Nursing Mothers law on the latter will be contrasted with predictions about whether salaried workers

women who express milk at work, it could affect the conditions faced by higher-paid workers as well. In fact, this Article will ultimately predict that, going forward, salaried, especially professional, women are likely to have a much easier time combining work and lactation than will lower-income, hourly workers—even though the latter are the ones covered by the new accommodation mandate.

### 1. Broad Employer Discretion

The relevant provision of the ACA contains two main components: the break time requirement, which mandates that employers allow break time for employees expressing breast milk whenever needed, and the space requirement, which requires employers to provide a private space, other than a toilet stall, for expressing milk.<sup>106</sup> Both of these requirements are governed by a reasonableness standard.<sup>107</sup>

While a reasonableness standard arguably provides the flexibility needed to deal with the infinite number of contingencies that might arise when it comes to pumping milk in the workplace, that broad standard has a significant downside as well, leaving many details up to the discretion of individual employers.<sup>108</sup> Especially given that the government has issued no formal regulations under the statute, common attitudes about breastfeeding will likely have a significant impact on employer-created policies (whether official or unofficial) and, later, perhaps on judicial decisions about the validity of those policies as well.

#### a. *The Break Time Requirement*

The ACA requires employers to provide non-exempt employees with “reasonable break time . . . to express breast milk for [a] nursing child for up to 1 year after the child’s birth each time such employee has need to express the milk.”<sup>109</sup> Under the law, employers are not required to compensate employees for break time, but those employers that do provide paid break time to their employees must allow nursing mothers to use the

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with more status and bargaining power (especially professional workers) will be able to more successfully breastfeed while working, even though they have no rights under the federal statute.

106. 29 U.S.C. § 207(r)(1) (2010).

107. 29 U.S.C. § 207(r)(1)-(2) (2010).

108. Because “[t]he frequency of breaks needed to express breast milk varies depending on factors such as the age of the baby, the number of breast feedings in the baby’s normal schedule, whether the baby is eating solid food, and other factors,” and because “the length of time necessary to express milk also varies from woman to woman,” the Department of Labor concluded that a reasonableness standard was more appropriate than a bright-line rule. Reasonable Break Time for Nursing Mothers: Request for Information from the Public, 75 Fed. Reg. at 244(II)(b) (Dec. 21, 2010).

109. 29 U.S.C. § 207(r)(1)(A) (2010).

time to express milk, if so desired.<sup>110</sup> As is discussed further below,<sup>111</sup> both the nature of the break provided and the fact that it is uncompensated limit its likely utility.

The law leaves it to employers to determine both the frequency and length of breaks provided for milk expression.<sup>112</sup> Thus, it is ultimately up to the employer to determine how many times the employee “has need to express the milk.”<sup>113</sup> While the Department of Labor has acknowledged that “nursing mothers typically will need breaks to express milk two to three times during an eight hour shift,”<sup>114</sup> it does not explicitly prohibit limiting breaks to one per day. Similarly, although the Department has stated that “[t]he act of expressing breast milk alone typically takes about 15 to 20 minutes,”<sup>115</sup> and that “there are many other factors” that could enter into the time needed as well,<sup>116</sup> it has not set forth any sort of mandatory minimum duration for the breaks.<sup>117</sup>

Thus, based on the provisions set forth above, it appears that employers who offer as few as two fifteen minute breaks per eight-hour shift could see themselves (and be seen by judges) as complying with the new law. Yet that amount of time may not sufficiently address the needs of working mothers, particularly women whose bodily processes don’t fit neatly within the proffered “norm.”

Moreover, the very fact that such detailed factors as those listed above<sup>118</sup> exist illustrates the truly unique and variable nature of women’s experiences with breast pumping—and breastfeeding, for that matter. That variability is of course precisely what led the Department to resort to a reasonableness standard in the first place.<sup>119</sup> Yet it simultaneously makes that standard problematic. The Department’s tendency to first state a minimum, and then mention factors that could require exceeding that minimum, suggests that employers operating under the new regime are

110. 29 U.S.C. § 207(R) (2010).

111. See *infra* notes 127-129 and accompanying text.

112. The Department of Labor advises employers making determinations of reasonableness to consider “both the frequency and number of breaks a nursing mother might need and the length of time she will need to express milk.” Reasonable Break Time for Nursing Mothers: Request for Information from the Public, 75 Fed. Reg. at 244(II)(b) (Dec. 21, 2010).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* Factors cited by the Department include: the time it takes to walk to the lactation space; whether the employee has to retrieve a breast pump from another location; whether the employee needs to unpack and set up her own pump or whether a pump is provided for her; the efficiency of the pump used; whether there is a sink or running water nearby for the employee to wash her hands before pumping and to clean the pump attachments when she is finished; and the time it takes for the employee to store her milk. *Id.*

117. *Id.*

118. See *supra* notes 112-116 and accompanying text.

119. See *supra* note 108.

expected to make individualized assessments based on the needs of their individual employees. Within the range of reasonableness, they are expected to provide the type of break that each woman needs.<sup>120</sup> Thus, the reasonable person standard requires employers to balance a wide range of factors, some involving quite personal and intimate details about bodily functions, in order to determine the appropriate amount of break time to be granted. It is simply unrealistic to expect, especially given the complex and fraught image of breastfeeding in this culture, that such discretion will be exercised in an equitable and evenhanded way. (Consider your own discomfort, reader, as you imagine discussing with your employer or employee the details provided in the footnotes and text presented here.)

Breast pumps, for example, vary greatly, and those variations can affect the time needed for pumping.<sup>121</sup> Similarly, physiological factors can also affect how frequently or quickly women can pump.<sup>122</sup> The nature of the space made available (discussed more thoroughly below<sup>123</sup>) will also affect the time needed. The availability of running water and soap, which is not required by the statute,<sup>124</sup> will also be a critical factor in determining reasonableness of time.<sup>125</sup> Likewise, breast milk must be stored in a cool place until consumed.<sup>126</sup> Reasonableness of break time may need to be

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120. If that is not the Department's intention, then the minimums stated in its regulations are seriously deficient, for, as just discussed, they will be inadequate to meet the needs of many breastfeeding workers.

121. Some expensive electronic pumps allow a mother to pump both breasts simultaneously in under ten minutes. With other, less expensive varieties, each breast must be pumped separately. Because both sides would likely need to be pumped during each session, the time required can easily be doubled if a less elaborate electronic model is used. Other pumps, such as hand-powered models, are significantly more affordable but even less efficient, and thus take more time to operate. See, e.g., MEDELA, *Retail Pumps*, <http://www.medelabreastfeedingus.com/products/category/retail-pumps> (last visited Nov. 20, 2014).

122. Some women have a large supply of milk that they are able to release quickly. Others have a smaller supply or a slower let down, which means breast pumping will be more time consuming for them. For some women, electronic stimulation is much less efficient than that of their child nursing. All of these factors, of course, will dictate whether a twenty minute break is sufficient. See LALACHE LEAGUE INTERNATIONAL, *How Do I Choose A Breast Pump?*, <http://www.llli.org/faq/pump.html>; LALACHE LEAGUE INTERNATIONAL *How Often Will I Have to Pump When I Go Back to Work?*, <http://www.llli.org/faq/pumpfreq.html>.

123. See *infra* Part II(B)(1)(b).

124. *Id.*

125. When pumping and storing breast milk, it is important that all parts be clean. Mothers will have to thoroughly clean the pieces of their breast pump (there are many) either immediately before or immediately after expressing in order to reduce the risk of harmful bacteria entering the infant's milk. If a mother has to walk a long distance to access water, this may render a twenty-minute break woefully inadequate. See MEDELA, *Frequently Asked Questions*, at *How Do I Clean or Sanitize My Breastpump Parts?*, <http://www.medelabreastfeedingus.com/faqs#cleaning>—sanitizing (last visited Nov. 20, 2014).

126. The Mayo Clinic, for example, states, "Freshly expressed breast milk can be kept at room temperature for up to six hours. If you won't use the milk that quickly or the room is especially warm, transfer the milk to an insulated cooler, refrigerator or freezer." *How Long Does*

adjusted further if a mother doesn't have quick, easy access to an appropriate storage mechanism.

All of these judgments could, of course, be significantly affected by an employer's attitudes, both conscious and unconscious, towards breastfeeding. An employer who distrusts nursing women (or working mothers in general) might not be receptive to a particular worker's needs, viewing every request for additional time beyond fifteen minutes or additional amenities beyond an empty room as a sign of the employee's self-concern and lack of commitment to the job. An employer affected by aversion might blanch at even discussing matters such as the washing of a breast pump or an infant's difficulty attaching to the breast. Finally, an employer who unduly sexualizes the breast, and perhaps associates the sexualization of women's bodies with low-income women or women of color in particular, might be affected by unconscious disapproval of the lactating employee's presence in the workplace at all.

Another area of employer discretion is worth noting as well. As previously mentioned, while an employer need not pay nursing employees for breaks taken to express milk, one who provides compensated breaks to other employees must allow female employees to use that break time for expressing.<sup>127</sup> However, any additional time that exceeds the paid break need not be compensated.<sup>128</sup> It is up to the employer, of course, to draw that line and keep track of the difference, rather than just allowing the employee to extend her paid break a bit to finish pumping—creating yet another area in which employer discretion could be affected by cultural attitudes.<sup>129</sup>

#### b. *The Space Requirement*

In addition to reasonable break time, the law also requires employers to provide a reasonable space for breast pumping. Employers must provide a place that is shielded from view, free from intrusion, and functional for expressing milk.<sup>130</sup> A bathroom, even if private, is not a permissible location under the Act.<sup>131</sup> Providing a location that is a reasonable distance

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*Breast Milk Keep?* MAYO CLINIC.ORG, <http://www.mayoclinic.com/health/breast-milk-storage/MY00926/NSECTIONGROUP=2>. Ideally, expressed milk will be stored in an insulated ice cooler for up to one day or in the back (not the door) of a refrigerator for up to five to eight days. *Id.*

127. § U.S.C. 207(r)(2) (2010).

128. Reasonable Break Time for Nursing Mothers: Request for Information from the Public, 75 Fed. Reg. at 244(II)(a). The Department provides an example of how this might work: “[I]f an employer provides a 20 minute paid break and a nursing employee uses that time to express milk and takes a total of 25 minutes for this purpose, the five minutes in excess of the paid break time do not have to be compensated.” *Id.*

129. *See id.*

130. 29 U.S.C. § 207(r)(1)(B).

131. Reasonable Break Time for Nursing Mothers: Request for Information from the Public, 75 Fed. Reg. at 244(II)(c). An anteroom or lounge connected to a bathroom, however,

from toilet stalls and any other bathroom areas with heavy concentrations of bacteria will likely—but not surely—satisfy the law.

A permanent space is not required.<sup>132</sup> A space temporarily created or converted for expressing milk, or made available when needed by the nursing mother is sufficient—provided the space is shielded from view and free from any intrusion from co-workers and the public.<sup>133</sup> If the space is not dedicated to the nursing mother's use, it must be available when needed in order to meet the statutory requirement, and the employer must ensure the employee's privacy "through means such as signs . . . or a lock on the door."<sup>134</sup>

In leaving it up to the employer whether to provide anything more than a partitioned space, this interpretation makes it highly likely that some employers will merely provide curtains or dividers, through which breast pumping could easily be heard by other workers. Such spaces might prove embarrassing to lactating women and could also facilitate—or even invite—harassment by co-workers or supervisors.

And the possibility of harassment is unfortunately very real. For example, in *Delima v. Home Depot*,<sup>135</sup> Nancy Delima's male supervisor had arranged for her to take breaks in a training room in order to express milk for her baby.<sup>136</sup> On several occasions, Delima's supervisor used the store's intercom page system to inform other employees to report to the training room while Delima was expressing milk.<sup>137</sup> He also often rattled the door while Delima was in the training room.<sup>138</sup> In addition, along with co-workers, he made comments about "bringing cereal for the pumped milk that [Delima] stored in the manager's refrigerator."<sup>139</sup> One male superior told Delima that he was frustrated by "women and all their issues."<sup>140</sup>

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"may be sufficient" under the law. *Id.* A locker room, too, may be acceptable if there is "sufficient differentiation between the toilet area and the space reserved for expressing breast milk[.]" *Id.*

132. *Id.* If providing a separate room is impracticable, "the requirement can be met by creating a space with partitions or curtains." *Id.*

133. WHD Fact Sheet, *supra* note 104. The Department's preliminary interpretation of the requirement that the space be shielded from view and free from intrusion "is that it requires employers where practicable to make a room (either private or with partitions for use by multiple nursing employees) available for use by employees taking breaks to express milk." Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. at 2411(c).

134. *Id.*

135. 616 F. Supp.2d 1055 (D. Or. 2008).

136. *Id.* at 1070.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

Nothing in the new statute gives employees a right to be protected from this sort of harassment<sup>141</sup> and the statute's minimal privacy requirements make such mistreatment quite possible. Cultural attitudes of aversion and sexualization, in particular, are likely to elicit harassment: Co-workers may express their discomfort with what they consider inappropriate breastfeeding (or pumping) by humiliating the person engaging in it; employers and/or co-workers might even view the nursing mother as deserving of harassment due to a perceived inappropriate expression of sexuality at work. In sum, the combined effect of distrust, aversion, and sexualization will likely be accommodation that provides minimal privacy, increased harassment due to that vulnerability, and employer ambivalence regarding the prevention of that harassment.

While partitioned spaces that invite harassment are allowed under the statute, the new law does require that the location provided for lactating mothers be "functional" as a space for expressing breast milk.<sup>142</sup> In order to be a functional space, "at a minimum, a space must contain a place for the nursing mother to sit, [and] a flat surface, other than the floor, on which to place the pump."<sup>143</sup> However, neither a sink for washing hands and pump attachments nor a place to store the breast milk is required under the law.<sup>144</sup>

Once again, such statutory gaps leave employees at the mercy of their employers. As discussed above, distrust could cause employers to resist giving their employees reasonable breaks, suitable rooms, and much-needed amenities like sinks and cool storage options. Employers may perceive such offerings as being "too expensive" for workers who they believe will contribute very little while breastfeeding (or even while parenting). Moreover, to the extent that certain women's race and class status already cause employers to see them as unreliable workers, this dynamic will only be exacerbated.<sup>145</sup>

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141. Harassment based on lactation is probably not uncommon in U.S. workplaces, and, of course, in some circumstances this sort of harassment could be actionable under Title VII, or relevant state laws. While I was unable to find specific data about the incidence of lactation harassment, pregnancy-related discrimination (which would include lactation discrimination) is on the increase. Orozco, *supra* note 4 at 1290-91, ("It surpasses the percentage increases in both sexual harassment and sex discrimination claims. Over the last ten years, charges of pregnancy discrimination filed with the EEOC and fair employment practices agencies (FEPAs) have increased over 48%."). Indicative of the prevalence of breastfeeding-related harassment and/or mistreatment is the fact that, as of 2010, six states and the District of Columbia had laws explicitly prohibiting discrimination against lactating women. *Id.* at 1297.

142. Reasonable Break Time for Nursing Mothers: Request for Information from the Public, 75 Fed. Reg. 244, 80076 (Dec. 21, (2010).

143. *Id.*

144. *Id.*

145. As the Department has noted, non-office work settings, such as retail stores, restaurants, and construction sites, may make it more challenging for employers to comply with the law. *Id.* at 80076. In its Request for Information, the Department asked the public for comments regarding the adequacy of spaces designated for other purposes, including managers' offices,

c. *Effects of Broad Discretion*

It is worth noting that, at every step in the process where the employer is granted wide discretion, low-income women and African-American women (as well as perhaps other women of color) are likely to be disproportionately disadvantaged—both by cultural attitudes likely to affect the exercise of that discretion and by the material realities of their lives. Hourly workers are likely to have little (if any) bargaining power (to urge employers towards more expansive accommodations) and stingy employer policies that place more burdens on the woman herself could strain a low-income worker's already strapped budget.

For example, such women may feel that they cannot afford to take the income reduction (easily around 7.5 hours a week) that the statute allows for time spent expressing breast milk for a child.<sup>146</sup> The Department does “strongly encourage[ ]” employers to allow employees to extend the work day to make up for unpaid break time, but they are not required to do so.<sup>147</sup> Once again, the amount of accommodation provided will be a direct function of not only the employer's attitudes but also the bargaining power of the employee—and both of those are likely to negatively impact these women.

In many ways, the entire scheme set up by the ACA is premised upon denial of these issues. That scheme explicitly assumes the need for negotiation between employer and employee and implicitly assumes that such an approach makes sense in low-paying, highly hierarchized workplaces. The Department trusts candid discussion will “help employers and employees to develop shared expectations . . . .”<sup>148</sup> “A simple conversation” between the lactating employee and a supervisor or human resources representative, the Department asserts, “would facilitate an employer's ability to make arrangements to comply with the law before the nursing mother returns to work.”<sup>149</sup>

Yet, especially given widespread popular attitudes about breastfeeding, that statement, and the employer-discretion-based accommodation mandate of the ACA, are surely unrealistic. As noted throughout this dis-

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storage spaces, and utility closets. *Id.* The Department also asked for “creative solutions” that address break time for nursing mothers who work in non-fixed places, such as bus drivers, law enforcement officers, emergency medical technicians, and postal workers. *Id.*

146. Since a woman should ideally pump with the same frequency as she would have nursed her child, LALACHE LEAGUE INTERNATIONAL, *How Often Will I Have to Pump When I Go Back to Work?*, <http://www.lalecheleague.org/faq/pumpfreq.html>, a full-time employee working forty hours a week could lose as much as ninety minutes per day, or 7.5 hours per week of pay. (Calculations here are based on a mother with a twelve-week-old baby who nurses every three hours for thirty minutes at a time, which is not uncommon for this age.)

147. Reasonable Break Time for Nursing Mothers: Request for Information from the Public, 75 Fed. Reg. at 244(II)(a) (Dec. 21, 2010).

148. *Id.* at 244(II)(b)(vi).

149. *Id.* at (II)(d).

cusson, the hypersexualization of the breast, as well as the image of breastfeeding as distasteful, if not disturbing, are highly likely to affect how some (if not many) employers exercise their discretion in administering the law. Employers who distrust their employees or have aversive reactions to lactation might be hesitant to offer ample, or even adequate, break times for nursing mothers—or, alternatively, they might forego the conversation entirely. These exercises of discretion will have a disparately negative impact on low-income workers, perhaps especially African-American women.

It is important to note as well that the topic of breastfeeding causes embarrassment for both men and women. Thus, as is treated more fully below,<sup>150</sup> employees themselves may be hesitant to discuss the issue—especially in a work environment where employer attitudes cause them concern about hostility or sexual harassment. Moreover, employer hyper-anxiety about harassment *liability*—for example, hyper-vigilance about discussions of physical appearance or body parts of any kind—could, ironically, make supervisors even more loathe to discuss breastfeeding than they otherwise might be.

An emphasis on negotiation between the parties is especially problematic given that the law does not explicitly require employers to have a written policy explaining employees' rights. A written policy would provide much more information to the employee without requiring an in-person conversation with her employer, and would thereby give her fuller and more accurate information about the parameters of the accommodation being provided. It would also decrease the amount of discussion needed about (potentially uncomfortable) details. Of course, as is discussed further below, she would still have no guarantee that the employer would follow that policy—or that the policy would be appropriate to her needs.<sup>151</sup>

## 2. Weak Enforcement Mechanism

The Department of Labor's Wage and Hour Division (WHD) has been charged with enforcing the ACA's new break time provisions.<sup>152</sup> WHD investigators determine compliance with the law by conducting interviews and gathering data on wages, hours, and other employment conditions.<sup>153</sup> If they determine that a violation has occurred, the WHD

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150. See *infra* Part II(B)(2).

151. On the limited remedies available under the statute, see *infra*, at Part II(B)(2).

152. Reasonable Break Time for Nursing Mothers: Request for Information from the Public, 75 Fed. Reg. at 244(II)(g). Enforcement of the new law will be based on statutory language and the guidance provided in WHD Fact Sheet #73 and its accompanying FAQ page. *Id.* at 244. An employee who believes her employer has violated the new law may call a toll-free WHD phone number. *Id.* at 244(II)(g). From here, she will be directed to the nearest WHD office. Basic information about how to file a complaint is also available on the WHD website. *Id.*

153. 29 U.S.C. § 211.

might “recommend changes in employment practices to bring an employer into compliance.”<sup>154</sup> That is the extent of the WHD’s power.

Thus, in terms of individual claims, while the new statute’s “enforcement landscape is still developing,”<sup>155</sup> it seems unlikely to provide robust remedies for employer failure to comply with its requirements. The statute does not specifically mention an individual cause of action, and at least one district court has held that it does not provide one.<sup>156</sup> In *Salz v. Casey’s Marketing Co.*,<sup>157</sup> the plaintiff complained after discovering a working video camera in the room her employer had provided for her to pump.<sup>158</sup> After the employer declined to remove the camera (suggesting that she cover it instead with a plastic bag), and subsequently reprimanded her for alleged job-performance inadequacies, she quit her job and subsequently sued.<sup>159</sup> The district court for the Northern District of Iowa held that the new law did not create an individual cause of action for damages caused by denial of breastfeeding break time required under its provisions.<sup>160</sup> The court explained:

Since Section 207(r)(2) provides that employers are not required to compensate employees for time spent express milking, and Section 216(b) provides that enforcement of Section 207 is limited to unpaid wages, there does not appear to be a manner of enforcing the express breast milk provisions. A recent notice from the Department of Labor corroborates Defendant’s interpretation and limits an employee to filing claims directly with the Department of Labor. The Department of Labor may then “seek injunctive relief in federal district court . . . .”<sup>161</sup>

However, the *Salz* court did allow the plaintiff to go forward with a claim for retaliation and constructive discharge, noting that, “once an employer discriminates or discharges an employee in relation to an employee’s complaint about the employer’s express breastfeeding policy, they have violated not only Section 207(r) [the nursing break provision] but also Section

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154. Reasonable Break Time for Nursing Mothers: Request for Information from the Public, 75 Fed. Reg. at 244(II)(g). In recommending such changes, “[t]o the extent possible,” the WHD will give violations of the break time and place provision priority consideration in order to allow expeditious resolution of the problem while preserving the employee’s ability to continue breastfeeding. *Id.*

155. *Andrews*, *supra* note 1, at 137.

156. *Salz v. Casey’s Marketing Co.*, No. 11-CV-3055-DEO, 2012 WL 2952998 (N.D. Iowa July 19, 2012).

157. *Id.* at \*2-3.

158. *Id.* at \*1.

159. *Id.*

160. *Id.*

161. *Id.* at \*3 (citations omitted).

215(a)(3) [the retaliation provision].”<sup>162</sup> Under this interpretation, since remedies under the retaliation section of the FLSA include reinstatement and liquidated damages (among others), retaliation claims have the most potential for providing recourse to employees.<sup>163</sup> But of course, not all employers will retaliate when they receive complaints about inadequate accommodation.

Thus, many employees may be left only with the option of asking the Department of Labor to seek an injunction against the offending employer behavior. (The FLSA also authorizes a minimal penalty of \$1,000 per violation.<sup>164</sup>) It seems unlikely, however, that injunctive relief will adequately assist nursing mothers. Even though an injunction is of course available on an expedited basis, the process is still unlikely to be quick enough.<sup>165</sup> Thus, the only meaningful relief will be reinstatement of lost wages for employees who are actually terminated. With such limited remedies available for individual plaintiffs, the fear of repercussions for offending employers is minimal. Employers could provide stingy and impracticable accommodations, or even fail to provide any accommodation at all, with little fear of consequences.

In short, the new statute provides a right with potentially no remedy. If other courts follow *Salz*, disinterested or hostile employers will have little incentive to comply with its provisions, and will have every reason to interpret the law in ungenerous, if not outright hostile, ways.

### 3. Factors Affecting Workers’ Decisions

Workers deciding whether to try to combine work and breastfeeding are likely to be influenced by both cultural and economic factors: First, to the extent that they are aware of breastfeeding attitudes that could influence their employers, they might hesitate even to try to negotiate an accommodation. Second, the economic realities they face could affect their assessment of the pros and cons of pumping breast milk at work.

Cultural biases about breastfeeding could deter low-income women, perhaps especially African-American women, from asking for accommodation for lactation. As noted above,<sup>166</sup> all three of the cultural attitudes

162. *Id.* at \*4.

163. *Id.* at \*3 (citing 29 U.S.C. § 217).

164. Fair Labor Standards Act Advisor, Dep’t. of Labor, *Enforcement under the Fair Labor Standards Act*, available at <http://www.dol.gov/elaws/esa/flsa/screen74.asp>.

165. Due to the extremely time-sensitive nature of breastfeeding and the physiological production of breast milk, failure to ensure quick resolution could result in a mother’s milk drying up and the cessation of breastfeeding (and/or, possibly, employment). *See generally*, Steven E.J. Daly and Peter E. Hartmann, *Infant Demand and Milk Supply* 11 J.HUM. LACT 21, 21 (1995) (concluding that “human milk production is at least in part controlled by the infant’s appetite,” thereby showing that inability to pump or nurse while at work would likely affect ability to produce milk). Hence, injunctive relief is more likely to help future mothers in the particular workplace than the particular woman who is currently affected by an employer’s noncompliance.

166. *See supra* Part II(A).

revealed by the psychological literature on breastfeeding are likely to have a disparately negative impact on those women. A low-income worker, especially if she is Black, might fear that pumping at work will exacerbate already-present employer distrust of her reliability. Or, given how much she needs her income, she might just prefer not to take the risk of her employer reacting negatively. She might worry that breastfeeding or pumping could elicit harassing behavior from supervisors or co-workers affected by aversion and/or sexualization.<sup>167</sup> Or she could simply feel uncomfortable discussing breastfeeding with her employer or drawing attention to her breasts, especially in an extremely hierarchical and/or predominately white workplace. Thus, such women's general awareness of prevailing cultural attitudes about breastfeeding (and about women in their socioeconomic and racialized groups) might combine with the negotiation-focused accommodation system set up by the new statute to cause them to forego breastfeeding altogether—as many of them do now.

If such a woman does decide to seek accommodation, the limited protections provided by the statute, as well as the potential for courts and employers to narrowly interpret it, could also have an especially negative *economic* impact on her options. As noted above,<sup>168</sup> especially for someone not earning a living wage, having one's pay docked for breastfeeding or milk pumping breaks is not an insignificant financial burden, nor are the costs of obtaining all the materials necessary to pump.<sup>169</sup> Such a woman may even find that the extra costs of obtaining an efficient breast pump present a formidable barrier.<sup>170</sup> When such financial burdens are exacerbated by stingy employer accommodation policies (made possible by low-wage workers' limited bargaining power), they might simply make breastfeeding not worth the effort. Further, if combining work *and* breastfeeding doesn't seem to be a viable option for such women, they are likely to forego breastfeeding for work.<sup>171</sup> Researcher Judith Galtry reports that:

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167. Author Bernice Hausman describes an exchange she had with prominent African-American theorist Patricia Hill Collins, in which Collins "suggested that by breastfeeding in a work setting, black women would risk representing themselves as sexual, which they could ill afford to do." HAUSMAN, *supra* note 20, at 45. Such a "strategy of respectability" is a "continuing political necessity" for Black women, to "combat racist employment discrimination." *Id.*

168. See *supra* Part II(B)(1).

169. For a discussion of the role that material barriers play in women's decisions not to breastfeed, see HAUSMAN, *supra* note 20, at 89–90.

170. Health insurers frequently provide only enough money for employees to buy the cheap, manual pumps—machines that are much slower and virtually useless in a work setting. Since a fast, reliable pump can cost nearly \$250, the cost of buying a pump might *itself* make breastfeeding difficult for a low-wage worker to afford. See *Breast Pumps: Reviews, ConsumerSearch*, <http://www.consumersearch.com/breast-pumps> (last updated Feb. 2013).

171. While the reasons for differential rates of breastfeeding among different groups of women are complex and not completely understood, it is likely that the need to work prevents some women from breastfeeding. See Office of the Surgeon General, Office on Women's

Low-income women, among whom African-American and Hispanic women are over-represented, . . . comprise the group most likely not to take [maternity] leave and to return to paid work soon after childbirth, as well as to work longer hours because of economic necessity. The economic imperative to return to paid employment in the early postpartum period is linked to both the low earnings of the women themselves and the high levels of male unemployment and underemployment in their communities.<sup>172</sup>

In contrast, the relatively strong bargaining power exercised by economically privileged women might enable them to negotiate generous interpretations (or even expansions) of the ACA accommodations with their employers, even though they are not covered by the statute. The normative standard set by the Reasonable Break Time for Nursing Mothers provision is likely to further augment these women's ability to obtain accommodations. (Imagine a lawyer saying to her managing partner, "Do you mean I get *less* accommodation than my assistant?"<sup>173</sup>) Moreover, such women's economic security is likely to make it more possible for them to choose to stay home while nursing, if they prefer—or if the realities of the workplace make combining work and lactation unrealistic.<sup>174</sup> As Galbry reports,

[W]omen with higher educational qualifications, higher-status occupations, and higher incomes, who return to work [after childbirth] to further their careers, are more likely to take leave

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Health, THE SURGEON GENERAL'S CALL TO ACTION TO SUPPORT BREASTFEEDING, BARRIERS TO BREASTFEEDING IN THE UNITED STATES, <http://www.ncbi.nlm.nih.gov/books/NBK52688/> ("Employed mothers typically find that returning to work is a significant barrier to breastfeeding. Women often face inflexibility[,] . . . a lack of privacy for breastfeeding[,] . . . are unable to find child care facilities[,] . . . face fears over job insecurity, and have limited maternity leave benefits . . . One of the biggest barriers to continuation of breastfeeding for women is the need to return to work."); see also Ogbuanu et. al, *Balancing Work and Family: Effects of Employment Characteristics on Breastfeeding*, 27 J. HUM. LACTATION 225, 225 (2011) ("Work-related issues have been cited as a major reason for noninitiation and early cessation of breastfeeding."); Cf. Dep't. of Fair Emp't & Housing v. Acosta Tacos, No. E-200708 T-0097-00se, 2009 WL 2595487 (Cal. Fair Emp't and Hous. Comm'n) (June 19, 2009) (plaintiff who was told she could return to work after she finished nursing her child did not breast feed because she couldn't afford to be unemployed), discussed in Hébert, *supra* note 32, at 121.

172. Judith Galbry, *Lactation and the Labor Market: Breastfeeding, Labor Market Changes, and Public Policy in the United States*, 18 HEALTH CARE FOR WOMEN INT'L 467, 471-72 (1997) (citations omitted).

173. It seems to this author that, rightly or wrongly, many lawyers would likely believe that they deserve benefits equal to or better than those awarded less highly paid employees in their workplaces.

174. "Studies of employed women find that those with the most professional autonomy are best able to balance the competing needs of breastfeeding and outside employment." KEDROWSKI & LIPSCOMB, *supra* note 12, at 71.

around the birth of a child. There are various reasons for this: These women are more likely to fit the eligibility for statutory leave; to have greater negotiating power with employers; and also to have higher-income partners who can support them. Therefore, this group is more likely to have greater choice as to whether they breast-feed and for what length of time.<sup>175</sup>

Thus, as compared with low-income, hourly wage workers, these economically privileged (disproportionately white) employees are less likely to face very limited accommodation regimes<sup>176</sup> and more likely to be able to combine breastfeeding with work if they so desire. Given these likely dynamics, the ACA could ultimately actually exacerbate the class- and race-based differences that have existed under the Title VII/PDA regime,<sup>177</sup> leading to a system where professional employees receive more accommodation than ever before, and working class and low-income workplaces remain sites of harassment and resistance to breastfeeding, all the while that they claim formal compliance with the law.

Thus, the combined effect of marginalized women's economic vulnerability and the cultural biases they may face under the new law could be to produce a full-fledged, two-tiered system, wherein such women (as compared to privileged women) are both less able to combine work and breastfeeding *and* less able to nurse *without* working (if they so desire).<sup>178</sup> As the next Part discusses, this two-tiered system replicates a longstanding structural feature of the U.S. economy, which has historically assigned low-wage work to women of color and poor white women, often without regard for the wellbeing of their children.

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175. Galbry, *supra* note 172, at 472 (citations omitted). Assumedly, the point about "statutory leave" in the quote refers to state statutes.

176. See Jodi Kantor, *On the Job, Nursing Mothers Are Finding a 2-Class System*, N.Y. TIMES, Sept. 1, 2006, at A1. (describing programs providing "free or subsidized breast pumps, access to lactation consultants, and special rooms with telephones and Internet connections for employees who want to work as they pump . . .").

177. See *generally id.*, (noting that "wealthier women can spend their way out of work-versus-pumping dilemmas, overnighting milk home from business trips and buying \$300 pumps that extract milk quickly. . .").

178. Breastfeeding rates do tend to relate inversely to workforce participation. In 2007, 80.6% of Latinas, 77.7% of whites, and 59.7% of Blacks reported ever having breastfed. The numbers for those still breastfeeding at six months were, respectively, 46.0%, 45.1%, and 27.9%. CENTER FOR DISEASE CONTROL AND PREVENTION, *Provisional Breastfeeding Rates by Socio-demographic Factors, Among Children Born in 2007*, available at [http://www.cdc.gov/breastfeeding/data/NIS\\_data/2007/socio-demographic\\_any.html](http://www.cdc.gov/breastfeeding/data/NIS_data/2007/socio-demographic_any.html) (The CDC material doesn't clearly indicate how Latinas of African or European ancestry are counted.) Correspondingly, "African-American mothers of infants have higher rates of labor force participation (66%) than their non-Hispanic white (57%), Latina (45%) and Asian/Pacific Islander (56%) sisters . . ."). As has been noted, those differentials "may explain their lower rates of breastfeeding, especially if they are not in professional positions with considerable autonomy." KEDROWSKI & LIPSCOMB, *supra* note 12, at 17.

## III. THE ACA, ECONOMIC ROLES, AND STRUCTURAL BIAS

*[The Public Health Service's strategy] fails to examine or address the reason for [the] gap between message and behavior, insistently keeping the focus on changing women's choices, and insistently maintaining the background assumption that these choices are best treated as the products of isolated free wills that can be understood and manipulated in abstraction from the social and material conditions that constrain, position, and shape them. — Rebecca Kukla<sup>179</sup>*

Part II predicted that prevailing cultural biases, the ACA's negotiation-focused and toothless accommodation scheme, and low-income women's limited economic resources may combine together to discourage such women from deciding to breastfeed while continuing to work. Implicit in that prediction is the recognition that such women's decisions are complex, significantly constrained social acts that can't be reduced to personal "choices."

The contextualized understanding of women's decisions presented in this Article sheds new light on current data about breastfeeding rates, which vary significantly by race and class status.<sup>180</sup> Poor, less-educated, and nonwhite women breastfeed less than their wealthier, more educated, white counterparts.<sup>181</sup> That disparity is frequently attributed to the alleged ignorance and/or laziness of low-income women and women of color. Consider, for example, this blog comment: "Not only are lower income women not given the education to breastfeed, they are also handed out formula. It is much easier to take the formula than to figure out how to breastfeed, especially if you are not aware of the benefits. It is really tragic."<sup>182</sup> This comment, while obviously intended to be sympathetic, nevertheless fails to mention important potential economic and cultural influences on low-income women's decisions about breastfeeding. In so doing, it subtly (though surely not intentionally) reinforces the notion that

179. Rebecca Kukla, *Ethics and Ideology in Breastfeeding Advocacy Campaigns*, 21 *HYPATIA* 157, 162 (2006).

180. See *infra*, note 181.

181. According to the Centers for Disease Control and Prevention, "Although U.S. breastfeeding rates are increasing, rates remain relatively low among some groups of women, particularly young women, black women, women at or below the federal poverty level, and women with less than a college education." CENTERS FOR DISEASE CONTROL AND PREVENTION, *The Importance of Breastfeeding*, available at <http://www.cdc.gov/prams/breastfeeding.htm>. According to CDC data from 2008, 58.9% of Black infants had ever breastfed, compared to 75.2% of white infants. *Progress in Increasing Breastfeeding and Reducing Racial/Ethnic Differences — United States, 2000-2008 Births*, 62 *Morbidity & Mortality Weekly Report* (Feb 8, 2013), available at <http://www.cdc.gov/mmwr/pdf/wk/mm6205.pdf>.

182. Natural Parenting, *Who Breast Feeds?*, MOTHERWEAR BREASTFEEDING BLOG, at comments (Oct. 9, 2007, 11:55 AM), [http://breastfeeding.blog.motherwear.com/2007/01/who\\_breastfeeds.html](http://breastfeeding.blog.motherwear.com/2007/01/who_breastfeeds.html) (comment submitted by username "Natural Parenting").

such women's behavior is due to their ignorance (due to lack of "education") and perhaps even their laziness (taking the easy road of bottle feeding rather than bothering to find out the benefits of breastfeeding). Yet the discussion of incentive effects above suggests that such women's behavior is perhaps better understood as the product of rational and accurate assessments of the pros and cons of combining breastfeeding and work. Given the risks, challenges, and limited benefits of trying to pump milk while working, many such women might reasonably conclude that it is best for themselves and their families to forego nursing—even if they are convinced that breast milk is the ideal source of nutrition for an infant.

This Part thus starts from the premise that low-income women's decisions to forego breastfeeding should be understood not as freely willed "poor" choices by individuals, but rather as rational decisions made within a severely constricted universe of options. Seeing such women's decisions as rational, rather than ill-informed or lazy, prompts one to look for the structural inequalities that constrain and produce them. The discussion in Part II can be understood as such an inquiry.<sup>183</sup> This Part extends that inquiry by looking not at the behavioral incentives created by existing social and legal regimes, but instead at the economic roles, and relationships to work, that are (re)produced by those regimes—as well as the stereotypes that legitimate those relationships. There are historical parallels, I argue, to the work-role inequalities a two-tiered system of breastfeeding is likely to replicate and legitimate.

More explicitly, this Part argues that the two-tiered system of breastfeeding access predicted above would reinforce longstanding work roles for low-income women and women of color, as well as the stereotypes that reinforce them. In addition, the lower breastfeeding rates for low-income women that are necessitated by such work roles are likely to be characterized as the result of women's personal "choices," rather than as evidence of systemic race and class inequality. In turn, that individualist understanding of low-income women's behavior will reinforce prevailing stereotypes of such women—as both "bad" mothers and "bad" workers.

Section A of this Part describes two economic roles to which low-income women and economically privileged women, respectively, have historically been relegated—roles that will likely be untouched, and possibly reinforced, by the turn to accommodation. Section B discusses how the new breastfeeding law could contribute to already-extant class and race inequalities among working mothers, as well as reinforce the blame-the-victim discourse that has traditionally legitimated those inequalities. Put differently, that section discusses how the stereotypes of low-income women and African-American women that have historically justified this

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183. As the reader will recall, the discussion in Part II shows how limited statutory protections and remedies, especially when operating in a world of complicated cultural attitudes towards breastfeeding and the women who do it, impose systemic constraints on women's choices about breastfeeding and work.

status-based employment regime are likely to legitimate a two-tiered breastfeeding regime with parallel effects.

A. *Women's Roles in Relation to Work: Historical Practices and the Stereotypes Legitimizing Them*

A new dimension of the breastfeeding-at-work issue is revealed when one examines the historical structuring of the capitalist workplace, and the roles of different women workers within it. Against that backdrop, the ACA accommodation regime, especially if it results in the two-tiered access predicted here, looks less like a transformation and more like the continuation of an unequal work structure that has been foundational to the capitalist system in the United States.

It is commonplace for scholars writing about women and work to note that “women” used to be seen as “natural” mothers and inappropriate workers whose place was in the home, and that Title VII and other legal reforms were designed to eliminate the effects of this “separate spheres” ideology.<sup>184</sup> But that statement might be only partially accurate. After all, some women have always been seen as appropriate workers—and in fact have been punished and derogated if they tried to stay home.<sup>185</sup> Those women have watched as legal reforms have opened high-paying jobs to white, economically privileged women, at the same time that their own financial dependence on inflexible and low-paying work has continued to make it extremely difficult for them to protect and care for their children.<sup>186</sup> In short, privileged women have been able to add the role of worker to their traditional role as mother,<sup>187</sup> but low-income women (disproportionately African-American women) have not been able to add the role of stay-at-home mother to their traditional role as worker. They continue to have to negotiate workplaces that place little value on their domestic roles or the welfare of their children.

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184. See, e.g., Laura A. Rosenbury, *Work Wives*, 36 HARV. J. L. & GENDER 345, 346, 356–57 (2013); Harvard Law Review, *To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 HARV. L. REV. 1255, 1258 (1986) (“The nineteenth amendment, title VII of the Civil Rights Act of 1964, and the 1971 case *Reed v. Reed* represent legal signposts on the road to full disintegration of the separate spheres ideology.”).

185. See discussion, *infra* notes 204–06 and accompanying text.

186. Cf. WILLIAMS, UNBENDING GENDER, *supra* note 58, at 150, (“[The full-commodification [model’s] vision of the market as a benign force that can enhance family life is one most often held by women with enough wealth to gain access to rewarding work and quality child care.”).

187. Not that privileged women don’t also continue to face anti-mother bias at work, of course. For example, in the practice of law, “Motherhood results in a wage penalty for women that remains unaccounted for even after elaborate controls for work experience.” Ronit Dinovitzer, Nancy Reichman, and Joyce Sterling, *The Differential Valuation of Women’s Work: A New Look at the Gender Gap in Lawyers’ Incomes*, 88 SOCIAL FORCES 819 (2009).

This Part discusses the two different roles that have historically been assigned to those two (broadly defined) groups of women.<sup>188</sup> The first, which I will call the “domestic” role, is the familiar “stay-at-home mom” status that has been assigned to white, economically privileged women since the “separate spheres” era of the 19th century, if not before.<sup>189</sup> That status is characterized by the prescription of motherhood as the appropriate role of such women (today, sometimes along with professional work) and is legitimated by stereotypes of them as innately domestic and nurturing. The domestic mother role traditionally relegates such women to a life characterized by (at least periodic) economic dependency and relative<sup>190</sup> economic powerlessness (both in relationships and in the post-childbirth job market). Although widely criticized since the mid-twentieth century,<sup>191</sup> this ideology still serves to justify sex-based wage differentials, entrenched glass ceilings in professional workplaces, and unequal distribution of domestic labor in the home.<sup>192</sup>

Of more central importance for this Article, however, is the second role to which certain women have been historically relegated—which I call the “colonized” role.<sup>193</sup> That role involves the exploitative use of those women’s labor for economic profit, often at the expense of their families.<sup>194</sup> Feminists like myself often say that the workplace is structured around a “male” model that didn’t change to accommodate women when they entered the economic sphere. But I’m increasingly of the mind that when we talk about blue color workers, the working poor, etc.—groups that are disproportionately women of color, but also include many whites—we have to acknowledge that this statement is not accurate. After all, those groups have been in the workplace for a long time. It might not

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188. Of course, there are variations within each group—especially, for example, race-based variations among low-income women. While my focus here will be on low-income white women and low-income African-American women, that is not to deny that many of the dynamics I describe may apply, to a greater or lesser degree, to other low-income women of color as well.

189. See WILLIAMS, *UNBENDING GENDER*, *supra* note 58, at 31.

190. By “relative,” I mean in comparison to if she had stayed in the work world and not taken time off to have and parent a child.

191. See, e.g., Betty Friedan, *THE FEMININE MYSTIQUE*, chapter 4 (1963).

192. WILLIAMS, *UNBENDING GENDER*, *supra* note 58, at 69–72 (discussing hostility that working mothers experience in the workplace).

193. I use the “colonize” root advisedly. In my opinion, the exploitative and appropriative economic relationships experienced by this group, as well as the pejorative, “othering” stereotypes that hide and legitimate that subordination, should be understood as parallel (but decidedly not identical) to the exploitation and Orientalizing that characterized colonial powers’ relations with colonized peoples—in short, as a form of what might be called “domestic colonialism.” For a different, but complementary, take on the notion of domestic colonialism, see NATSU SAITO, *SETTLER COLONIALISM & RACE IN AMERICA* (forthcoming) (book draft on file with the author).

194. Since this is often the less familiar role, I’ll describe it in more detail.

be too far of a stretch, in fact, to suggest that the modern industrialized workplace was actually designed *with them in mind*—that it is explicitly structured to appropriate the labor of such women (and their male counterparts) as much and as cheaply as possible, without regard to the impact on their families and without concern for their role (or rights) as mothers (or, of course, fathers).<sup>195</sup> In that sense, the modern workplace is not so much a “male” workplace, as an exploitative one—if you will, a harshly capitalist one. Perhaps it is even appropriate to call it colonialist.

From at least as early as 1900, the United States’ capitalist economy has relegated certain groups of women to routine, menial, often-repetitive work at low pay.<sup>196</sup> (This has happened to men as well,<sup>197</sup> but my focus here is on women.) Such employment has often involved—and continues to involve today—working long hours in highly regulated workplaces, as expendable employees who have very little power, and for wages that often consign fulltime workers to lives of poverty.<sup>198</sup> Of course, in the early stages of capitalism, many female industrial workers had to bring their children with them into dangerous workplaces or leave them home unattended.<sup>199</sup> And while child labor laws prevent most such abuses today,<sup>200</sup>

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195. For example, the notoriously exploitative garment industry in the United States was one of the first industries to employ women. On that industry’s deployment of disparaging stereotypes to naturalize the relegation of women workers to low-paying jobs involving spinning, weaving, and sewing, see ELLEN ISRAEL ROSEN, *MAKING SWEATSHOPS: THE GLOBALIZATION OF THE U.S. APPAREL INDUSTRY* 24 (2002) (“The segregation of women in low-wage industrial production has traditionally been legitimated by defining the work women do as rooted in their biological, anatomical, and psychological ‘nature’—for example, their small hands [and] their lesser intelligence, which presumably makes them unable to master more complex industrial work skills.”).

196. The presence of (low-income) women in U.S. labor markets increased significantly after 1900, DAVID BRODY, *WORKERS IN INDUSTRIAL AMERICA* 21(1980) (in 1920 Chicago, “20.4 percent of the wives of semiskilled and unskilled men were working”). They worked especially in clerical and domestic jobs, but also (by the 1930s) in certain industries (for example, automobiles (7% of the workers) and electrical (25% of the workers), as well as canning, textiles, candy, and meatpacking). THE GALE GROUP, *Working Women in the 1930s*, available at [http://ic.galegroup.com/ic/uhic/ReferenceDetailsPage/ReferenceDetailsWindow?query=&prodId=UHIC&displayGroupName=Reference&limiter=&disableHighlighting=true&displayGroups=&sortBy=&zid=&search\\_within\\_results=&action=2&catId=&activityType=&documentId=GALE—CX3468301237&source=Bookmark&u=sand55832&jsid=ff1c546a17b62d2d1ce4007351b97724](http://ic.galegroup.com/ic/uhic/ReferenceDetailsPage/ReferenceDetailsWindow?query=&prodId=UHIC&displayGroupName=Reference&limiter=&disableHighlighting=true&displayGroups=&sortBy=&zid=&search_within_results=&action=2&catId=&activityType=&documentId=GALE—CX3468301237&source=Bookmark&u=sand55832&jsid=ff1c546a17b62d2d1ce4007351b97724).

197. See generally, BRODY, *supra* note 196 (examining history of industrial labor organization in 20th century).

198. For example, during the 1930s, women’s average annual wages were approximately half those of men (\$525 versus \$1027). THE GALE GROUP, *supra* note 196. Once the Depression hit, women’s wages dropped, “so that many working women could not meet basic expenses.” *Id.*

199. JOYCE BURNETTE, *GENDER, WORK AND WAGES IN INDUSTRIAL REVOLUTION BRITAIN 176-77* (2008).

200. See U.S. Wage & Hour Div., *Child Labor Provisions for Nonagricultural Occupations under the Fair Labor Standards Act*, <http://www.dol.gov/whd/regs/compliance/childlabor101.pdf> (last visited Mar. 19, 2014). *But see* Steve Rosen, *Time to Rethink Child Labor Laws*, CHI. TRIB. (Sept. 30,

migrant farm workers continue to have to bring their children to the fields and blue collar workers often find themselves having to leave their children at home unattended, send them to school sick, arrange and rearrange child care as daily circumstances change, and the like—all because to do otherwise could cost them their jobs.<sup>201</sup>

In short, the work available to economically marginalized women often requires them to face (and, not uncommonly, engage in Herculean efforts to overcome) serious barriers to their children's well-being in order to ensure their families' economic survival. Economic arrangements under capitalism provide tidy profits to employers of such women, at the expense of those women's families. This exploitative relationship is arguably even more entrenched today than it was a few decades ago, with technology facilitating worker surveillance, the minimum wage currently worth much less in real dollars than it was a half-century ago,<sup>202</sup> and executive compensation exploding while worker wages stagnate.<sup>203</sup>

This exploitative consignment of certain women to menial, low-paying jobs has been obscured and legitimated by class and race stereotypes

2013), <http://www.chicagotribune.com/business/yourmoney/sns-201201301830—tms—kidmoneyctnsr-a20120130-20120130,0,6724003.story> (last visited Feb. 19, 2013) (discussing push to relax child labor laws in states such as Maine and Wisconsin); Peggy Lowe, *Labor Department Revising Child Labor Plan*, HARVEST PUBLIC MEDIA (Feb. 1, 2012), <http://harvestpublicmedia.org/article/998/labor-department-revising-child-labor-plan/5> (discussing relaxation of child labor laws in agriculture) (last visited Feb. 19, 2013).

201. Jodi Kantor, *As Shifts Vary, Family's Only Constant is Chaos*, NEW YORK TIMES, Aug. 14, 2014, at A1 (describing how computer programs designed to maximize efficient use of workers result in constantly-changing schedules that wreak havoc on employees' lives); HUMAN RIGHTS WATCH, *TAKE ACTION: End Child Labor in US Agriculture*, <http://www.hrw.org/support-care> (last visited Feb. 19, 2013) (describing how child labor laws are more relaxed for, or exclude, agriculture and leave migrant children unprotected); OREGON PUBLIC BROADCASTING, *Oregon Farmworker Issues*, OPB.ORG, [http://www.opb.org/programs/oregonstory/ag\\_workers/issues.html](http://www.opb.org/programs/oregonstory/ag_workers/issues.html) (last visited Mar. 17, 2014) (“[D]ue to lack of adequate childcare, many children are forced to be in the fields with their parents.”); JOAN WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* 42-76 (2010) [hereinafter WILLIAMS, *RESHAPING*] (describing challenges faced by modern-day workers). Of course, attending activities such as student/teacher conferences, school plays and concerts, and athletic events is a class luxury far beyond the reach of this group of mothers (and fathers).

202. Today, the minimum wage is \$7.25/hour. *Wage and Hours Div.*, U.S. DEP'T. OF LABOR, <http://www.dol.gov/whd/minimumwage.htm>. When adjusted for inflation, that is \$2 less than it was in 1968. The Huffington Post, *The Minimum Wage is Worth \$2 Less Today Than It Was In 1968*, (June 20, 2013, 4:14pm), [http://www.huffingtonpost.com/2013/06/18/minimum-wage-worth-less-than-1968\\_n\\_3461568.html](http://www.huffingtonpost.com/2013/06/18/minimum-wage-worth-less-than-1968_n_3461568.html). That legal minimum would have to be \$13 to have the same buying power today as it had fifty years ago. For a concrete description of the lived experience of parenting for low-wage workers today, see WILLIAMS, *RESHAPING*, *supra* note 201, at 42-76.

203. “Incomes for the highest-earning 1 percent of Americans soared 31 percent from 2009 through 2012, after adjusting for inflation . . . . For the rest of us, [income] inched up an average of 0.4 percent.” Associated Press, *Twelve Questions About Income Inequality: Who Are the 1 Percent?*, OREGON LIVE, THE OREGONIAN, (January 27, 2014, 9:40AM), [http://www.oregonlive.com/business/index.ssf/2014/01/12\\_questions\\_about\\_income\\_ineq.html](http://www.oregonlive.com/business/index.ssf/2014/01/12_questions_about_income_ineq.html).

that construct such women as both poor workers and bad mothers—and thereby blame them for their own (and their children’s) situations. Narratives depicting marginalized workers as unintelligent, irresponsible, and lazy suggest that they’re qualified only for low-value, exploitative, and strictly supervised work.<sup>204</sup> And the image of these same women as irresponsible, sometimes dangerous, and innately un-nurturing mothers has been used to justify an economic system that separates them from their children in ways that can compromise those children’s well-being.<sup>205</sup> Then, when occasional (and virtually unavoidable) harms to children occur, those are constructed, of course, not as the inevitable result of unreasonable work demands but instead as evidence of the very character flaws that justified the economic exploitation to begin with.<sup>206</sup>

The stereotyping of privileged white women as “naturally” belonging to the domestic world of mothering and low-income white women and women of color as “naturally” belonging to the world of colonialist work is illustrated by the public discussions surrounding the “workfare reforms” of the Clinton presidency. Clinton’s effort to “end welfare as we know it”<sup>207</sup> forced indigent recipients of Temporary Assistance for Needy Families (TANF) aid (as it became called under the new welfare regime) to seek employment rather than stay home with their young children. Some readers may remember the media’s frequent depiction, during that period, of welfare recipients as lazy, selfish women who try to stay home to indulge themselves in a life of leisure. In contrast, media depictions (during the same period) of privileged women treated them as generous, self-sacrificing mothers who both do and should forego careers for the benefit of their children.<sup>208</sup> Obviously, each of these contrasting stereotypes, in its

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204. See Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1, 8-12 (1988). The footnotes of the Austin piece stunningly illustrate both the wide range of abusive things employers do and say to their workers, and their justifications for doing so.

205. For more on this point, see *infra* at text accompanying notes 191-93.

206. As should be clear from the discussion thus far, my point here is not to suggest that such women are in fact guilty of poor or inadequate mothering. Rather, their accomplishments as mothers, often attained in the face of significant barriers not of their own making, are effaced, while they are blamed for the results produced by those barriers. For citations to studies about derogatory attitudes often held towards mothers who are “racial minorities, poor, incarcerated, single or divorced, or employed outside the home,” see KEDROWSKI & LIPSCOMB, *supra* note 12, at 43- 6. See also Twila L. Perry, *Family Values, Race, Feminism and Public Policy*, 36 SANTA CLARA L. REV. 345, 361 (1996) (comparing social perceptions of privileged stay-at-home mothers as noble with those of mothers on public assistance as lazy); Fineman, *supra* note 92 (discussing negative attitudes toward single mothers often expressed in poverty discourses).

207. Governor Bill Clinton, *The New Covenant: Responsibility and Rebuilding the American Community*, Remarks to Students at Georgetown University (Oct. 23, 1991), available at [http://www.dlc.org/ndol\\_ci4c81.html?kaid=127&subid=173&contentid=2783](http://www.dlc.org/ndol_ci4c81.html?kaid=127&subid=173&contentid=2783).

208. During the so-called “mommy wars” of the 1990s, privileged women (and others) debated whether “women” (clearly meaning women like them) should stay home and care for their children or pursue challenging careers. “Marilyn Quayle [wife of the vice-president under

own way, legitimated harmful pro-work and anti-work policies and practices directed (respectively) at the two groups of women. But the ability of the American imaginary to hold both views simultaneously—to strip poor women of the financial support that would enable them to stay home with their young children precisely at the same moment that privileged women were being excoriated for working outside the home—vividly illustrates how differential stereotypes justify relegating these groups of women to starkly different relationships to work.

Focusing on African-American women in particular, it is tempting to see the exploitative conditions under which they work today as a modern (and obviously less extreme) extension of slavery. After all, the exploitative use of women's labor, to the detriment of their offspring, was central to that institution. The "owners" of enslaved women appropriated not only their physical labor but their reproductive labor as well—both by forcing them to wet-nurse and by forcing them to serve as "breeders" who reproduced and expanded the "property" of the master.<sup>209</sup> Enslaved women were often forced to forego nursing their own infants in order to return to the fields or wet-nurse other children.<sup>210</sup> And many of their offspring suffered the complete loss of their mothers through forced sale—perhaps the ultimate harm to a child. All of these deprivations were, of course, legitimated by reference to stereotypes of enslaved people as sub-human and incapable of "normal" human connections.<sup>211</sup>

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George H.W. Bush] champion[ed] the fact that she gave up her law career for the sake of her family, [while] Hillary Clinton defend[ed] her decision to combine the two." Lynda Richardson, *No Cookie-Cutter Answers in 'Mommy Wars'; Women Are Struggling With Their Choices About Having Jobs or Staying Home*, N.Y. TIMES (1992), available at <http://www.nytimes.com/1992/09/02/nyregion/no-cookie-cutter-answers-mommy-wars-women-are-struggling-with-their-choices.html?action=click&module=Search@ion=searchResults&pagewanted=2&pagewanted=print>. Those who stayed home admitted to feeling a bit threatened by the "high-powered career[s]" of those who didn't. *Id.* But 49% of stay-at-home mothers in one survey said that "employed mothers did not spend enough time with their children." *Id.* The assumption that such women might be harming their kids is captured by the comment of one woman interviewed for the Richardson article: "Since mothers haven't been working full time for that many years, we have yet to see the results of the upbringing of the children. . . . We don't know what these children are going to be like but it's hard to imagine it's going to be terrific.") In contrast, the debate over "welfare reform" was striking in its failure to consider the possibility that forcing poor mothers to leave home might be harmful to their small children. *See, e.g., White Ghetto*, NEWSWEEK MAG., May 29, 1994, available at <http://www.newsweek.com/white-ghetto-188856> (criticizing the "twin totems of the welfare debate[.] . . . [g]etting married and getting a job," by noting (disturbingly) that some fathers might be more harmful to a family than helpful, but saying nothing about whether forcing the mother out of the home could harm her young children).

209. ROBERTS, *supra* note 18, at 24–28.

210. *See id.*, (discussing slave owners' view of female slaves as producers and reproducers, but not as mothers or nurturers); *see also* LINDA M. BLUM, AT THE BREAST: IDEOLOGIES OF BREASTFEEDING AND MOTHERHOOD IN THE CONTEMPORARY UNITED STATES 21–22, 26 (1999).

211. ROBERTS, *supra* note 18, at 24–28.

In summary, it is only white, privileged women who have traditionally been stereotyped as “natural” mothers and consigned to the domestic role. In contrast, from slavery to the modern-era welfare-to-work reforms, racially and economically marginalized women have often been forced (whether through physical compulsion or extremely limited economic options) to work for others under conditions that disadvantage their own offspring.<sup>212</sup> These practices have transformed certain aspects of motherhood—including the right to be able to survive (at least economically and sometimes literally) without facing serious risks to your children’s well-being—into class and race privileges, privileges that racially and economically marginalized women have often been denied.

Moreover, that denial has directly benefitted exploitative employers, and (as I have noted) has been justified by reference to a raced and classed discourse of *colonization*<sup>213</sup>—a discourse that suggests both that such women are innately suited for exploitative labor and that their inherent nature (not the demands of the work itself—or other factors such as poor school systems) is the major barrier to their children’s successful upbringing.<sup>214</sup>

As is discussed in the next section, the ACA is likely to perpetuate the relegation of economically privileged and low-income women to domestic and colonialist relationships to work, respectively. In so doing, it will reinforce stereotypes of privileged women as nurturing, and low-income women as self-interested, inadequate mothers.

B. *Why the ACA is Likely to Reinforce Longstanding Women’s Work Roles and Invite Women-Blaming in the Process*

*[W]e worry that breastfeeding will devolve into a privilege reserved for middle-class and upper-middle-class women whose particular skills are more in demand in a given labor market. By contrast, women from lower economic strata will be denied access to breastfeeding in the work-*

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212. See *supra*, Part III.

213. Again, I use the word “colonization” here to suggest that exploitative relationships similar to those that characterized the colonial enterprise—in which the United States and other foreign powers subjugated the indigenous populations and appropriated the natural resources of colonized regions for their own benefit,—can be found in pockets of marginalized communities and populations within the territorial United States. See ÜRGEN OSTERHAMMEL, COLONIALISM: A THEORETICAL OVERVIEW 5-7, 11, 15 (2005).

214. These exploitative economic and social arrangements have of course not only been *allowed* but have even been *facilitated* by legal rulings and legal discourse. See Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare “Reform,” Family, and Criminal Law*, 83 CORNELL L. REV. 688, 734 (1998) (arguing that “both political and public rhetoric have reflected a broader consensus that poor women should spend their time working rather than caring for their children”).

*place and have to face an increasing social stigma associated with being a nonbreastfeeding mother.* — Kedrowski & Lipscomb<sup>215</sup>

The new accommodation regime is likely to reinforce both of the roles historically ascribed to women, the domestic role and—especially—the colonized role. As previously discussed, if the law indirectly encourages increased accommodation of lactation in professional workplaces (as predicted here), many privileged women might be able to successfully combine work and lactation.<sup>216</sup> Even those who aren't that lucky will often be able to afford staying home, and some of them can be expected to do so. Thus, when accommodation is inadequate, it will sometimes reinforce their traditional domestic role.

More central to the argument here, the exploitative relationship to work historically imposed upon less privileged women is unlikely to be significantly affected by the ACA. Such women are unlikely to receive meaningful accommodation and are unlikely to be able to stay home to nurse instead.<sup>217</sup> So they will often continue to work and forego breastfeeding their children, even if they have concluded that breast milk is the most beneficial form of infant nutrition.<sup>218</sup>

Moreover, when low-income women and women of color choose not to breastfeed, violating modern norms of “scientific motherhood,” they will risk being stigmatized as both “bad” mothers and noncompliant patients.<sup>219</sup> In fact, as breastfeeding increasingly becomes associated with conscientious, good motherhood, and the lower breastfeeding rates of marginalized mothers begin to be labeled a public health problem,<sup>220</sup> the risk increases that such women's choices will be seen as evidence of ignorance and poor parenting—and therefore as deserving of disciplinary surveillance and regulation. It is no surprise, then, that Bernice L. Hausman

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215. KEDROWSKI & LIPSCOMB, *supra* note 12, at 127.

216. Their significantly higher rates of breastfeeding than other women's suggest that many privileged white women currently either are adequately accommodated or refrain from working while breastfeeding.

217. See *supra* text accompanying notes 166-175.

218. One woman, a former cashier, was quoted in the New York Times as saying, “I feel like I had to choose between feeding my baby the best food and earning a living.” Kantor, *supra* note 176.

219. Cf. HAUSMAN, *supra* note 20, at 40 (“[T]he norms of mothering developed in conjunction with ‘scientific motherhood’ are intimately linked to white, middle-class expectations of proper maternal submission to medical authority.”). See also Nancy Ehrenreich, *The Colonization of the Womb*, 43 DUKE L.J. 492, 519-20 (1993) (discussing stigmatization of women who refuse to “follow doctors’ orders”).

220. Arthur I. Eidelman & Richard J. Schanler, *Breastfeeding and the Use of Human Milk*, American Academy of Pediatrics, *Breastfeeding and the Use of Human Milk*, 129 PEDIATRICS e827, e837 (2012), <http://pediatrics.aappublications.org/content/early/2012/02/22/peds.2011-3552> (“Recently, published evidence-based studies have confirmed and quantitated the risks of not breastfeeding. Thus, infant feeding should not be considered as a lifestyle choice but rather as a basic health issue.”).

starts her book on breastfeeding in American culture with the story of an African-American woman on welfare, Tabitha Walrond, who was charged with recklessly causing her child's death when the breastfed baby died due to failure to thrive. (Walrond was ultimately convicted of negligent homicide.)<sup>221</sup> Hausman compares Walrond's treatment (and the discourse that legitimated it) with the considerably more charitable treatment (and the discourses surrounding it) of economically and racially privileged breastfeeding women who accidentally starve their babies.<sup>222</sup>

Walrond's story illustrates the risk that lactation promotion efforts will focus on "educating" and controlling individual women, paying inadequate attention to the structural and economic factors that might account for differential breastfeeding practices.<sup>223</sup> Nor is consideration likely to be given to many women's historical experience of the workplace as a site of economic exploitation, sexualized mothering, and disciplinary surveillance—all of which (as discussed above) might deter those women from bringing intimate family matters such as breastfeeding into that space to begin with.<sup>224</sup> For all of these reasons, a new regime of limited accommodation is unlikely to encourage low-income and African-American women to breastfeed and in fact might reinforce stereotypes of such women as selfish and irresponsible mothers. In this context, it is important to be mindful of Angela Davis' observation many years ago that privileges for powerful women often morph into *duties* for the less powerful.<sup>225</sup> Walrond's case is a vivid reminder of how mothering "advice" given to privileged women can turn into criminal prosecutions of less powerful, more stigmatized women—and of how harmful conditions produced by structural inequality can be obfuscated by a discourse of personal individual "choice."

Thus, it might be appropriate to ask whether the lower rates of breastfeeding among African-Americans represent an act of resistance by some women to the medical and governmental surveillance of their mothering.<sup>226</sup> As one example of such surveillance, consider the following

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221. HAUSMAN, *supra* note 20, at 33–34. Of course, Walrond's case shows that, even when such women *follow* mothering dictates, they might still be treated as deviants.

222. *Id.* at 33–36.

223. In general, educational information is much more available to women than material support for breastfeeding—which, as Hausman notes, can make "education" seem an awful lot like "exhortation." HAUSMAN, *supra* note 20, at 87.

224. For African-American women, the workplace has historically often been a place of discrimination and disrespect, while the home has been a refuge from work—a place of safety and fulfillment. See Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1, 20–21 (1993) ("Black women historically experienced work outside the home as an aspect of racial subordination and the family as a site of solace and resistance to white oppression."); WILLIAMS, UNBENDING GENDER, *supra* note 58, at 167.

225. Cf. DAVIS, *supra* note 19 (discussing contraception).

226. For one discussion of how disciplinary surveillance of women's reproductive behavior constructs some groups as deviant, justifying coercive interventions into their reproductive lives,

statement by a nursing advocate: “It cannot be blamed on society or the medical profession when a woman cannot accept [breastfeeding] as part of the biologic role of a mother.”<sup>227</sup> Or, the concern expressed by a counselor at a health clinic for poor teenagers, who bemoaned the fact that teen mothers were “pushed by their own parents to return to school or work rather than to breast-feed.”<sup>228</sup> When breastfeeding is naturalized as the “appropriate” role of all mothers, no matter what their personal preferences or socioeconomic circumstances, then those who have historically been stereotyped as bad mothers face serious risks, whether they avoid the practice (and can be criticized for not choosing what is “best” for their child) or engage in it (and can be punished, like Walrond was, for doing it “badly”). It is not surprising, then, that such women might try to avoid it altogether. As Hausman has noted, “It is unlikely . . . that any medical campaign to promote breastfeeding will succeed . . . if physicians convey the notion that breastfeeding is the mode of infant feeding proper to the female biological role.”<sup>229</sup>

Nor are breastfeeding practices likely to change if the solution is seen to lie in reforming individual women’s decision-making processes, rather than in changing the social and material circumstances under which their decisions are made. As one author has noted, “federal breastfeeding policy is heavy on symbolic expressions of support, but weak in terms of actual support for women wishing to breastfeed.”<sup>230</sup> And, as the discussion in Part III illustrates, that flaw has not fundamentally changed with passage of the ACA. With so much still left to the discretion of employers and the abilities of individual women to negotiate (and afford) adequate accommodations, the potential is great that women will be blamed for decisions that are an inevitable result of the circumstances in which they live and work.

This victim-blaming has found expression, for example, in the “choice” discourse that courts sometimes use in breastfeeding decisions, constructing a woman’s demands for meaningful workplace equality as instead demands to be allowed to provide any and all child care that she feels is good for her child (as if that would be such a terrible thing to structure workplaces to accomplish!). Consider, for example, *Barrash v. Bowen*,<sup>231</sup> a Fourth Circuit case in which the plaintiff alleged that other employees had been granted sick leave of more than six months, while her request for six-months’ unpaid leave to breastfeed was denied (even though the company policy allowed such leaves to be granted for childcare reasons on a discre-

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see Ehrenreich, *Colonization of the Womb*, *supra* note 219, at 519–21 (discussing court-ordered Cesarean sections).

227. HAUSMAN, *supra*, note 20, at 84 (quoting Ruth Lawrence).

228. Jules Law, *The Politics of Breastfeeding: Assessing Risk, Dividing Labor*, 25 SIGNS 407, 407 (2000) (citation omitted).

229. HAUSMAN, *supra* note 20, at 88.

230. KEDROWSKI & LIPSCOMB, *supra* note 12, at 85.

231. *Barrash v. Bowen*, 846 F.2d 927, 931–32 (4th Cir. 1988).

tionary basis). The Fourth Circuit overturned the trial court's ruling for plaintiff, stating that she did not have a "right to be let alone while she cares for her baby in the manner she thinks best."<sup>232</sup> "[T]he measure of any duty of reasonable accommodation," the court primly stated, "is not the same as the measure of the mother's right to care for her child as she pleases."<sup>233</sup>

Constructing this mother as a demanding, selfish employee, these quotes lead to the inescapable conclusion that the court viewed plaintiff's request for equal accommodation as unreasonable. In so labeling plaintiff's request for leave (and overturning the ruling in her favor), the appellate court essentially blamed the mother for the employer's apparently gender-biased practice of leave-granting.<sup>234</sup> In so doing, such rulings trivialize the public health and gender equality consequences of employers' resistance to accommodating nursing mothers.<sup>235</sup> Moreover, given that wanting the best for one's child is the essence of the traditional maternal selflessness norm, in treating such an attitude as improper for workers, the court implicitly treats working outside the home as incompatible with mothering. Its statements convey the distinct impression that selfless dedication to one's offspring directly conflicts with being sufficiently dedicated to one's work. Ironically, the stereotype of the plaintiff as a bad worker is precisely what enables her employer to impair her ability to be a good mother.

Such punitive and suspicious attitudes towards breastfeeding women (one sometimes gets the sense from judicial discourse that the judge believes the woman is trying to *get away with* something)<sup>236</sup> reflect a decontextualized understanding of women's behavior that fails to appreciate the myriad influences on women's choices previously described here.<sup>237</sup> They also strongly suggest that harmful cultural attitudes towards breastfeeding might generate harsh judicial attitudes towards lactating women—attitudes that could continue to influence holdings under the ACA. Finally, cases like *Barrash* reinforce the very stereotypes that have justified relegating working-class and poor women to inflexible and demanding workplaces to begin with. Constructing the plaintiff as a selfish worker who unreasonably

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232. *Id.* at 932.

233. *Id.*

234. The employer claimed that the plaintiff's accommodation request was denied because of a new policy to reduce unpaid leaves. But the plaintiff introduced data showing that the number of leaves granted to men increased during the same period. *Id.* at 931. The district court found that the leave reduction policy had a disparate impact on young mothers. *Id.*

235. In fact, throughout its opinion, the Fourth Circuit treated plaintiff's behavior not as principled and determined assertions of her legal rights but rather as stubborn insubordination. *See, e.g., id.*, at 930 (stating that "management had the discretionary authority to grant leave without pay and to determine its duration. . . [E]mployees . . . may not dictate the exercise of that discretionary, managerial function.")

236. *See, e.g., id.* at 932 ("to care for her child *as she pleases*") (emphasis added).

237. *See supra* Part II(B)(3).

pushes the boundaries, the case blames the victim for her employer's exploitation of her labor and harming of her children.

In summary, the joint operation of law and culture in this area is likely to enforce upon low-income white women and women of color (and, to a lesser extent, upon privileged white women as well) the very roles that have historically served as the basis of their respective experiences of subordination. And the decisions women make about work and breastfeeding under the ACA, while incentivized by the legal and cultural context in which they find themselves, are likely to be perceived as the result of their inherent natures. Privileged women will probably continue to be stereotyped as "natural homemakers" concerned for their children, while marginalized women will continue to be perceived as bad workers requiring strict regulation and as irresponsible mothers who make poor parenting choices.

The end result is a society that defines breastfeeding as central to good mothering but then prevents the very women who have been stereotyped as bad mothers from engaging in the practice. In a tight, self-referential circle, the very stereotype that has historically justified the exploitation of such women in regimented, low-paying workplaces will not only consign them to work situations unlikely to facilitate breastfeeding but also be cited to blame them for any parenting "failures" necessitated by such work, affirming their roles as both irresponsible mothers and exploitable workers.

## CONCLUSION

*La Leche League continues to promote full-time mothering to accomplish biological breastfeeding, just as feminist groups have largely supported full-time market work for women who are then expected to outsource child care and housekeeping: both positions . . . need adjustment.* – Bernice Hausman<sup>238</sup>

The central message of this Article is that socially constructed assumptions about women's bodies, roles, and relationships to work could significantly limit the positive impact of the ACA's new breastfeeding provisions, even possibly making them harmful to certain women. As has been discussed, three dynamics combine to limit the benefits that one might assume would flow from the statute's accommodation mandate.<sup>239</sup> First, the broad discretion that the act allocates to employers and courts invites raced and classed decision making based on prevailing cultural attitudes towards both breastfeeding and mothers who work. In fact, the narrow interpretation to which the ACA is susceptible, and which cultural attitudes suggest is likely, could create incentives that enforce historically

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238. HAUSMAN *supra* note 20, at 186.

239. See *supra* text accompanying notes 17-21.

subordinating roles on low-income and blue-collar women—especially those who are African-American.

Second, the law's failure to provide material support for breastfeeding workers, as well as its reliance upon negotiated arrangements, severely limit the positive impact it is likely to have on low-income women. With little bargaining power or resources at their disposal, low-income workers will often be left with expensive and ungenerous "accommodations" that make breastfeeding while employed extremely impracticable. Finally, to the extent that it sends a hortatory message about feeding breast milk without making that reality possible for low-income women, the new law risks re-stigmatizing such women as irresponsible mothers. Once those women have a right to breastfeed, only they will be to blame if they do not do it. In short, lactation could well become a new arena of disciplinary surveillance of low-income women—as the Walrond case discussed by Hausman presages.<sup>240</sup>

Indeed, the passage of the accommodation provision risks having the same impact that inattention to cultural stereotypes has had in the reproductive arena. The mainstream reproductive rights movement—and privileged women in general—became complacent about the right to terminate a pregnancy following *Roe v. Wade*,<sup>241</sup> allowing the Supreme Court to progressively eviscerate the substance of that right when no one was looking.<sup>242</sup> At the same time, they failed to challenge both the increasing regulation of the reproductive lives of low-income women, especially women of color, and the stereotypes invoked to justify that regulation.<sup>243</sup> As I have discussed elsewhere,<sup>244</sup> the end result of these developments is that we have a two-tiered system of abortion access—and more generally, of reproductive rights and justice. Under that system, economically privileged (primarily white) women have far greater ability to control their reproductive processes, and are subjected to far fewer punitive state efforts to control those processes, than their low-income (disproportionately nonwhite) counterparts.<sup>245</sup>

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240. See discussion, *supra* notes 197–205.

241. *Roe v. Wade*, 410 U.S. 113 (1973).

242. See Lynne Henderson, *Flexible Feminism and Reproductive Justice: An Essay in Honor of Ann Scales*, 91 DENV. U. L. REV. 141, 149–53 (2013).

243. See Rigel Oliveri, *Crossing the Line: The Political and Moral Battle over Late-Term Abortion*, 10 YALE J.L. & FEMINISM 397, 431 (1998) (discussing stereotypes of women who obtain late-term abortions).

244. See Ehrenreich, *supra* note 8, at 7, 9.

245. Of course, recent years have witnessed an explosion of restrictive abortion legislation, including statutes (such as mandatory ultrasounds laws) that have triggered more vociferous objections from mainstream observers. See Henderson, *supra* note 244, at 151. But nevertheless, abortion restrictions overall have had a markedly greater impact on low-income women. For example, "TRAP" laws (Targeted Regulation of Abortion Providers) have raised expenses and driven clinics to close in such numbers as to make access to an abortion provider prohibitively expensive and time-consuming for many women. Manny Hernandez, *Abortion Law Pushes Texas*

Similarly, here, the conclusion that the ACA has “solved” the breastfeeding problem could result in a system that protects low-wage workers in name only, while indirectly but concretely increasing accommodations for privileged women. And just as stereotypes of low-income women, especially women of color, have been used to justify serious restriction of their autonomy in the reproductive context,<sup>246</sup> so marginalized workers could find themselves abandoned—and blamed for their own circumstances—now that they have statutory “protection.” Thus, while the accommodation approach of the ACA is in some ways a step in the right direction, in others it is also a dangerous placebo that could actually harm the women it is designed to help.

The ACA appropriately recognizes that each lactating-woman-and-nursing-child dyad is different.<sup>247</sup> Highly specific standards defining the nature of the accommodation required are therefore unlikely to be viable—which is exactly why the ACA resorts to the general, discretion-laden reasonable person standard. But the discussion above reveals the limited usefulness of such a broad standard where those exercising the discretion are likely to be strongly affected by cultural attitudes inflected with race and class bias. The fact that many non-office positions cannot fit neatly into the statute’s regime<sup>248</sup> further suggests that the challenges of developing a detailed set of accommodation requirements may simply be insurmountable. Allowing women a year of paid parenting leave may be an infinitely more practical, humane, and equitable approach than the ACA’s limited accommodation right.<sup>249</sup> On-site day care centers and seniority protection policies also come to mind.<sup>250</sup>

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*Clinics to Close Doors*, N.Y. TIMES, (March 6, 2014), [http://www.nytimes.com/2014/03/07/us/citing-new-texas-rules-abortion-provider-is-shutting-last-clinics-in-2-regions.html?\\_r=0](http://www.nytimes.com/2014/03/07/us/citing-new-texas-rules-abortion-provider-is-shutting-last-clinics-in-2-regions.html?_r=0). More importantly, low-income women have been the main targets of the increasing criminalization of birthing. See generally, Lynne M. Paltrow & Jeanne Flavin, *Arrests of & Forced Interventions on Pregnant Women in the United States, 1973-2005*, 38 J. HLTH POLITICS, POL’Y, & L. 299 (2013) (describing results of empirical research on coercive legal interventions into women’s reproductive lives).

246. See Ehrenreich, *Colonization of the Womb*, *supra* note 219.

247. See *supra* note 108.

248. See discussion, *supra* note 136.

249. And, while such leaves may be unimaginable in the current U.S. political climate, they are quite common in other countries. In fact, “the U.S. [is] the only industrialized nation not to mandate paid leave for mothers of newborns.” Katy Hall & Chris Spurlock, *Paid Parental Leave: U.S. vs. The World* (INFOGRAPHIC), HUFFINGTON POST (Feb. 21, 2013), [http://www.huffingtonpost.com/2013/02/04/maternity-leave-paid-parental-leave-\\_n\\_2617284.html](http://www.huffingtonpost.com/2013/02/04/maternity-leave-paid-parental-leave-_n_2617284.html). The United Kingdom, for example, requires 280 days of paid maternity leave at 90% pay. Many countries give leave to fathers as well. *Id.*

250. For one relatively modest suggestion, see KEDROWSKI & LIPSCOMB, *supra* note 12, at 114 (“[W]e advocate that employers assume more of the burdens of breastfeeding, by providing longer, paid maternity leaves, paid break time for nursing or milk expression, a private place for nursing or expression, suitable storage for expressed milk, and on-site child care for lactating mothers. Some of these burdens could be subsidized by the state.”).

Activists and attorneys need to push for a more concrete understanding of all women's circumstances, and more fundamental change in the workplace, if they want to avoid entrenchment of a class-based, two-tiered system of breastfeeding rights—a system that perpetuates, rather than undermining, the longstanding, exploitative nature of many women's relationships to work.