

Affirming and Supporting Black Women's Lactation Agency as Redress

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I. INTRODUCTION

At an 1858 abolitionist meeting in Silver Lake, Indiana, Sojourner Truth faced a heckler—the kind of person who might be identified on today’s internet as a White supremacist troll.¹ This troll, making a bad-faith argument that Truth was simply too tall and too forceful a speaker to be a woman, insisted that she must be a man: if Truth wished to prove otherwise, the troll suggested, she should “submit her breast to the inspection of some of the ladies present.”² This man attempted to silence the sixty-two-year-old Black abolitionist and feminist with a combination of racism and misogyny, demanding that she expose herself in a very different way than might have been asked of Frederick Douglass or Elizabeth Cady Stanton.³ But Truth refused to retreat from the speaker’s podium. Instead, she told the audience that

Her breasts had suckled many a white babe, to the exclusion of her own offspring; that some of those white babies had grown to man’s estate; that, although they had suckled her colored breasts, they were, in her estimation, far more manly than her persecutors appeared to be; and she quietly asked them, as she disrobed her bosom, if they, too, wished to suck! In vindication of her truthfulness, she told them that she would show her breast to the whole congregation; that it was not to her shame that she uncovered her breast before them, but to their shame.⁴

This Article opens with Truth baring her breasts for four reasons. First, for many women like Truth who survived enslavement, lactation was a specifically gendered and racialized site of atrocity. Under chattel slavery in the United States, enslaved women were prevented from breastfeeding their infants as needed, compelled to wean their children far too early at the demands of their enslavers, or made to wet-nurse their enslavers’ White children in place of their own.⁵ This lactational coercion was part of a larger atrocity of reproductive abuse perpetuated against enslaved women.⁶

Second, as Truth notes, enslaved women’s children were harmed when their mothers were denied agency over their own lactation.⁷ Indeed, any

1. See William Hayward, *Pro-Slavery in Indiana*, *LIBERATOR*, Oct. 15, 1858, at 1.

2. See *id.*

3. See *id.*

4. *Id.*

5. See WILMA A. DUNAWAY, *THE AFRICAN-AMERICAN FAMILY IN SLAVERY AND EMANCIPATION* 135 (2003).

6. See *id.* at 128 (statement of Thomas Jefferson) (“[W]ith respect therefore to our women & their children . . . it is not their labor, but their increase which is the first consideration with us.”).

7. See *id.* at 142.

affront to a woman's bodily autonomy harms not only her but also her family and the wider community.⁸

Third, the anecdote anticipates how structural racism and misogyny would continue curtailing Black women's bodily autonomy during Jim Crow.⁹ The seeds had already been planted during the slavery era. The Indiana heckler demanded Truth show her breasts less than two years after *Scott v. Sandford*, as courts across the United States built on that precedent to further deny the agency and self-determination of Black people.¹⁰ For example, the Supreme Court of North Carolina held that enslaved married couples were not truly married because they were not legally persons.¹¹ The Michigan Supreme Court held that a steamboat company could refuse to sell overnight accommodations to a Black passenger.¹² And in a California reprise of the famous 1772 English *Somerset* trial,¹³ Archy Lee only narrowly escaped being sent back to enslavement when a federal judge overruled the Supreme Court of California's order that would have returned him to Mississippi, even though California was supposedly a free state.¹⁴

Fourth and finally, this anecdote about Sojourner Truth lays bare the intergenerational trauma around lactation that persists for women descended from the victims of enslavement and Jim Crow. As of 2014, 85% of all Black women in the United States have had at least one child by the age of forty-four, so the experience of Black mothers forms a significant

8. See R.A. Lenhardt & Kimani Paul-Emile, *Skimmed Milk: Reflections on Race, Health, and What Families Tell Us About Structural Racism*, 57 CAL. W. L. REV. 231, 240 (2021) (“[F]amilies of color are critical units of analysis when it comes to understanding how structural racial inequality works in American society.”); see also Emily West & R.J. Knight, *Mothers' Milk: Slavery, Wet-Nursing, and Black and White Women in the Antebellum South*, 83 J. OF S. HIST. 37, 51 (2017) (“WPA testimony supports the idea of wet-nursing as a uniquely gendered type of exploitation for commodified women.”).

9. See discussion *infra* Section III.B.

10. See generally *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1856) (enslaved party) (denying the legality of Black people as American citizens), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; *Heirn v. Bridault*, 37 Miss. 209, 222 (1859).

11. *Howard v. Howard*, 51 N.C. 235, 236 (1858).

12. *Day v. Owen*, 5 Mich. 520, 527 (1858).

13. See, e.g., Dorothy Couchman, ‘Mungo Everywhere’: *How Anglophones Heard Chattel Slavery*, 36 SLAVERY & ABOLITION 704, 704 (2015).

14. See CAL. TASK FORCE TO STUDY & DEV. REPARATION PROPOSALS FOR AFR. AMS., INTERIM REPORT 72 (2022) [hereinafter INTERIM REPORT] (citing STACEY L. SMITH, FREEDOM'S FRONTIER: CALIFORNIA AND THE STRUGGLE OVER UNFREE LABOR, EMANCIPATION, AND RECONSTRUCTION 76–78 (2013)).

part of Black women’s experience in the aggregate.¹⁵ Black women with infants in California are almost 18% less likely than White or Hispanic women to have ever attempted breastfeeding and 23% less likely to continue breastfeeding by the time their children are six months old.¹⁶ This racial disparity in breastfeeding sheds light on the fact that Black infants are still almost twice as likely as White infants to die before their first birthday, and Black children suffer higher rates of diseases that breastfeeding may prevent.¹⁷ At the same time, “Black collective memory of historical traumas surrounding slavery [and] the historical indignations related to Black women wet-nursing White infants” persists.¹⁸ This Article outlines the structural racism that undergirds this lactation disparity, exposing a web of facially race-neutral laws and policies around breastfeeding that have failed to adequately protect Black women’s lactation agency.

Even as lactation remains a site of historical trauma from enslavement, the ongoing denial of Black women’s agency over the internal processes of their own bodies remains a “badge and incident of slavery.”¹⁹ As such, lactation is ripe as a site for redress. Affirming and supporting the rights of people who are descended from the victims of enslavement and Jim Crow to decide whether, when, and how to feed their infant children is an appropriate reparation for the harms that their forebearers suffered. For simplicity’s sake, this Article will refer to people who lactate as “women,” although transgender people may also lactate, and children may be the parents of infants. In addition, this Article will refer to the descendants of the victims of enslavement and segregation primarily as “Black,” although Native people were also victims of unfree labor and Jim Crow in California.²⁰

15. See Gretchen Livingston, *They’re Waiting Longer, but U.S. Women Today More Likely to Have Children Than a Decade Ago*, PEW RSCH. CTR. (Jan. 18, 2018), <https://www.pewresearch.org/social-trends/2018/01/18/theyre-waiting-longer-but-u-s-women-today-more-likely-to-have-children-than-a-decade-ago/#fnref-24248-1> [https://perma.cc/AMC5-935H].

16. See K.S. Scanlon et al., *Racial and Ethnic Differences in Breastfeeding Initiation and Duration, by State—National Immunization Survey, United States, 2004-2008*, 59 MORBIDITY & MORTALITY WKLY. REP. 327, 329 (2010).

17. See ANDREA FREEMAN, SKIMMED: BREASTFEEDING, RACE, AND INJUSTICE 11 (2020).

18. Anthony Kwame Harrison, *Using Black Lives as if They Don’t Matter: The Famous Four and Other Serious Stories of Capitalism and White Supremacy*, 57 CAL. W. L. REV. 291, 295 (2021).

19. See Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 597–98 (2012).

20. See KIMBERLY JOHNSTON-DODDS, CAL. RSCH. BUREAU, CRB-02-014, EARLY CALIFORNIA LAWS AND POLICIES RELATED TO CALIFORNIA INDIANS 8–9 (2002). Discourses around breastfeeding and reproduction are especially vulnerable to restricting female-embodied people with children to their role as “mothers.” In a society that does not respect caretaking, turning people into “mothers” is a shortcut to ignoring their interests and stripping

By affirming and supporting Black women's lactation agency as a form of redress, California can show its sincerity in atoning for the harms it perpetuated against women, children, and families during enslavement and Jim Crow.

II. WHY LACTATION AS REDRESS?

The answer is simple: because lactation matters.

Lactation is poised at a lacuna of legal and political attention, where Black women's health, sense of self, and the respect—or lack of respect—that they and their families are afforded in society have long gone officially unaddressed. Indeed, even the masterful 484-page Interim Report of the California Reparations Task Force devotes only two sentences to racial disparities in breastfeeding, the same number of sentences that it spends considering tennis star Serena Williams's postnatal blood clots.²¹ In contrast, lactation disparities impact most mothers of the half-million Black children in California.²²

Post-segregation, Black women's lactation agency has remained curtailed by practices that leave their interests unacknowledged and unprotected, including facially race-neutral breastfeeding laws and policies that have primarily benefitted White professional women;²³ facially race-neutral Women, Infants, and Children (WIC) policies that benefit agribusiness to the disadvantage of recipients;²⁴ and the child welfare and carceral systems, where Black women are subject to disproportionate surveillance and punishment.²⁵

away their rights in the name of protecting their children. At the same time, it is important to acknowledge that not all women with children are physically able to breastfeed, not all mothers are adults, and not all parents who lactate are women. *Id.*

21. See INTERIM REPORT, *supra* note 14, at 427.

22. *Child Population, by Race/Ethnicity*, KIDS DATA, <https://www.kidsdata.org/topic/33/child-population-race/table#fmt=140&loc=2&tf=141&ch=7,11,70,10,72,9,73&sortColumnId=0&sortType=asc> [<https://perma.cc/H2CV-V3BE>] (displaying data for California, Year: 2021, Data Type: Number, Race/Ethnicity: All).

23. See Andrea Freeman, “First Food” Justice: Racial Disparities in Infant Feeding as Food Oppression, 83 FORDHAM L. REV. 3053, 3076–78 (2015).

24. See *id.* at 3066–68.

25. See, e.g., Melissa Murray, *The Milkmaid's Tale*, 57 CAL. W. L. REV. 211, 229–30 (2021); see also Joseph Hayes et al., *Fact Sheet: California's Prison Population*, PUB. POL'Y INST. CAL. (July 2019), <https://www.pplic.org/publication/californias-prison-population> [<https://perma.cc/XJJ5-LDK8>] (noting that in 2017, 25.9% of California's women prisoners were Black, while adult Black women comprised only 5.7% of the state as a whole).

Some argue that lactation rights are not a serious enough issue for racial justice. For example, White breastfeeding scholar Patricia Hausman tells a story about asking Black feminist sociologist Patricia Hill Collins about “African-American women’s low rates of breastfeeding,” describing how Collins “stated quite clearly that she felt breastfeeding to be a white, middle-class women’s issue that black women didn’t have time to deal with, given other social priorities and issues of greater concern to them.”²⁶ However, since this terse exchange between Collins and Hausman, Black lactation activists have highlighted the connections between breastfeeding and other “social priorities and issues of concern.”²⁷ As a form of redress, affirming and supporting Black women’s lactation agency means dismantling medical racism, employment discrimination, and the over-policing of Black families. Lactation agency also works to ameliorate the harms that incarceration poses to Black mothers and their children. Indeed, the denial of Black women’s lactation agency does not merely affect them: the usurpation of Black women’s bodily autonomy has profound spillover effects on society writ large. On a population level, the foundation of infant and child health must be respect and support for their parents’ decision-making around lactation and other aspects of reproduction.

III. THE ATROCITY

The explicitly racialized system of chattel slavery denied Black women’s bodily autonomy.²⁸ Jim Crow extended this denial.²⁹ Nearly sixty years after Jim Crow, facially neutral laws still fail to adequately protect Black women’s agency over their own lactation.³⁰

26. BERNICE L. HAUSMAN, MOTHER’S MILK: BREASTFEEDING CONTROVERSIES IN AMERICAN CULTURE 45 (2003).

27. See, e.g., Andrea Freeman, *Skimmed Revisited*, 57 CAL. W. L. REV. 331, 348–49 (2021) (quoting Black lactation activist Kimberly Seals Allers on how the factors that prevent Black women *from* breastfeeding are materially different from the pressure some upper-middle-class White women experience *to* breastfeed: “[I]n my many years of working in marginalized neighborhoods in Detroit, Philadelphia and across the Southeast, I have never heard a [B]lack woman say she was pressured to breastfeed. Ever. I would love to hear that!”).

28. Abigail Wulah, Fadumo M. Abdi & Mavis Sanders, *Promoting Black Girls’ and Women’s Sexual and Reproductive Health Requires Acknowledging Their History and Experiences*, CHILD TRENDS (Jan. 25, 2023), <https://www.childtrends.org/publications/promoting-black-girls-and-womens-sexual-and-reproductive-health-requires-acknowledging-their-history-and-experiences> [<https://perma.cc/AA7J-HN2M>].

29. *Id.*

30. See generally Bennett Capers, “*And They Took My Milk!*,” 57 CAL. W. L. REV. 319, 326 (2021) (recognizing the inadequacy of workplace accommodations for breastfeeding and attributing it to potential shortcomings in advocacy).

A. Lactation Abuse in Enslavement

West African women in the seventeenth, eighteenth, and nineteenth centuries typically breastfed for two or three years after childbirth, both as a form of birth control and because cultural expectations structured such behaviors as perfectly normal.³¹ But enslavement, forced transport across the Atlantic Ocean, and sale to enslavers in the United States stripped away the victims' bodily autonomy. During enslavement, Black women typically lacked meaningful choices over when and whether to have children, whom they would have children with, and whether and how long they would breastfeed.³²

In a perceived conflict between enslaved Black women's lactation agency and White enslaver's short-term economic interests, the short-term economic interests invariably won. While a newborn may need to be fed more than ten times per day, the 1840 *Southern Cultivator and Monthly Journal* recommended rounding enslaved women's nursing schedule down to only three times during the workday: "[M]orning, noon, and evening, until [babies] are eight months old, and twice a day from thence."³³ Combined with the malnutrition that many lactating women suffered and the forced wet-nursing described above, this inadequate schedule meant that Black infants did not receive enough nutrients. Together with insufficient medical and childcare, inadequate lactation produced extremely high mortality rates among enslaved Black children: in 1850, more than half of Black deaths in the United States were of children under the age of nine, and enslaved babies died at over twice the rate of White babies.³⁴

B. Lactation Denial During Jim Crow

Even though lactation opportunities were inadequate, breastfeeding remained the most common way for Black women to feed their babies

31. See DUNAWAY, *supra* note 5, at 138.

32. See *id.* at 119–20 (“Kanawha County, West Virginia, slave Lizzie Grant recalled: ‘I was about 17 years old when I was given to my young Maser, me and the man that I called my husband. So our young Maser put us to live together to raise from just like you would stock today. They never thought anything about it either. They never cared or thought about our feeling in the matter . . . [because] it was cheaper to raise slaves than it was to buy them.’”).

33. 4 WORKS PROGRESS ADMIN., SLAVE NARRATIVES: A FOLK HISTORY OF SLAVERY IN THE UNITED STATES FROM INTERVIEWS WITH FORMER SLAVES 103 (1941) (ebook), <https://www.gutenberg.org/files/18485/18485-h/18485-h.htm> [<https://perma.cc/YAB9-V9DB>].

34. See DUNAWAY, *supra* note 5, at 141.

during and after Reconstruction. Thus, in her 1883 *Book of Medical Discourses*, Dr. Rebecca Lee Crumpler³⁵ framed lactation as the expected mode of infant feeding.³⁶ Yet Dr. Crumpler noted that even after enslavement, Black women were still expected to breastfeed upper-class White babies:

A lady of wealth may get discouraged and give her babe to the care of another, whose babe may in consequence have to be put in some charity-house or otherwise to board. Her babe may thrive and live; while that of her wet-nurse may soon pine away and die. No one can avoid distressing others unless he strives, to the best of his ability, to bear his own burdens.³⁷

After enslavement, free women worked either in agricultural labor or as domestic servants for wealthy White women—including as wet nurses, as their mothers and grandmothers had been.³⁸ Dr. Crumpler's attention to this intergenerational lactation abuse is apparent when she frames these White women who shifted lactation labor onto poor Black women as baby killers and bad citizens.³⁹

Within a generation or two, a Black middle class developed and continued to practice breastfeeding. The 1903 marital advice manual *Golden Thoughts*, marketed specifically to Black audiences from the aspiring middle class,⁴⁰ presented breastfeeding as the expected way to feed young children⁴¹—and also as occasionally effective birth control.⁴² In fact, by noting that lactation could temporarily suppress ovulation, *Golden Thoughts* was part of a larger national trend that provided women with greater access to contraceptive knowledge and allowed them to bear fewer children as a result.⁴³ At the same time, mortality rates among Black infants remained

35. Dr. Crumpler was the first African-American woman to earn an M.D. Cindy Shmerler, *Overlooked No More: Rebecca Lee Crumpler, Who Battled Prejudice in Medicine*, N.Y. TIMES (July 17, 2021), <https://www.nytimes.com/2021/07/16/obituaries/rebecca-lee-crumpler-overlooked.html> [<https://perma.cc/9KGW-4C8E>].

36. REBECCA LEE CRUMPLER, *A BOOK OF MEDICAL DISCOURSES IN TWO PARTS* 45 (1883) (ebook), <https://www.gutenberg.org/cache/epub/65188/pg65188-images.html> [<https://perma.cc/V9XZ-J7XS>].

37. *Id.*

38. See FREEMAN, *supra* note 17, at 43.

39. See CRUMPLER, *supra* note 36.

40. See MICHELE MITCHELL, *RIGHTEOUS PROPAGATION: AFRICAN AMERICANS AND THE POLITICS OF RACIAL DESTINY AFTER RECONSTRUCTION* 88 (2004).

41. See PROFESSOR & MRS. J.W. GIBSON, *GOLDEN THOUGHTS ON CHASTITY AND PROCREATION, INCLUDING HEREDITY, PRENATAL INFLUENCES, ETC., ETC.* 204 (1903); see also MITCHELL, *supra* note 40 (noting that while *Golden Thoughts* was marketed to Black readers—with illustrations of a middle-class Black household and an introduction by prominent Black Atlanta physician Dr. H.W. Butler—“page by page, line by line, the text was . . . identical” to a White-marketed book titled *Social Purity*).

42. GIBSON, *supra* note 41, at 362.

43. See MITCHELL, *supra* note 40, at 90–91.

high, at least on paper—a combination that White eugenicists celebrated and Black eugenicists fretted over as “race suicide.”⁴⁴

As Black Americans left the rural south, especially around World War I, urbanized economic pressures played an increasing role in Black women’s choices around reproduction and lactation. Because Jim Crow depressed wages, married Black women were far more likely to work outside the home than married White women.⁴⁵ In Southern California, Black women mainly worked as domestic laborers in White households; in Northern California, some Black women found jobs in manufacturing as well.⁴⁶ In both environments, it was forbidden for working parents to bring along an infant to feed and care for during the workday. As a result, working Black mothers left their young children during the day in the care of relatives or friends, some of whom might even provide cross-nursing.⁴⁷

Other Black women across the United States relied on a patchwork of mutual aid groups to care for their children. In 1911, for example, the National Association for the Advancement of Colored People’s (NAACP) magazine, *The Crisis*, reported on “day nurseries”—precursors of today’s daycare centers—in Baltimore, Brooklyn, and elsewhere.⁴⁸ Faced with working mothers’ need for breastmilk substitutes, the Cincinnati health department sold “pure [cow’s] milk for feeding babies . . . at cost price.”⁴⁹ However, in an age before effective food safety regulations, feeding an infant anywhere except at the breast carried inevitable risks that contributed to the high mortality rate.⁵⁰ Indeed, it is important to remember that early twentieth-century Black mothers who weaned their babies, placed them in daycare, and went to work were not necessarily enacting an idealized vision of female agency. Instead, Black women and their children have

44. *Id.* at 90; *see also* WILLIAM HANNIBAL THOMAS, *THE AMERICAN NEGRO: WHAT HE WAS, WHAT HE IS, AND WHAT HE MAY BECOME* 200 (1901). *But see* W.E.B. DU BOIS, *THE PHILADELPHIA NEGRO: A SOCIAL STUDY* 387 (2007) (commenting that, in America, “a census which gives a slight indication of the utter disappearance of the American Negro from the earth is greeted with ill-concealed delight”).

45. *See* FREEMAN, *supra* note 17, at 46.

46. *See* LYNN M. HUDSON, *WEST OF JIM CROW: THE FIGHT AGAINST CALIFORNIA’S COLOR LINE* 60–61 (2020).

47. *See* FREEMAN, *supra* note 17, at 44.

48. A.W. Hunton, *Women’s Clubs: Caring for the Children*, 2 *CRISIS*, June 1911, at 78, 78–79.

49. Felix J. Koch, *Little Mothers of Tomorrow*, 14 *CRISIS*, Oct. 1917, at 289, 289.

50. *See* FREEMAN, *supra* note 17, at 48.

suffered from inadequate childcare resources and absent workplace lactation rights for more than a century.

Shocked by high mortality rates among urban babies while refusing to recognize the structural forces responsible for these deaths, turn-of-the-century eugenicists blamed Black mothers instead.⁵¹ In California, White supremacists had already segregated both public space and private life,⁵² but twentieth-century eugenicists turned to infringing Black women's reproductive rights to achieve their genocidal purposes.⁵³ It is essential to acknowledge the connection between this eugenicist history and the continuing inadequacy of perinatal care for many Black women and infants, which this Article will discuss below.

By the late 1940s, when Black women were already forgoing lactation for generations, Black families finally had enough spending power to be targeted by advertisements for commercial breastmilk substitutes.⁵⁴ In 1950, only 24% of new mothers of any race reported starting to breastfeed their infants; in addition, only 5% of mothers continued lactating more than a few months post birth.⁵⁵ This decline in breastfeeding was driven, in part, by the availability of more reliable forms of contraception;⁵⁶ by 1975, three out of four American babies were exclusively fed on formula.⁵⁷

Although it was common for both Black and White women in the twentieth century to view infant formula as modern and hygienic, discussions of lactation among Black audiences additionally positioned breastmilk substitutes as a detour around racialized lactation trauma.⁵⁸ In addition, in the Jim Crow era, when Black people's safety was under threat in public spaces,

51. See MITCHELL, *supra* note 40, at 82.

52. In the 1850s alone, California tried to pass at least four Black exclusion laws but finally settled for outlawing marriage between Blacks and Whites, excluding Black settlers from homesteading on state land, and refusing to fund public schools for Black children. INTERIM REPORT, *supra* note 14, at 73.

53. Between 1909 and 1979, California forcibly sterilized 20,000 residents, about a third of the total number of forced sterilizations in the United States. Women were more frequently the subject of sterilizations starting in the 1930s; Black Californians were sterilized at four times their rate in the overall population. *Id.* at 115.

54. See FREEMAN, *supra* note 17, at 62.

55. *Id.* at 50.

56. JAN RIORDAN, BREASTFEEDING AND HUMAN LACTATION 11–12 (3d ed. 2005).

57. KIMBERLY SEALS ALLERS, THE BIG LETDOWN: HOW MEDICINE, BIG BUSINESS, AND FEMINISM UNDERMINE BREASTFEEDING 56 (2017).

58. Carmen Willette, *The Sharecroppers*, 47 CRISIS, May 1940, at 148 (embedding breastfeeding in scenes of rural poverty: “When the last pallet is up from underfoot, and the children have rolled their patch work quilt up from the table that it might be used for the morning meal, when through much experience the mother has made the fire flourish enough to cook the hominy grits and chickory brew while supporting the last born on one arm as it nursed at her drying breast, you crowd about the rude table with its red cloth and wait until the blessing is said”).

it would have been unthinkable for a Black woman to breastfeed her infant away from home. For Black women, avoiding breastfeeding by offering their infants convenient milk substitutes in bottles thus promised newfound security.⁵⁹

White women, who had been driven by different motivations than Black women at midcentury to embrace breastmilk substitutes, were nudged back to breastfeeding around the 1970s, thanks in part to the efforts of La Leche League.⁶⁰ La Leche League was founded by middle-class White mothers in the Chicago suburbs in 1956;⁶¹ grass-roots outreach in racially segregated communities meant that La Leche League's breastfeeding activism remained racialized for generations.⁶² For example, although fewer than six out of ten White mothers had ever breastfed in the late 1980s, this number dwarfed the two out of ten Black mothers who did so.⁶³ Today, when nearly eight out of ten White mothers initiate breastfeeding, Black mothers' rates of breastfeeding initiation are now equal to those of 1980s White women;⁶⁴ in addition, just barely more than one out of ten Black mothers today continues to breastfeed at a year.⁶⁵ As explored below, this disparity brings specific harms for Black women and children.

IV. THE HARMS OF LACTATION AGENCY DENIAL

Until the industrial revolution, breastfeeding was the norm for almost all newborns, continuing to some degree at least until a child grew teeth.⁶⁶ Today, when breastfeeding is the exception for certain populations, the harms of curtailing lactation have become clear.

Infants who are fed breastmilk substitutes are at higher risk of ear infections, respiratory infections, and digestive infections—including necrotizing enterocolitis, which kills parts of a baby's intestines and can result in death.⁶⁷ As they grow, children fed breastmilk substitutes are also at greater risk of allergic and auto-immune conditions, from asthma and eczema to type

59. See Capers, *supra* note 30, at 326–27.

60. See FREEMAN, *supra* note 17, at 50.

61. See HAUSMAN, *supra* note 26, at 160.

62. See FREEMAN, *supra* note 17, at 50–51.

63. See *id.*

64. See *id.*

65. See *id.*

66. See RIORDAN, *supra* note 56, at 5 (“[T]he infant-feeding practices of [some] societies today may reflect breastfeeding practices of much earlier (prehistoric) times.”).

67. See *id.* at 17.

1 diabetes, as well as metabolic conditions, including cardiovascular disease and type 2 diabetes.⁶⁸ These risks translate into higher incidences of food and respiratory allergies,⁶⁹ type 2 diabetes,⁷⁰ hypertension,⁷¹ obesity,⁷² and eczema in Black children than White children.⁷³ In addition, Black children are more likely to die of asthma than children of any other race.⁷⁴

Women who give birth but then forego lactation also face health risks. These risks include increased incidence of the most common causes of heart disease: type 2 diabetes, hypertension, and high cholesterol.⁷⁵ Black women are more likely to die of heart disease than American women of other races.⁷⁶ Lactation may reduce uterine bleeding, make it easier for women to lose excess pregnancy weight, and even protect against some ovarian and breast cancers—including one that is more common in Black women who have had several pregnancies.⁷⁷ Thus not only does lactation offer health benefits to women and children, but the denial of lactation may also carry special risks for Black women and children.

V. ATONEMENT AND REDRESS

During enslavement and Jim Crow, Black women suffered the atrocity of denied bodily agency and self-determination about whether and how

68. See ALLERS, *supra* note 57, at 85–87. For a discussion on the debate—and lack of reliable studies—about whether children who are not breastfed suffer harm to their cognitive development, see *id.* at 86 (arguing that “[t]here was no substantive relationship between breastfeeding in full-term infants and cognitive performance.”).

69. See Ganesa Wegienka et al., *Racial Differences in Allergic Sensitization: Recent Findings and Future Directions*, 13 CURRENT ALLERGY & ASTHMA REP. 255, 257–58 (2013).

70. Dana Dabelea et al., *Prevalence of Type 1 and Type 2 Diabetes Among Children and Adolescents From 2001 to 2009*, 311 [J]AMA 1778, 1781 (2014).

71. See Liwei Chen, Neal Simonsen & Li Liu, *Racial Differences of Pediatric Hypertension in Relation to Birth Weight and Body Size in the United States*, PLOS ONE, July 15, 2015, at 1, 2 (“Non-Hispanic Black adolescent boys have a significantly higher hypertension rate than their non-Hispanic White counterparts in the US.”).

72. See Bryan Stierman et al., *National Health and Nutrition Examination Survey 2017–March 2020 Prepandemic Data Files—Development of Files and Prevalence Estimates for Selected Health Outcomes*, 158 NAT’L HEALTH STAT. REP. 1, 12 (2021).

73. See Teresa Fu et al., *Eczema and Sensitization to Common Allergens in the United States: A Multiethnic, Population-Based Study*, 31 PEDIATRIC DERMATOLOGY 21, 23 (2014).

74. INTERIM REPORT, *supra* note 14, at 429.

75. See, e.g., Eleanor Bimla Schwarz et al., *Duration of Lactation and Risk Factors for Maternal Cardiovascular Disease*, 113 OBSTETRICS & GYNECOLOGY 974 (2009).

76. See, e.g., Richard Allen Williams, *Cardiovascular Disease in African American Women: A Health Care Disparities Issue*, 101 J. NAT’L MED. ASS’N 536, 536 (2009) (“Age-adjusted death rates for heart disease in 2002 were significantly higher for black women (169.7 per 100,000) compared to White women (131.2 per 100,000).”).

77. See Freeman, *supra* note 23, at 3064–65.

long to breastfeed their children. As Sojourner Truth might remind us, perpetuating this atrocity has brought shame upon society.⁷⁸ To reclaim its moral character, California must first apologize for its role in this atrocity.⁷⁹

Next, to turn the “apology into a meaningful, material reality,” California must seize the opportunity to affirmatively recognize Black women’s right to self-determination and agency over their lactation and enact laws and instate policies that ensure Black women can fully exercise these rights.⁸⁰ Lactation agency is currently curtailed by inadequate perinatal care, the distribution and marketing of infant formula, and stubborn cultural assumptions that it is naturally impossible or at least very difficult for women who are physically separated from their infants—whether in school, at work, in prison, or via the loss of child custody—to lactate.⁸¹ Finally, California must ensure that lactation redress is successful by taking care that Black-directed peer breastfeeding groups, doulas, and resource centers are vocal participants in planning and executing lactation redress. The guidance of Black people who lactate must be central to restoring Black lactation agency.

This Article’s lactation redress proposal is spiritually akin to the Creating a Respectful and Open Workplace for Natural Hair Act of 2019 (CROWN Act).⁸² Highlighting that workplace prohibitions against natural Black hairstyles are not racially neutral but “remain a rampant source of racial discrimination with serious economic and health consequences,”⁸³ and noting that such policies “burden . . . Black employees more than any other group,”⁸⁴ the CROWN Act instructs California courts to find that “targeting hairstyles associated with race is racial discrimination.”⁸⁵ Like the CROWN Act, this Article recognizes that although people of all races

78. See Hayward, *supra* note 1.

79. See ROY L. BROOKS, ATONEMENT & FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS 142 (2004).

80. See *id.*

81. As a cultural norm, men urinate standing up, but a urinal is not considered an ‘accommodation’ for men—it is just the standard. This is exactly what women deserve: lactation facilities as the norm, instead of being made to feel they are being done a favor because of their unique biological needs.

ALLERS, *supra* note 57, at 223.

82. S.B. 188, 2019 Reg. Sess. §§ 2, 3 (Cal. 2020) (amending CAL. EDUC. CODE § 212.1 and CAL. GOV’T CODE § 12926).

83. *Id.* § 1(c).

84. *Id.* § 1(d).

85. *Id.* § 1(f).

lactate, Black women today remain disproportionately impacted by systemic barriers to lactation. Thus, to acknowledge the historical roots of this denial and right this wrong, California must take steps to ensure that Black women are able to exercise autonomy and self-determination over their lactation.

VI. AREAS FOR LACTATION REDRESS

A. *Lactation Agency in Perinatal Care*

Black women are less likely than women of other races to give birth in hospitals that have been designated “Baby-Friendly,” an international standard that requires ten different practices to increase breastfeeding success.⁸⁶ When hospitals in majority-Black communities institute Baby-Friendly policies, more women practice lactation, as when Boston Medical Center implemented Baby-Friendly policies in its maternity ward and 40% more Black patients started exclusively breastfeeding their infants.⁸⁷

But as Black lactation activists point out, attitudes must be changed along with policies. Jacquelin Franklin, who runs breastfeeding groups for Black women in California, “cautions that although hospital practices have changed, some staff may not follow the new practices with Black mothers because the staff have the attitude of ‘Oh well, she’s Black, so she’s not going to breastfeed anyway.’”⁸⁸ Further, systemic healthcare discrepancies form an additional barrier to breastfeeding, as Black women in California and nationally are more likely to give birth prematurely,⁸⁹ and standard hospital policies often make it especially difficult for new parents to breastfeed premature babies, even those who are able to suckle.⁹⁰

As redress, California must mandate that all hospitals and birth centers institute and follow Baby-Friendly policies for Black women patients and their newborns. Women who are not proactively offered lactation support

86. See Freeman, *supra* note 23, at 3070–71.

87. Before the policies were instituted, 34% of Black women exclusively breastfed after delivery at Boston Medical Center; afterward, 74% did. See BABY-FRIENDLY USA, THE BABY-FRIENDLY HOSPITAL INITIATIVE AT BOSTON MEDICAL CENTER 10 (2011), http://flbreastfeeding.org/archiveFBC/HTMLobj-2124/BFHI_BMC.pdf [<https://perma.cc/V3UP-ADYE>].

88. Tonya L. Brito & Sofia Jonas, *Breastfeeding, Race and Mutual Aid*, 57 CAL. W. L. REV. 257, 276 (2021) (noting, in addition, that health care providers are more likely to encourage White women to breastfeed than Black women).

89. See INTERIM REPORT, *supra* note 14, at 427.

90. See FREEMAN, *supra* note 17, at xi (“While my NICU neighbor cried as she filled shelf after shelf of the communal fridge with bottles of milk that her baby could not digest, I struggled to squeeze out even a few drops.”).

after delivery may be too exhausted or in pain to seek it out themselves.⁹¹ As long as breastfeeding resources are only made available to the medically privileged, Black women's lactation agency will continue to be short-changed.

B. Infant Formula: Capitalizing on Lactation Agency Denial

Breastmilk substitutes are not substantively equivalent to breastmilk. Breastmilk substitutes are made primarily from surplus dairy and soybean commodities that are subsidized by the U.S. Department of Agriculture (USDA).⁹² Breastmilk, on the other hand, carries cells and nutrients with immune benefits that protect infants' gut lining, transfers antibodies from mother to child, and limit the dangers of some bacteria.⁹³ Despite this, much advertising of infant formula focuses on presenting substitutes and breastmilk as comparable.⁹⁴ Yet safely preparing a bottle of formula requires access to clean drinking water, which one million Californians lack.⁹⁵ In addition, breastmilk substitutes are not always available on store shelves, as American parents are well aware after the formula shortage of 2022.⁹⁶

Despite these disadvantages, companies that sell formula have engaged in generations of misleading claims and cultural rescripting to position

91. Compare Christa M. Kelleher, *The Physical Challenges of Early Breastfeeding*, 63 SOC. SCI. & MED 2727, 2734 (noting that "many women felt vulnerable right after birth and are often dependent upon health care practitioners to help them figure out how to make their bodies 'work' when it comes to breastfeeding"), with Jody Segrave-Daly, *How to Breastfeed During the First Two Weeks of Life*, N. Y. TIMES (Apr. 18, 2020), <https://www.nytimes.com/article/breastfeeding-newborn.html> [<https://perma.cc/RBW3-GXAS>] (recommending assistance, especially for exhausted mothers or those on pain medication, to ensure that the newborn's head is not improperly positioned, lest it "lead to a blocked nose or mouth, which in turn can stop [the baby from] breathing.").

92. See Freeman, *supra* note 23, at 3068.

93. See HAUSMAN, *supra* note 26, at 18.

94. See, e.g., Ashley May, *Study: 'Breakthrough' Infant Formula Protects Immune System Like Breast Milk*, USA TODAY (Oct. 27, 2016, 1:18 PM), <https://www.usatoday.com/story/news/nation-now/2016/10/27/study-breakthrough-infant-formula-protects-immune-system-like-breast-milk/92458028> [<https://perma.cc/C9BR-AGEY>] ("This is the biggest breakthrough in the last decade' for Abbott formula, the owner [of] Similac, said Dr. Rachael Buck, one of the study's researchers who works for the company.").

95. Emily Hoeven, *1 Million Californians Lack Safe Drinking Water*, CAL MATTERS (July 27, 2022), <https://calmatters.org/newsletters/whatmatters/2022/07/california-drinking-water-safe> [<https://perma.cc/77G4-4YM5>]; see also INTERIM REPORT, *supra* note 14, at 11–12.

96. David Leonhardt, *The Baby Formula Crisis*, N. Y. TIMES (May 13, 2022), <https://www.nytimes.com/2022/05/13/briefing/baby-formula-shortage-us-economy.html> [<https://perma.cc/HXA9-VSQG>].

their products as the only choice for feeding infants in modern society.⁹⁷ Indeed, the prevalence of infant formula, including in food-support programs like WIC, has helped to structurally foreclose more family-friendly policies like universal parental leave or workplace childcare.⁹⁸ In addition, formula marketing in the United States has been explicitly racialized for nearly eighty years, during which time formula companies have been left free to meddle with the lactation agency of women descended from the victims of enslavement and Jim Crow.⁹⁹

1. WIC as State-Endorsed Lactation Agency Denial

Although race-neutral on their face, nutritional support policies that default to providing infant formula have built structural barriers to Black women's lactation agency. The California WIC program provides nutritional support and breastfeeding programs for pregnant women and their children under five.¹⁰⁰ Just under 10% of California WIC participants in 2015 were Black, or about twice the rate of the overall population.¹⁰¹ WIC helps participants access standard grocery store foods, including fruits, vegetables, dairy or soy, eggs, beans, grains, and canned fish.¹⁰² But WIC food packages also include powdered infant formula for participants with a baby under six months, even if the parent is lactating. Critical lactation theorist Andrea Freeman argues that “distributing formula through WIC represents a powerful endorsement of its use,” noting that “[w]omen in the WIC program breastfeed at a rate of one half to one third the rate of non-WIC clients.”¹⁰³ This lower rate reflects the fact that breastfeeding “is essential for the continuation

97. See FREEMAN, *supra* note 17, at 74 (“Formula advertising inspires an expectation of breastfeeding failure. It misleadingly presents formula as a solution to normal infant behaviors, such as fussiness and spitting up. It confuses consumers about whether formula is superior, inferior, or equivalent to breast milk, particularly in combination with the product’s endorsement by health care practitioners and institutions.”).

98. See Linda C. Fentiman, *Marketing Mothers’ Milk: The Commodification of Breastfeeding and the New Markets for Breast Milk and Infant Formula*, 10 NEV. L.J. 29, 72–75 (2009).

99. See generally FREEMAN, *supra* note 17, at 62–63 (discussing the racialized nature of marketing campaigns).

100. *Women, Infants & Children Program: How WIC Helps*, CAL. DEP’T OF PUB. HEALTH, <https://www.cdph.ca.gov/Programs/CFH/DWICSN/pages/program-landing1.aspx> [<https://perma.cc/9MYC-DBM7>].

101. CAL. WIC ASS’N, ENGAGEMENT AND PARTICIPATION OF AFRICAN AMERICANS IN CALIFORNIA WIC: RECOMMENDATIONS FROM THE ASK THE COMMUNITY FIRST TASK FORCE 2–3 (2015), https://www.calwic.org/storage/documents/Engaging_Families/ATC_Report_r4.pdf [<https://perma.cc/M8PF-4BDW>].

102. *WIC Monthly Food Prescription*, NAT’L WIC ASS’N, http://s3.amazonaws.com/aws.upl/nwica.org/wic_food_package.pdf [<https://perma.cc/TF9L-B96U>].

103. Freeman, *supra* note 23, at 3067 (citing George Kent, *WIC’s Promotion of Infant Formula in the United States*, INT’L BREASTFEEDING J., Apr. 20, 2006, at 1, 6).

of lactation.”¹⁰⁴ That is, supplementing with formula leads to less infant demand for breastmilk and more infrequent breastfeeding, which decreases milk production and drives demand for formula and can finally drive lactation to an end.

Dismantling the structural barriers that make it difficult for Black women to exercise lactation agency will require effort—but providing infant formula remains shockingly cheap for WIC. The USDA, which administers WIC, receives rebates of 85–98% on formula purchases.¹⁰⁵ Formula companies then offset these rebates by raising prices for retail customers.¹⁰⁶ Because some of these retail customers paying inflated prices include WIC participants whose babies have aged out of the formula benefit, the weight of this cross-subsidy is borne by low-income women and their children. As of this writing, a twelve-ounce can of Similac Advance costs \$17.94 at Walmart¹⁰⁷—or more than the California minimum wage for one hour of work¹⁰⁸—and produces approximately ninety ounces of formula, which might last a six-month-old less than three days,¹⁰⁹ putting the cost around \$50 per week. WIC is a federal program, so California WIC has limited options for curtailing the inclusion of formula.¹¹⁰ Nonetheless, it is important to acknowledge the effect WIC has on abridging Black women’s lactation agency in California. There is no such thing as a free bottle.

104. RIORDAN, *supra* note 56, at 79 (emphasis in original).

105. Freeman, *supra* note 23, at 3067.

106. *Id.*

107. *Baby Formula in Feeding*, WALMART, https://www.walmart.com/browse/baby/baby-formula/5427_133283_4720344 [<https://perma.cc/FK39-3CUT>].

108. California’s Minimum Wage is \$15.50 per hour. *Minimum Wage Frequently Asked Questions*, CAL. DEP’T INDUS. RELS., https://www.dir.ca.gov/dlse/faq_minimumwage.htm [<https://perma.cc/AGH3-S6FK>].

109. *See Amount and Schedule of Baby Formula Feedings*, HEALTHYCHILDREN, <https://www.healthychildren.org/English/ages-stages/baby/formula-feeding/Pages/Amount-and-Schedule-of-Formula-Feedings.aspx> [<https://perma.cc/Y2E9-EZEP>].

110. On the public health challenges for states of federal preemption, *see, e.g., Impact of Preemptive Laws on Public Health 201511*, AM. PUB. HEALTH ASS’N (Nov. 3, 2015), <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2016/01/11/11/08/impact-of-preemptive-laws-on-public-health> [<https://perma.cc/4X9X-B5DU>] (“Opponents of preemption would . . . support federal legislation that strongly protects public health through evidence-based strategies. However, federal mandates may not always reflect the needs of a local community, and they need not preempt stronger action at lower levels.”).

2. Formula Companies Benefit from Lactation Agency Denial

The World Health Organization's 1981 International Code of Marketing of Breast-Milk Substitutes states that "there should be no advertising or other form of promotion to the general public" of breastmilk substitutes.¹¹¹ But the United States has not signed onto the code, and formula companies Mead Johnson, Abbot Laboratories, Nestlé, and Danone spend about half a billion dollars on advertising each year.¹¹² Formula sales are big business: Abbot Labs alone paid \$2.4 million to lobbying firms in 2015, and contributed another half a million dollars to congressional candidates in 2016.¹¹³ Given Black families' high rates of formula feeding, many of the customer dollars fueling this lobbying and advertising come from Black women and their families, despite the fact that the formula companies' current business model greatly benefits from abridging Black women's lactation agency.

Indeed, free to advertise, formula companies have made use of the legacy of misogyny and racism that has usurped Black women's lactation agency. As Black breastfeeding activist Kimberly Seals Allers notes, "The act of breastfeeding cannot be separated from the narrative of Black women's bodies. . . . The river of historical trauma among women of color runs deep and wide."¹¹⁴ As a result, Black women with young children today are unlikely to have older female relatives who can offer advice or support around breastfeeding. Instead, Black women looking for guidance about lactation may be more likely to find it from formula companies than from women in their community.¹¹⁵ Of the twelve videos displayed at the top of the Enfamil formula brand's YouTube page in December 2022, six featured product testimonials from Black women.¹¹⁶ As Freeman notes, "most . . . images of Black women breastfeeding appear in formula advertisements. The formula companies use these positive portrayals to create a feeling of goodwill for their product, promising to deliver a bonding, nurturing relationship between Black mother and child

111. World Health Organization [WHO], *International Code of Marketing of Breast-milk Substitutes*, at 16 art. 5, ¶ 1, Res. WHA34.22 (May 21, 1981), <https://www.who.int/publications/i/item/9241541601> [<https://perma.cc/NAM2-GLE6>].

112. See FREEMAN, *supra* note 17, at 52, 57.

113. See ALLERS, *supra* note 57, at 143–44.

114. *Id.* at 150.

115. See Amanda J. Calhoun, *Slavery and Racism Drive a Toxic Double Standard About Breastfeeding*, WASH. POST (June 8, 2022, 6:00 AM), <https://www.washingtonpost.com/outlook/2022/06/08/slavery-racism-drive-toxic-double-standard-about-breastfeeding> [<https://perma.cc/5X8L-3GP3>].

116. See *Enfamil US*, YOUTUBE, <https://www.youtube.com/@enfamil/videos> [<https://perma.cc/V2NP-4CW3>] (displaying customer reviews from, but not limited to, Victoria, Mireille, Shantel, Ashanti, and Lexie-Ann).

without the hassle and unpredictability of actual breastfeeding.”¹¹⁷ Moreover, these misleading ads remain some of the most publicly prominent sources of lactation information, exacerbating the structural barriers that abridge Black women’s lactation agency.¹¹⁸ Lactation redress in California thus must include a ban on the advertising of breastmilk substitutes.

C. Separating Parents from Babies as Lactation Agency Denial

By one week after an infant’s birth, a lactating person’s milk supply is driven not primarily by hormonal cues but by a behavioral one: the removal of milk from the breasts.¹¹⁹ That is, feeding an infant drives the production of more breastmilk. If milk is not sucked or manually expressed, lactation will eventually cease. Thus, women who are physically separated from their infants but want to continue providing breastmilk must express milk every few hours—typically using a breast pump—to maintain lactation. One cause of this physical separation is employment. California’s Paid Family Leave Benefits offers new parents up to eight weeks of benefits at 60% or 70% of their typical wage, a reduction in income that may be unworkable for many low-income women.¹²⁰ As detailed below, low-income women who express breastmilk at work face additional economic pressures. This Section examines how Black women’s lactation agency is curtailed when they must be physically apart from their infants, whether at work, in prison, or because of the child welfare system.

1. Employment Policies Leave Many Black Women Unprotected

Working women are right to anticipate that continuing to lactate while separated from their infants will be a challenge. Research suggests, for example, that the return-to-work requirements instituted in 1996 with the new Temporary Assistance to Needy Families program drove down the national breastfeeding rate by 5.5% because lactating women re-entering the workplace after childbirth were largely unprotected by breastfeeding

117. FREEMAN, *supra* note 17, at 65.

118. See Andrea Freeman, *Unmothering Black Women: Formula Feeding as an Incident of Slavery*, 69 HASTINGS L.J. 1545, 1550, 1571 (2018).

119. See RIORDAN, *supra* note 56, at 79.

120. See generally *Am I Eligible for Paid Family Leave Benefits?*, EMP. DEV. DEP’T, https://edd.ca.gov/en/disability/Am_I_Eligible_for_PFL_Benefits [<https://perma.cc/7MG2-SPYG>].

accommodation laws.¹²¹ Today, California Labor Code Section 1031(i) exempts an employer of fewer than fifty employees from complying with workplace breastfeeding accommodations “if it can demonstrate that a requirement would impose an undue hardship.”¹²² Management and those classified as independent contractors, including women who work “in domestic, agricultural or service occupations”—and who are more likely to be Black¹²³—or those who work for smaller organizations are thus all left unprotected. Black women are more likely to be low-income workers, with an estimated 2015 median wealth of \$200 for Black women—versus a \$15,640 median wealth for White women.¹²⁴

In addition, “labor market discrimination significantly contributes to the wealth gap.”¹²⁵ With fewer assets, less bargaining power, and fewer protections, Black women’s lactation agency in the workplace is not adequately protected by current accommodation laws.¹²⁶ Truly affirming lactation agency would mean childcare in the workplace and paid breastfeeding breaks so that Black women could feed their babies as needed without forgoing wages. Until that time, however, redress must at least include paid pump time for all Black women workers, regardless of the conditions of their labor.

Also, all women are still inadequately protected from breastfeeding discrimination in the workplace. As Freeman notes, “Two-thirds of cases alleging breastfeeding discrimination between 2008 and 2018 led to the employee losing her job”—including cases where employers refused to let women who were in pain or leaking milk take breaks, “forced them to expose their breasts to their coworkers [or] clients,” or “mooed at them.”¹²⁷ The nature of these incidents suggests that workplace harassment tracks with overall racism and misogyny: given that Black women suffer from the intersection of both, their need for protection from discrimination is

121. See Steven J. Haider, Alison Jacknowitz & Robert F. Schoeni, *Welfare Work Requirements and Child Well-Being: Evidence from the Effects on Breastfeeding* 2 (Nat’l Poverty Ctr., Working Paper No. 03-3, 2003), http://www.npc.umich.edu/publications/working_papers/paper3/03-3.pdf [<https://perma.cc/F59X-4QBN>].

122. CAL. LAB. CODE § 1031(i) (Deering 2022).

123. Ruqaiyah Yearby, *Employment Discrimination, Breastfeeding, and Health Justice*, 57 CAL. W. L. REV. 279, 284 (2021).

124. See INTERIM REPORT, *supra* note 14, at 453.

125. *Id.* at 462.

126. See NAT’L P’SHP FOR WOMEN & FAMS., PAID FAMILY AND MEDICAL LEAVE: A RACIAL JUSTICE ISSUE—AND OPPORTUNITY 5–6 (2018) (discussing disparities in Black women’s access to paid parental leave and the corresponding effects on breastfeeding).

127. See FREEMAN, *supra* note 17, at 131 (citing Liz Morris, Jessica Lee & Joan C. Williams, *Exposed: Discrimination Against Breastfeeding Workers*, UC HASTINGS CTR. WORKLIFE L., no. 1, 2019, at 4).

proportionately greater. Lactation redress must include meaningful remedies for breastfeeding discrimination in the workplace.

2. Education and Lactation Agency

In California, all lactating students in public K-12 schools have the right to time, space, and refrigeration to privately express and store breastmilk.¹²⁸ In addition, some public high schools further support student parents' lactation agency by providing on-site childcare.¹²⁹ In 2019, 25.8% of mothers ages fifteen through nineteen in the United States were Black, or about twice the overall rate.¹³⁰ Childcare that facilitates lactation in K-12 schools is thus an important area for Black redress.

California parents who are students at community colleges and public universities have similar rights to express and store milk on campus under California Education Code Title 3, Chapter 4.5, but may have less access to on-campus childcare.¹³¹ Among California's community colleges, there are approximately 145,000 parents who are students, of whom 80% are women.¹³² Additionally, Black students at community college are almost twice as likely to be parents as non-Black students.¹³³ Providing subsidized childcare at community colleges to facilitate breastfeeding is thus another ripe area for lactation redress in California.

128. See CAL. EDUC. CODE § 222(a) (Deering 2016).

129. See, e.g., *Teenage Pregnancy and Parenting Program*, LA VISTA & LA SIERRA HIGH SCH., https://fullertonlvshs.ss8.sharpschool.com/students/t_a_p_p_program-_teenage_parents/home [<https://perma.cc/FU3G-JYWE>].

130. *About Teen Pregnancy*, CDC, <https://www.cdc.gov/teenpregnancy/about/index.htm> [<https://perma.cc/X66P-DGN2>].

131. Elissa Nadworny, *Colleges Could Do More to Help Student Parents Pay For Child Care, Watchdog Says*, NPR (Sept. 12, 2019, 6:01 AM), <https://www.npr.org/2019/09/12/759949879/colleges-could-do-more-to-help-student-parents-pay-for-child-care-watchdog-says> [<https://perma.cc/5KT3-Z26S>] ("Less than half of public four-year and public two-year colleges reported having a campus child care center in 2015. And when campuses do have child care, there are often long waitlists.").

132. See Sherrie Reed et al., *A Portrait of Student Parents in the California Community Colleges*, 6 WHEELHOUSE CTR. CMTY. COLL. LEADERSHIP & RSCH., no. 2, Mar. 2021, at 1, 5.

133. *Id.* at 5 (displaying statistical data showing that 13% of community college students who are parents are Black, while only 7% of students who are *not* parents are Black).

3. Child Welfare and Lactation Agency

Currently, California's Child Welfare Services fails to adequately protect Black women's lactation agency. More than one out of every five children in foster care in California is Black, meaning that Black children are removed from their parental custody at more than three times their rate in the general population.¹³⁴ Breastfeeding women who lose custody of their children lose many of their lactation rights because California frames these rights in relation to motherhood by foregrounding the woman's "infant child,"¹³⁵ or stating that "a mother may breastfeed her child in any location . . . where the mother and child are otherwise authorized to be present."¹³⁶ Thus Black women with part-time custody of their children, or who expect to regain custody of their children and wish to maintain their milk supply until then, will find little protection in California law because it does not recognize lactation agency as fundamental to women's bodily autonomy.

Breastfeeding also stands out as an area that can bring increased scrutiny for women from law enforcement, medical, and child welfare professionals. In a case before the Ninth Circuit, a woman in a public park in San Francisco attempting to breastfeed her crying child was arrested by police officers concerned that "she was under the influence of alcohol,"¹³⁷ although she insisted that she was not intoxicated.¹³⁸ Not only is some alcohol consumption when breastfeeding normal in many cultures,¹³⁹ it should pose no risk to public safety as drinking alcohol has been legal for adults since 1933. In one California appellate case, a woman who followed a macrobiotic diet—a type of veganism—lost custody of her child because she continued to breastfeed over a pediatrician's concerns about the lack of animal protein in her diet.¹⁴⁰ In another California appellate case, a breastfeeding woman lost custody of her child after admitting to a social worker that she had once eaten a marijuana-laced brownie by

134. See *Children in Foster Care, by Race/Ethnicity*, KIDS DATA, <https://www.kidsdata.org/topic/22/foster-in-care-race/table> [<https://perma.cc/DZG3-3A9N>] (showing data for the year 2018).

135. CAL. LAB. CODE § 1030 (West 2020).

136. CAL. CIV. CODE § 43.3 (West 1997).

137. *Johnson v. Barr*, No. 20-01569, 2021 U.S. Dist. LEXIS 183685, at *20–21 (N.D. Cal. Aug. 24, 2021).

138. *Id.* at *9–10.

139. See, e.g., Anna Burbidge, *Alcohol and Breastfeeding*, LA LECHE LEAGUE GB, <https://www.laleche.org.uk/alcohol-and-breastfeeding> [<https://perma.cc/GS9S-PFD7>] ("Drinking while nursing is not against the law [in the United Kingdom] and mothers have enjoyed alcohol in moderation while breastfeeding throughout history.").

140. See *People v. Pointer*, 151 Cal. App. 3d 1128, 1132 (1984).

mistake.¹⁴¹ Because Black women are subject to increased scrutiny over their parenting,¹⁴² greater protection for Black Women's lactation agency within the Child Welfare System is an important area for redress.

4. *The Carceral System and Lactation Agency*

Black women are disproportionately incarcerated in California: although only one in every eighteen California women is Black, one in four women in California prisons is Black.¹⁴³ As of 2015, Black women were also overrepresented in county jails at one in five.¹⁴⁴ As of 2016, about 58% of incarcerated women in the United States are the parents of minor children.¹⁴⁵ Thus, the carceral system represents another area of concern for lactation redress.

a. *A Good Start for California's Jails*

As of 2020, California requires county jails to “implement an infant and toddler breast milk feeding policy for lactating parents.”¹⁴⁶ This law means that lactating women in jail have the right to express and refrigerate milk as well as the option of arranging for friends or family to regularly visit to pick up their milk and bring it to their young children. However, like existing workplace breastfeeding accommodations, these policies place the burden of adequately maintaining milk supply and transporting expressed milk solely on incarcerated women and their families. For a woman in jail in a different county or across the state from her baby, for instance, this policy may do very little. Moreover, the weight of potential

141. See *People v. Pimentel*, F067659, 2015 Cal. App. LEXIS 5060, at *31–32 (Cal. Ct. App. July 17, 2015).

142. See Collier Meyerson, *For Women of Color, the Child-Welfare System Functions Like the Criminal-Justice System*, NATION (May 24, 2018), <https://www.thenation.com/article/archive/for-women-of-color-the-child-welfare-system-functions-like-the-criminal-justice-system> [<https://perma.cc/ULN8-UEVP>].

143. Hayes et al., *supra* note 25.

144. See VERA INST., INCARCERATION TRENDS IN CALIFORNIA 2 (2019), <https://www.vera.org/downloads/pdffdownloads/state-incarceration-trends-california.pdf> [<https://perma.cc/L9WB-CJGC>]. Similarly, although Black people are overrepresented in county jail, White people are underrepresented: as of 2015, Whites are roughly 39% of California's overall population, but only 29% of Californians in county jail. *Id.*

145. LAURA M. MARUSCHAK, JENNIFER BRONSON & MARIEL ALPER, SURVEY OF PRISON INMATES, 2016: PARENTS IN PRISON AND THEIR MINOR CHILDREN 1 (2021).

146. CAL. PEN. CODE § 4002.5(a) (Deering 2019).

failure in the county jail breastfeeding program weighs heaviest on these incarcerated women's young children, who also have the least recourse.¹⁴⁷

b. Lactation Agency Still Denied in Prison

On average, women with children who are incarcerated in California prisons face greater disruptions to their lactation agency and relationship with their children than women in jail. Not only are sentences longer, but prison facilities are also much more likely to be far away from a woman's home community. For example, taking public transit to Central California Women's Facility (CWF), which houses about half of California's women prisoners,¹⁴⁸ starts with a seven-hour bus ride from Los Angeles or a five-hour bus ride from San Francisco.¹⁴⁹ The bus then stops in Madera, twelve miles from CWF, which is not served by local transportation routes.¹⁵⁰

California's Community Prisoner Mother Program (CPMP) was designed to ameliorate some of the problems posed by incarcerated women's physical separation from their children.¹⁵¹ CPMP provides space for incarcerated women and their children under the age of six to live together in a special prison facility.¹⁵² CPMP thus promotes incarcerated women's lactation agency. However, CPMP is currently far too small to meet the needs of California's incarcerated mothers, consisting of a single facility in Santa Fe Springs with twenty-four total slots—only eight of which were occupied

147. See, e.g., ROBERT C. FELLMETH & JESSICA K. HELDMAN, CHILD RIGHTS & REMEDIES 21 (2019) (noting that children's immaturity restricts their access to the courts to "one of three ways: . . . a parent may bring an action on behalf of children . . . children may be brought before the court by other persons . . . [or] children may benefit from an *en masse* suit which may include or assist them").

148. On November 23, 2022, 1,881 women were incarcerated at CWF. See CAL. DEP'T CORR. & REHAB., WEEKLY REPORT OF POPULATION AS OF MIDNIGHT NOVEMBER 23, 2022, at 1 (2022) [hereinafter WEEKLY REPORT], https://www.cdcr.ca.gov/wp-content/uploads/sites/174/2022/11/Tpop4_d221123.pdf [<https://perma.cc/7LBX-R4HY>].

149. Driving Directions from Los Angeles, C.A. to Madera, C.A., GOOGLE MAPS, <https://www.google.com/maps> (follow Hyperlink; then search starting point field for "Los Angeles, CA" and search destination field for "Madera, CA"); Driving Directions from San Francisco, C.A. to Madera, C.A., GOOGLE MAPS, <https://www.google.com/maps> (follow Hyperlink; then search starting point field for "San Francisco, CA" and search destination field for "Madera, CA").

150. Driving Directions from Madera, C.A. to 23370 Rd 22, Chowchilla, CA 93610, GOOGLE MAPS, <https://www.google.com/maps> (follow Hyperlink; then search starting point field for "Madera, CA" and search destination field for "23370 Rd 22, Chowchilla, CA 93610"; then select "transit" option).

151. See CAL PEN. CODE § 3412 (West 2005).

152. *Community Prisoner Mother Program*, CAL. DEP'T. CORR. & REHAB., <https://www.cdcr.ca.gov/rehabilitation/pre-release-community-programs/community-prisoner-mother-program> [<https://perma.cc/H3WD-4PPF>].

as of November 23, 2022.¹⁵³ At the same time, 3,962 women were incarcerated in California state prisons.¹⁵⁴ Thus CPMP's capacity would only be adequate if one out of every 500 California women prisoners was a mother of children under 6.¹⁵⁵ Instead, estimates suggest that incarcerated women are *nearly one hundred times* more likely to be the parent of children this age, such that nearly 800 women and their children could currently be eligible for CPMP.¹⁵⁶

Not only would increasing the capacity of CPMP mean respecting the lactation agency of more incarcerated women, but doing so would also facilitate maintaining the family relationships that help formerly incarcerated people transition after release from prison. Black women's overrepresentation among incarcerated women in California makes prison an important site of lactation redress. While demand still outpaces CPMP availability, lactation redress should include a reparative preference in the CPMP eligibility process for women who are descended from the victims of enslavement and Jim Crow.

VII. CONCLUSION: LISTEN TO BLACK WOMEN

This Article has outlined how Black women's lactation agency was denied during enslavement and Jim Crow—and how it remains under threat today. In part, the persistence of systemic racism and misogyny in breastfeeding laws and policies is due to the ongoing exclusion of Black women's perspectives from the decision-making process.

To remedy this systemic erasure, California must listen to Black women in instituting lactation redress. The issues that this Article has outlined are recognized and navigated every day by Black women in California. Black Californians also gather in breastfeeding coalitions, train as lactation consultants, and provide lactation support and mutual aid in their communities. Experts on the Black lactation experience in California can be found among public entities like Los Angeles County's CinnaMoms and other WIC

153. See WEEKLY REPORT, *supra* note 148.

154. *Id.*

155. *See id.*

156. That is, about 4,000 women are in California state prisons. *Id.* Fifty-eight percent of incarcerated women are parents of children under 18, and about 2,200 of them are Black women. See MARUSCHAK, BRONSON & ALPER, *supra* note 145, at 1, 7. Roughly one-third of those parents—about 19% of the total prison population—have children who are 6 years of age or younger, for a total estimate of 743 incarcerated women who might be eligible for the CPMP. *Id.* at 1.

programs,¹⁵⁷ community organizations and nonprofits like Los Angeles County's Soul Food for Your Baby or Solano County's More Excellent Way,¹⁵⁸ and private practices, including San Joaquin County's Flourishing Families or Santa Clara County's The Cradle Company.¹⁵⁹ To ensure that lactation redress is effective, targeted, and culturally appropriate, California must listen to Black women.

157. *Meet the CinnaTeam*, CINNAMOMS, <https://www.cinnamoms.org/about> [<https://perma.cc/TL4Y-677G>].

158. SOUL FOOD FOR YOUR BABY, <https://www.soulfood4yourbaby.org> [<https://perma.cc/9C97-H45K>]; *Our Services*, MORE EXCELLENT WAY, <https://www.mewpeers.org/services> [<https://perma.cc/H23N-RR8S>].

159. *About Us*, FLOURISHING FAMS., <https://www.flourishingfamiliesinc.org/about-us> [<https://perma.cc/V34T-H42X>]; *About Us*, THE CRADLE Co., <https://www.thecradlecompany.com/about-us> [<https://perma.cc/Z4BJ-HJ7Z>].