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Lactation Law

Meghan Boone*

Over the last twenty years, state legislatures have passed a number of laws designed to support and encourage breastfeeding, including laws that protect public breastfeeding and lactating employees in the workplace. Both sides of the political aisle cheered the passage of these laws, and more recent federal laws, as an unqualified positive for women, families, and public health. This Article argues that such unbridled enthusiasm may be unwarranted.

While the legal rights of women in the reproductive process have been extensively theorized through the lens of abortion and contraception, considerably less attention has been paid to the question of how the law should approach the rights of lactating women. Courts have generally been unwilling to envision lactation rights as encompassed within existing antidiscrimination or accommodation frameworks. Consequently, modern statutes that specifically address lactation fill a void in the law. This Article turns a critical eye on such laws by exploring the ways that they are underinclusive—leaving without protection individuals that the state should protect as a normative matter—and the ways they reinforce the assumed naturalness and primacy of the maternal experience and the

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desirability of traditional family structures. Thus, while lactation laws respond to a real need, they do so at the expense of reinforcing traditional notions of gender, motherhood, and family.

This Article focuses on three main critiques of modern lactation laws. First, these laws often frame the rights involved as the right of an infant child to access breast milk, not as the right of a woman to lactate. Break time laws, for instance, often mandate that any milk expressed during a break be “for [the woman’s] infant child.” This language conditions a woman’s right to lactate on the eventual benefit to her child and does not protect her rights as an individual actor with potentially separate interests. Second, modern lactation laws often condition legal protections for lactating women on women’s adherence to traditionally feminine, and maternal, gender norms. For example, both Missouri and North Dakota protect public breastfeeding only when it’s done with “discretion” or “modesty.” Finally, lactation laws restrict the access of nontraditional families to the benefits of breastfeeding and breast milk by limiting the language of the statutes to protect only certain types of lactation. This limitation leaves many lesbian and gay parents, socioeconomically disadvantaged families, and adoptive parents without an economically viable or legally protected way to provide breast milk to their children. These common characteristics of modern lactation laws work in concert with one another to encourage or even require women and families to adhere to traditional roles and structures. This Article concludes by exploring how legislatures could draft new lactation laws that meet the stated public health goals of the current laws while avoiding the negative discursive effects and distributional consequences identified.

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INTRODUCTION

In 2010, Amy Anderson, a substitute teacher in Maine, gave birth to a stillborn baby.¹ Within days, her body began automatically producing breast milk.² Unsure what to do, Ms. Anderson sought advice online, where she discovered that her breast milk could help other babies, particularly those with health problems or born prematurely.³ Despite her grief, Ms. Anderson was inspired by the idea that she could help other babies, so she began to pump and donate her breast milk to nonprofit milk banks.⁴ The school administrators where Ms. Anderson worked, however, informed her that she was not entitled to unpaid breaks or a private place to express breast milk during the work day. Even though other recently pregnant teachers in her school were entitled to these benefits, the school maintained that Ms. Anderson was not—because her baby was dead.⁵ Maine law specified that an employee was entitled to breaks only “to express breast milk for her nursing child.”⁶ The law did not protect Ms. Anderson because she was expressing breast milk to process her grief, help other needy infants, and honor her stillborn baby—not to directly benefit her own nursing infant.

Ms. Anderson’s story is not an anomaly. In fact, most state and federal laws that address the rights of lactating women⁷ often explicitly exclude women like

1. See Katie Muse, *Mother Donates 92 Gallons of Breast Milk in Honor of Stillborn Son*, FOX 2 DETROIT (Dec. 10, 2015), <http://www.fox2detroit.com/health/56838996-story> [<https://perma.cc/8YU6-B2BN>].

2. See Julie Evans, *Grieving Mom Gives Gift of Breast Milk After Stillbirth*, SHEKNOWS (Oct. 12, 2015), <http://www.sheknows.com/parenting/articles/1098629/grieving-mom-gives-gift-of-breast-milk-after-stillbirth> [<https://perma.cc/8958-ULVX>].

3. *Id.*

4. *Id.*

5. *Id.*

6. ME. REV. STAT. tit. 26, § 604 (2009).

7. My use of the words “woman” and “women” throughout this piece are intended to include transgender women, who may wish to induce lactation for a variety of reasons, and transgender men who choose to breastfeed (or “chestfeed” as some members of the transgender community prefer). Although not the focus of this Article, the unique challenges of the transgender population with regards to legal protection for breastfeeding should not be overlooked. Due to the relative rarity of transgender men breastfeeding and the stigmas associated with transgender people and breastfeeding, transgender men face unique challenges when deciding to breastfeed, including a lack of scientific knowledge and medical support, community support and acceptance, and legal protection, plus a possibility of personal confusion in terms of gender identity. See Trevor MacDonald et al., *Transmasculine Individuals’ Experiences with Lactation, Chestfeeding, and Gender Identity: A Qualitative Study*, BMC PREGNANCY & CHILDBIRTH, May 16, 2016, at 15–16; Emily Wolfe-Roubatis & Diane L. Spatz, *Transgender Men and Lactation: What Nurses Need to Know*, 40 MCN AM. J. MATERNAL/CHILD NURSING, January/February 2015, at 32. Trans-women face unique problems as well. Typically, they must induce lactation through the use of medications. Very little scientific research has been done, however, to investigate the interaction between hormone treatment and the medications needed to induce lactation, so often this may be done at a risk. See Lindsey Bever, *How a Transgender Woman Breast-fed Her Baby*, WASH. POST (Feb. 15, 2018), https://www.washingtonpost.com/news/to-your-health/wp/2018/02/14/how-a-transgender-woman-breast-fed-her-baby/?utm_term=.3da2c431cd73 [<https://perma.cc/DJ9Q-SHGY>]. Also, trans-women often lack support from the medical community and the media, and as a result have a much harder time finding medical personnel willing to help. This

Ms. Anderson and other women who are lactating in a “non-traditional” manner. Despite the sustained government interest in increasing breastfeeding rates as a matter of public health over the last several decades,⁸ most state and federal laws aimed at doing so protect only certain breastfeeding women and only certain types of lactation. Why might this be?

Laws that explicitly discriminate on the basis of sex or rely on outdated ideas regarding the supposedly fundamental nature of sex differences are comparatively rare today. The dearth of laws that contain explicitly gendered standards, however, does not mean that the law is free of deeply engrained, traditional ideas surrounding gender. Law still can, and does, create “more subtle”⁹ reaffirmations of the gendered ways that society values women and promotes their adherence to traditional social roles. Laws that incorporate gendered norms perpetuate those norms, and those norms are strengthened, in turn, by the presence of laws which rely on them.¹⁰

This Article explores one example of subtly gendered law: lactation law. State and federal laws protect breastfeeding and lactation in a number of different contexts, including the workplace, the jury box, and the public square. The passage of lactation laws¹¹ has been applauded by many feminist organizations as unquestionable progress in the fight for women’s equality. This Article explores the idea that although laws that seek to support breastfeeding are a positive step for women, both the conceptual framework of these laws, as well as the text of the legislation, are deeply problematic from a feminist perspective. Modern lactation laws are not designed to protect, and in fact do not protect, all lactating women or all lactation. Instead, they protect only lactation that comports with our societal expectation of appropriate motherhood—an idealized

works along with the common prejudice against trans-women, which can be exacerbated by breastfeeding efforts. See Trevor MacDonald, *Transgender Parents and Chest/Breastfeeding*, KELLYMOM (Dec. 19, 2016), <https://kellymom.com/bf/got-milk/transgender-parents-chestbreastfeeding/> [https://perma.cc/6X3A-ST53].

8. See, e.g., CTRS. FOR DISEASE CONTROL & PREVENTION, BREASTFEEDING (Mar. 21, 2018), <https://www.cdc.gov/breastfeeding/policy/> [https://perma.cc/V424-WQLS] (detailing the federal government’s actions relating to breastfeeding since 1984).

9. See *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

10. Naomi Mezey & Cornelia T. L. Pillard, *Against the New Maternalism*, 18 MICH. J. GENDER & L. 229, 236 (2012) (“The cultural and the legal are not easily distinguishable from each other, nor does their influence move primarily in one direction. Rather, law and culture mutually constitute each other.”).

11. There is a distinction to be made between breastfeeding, which is the physical act of feeding a child directly from the breast, and lactation, which is the formation and secretion of milk by the breast and is (most often) a physiological response to a recent pregnancy and/or birth. The laws discussed in this Article address both breastfeeding and lactation in different contexts, but for ease of description I am referring to the laws generally as “lactation laws.” Although not the focus of this project, there are interesting arguments regarding the desirability of laws which encourage or enable the use of breast pumps to express breast milk at the expense of laws which directly support or enable breastfeeding. See Judith Galtry, *Extending the “Bright Line”: Feminism, Breastfeeding, and the Workplace in the United States*, 14 GENDER & SOC’Y 295, 304 (2000) (discussing the potential drawbacks of focusing on breast milk expression as part of breastfeeding policy).

motherhood that is inextricably intertwined with race, class, and gender expectations and norms. They thus harm, first, an identifiable group of nonconforming women and, more generally, all women, by further entrenching deeply held stereotypes.¹²

This Article grows out of a modern strand of feminist legal scholarship that challenges and problematizes the resurgence of policies and laws that make the rights and benefits afforded to women dependent on their fulfillment of traditional maternal roles.¹³ As this Article explores, though this maternalist strategy may result in immediate benefits to women by increasing their political power or providing additional legal protection, it risks undermining women's equality in the long-term by defining women primarily through their reproductive and caregiving roles. Further, it risks placing the benefits of maternalist laws outside the reach of women who cannot meet the cultural expectation of an idealized white, middle-class, stay-at-home mother.

Part I describes how courts have struggled to analyze the claims of lactating women under various existing frameworks. Part II describes modern lactation laws, focusing on the development over the last twenty-five years of two major areas of lactation rights—workplace accommodation laws and legal protections for public breastfeeding. Part III discusses how these modern lactation laws, despite addressing the need for breastfeeding protection, are problematic. First, these laws often frame the rights involved as those of an infant child to breast milk, not a woman's right to breastfeed and lactate. This conditions a woman's rights on the rights of her child and curtails her ability to make choices based on her own interests. Second, modern lactation laws condition legal protections for lactating women on a woman's adherence to traditionally feminine and appropriately maternal gender norms. Finally, the laws restrict the access of non-traditional families to the benefits of breastfeeding and breast milk by limiting their protection to only certain types of lactation. Part IV describes my proposal for new lactation laws that would protect breastfeeding and lactating women while avoiding reliance on outdated stereotypes regarding women's maternal role. In the Conclusion, I discuss how the problems inherent in developing laws that protect breastfeeding are reflective of larger feminist legal discussions and also serve as a potential model for successfully legislating in the face of real physical difference.

12. Cf. Dara E. Purvis, *The Rules of Maternity*, 84 TENN. L. REV. 367, 369 (2017) (describing the regulation of motherhood as having a two-fold effect by both further constraining the bounds of acceptable motherhood and by fundamentally altering the autonomy of mothers).

13. See, e.g., Beth A. Burkstrand-Reid, *From Sex for Pleasure to Sex for Parenthood: How the Law Manufactures Mothers*, 65 HASTINGS L.J. 211, 258 (2013); Mezey & Pillard, *supra* note 10, at 229–96.

I.

LACTATION RIGHTS AND THE COURTS

Before turning to the focus of this project—modern statutory lactation law—it is important to first address why lactation laws are necessary despite the myriad laws that already address issues of sex, pregnancy, disability, and family responsibility. Although existing laws provide protection for women at various points along the reproductive timeline, courts have been generally unwilling to interpret existing law to cover claims relating to breastfeeding.¹⁴ The following brief history of lactation claims shows that, absent the statutes discussed in the next Section, lactating plaintiffs would have insufficient legal protection.

Historically, laws prohibiting sex discrimination have been unavailing to women claiming legal protection for breastfeeding and lactation.¹⁵ Courts have struggled with how to handle lactation in a traditional sex-equality framework because there is—almost by definition—no male comparator¹⁶ and because there is a perceived element of “choice” regarding breastfeeding that is generally not apparent in other areas of accommodation law, like disability.¹⁷ This notion of

14. See generally Marian Kousaie, *From Nipples to Powder*, 49 AKRON L. REV. 207, 230 (2016) (observing that courts have been unreceptive to arguments for granting expansive protection of lactating women based on the Constitution, Americans with Disabilities Act, Family and Medical Leave Act, or Pregnancy Discrimination Act).

15. See Marcia L. McCormick, *Gender, Family, and Work*, 30 HOFSTRA LAB. & EMP. L.J. 309, 331 (2013) (“Women and men are not necessarily similarly situated physically or socially when it comes to issues surrounding pregnancy, birth, or caring for a newborn. Thus, it is probably not a surprise that the laws that prohibit sex discrimination have not necessarily been considered to address discrimination against breastfeeding mothers or to require accommodation of breastfeeding.”); L. 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, 119 (2011) (“[T]here has been active resistance by some members [of the legal community] to the notion that action taken against women because of lactation, breastfeeding, or expressing milk, particularly in the context of the workplace, violates prohibitions against discrimination on the basis of sex or gender.”); *Derungs v. Wal-Mart Stores, Inc.*, 374 F.3d 428, 430 (6th Cir. 2004) (finding that “under the . . . Ohio Public Accommodation statute, restrictions on breast-feeding do not amount to discrimination based on sex . . .”).

16. See Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 762 (2011) (“Sex discrimination challenges that have been brought related to breastfeeding rules have fared about as well as those in *Geduldig* and *Gilbert*, with courts finding that the absence of a comparator for breastfeeding women rendered it unreasonable to see the rules as discriminatory based on sex.”); Galtry, *supra* note 11, at 301 (discussing how US courts viewed breastfeeding claims within a paradigm of liberal thought with the corresponding emphasis on “commonality and ‘sameness’ as a prerequisite to equality”); see also *Martinez v. N.B.C., Inc.*, 49 F. Supp. 2d 305, 310 (S.D.N.Y. 1999) (“[Sex plus discrimination] cannot be for the quite simple reason that men are physiologically incapable of pumping breast milk, so plaintiff cannot show that she was treated less favorably than similarly situated men.”); *Wallace v. Pyro Mining Co.*, 789 F. Supp. 867, 869 (W.D. Ky. 1990), *aff’d*, 951 F.2d 351 (6th Cir. 1991) (“While breast-feeding, like pregnancy, is a uniquely female attribute, excluding breast-feeding from those circumstances for which [the employer] will grant personal leave is not impermissible gender-based discrimination, under the principles set forth in *Gilbert*.”).

17. See Trial Order at 7, *Allen v. Totes/Isotoner Corp.*, No. CV06 03 0917, 2007 WL 5843192, (Ohio Com. Pl. July 31, 2007) (“Pregnant women who give birth and chose not to breastfeed or pump their breasts do not continue to lactate for five months. Thus, Allen’s condition of lactating was not a condition relating to pregnancy but rather a condition relating to breastfeeding. Breastfeeding discrimination does not constitute gender discrimination.”); see also LINDA M. BLUM, AT THE BREAST

“choice” is perhaps even more powerful in the breastfeeding context than in the pregnancy context, as not all post-partum women choose to breastfeed and because, unlike in the pregnancy context, the species will be able to successfully replicate itself even absent breastfeeding. Thus, as compared to pregnancy, the arguments regarding the necessity of breastfeeding are less compelling.¹⁸

Like claims for sex discrimination generally, specific pregnancy discrimination claims under the Pregnancy Discrimination Act (PDA) have also historically failed to protect breastfeeding plaintiffs.¹⁹ Courts have struggled to define the scope of pregnancy-related conditions covered by the PDA.²⁰ The courts’ treatment of lactation claims is a prime example of this struggle. Most courts have found that lactation is not a “related medical condition[.]”²¹ within the meaning of the PDA.²² A district court in Iowa even noted that lactation-based pregnancy discrimination claims are not cognizable because it is physically possible for men, too, to lactate.²³ Recently, however, the United

6–7 (1999) (noting that in comparison to feminist legal scholars’ explorations of laws surrounding pregnancy and birth, less attention has been paid to breastfeeding “because it seems a more optional aspect of motherhood.”).

18. See Galtry, *supra* note 11, at 300 (“By contrast, breastfeeding, while like pregnancy, a potent and visible manifestation of sex-specific difference or otherness in the marketplace, was neither an inevitable aspect of the process of metamorphosis to motherhood nor seen as necessary in most instances to infant survival, at least within industrialized nations.”).

19. See Kousaie, *supra* note 14, at 234; Hébert, *supra* note 15, at 120.

20. See generally Joanna L. Grossman, *Expanding the Core: Pregnancy Discrimination Law as it Approaches Full Term*, 52 IDAHO L. REV. 825 (2016) (discussing how courts have had to grapple with whether claims relating to contraception, infertility, and lactation are covered by existing pregnancy discrimination laws).

21. Pregnancy Discrimination Act, 42 U.S.C.A. § 2000e(k) (stating that “[t]he 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”).

22. See *Wallace v. Pyro Mining Co.*, 789 F. Supp. 867, 869 (W.D. Ky. 1990), *aff’d*, 951 F.2d 351 (6th Cir. 1991) (“We believe these factors indicate Congress’ intent that ‘related medical conditions’ be limited to incapacitating conditions for which medical care or treatment is usual and normal. Neither breast-feeding and weaning, nor difficulties arising therefrom, constitute such conditions.”); see also *Martinez v. N.B.C., Inc.*, 49 F. Supp. 2d 305, 309 (S.D.N.Y. 1999) (stating that “[t]he drawing of distinctions among persons of one gender on the basis of criteria that are immaterial to the other, while in given cases perhaps deplorable, is not the sort of behavior covered by Title VII” and that this principle has been applied to breastfeeding cases, and implying that it is applicable to the case at hand); *Fejes v. Gilpin Ventures, Inc.*, 960 F. Supp. 1487, 1491–92 (D. Colo. 1997) (“Based on the language of the PDA, its legislative history, and decisions from other courts interpreting the Act, I hold that breast-feeding or childrearing are not conditions within the scope of the PDA.”); *McNeill v. N.Y.C. Dep’t of Corr.*, 950 F. Supp. 564, 569 (S.D.N.Y. 1996) (finding plaintiff’s absence from work to breastfeed her child was not within the scope of the PDA).

23. *Ames v. Nationwide Mut. Ins. Co.*, No. 4:11-cv-00359, 2012 WL 12861597, at *6 n.28 (S.D. Iowa Oct. 16, 2012), *aff’d*, 747 F.3d 509 (8th Cir. 2014), *opinion withdrawn on reh’g*, 760 F.3d 763 (8th Cir. 2014), *aff’d*, 760 F.3d 763 (8th Cir. 2015) (“Furthermore, it is a scientific fact that even men have milk ducts and the hormones responsible for milk production. Accordingly, lactation is not a physiological condition experienced exclusively by women who have recently given birth.”) (internal citations omitted). Although it is true that men, in exceptional circumstances, can sometimes be induced

States Court of Appeals for the Fifth Circuit found the opposite, concluding that lactation is a related medical condition under the PDA because “[i]t is undisputed . . . that lactation is a physiological result of being pregnant and bearing a child.”²⁴ In the aftermath of this ruling, other courts have followed the example of the Fifth Circuit and have characterized lactation as a pregnancy-related medical condition.²⁵ It is still unclear, however, whether this contemporary approach will become the majority position.²⁶

Sex and pregnancy discrimination claims are also imperfect vehicles for lactation rights claims in part because they are designed to prevent discrimination based on an identity (i.e., a woman or a pregnant person) not necessarily to provide an affirmative accommodation for a particular action (i.e., the need for break time at work to express milk). Although antidiscrimination frameworks are designed to deal with the former, they are less helpful when the claim is based not only on the identity of the claimant, but also on her actions.²⁷

Plaintiffs attempting to use the Americans with Disabilities Act (ADA) to secure lactation rights have likewise had limited success.²⁸ Courts generally have been unwilling to extend ADA protections to pregnancy-related conditions, unless physiological impairments are experienced in conjunction with, or as a result of, pregnancy.²⁹ Courts have interpreted the ADA to require the “abnormal functioning of the body or a tissue or organ”³⁰ and have thus exempted lactation because women’s bodies are “supposed” to lactate. As one court noted, it is

to lactate, see Nikhil Swaminathan, *Strange but True: Males Can Lactate*, SCI. AM., Sept. 6, 2007, male lactation is exceedingly rare and generally must be induced through a combination of hormones and stimulation. In any case, male lactation is not the focus of this Article, despite the tantalizing legal questions that a lactating male might present.

24. E.E.O.C. v. Houston Funding II, Ltd., 717 F.3d 425, 428 (5th Cir. 2013).

25. See *Martin v. Canon Business Solutions, Inc.*, No. 11-cv-02565-WJM-KMT, 2013 WL 4838913, at *8 (D. Colo. Sept. 10, 2013); *Allen-Brown v. District of Columbia*, 174 F. Supp. 3d 463, 478 (D.D.C. 2016); *E.E.O.C. v. Vamco Sheet Metals, Inc.*, No. 13 Civ. 6088(JPO), 2014 WL 2619812, at *6 (S.D.N.Y. June 5, 2014).

26. Some states have also recently passed Pregnant Workers Fairness Acts, which specifically define pregnancy discrimination to include failure to accommodate lactation needs. See, e.g., DEL. CODE ANN. tit. 19, § 710(17) (West 2016) (defining pregnancy discrimination as including lactation discrimination).

27. See Grossman, *supra* note 20, at 849–50 (noting the distinction in pregnancy discrimination claims between “status” claims and “action” claims).

28. See Marcy Karin & Robin Runge, *Breastfeeding and a New Type of Employment Law*, 63 CATH. U. L. REV. 329, 341 n.64 (2014) (collecting cases in which courts held the ADA inapplicable to breastfeeding claims); see also *Bond v. Sterling, Inc.*, 997 F. Supp. 306, 311 (N.D.N.Y. 1998) (“It is simply preposterous to contend a woman’s body is functioning abnormally because she is lactating.”); *Martinez v. N.B.C., Inc.*, 49 F. Supp. 2d 305, 309 (S.D.N.Y. 1999) (dismissing breastfeeding claim under the ADA and noting its alignment with other courts that have considered the issue); *Currier v. Nat’l Bd. of Med. Exam’rs*, 965 N.E.2d 829, 835 (Mass. 2012) (stating that lactation and expressing breast milk were not covered disabilities under the ADA).

29. See generally Kousaie, *supra* note 14, at 224–27 (discussing litigants’ unsuccessful attempts at using the ADA to secure lactation rights, in part due to the requirement of additional physical impairment beyond normal pregnancy).

30. *Bond*, 997 F. Supp. at 311.

“simply preposterous to contend a woman’s body is functioning abnormally because she is lactating.”³¹

Perhaps the most expansive judicial interpretation of lactation rights came in the 1981 case *Dike v. School Board of Orange County*, which concluded that “[i]n light of the spectrum of interests that the Supreme Court has held specially protected . . . the Constitution protects from excessive state interference a woman’s decision respecting breastfeeding her child.”³² After articulating a right to make breastfeeding decisions, however, the court remanded the case to the district court to decide whether the defendant’s refusal to let the plaintiff schoolteacher breastfeed her child while on her off-duty lunch breaks “further[ed] sufficiently important state interests and [were] closely tailored to effectuate only those interests.”³³ Subsequent attempts to use *Dike* to argue for the right to breastfeed in the face of contrary state interests have been mostly unsuccessful.³⁴

The failure to obtain protection for breastfeeding through existing legal frameworks spurred advocacy for the specific statutory protections for breastfeeding that are the focus of the next Section.

II.

MODERN LACTATION LAWS

There has been an enormous resurgence of breastfeeding in the United States. In 1970, the percentage of infants breastfed at one week postpartum dipped to an all-time low of 25 percent. In 2000, that percentage had climbed to 70.3 percent of infants breastfed at birth and 34.5 percent of infants still breastfed at six months. In the most recent data available, those numbers have jumped to 81.1 percent and 51.8 percent, respectively.³⁵ This renewed interest in breastfeeding has been sparked in part by scientific evidence that babies fed

31. *Id.* The author notes the irony that courts will exempt lactation from protection under the PDA—because lactation is not a condition related to pregnancy—and will likewise exempt lactation from protection under the ADA because it is a normal condition related to pregnancy.

32. 650 F.2d 783, 787 (5th Cir. 1981).

33. *Id.*

34. See *Southerland v. Thigpen*, 784 F.2d 713, 718 (5th Cir. 1986) (denying an incarcerated woman’s right to breastfeed her infant son); see also *Berrios-Berrios v. Thornburg*, 716 F. Supp. 987, 990–91 (E.D. Ky. 1989) (recognizing the fundamental interest in a woman’s decision to breastfeed and ultimately providing an injunction to allow an incarcerated woman to breastfeed her infant child during normal visitation hours, but restricting ability to express and store breast milk for child due to legitimate interests of the government). *But see Judge: New Mexico Prison Breast-Feeding Ban Unconstitutional*, U.S. NEWS (July 1, 2017), <https://www.usnews.com/news/best-states/new-mexico/articles/2017-07-01/judge-new-mexico-prison-breast-feeding-ban-unconstitutional> [<https://perma.cc/K596-U4X8>] (discussing a recent case holding that prison policies banning mothers from breastfeeding their children during visits violated the New Mexico state constitution).

35. See CTRS. FOR DISEASE CONTROL & PREVENTION, NATIONAL BREASTFEEDING REPORT CARD (2016). The report tracks five indicators: (1) ever breastfed, (2) breastfeeding at six months, (3) breastfeeding at twelve months, (4) exclusive breastfeeding at three months, and (5) exclusive breastfeeding at six months.

breast milk perform better on many indicators of health³⁶ throughout infancy and childhood.³⁷

As a result of this renewed interest in breastfeeding, and beginning in the mid-1990s,³⁸ state legislatures considered, and generally adopted, new laws designed to afford breastfeeding women legal protections that they did not previously enjoy.³⁹ The two most common types of lactation laws are those that encourage or require employers to accommodate lactating employees and those that protect public breastfeeding. While addressing two different issues, both types of laws are aimed at dismantling common roadblocks to breastfeeding, as reported by women.⁴⁰ Although there has been some limited federal legislation concerning breastfeeding, there is no comprehensive or robust federal statutory scheme addressing lactation rights. Lactation laws are thus mostly state laws.⁴¹ Evidence suggests that state laws have been moderately successful in encouraging the initiation and continuation of breastfeeding.⁴² Studies show the

36. Breastfeeding is associated with numerous health benefits for children, including reduced risk of childhood cancer, asthma, Crohn's disease, ulcerative colitis, and measles; better cognitive and motor development; and decreased risk of obesity during childhood and adolescence. *See* Sevin Altinkaynak et al., *Breast-feeding Duration and Childhood Acute Leukemia and Lymphomas in a Sample of Turkish Children*, 42 J. PEDIATRIC GASTROENTEROLOGY & NUTRITION 568, 570 (2006); A. Silfverdal et al., *Breast-feeding and a Subsequent Diagnosis of Measles*, 98 ACTA PAEDIATRICA 715, 716 (2009); Sandrine Péneau et al., *Breastfeeding, Early Nutrition, and Adult Body Fat*, 164 J. PEDIATRICS 1363, 1366 (2014); Matthew W. Gillman et al., *Risk of Overweight Among Adolescents Who Were Breastfed as Infants*, 285 J. AM. MED. ASS'N 2461, 2465 (2001); Xu et al., *Systematic Review with Meta-Analysis: Breastfeeding and the Risk of Crohn's Disease and Ulcerative Colitis*, 46 ALIMENTARY PHARMACOLOGY & THERAPEUTICS 780, 785 (2017).

37. There is legitimate debate regarding the extent to which the health benefits of breastfeeding to both infants and women has been overstated. *See generally* SUZANNE BARSTON, *BOTTLED UP: HOW THE WAY WE FEED BABIES HAS COME TO DEFINE MOTHERHOOD, AND WHY IT SHOULDN'T* (2012). The purpose of this project is not to weigh in on the debate regarding whether or not the health benefits of breastfeeding and lactation are as compelling as initially reported, but only to discuss the laws that protect lactation. Even those that dispute that breastfeeding is a "magic bullet" for infant health generally recognize that breastfeeding results in at least modest benefits to women and children and that, regardless of the presence or absence of health benefits, women should have the choice to breastfeed if they wish.

38. Florida was the first state to enact comprehensive breastfeeding legislation. *See, e.g.*, FLA. STAT. § 383.015 (2017) (first enacted as legislation in 1993). Florida's breastfeeding statutes have thus served as an informal model for other state lactation laws. *See* DOUGLAS REID WEIMER, CONG. RES. SERV., SUMMARY OF STATE BREASTFEEDING LAWS AND RELATED ISSUES 2 (2009).

39. KAREN M. KEDROWSKI & MICHAEL E. LIPSCOMB, BREASTFEEDING RIGHTS IN THE UNITED STATES 90 (2008) (noting that the earliest state laws regarding breastfeeding appeared in 1970, while the current trend of state breastfeeding laws began in 1993 and continued into the 2000s).

40. *See* Patrick Sullivan, *Breast-feeding Still Faces Many Roadblocks, National Survey Finds*, 154 CAN. MED. ASS'N J. 1569 (1996) (discussing women's feelings of embarrassment and constraint as a result of breastfeeding).

41. KEDROWSKI & LIPSCOMB, *supra* note 39, at 89.

42. *See* Summer Sherburne Hawkins et al., *Do State Breastfeeding Laws in the US Promote Breastfeeding?*, 67 J. EPIDEMIOL COMMUNITY HEALTH 250, 252–53 (2014) (concluding that state laws that promote breastfeeding through workplace break time provisions and public breastfeeding protections increase breastfeeding rates); *see also* Lindsey Murtagh & Anthony D. Moulton, *Working Mothers, Breastfeeding, and the Law*, 101 AM. J. PUB. HEALTH 217, 222 (2011) (noting that the laws appropriately target an issue (employment outside the home) that negatively affects the duration of breastfeeding); Michael D. Kogan et al., *Multivariate Analysis of State Variation in Breastfeeding Rates*

particular effectiveness of state lactation laws in increasing rates of breastfeeding initiation and duration among Black and Hispanic mothers, and women with less education, both groups with generally lower rates of breastfeeding.⁴³ This suggests that protective laws are most crucial for otherwise vulnerable groups.

Interestingly, many states' lactation laws were passed during a single legislative session as part of a comprehensive statutory scheme addressing multiple aspects of lactation rights. For instance, the District of Columbia's breastfeeding law includes both an affirmative right to breastfeed in public as an exception to the otherwise applicable public indecency statutes, and a requirement for workplace accommodations.⁴⁴ Sixteen other states have also enacted multiple types of lactation laws, either as part of the same legislation or during the same legislative year.⁴⁵ This type of comprehensive, packaged legislation may help to explain why the language of state lactation laws is relatively homogenous, as discussed below.

A. Workplace Accommodations

For most women in the United States, including women with young children, paid work outside the home is a necessity. In 2011, 55.8 percent of women with infants younger than one-year old participated in the paid workforce.⁴⁶ Most women go back to work within a few months of giving birth, and some do so considerably earlier.⁴⁷ Balancing work with motherhood is a perennial challenge, and women who wish to breastfeed face additional challenges in the workplace.⁴⁸ Maintaining adequate milk supply while separated

in the United States, 98 AM. J. PUB. HEALTH 1872, 1877 (2008) (“Breastfeeding initiation rates were highest in those states that had enacted multiple pieces of legislation supportive of breastfeeding and lowest among states with no such legislation . . .”).

43. See Hawkins et al., *supra* note 42, at 255 (noting that most of the gains in breastfeeding initiation and duration “were observed among Hispanic and Black women and women of lower educational attainment, suggesting that such state laws may help reduce disparities in breastfeeding rates”).

44. D.C. CODE § 2-1402.81 et seq. (2007).

45. ALASKA STAT. § 29.25.080 (1998); ARK. CODE ANN. § 20-27-2001 (2007); ARK. CODE ANN. § 5-14-112 (2007); CONN. GEN. STAT. § 46a-64 (2012); CONN. GEN. STAT. § 51-217(b) (2012); KAN. STAT. ANN. § 65-1,248 (2006); KAN. STAT. ANN. § 43-158 (2006); KY. REV. STAT. ANN. § 11.755 (2006); LA. STAT. ANN. § 51:2247.1 (2001); MASS. GEN. LAWS ch. 111, § 221 (2008); MINN. STAT. § 145.905 (1998); MINN. STAT. § 617.23 (1998); MO. REV. STAT. § 191.918 (2014); MONT. CODE ANN. § 50-19-501 (2007); MONT. CODE ANN. § 39-2-217 (2007); N.D. CENT. CODE § 12.1-20-12.1 (2009); N.D. CENT. CODE § 23-12-17 (2009); OR. REV. STAT. § 109.001 (1999); OR. REV. STAT. § 10.050 (1999); 35 PA. CONS. STAT. § 636.1 et seq. (2012); 23 R.I. GEN. LAWS § 23-13.5-1 (2008); 11 R.I. GEN. LAWS § 11-45-2 (2008); 23 R.I. GEN. LAWS § 23-13.2-1 (2008); TENN. CODE ANN. § 68-58-101 et seq. (2006); UTAH CODE ANN. § 17-15-25 (1995); UTAH CODE ANN. § 10-8-41 (1995).

46. KAREN WAMBACH & JAN RIORDAN, BREASTFEEDING AND HUMAN LACTATION 635–61 (5th ed. 2016).

47. Wen-Jui Han et al., *The Timing of Mothers' Employment After Childbirth*, 131 MONTHLY LAB. REV. 15, 15–16 (2008).

48. See generally WAMBACH & RIORDAN, *supra* note 46, at 635–61 (describing “Maternal Employment and Breastfeeding”).

from an infant, accessing a private place and the break time necessary to express milk, storing milk safely until the end of the workday, and overcoming any embarrassment or discomfort in order to speak with supervisors about their needs, all can prevent lactating women from successfully continuing to breastfeed after returning to work.⁴⁹ And even common breastfeeding issues unrelated to employment, such as leaking, blocked ducts, or infection may be exacerbated by the demands of the workplace.⁵⁰ Because of these challenges, women who work full time are considerably less likely to breastfeed six months after the birth of a child.⁵¹ Women frequently attribute early weaning to unsupportive work environments.⁵² In fact, in the month she returns to work, a mother is 2.18 times more likely to quit breastfeeding than her nonworking counterparts.⁵³

These challenges are especially acute for women whose work is lower paid, offers less flexibility, and affords them less control over their workspace and schedule. As a result, women in jobs classified as lower-skill, such as clerical and service jobs, report shorter breastfeeding durations.⁵⁴ This decrease in breastfeeding rates for working women in non-professional positions parallels the lower breastfeeding rates among younger women and women of color, as well as those who are unmarried or have less formal education.⁵⁵ Women in professional jobs generally have more autonomy at work, which allows them to structure their work time to accommodate the need to express breast milk more easily.⁵⁶ Even for professional women, however, identifiable and concrete challenges to breastfeeding exist once back at work.

Twenty states currently have laws that require some or all employers to offer employees break time or a private location to express milk, or both.⁵⁷ Seven

49. See U.S. DEP'T OF HEALTH & HUMAN SERVS., THE SURGEON GENERAL'S CALL TO ACTION TO SUPPORT BREASTFEEDING 12, 17–18, 23, 39 (2011), <https://www.surgeongeneral.gov/library/calls/breastfeeding/calltoactiontosupportbreastfeeding.pdf> [<https://perma.cc/GG73-EYRP>] [hereinafter "SURGEON GENERAL'S CALL TO ACTION"].

50. Shana M. Christrup, *Breastfeeding in the American Workplace*, 9 AM. U. J. GENDER SOC. POL'Y & L. 471, 481 (2001) ("For example, having milk leak in the middle of an important meeting may cause extreme stress and undue hardship—stress that would not normally be encountered, or at least not be as severe, if the mother was not within the work environment.").

51. WAMBACH & RIORDAN, *supra* note 46, at 637.

52. *Id.*

53. Murtagh & Moulton, *supra* note 42, at 217.

54. *Id.* at 218 ("Professional women typically have more autonomy, enabling greater privacy to breastfeed and greater freedom to accommodate the timing demands of lactation.").

55. WAMBACH & RIORDAN, *supra* note 46, at 58; see also Andrea Freeman, "First Food" Justice: Racial Disparities in Infant Feeding as Food Oppression, 83 FORDHAM L. REV. 3053, 3063 (2015) (discussing racial disparities in breastfeeding rates).

56. Murtagh & Moulton, *supra* note 42, at 218.

57. ARK. CODE ANN. § 11-5-116 (2009); CAL. LAB. CODE § 1030 et seq. (2001); COLO. REV. STAT. § 8-13.5-104 (2008); D.C. CODE § 2-1402.82 (2007); HAW. REV. STAT. § 378-2 (2013); 820 ILL. COMP. STAT. 260/10 (2001); IND. CODE § 5-10-6-2 (2008); LA. STAT. ANN. § 17:81 (2016); ME. STAT. tit. 26, § 604 (2009); MINN. STAT. § 181.939 (2014); MONT. CODE ANN. § 39-2-215 et seq. (2007); NEB. REV. STAT. § 48-1102 (2015); N.M. STAT. ANN. § 28-20-2 (West 2007); N.Y. LAB. LAW § 206-c

additional states have laws that encourage employers to provide these type of workplace accommodations.⁵⁸ State laws mandating or encouraging employers to provide lactating women workplace accommodations generally follow the same basic pattern. The laws either dictate, or allow at an employer's discretion, that employees be provided with a "reasonable" amount of unpaid break time to express breast milk during the workday and a private place to do so, generally not a bathroom.⁵⁹ The laws thus attempt to address the two most cited barriers to continuation of breastfeeding once back at work—a lack of privacy and adequate time to express milk while at work.⁶⁰ Some state laws include language about what locations are acceptable for the expression of breast milk, while others leave this determination to employers. A typical example is Georgia's statute, which states:

An employer may provide reasonable unpaid break time each day to an employee who needs to express breast milk for her infant child. The employer may make reasonable efforts to provide a room or other location (in close proximity to the work area), other than a toilet stall, where the employee can express her milk in privacy. The break time shall, if possible, run concurrently with any break time already provided to the employee. An employer is not required to provide break time under this Code section if to do so would unduly disrupt the operations of the employer.⁶¹

Many state laws mirror this Georgia law by exempting employers from the law's mandate if providing accommodations to lactating employees would create undue burden or hardship on the employer.

As part of the passage of the Patient Protection and Affordable Care Act in 2010, the Fair Labor Standards Act (FLSA) was amended to provide workplace lactation breaks to some employees. This federal law follows the same basic format of similar state laws. The law requires employers to provide:

(2007); OR. REV. STAT. § 653.077 (2007); TENN. CODE ANN. § 50-1-305 (1999); TEX. GOV'T CODE ANN. § 619.002 et seq. (2015); UTAH CODE ANN. § 34-49-202 (2016); VT. STAT. ANN. tit. 21, § 305 (2013); VA. CODE ANN. § 22.1-79.6 (2014).

58. CONN. GEN. STAT. § 31-40w (2001); DEL. CODE ANN. tit. 19, § 710-11 (1953); GA. CODE ANN. § 34-1-6 (1999); N.D. CENT. CODE § 23-12-17 (2009); OKLA. STAT. tit. 40, § 435 (2006); 23 R.I. GEN. LAWS § 23-13.2-1 (2008); WASH. REV. CODE § 43.70.640 (2001).

59. See, e.g., ARK. CODE ANN. § 11-5-116 (2009) ("An employer shall provide reasonable unpaid break time each day to an employee who needs to express breast milk for her child in order to maintain milk supply and comfort."); CAL. LAB. CODE § 1030 (2001) ("Every employer, including the state and any political subdivision, shall provide a reasonable amount of break time to accommodate an employee desiring to express breast milk for the employee's infant child."); COLO. REV. STAT. § 8-13.5-104 (2008) ("The employer shall make reasonable efforts to provide a room or other location in close proximity to the work area, other than a toilet stall, where an employee can express breast milk in privacy."); CONN. GEN. STAT. § 31-40w (2001) (same); D.C. CODE ANN. § 2-1402.82 (2007) ("An employer shall make reasonable efforts to provide a sanitary room or other location in close proximity to the work area, other than a bathroom or toilet stall, where an employee can express her breast milk in privacy and security.");

60. Murtagh & Moulton, *supra* note 42.

61. GA. CODE ANN. § 34-1-6 (1999).

[A] reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk; and a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.⁶²

FLSA leaves large portions of employees without protection, however, as it: 1) does not cover employees otherwise exempt from the requirements of FLSA, 2) only requires employers to provide break time to express breast milk for children younger than one year, and 3) exempts employers with fewer than fifty employees that demonstrate hardship.⁶³ Further, enforcement of the protections in FLSA have been difficult, as explained in Part III.A.

B. Public Breastfeeding Laws

States have also taken steps to protect public breastfeeding through legislation. These laws are necessary because in the United States the female breast is commonly sexualized, such that many Americans believe that breasts should not be exposed in public.⁶⁴ Many women avoid breastfeeding in public due to the well-founded fear of social censure. One survey conducted in the United States found that 37 percent of respondents believed women should breastfeed only in private, with an additional 27 percent undecided about whether public breastfeeding was appropriate.⁶⁵ One need only take a cursory tour through the comments posted online concerning public breastfeeding, or review any number of news stories concerning the harassment women face when breastfeeding in public, to confirm that there are many individuals who firmly believe that breastfeeding should only occur in private and that they are within their rights to insist that other people conform to that expectation.⁶⁶ Even women

62. Fair Labor Standards Act of 1938, 29 U.S.C. § 207 (2010). Unfortunately, even with the protections contained in state laws and in the Affordable Care Act, only 40 percent of women report having access to reasonable break time and private space to express breast milk. See Katy B. Kozhimannil et al., *Access to Workplace Accommodations to Support Breastfeeding After Passage of the Affordable Care Act*, 26 WOMEN'S HEALTH ISSUES 6, 9 (2016).

63. See 29 U.S.C. § 207(r) (2010). Further, courts that have interpreted the provision have done so narrowly. See David W. Johnston, *Lactation Only in the Lactation Room*, 20 No. 9 N.H. EMP. L. LETTER 1 (2015) (describing a New Hampshire case in which a court ruled that an employer did not have to accommodate an employee's request to either be allowed to leave the premises to breastfeed her baby or to breastfeed her baby in the room provided for lactation breaks).

64. WAMBACH & RIORDAN, *supra* note 46, at 55. Conversations about the propriety of public breastfeeding reflect a centuries-old debate about the topic. In the eighteenth and nineteenth centuries, the clothes of the women featured nursing slits, which were designed to avoid exposing breasts. This suggests that while women were expected to breastfeed, there was still the demand to avoid visibility while breastfeeding. See Catriona Fisk, *A Decent Mother? The Breastfeeding and Visibility Debate Is Nothing New*, CONVERSATION (Apr. 18, 2016), <http://theconversation.com/a-decent-woman-the-breastfeeding-and-visibility-debate-is-nothing-new-57728> [<https://perma.cc/3SJ9-SSJ6>].

65. WAMBACH & RIORDAN, *supra* note 46, at 55–56.

66. See, e.g., Caroline Bologna, *Breastfeeding Mom Is 'Humiliated' After Being Told to Nurse in Marshalls Bathroom Stall*, HUFFINGTON POST (Sept. 14, 2015, 12:38 PM),

who believe that public breastfeeding is appropriate may be concerned that they will be exposed while breastfeeding or will make others uncomfortable.⁶⁷

Until recently, public indecency laws in many states prevented or discouraged public breastfeeding by classifying the baring of a female breast as

http://www.huffingtonpost.com/entry/breastfeeding-mom-is-humiliated-after-being-told-to-nurse-in-marshalls-bathroom-stall_us_55f6cf2ae4b063ecbfa4c92e [https://perma.cc/P9CK-4JAU] (discussing a mother who was required to breastfeed in the restroom, rather than a fitting room, in a Marshalls store); Caroline Bologna, *Gym Apologizes to Mom After Barring Her from Breastfeeding in Women's Locker Room*, HUFFINGTON POST (Sept. 18, 2015, 4:27 PM), http://www.huffingtonpost.com/entry/gym-apologizes-to-mom-after-barring-her-from-breastfeeding-in-womens-locker-room_us_55fc42cce4b00310edf6d41d [https://perma.cc/6GJU-5453] (describing an L.A. Fitness gym employee who prohibited a mother from breastfeeding in the women's locker room and instead allowed her to go to the children's bathroom or the front lobby); Dana Hedgpeth, *Woman Says She Was Told to Pump Breast Milk in Pet Area at Dulles Airport*, WASH. POST, Oct. 7, 2015 (describing an incident where an airport employee told a mother that she could breastfeed only in a "pet relief area"); Katie Mettler, *Breast-feeding Good Moms Get Kicked Out of the 'Bad Moms' Movie*, WASH. POST (Aug. 3, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/08/03/breast-feeding-moms-got-kicked-out-of-the-bad-moms-movie-so-30-others-walked-out-too/?utm_term=.20063c052112 [https://perma.cc/H74M-TYMB] (describing a confrontation between a mother who breastfed in the lobby of a movie theater and a theater employee who told her to cover up or leave the theater); *Texas Mom Asked to Leave Target After Trying to Breastfeed Baby*, KHOU (Oct. 10, 2016, 8:50 AM), <http://www.khou.com/news/local/texas/texas-mom-asked-to-leave-target-after-trying-to-breastfeed-baby/333231171> [https://perma.cc/5JDD-4F9R] (depicting a conflict between a mother who was nursing in an empty fitting room at Target and an employee who prohibited her from using the fitting room and criticized her for leaving her home with a hungry baby); Vanessa A. Simmons, *Translated: Mom Shamed for Breastfeeding in Public at a Park*, NORMALIZE BREASTFEEDING (Apr. 16, 2015), <https://normalizebreastfeeding.org/2015/04/mom-shamed-for-breastfeeding-in-public-at-a-park/> [https://perma.cc/66G5-J54Q] (discussing a man and woman yelling at a mother that she was "irresponsible" for breastfeeding in a public park in Los Angeles); Laura Vitto, *Breastfeeding Mother Records Her Experience with Public Harassment*, MASHABLE (June 15, 2016), <http://mashable.com/2016/06/15/public-breastfeeding-video/#CzyC2XKWlaqt> [https://perma.cc/JFX6-FSC9] (showing a video of a man harassing and screaming at a mother for breastfeeding in the café area of a Target store); Wendy Wisner, *The Time I Was Shamed for Breastfeeding in Public*, ROLE REBOOT (Aug. 5, 2015), <http://www.rolereboot.org/family/details/2015-08-the-time-i-was-shamed-for-breastfeeding-in-public/> [https://perma.cc/8BRP-U4WZ] (describing an incident where a mother was breastfeeding her six-month-old baby in a booth in a Subway restaurant when an employee told her that she was committing indecent exposure and sent her to the restroom).

67. See SURGEON GENERAL'S CALL TO ACTION, *supra* note 49, at 13 (noting that embarrassment remains a barrier to women breastfeeding); see also HEALTHY CAROLINA, CHALLENGES BREASTFEEDING MOTHERS FACE AND STRATEGIES THAT WORK 1, <https://www.sa.sc.edu/healthycarolina/files/2014/04/Challenges-Breastfeeding-Mothers-face-and-Strategies-that-Work.pdf> [https://perma.cc/9Y7Y-E9JQ]:

Although there is growing support for women breastfeeding in public, many mothers nevertheless worry that their breasts will be exposed while breastfeeding of [*sic*] pumping, and do not want to make other people uncomfortable. Mothers who return to work may be embarrassed to speak with supervisors about their needs, and worry about what their colleagues might say.

indecent exposure.⁶⁸ Although arrests were rare, they did sometimes occur.⁶⁹ Partly in response to the concern that women breastfeeding in public could be subject to criminal sanction, twenty-nine states enacted exceptions to public indecency laws for public breastfeeding.⁷⁰ For example, a Florida public indecency law stipulates that a mother's breastfeeding does not, under any circumstance, constitute a "lascivious act."⁷¹

Additionally, the vast majority of states—forty-seven—have affirmatively written the right to publicly breastfeed into state law.⁷² These statutes often

68. See Weimer, *supra* note 38, at 2 ("As breastfeeding has become more common, legal concerns have arisen on applying state decency laws and other laws concerning public nudity and exposure to nursing mothers. Because of these concerns, a wide range of state laws have been enacted to deal with issues involving various aspects of breastfeeding."); see also *Personal Rights—Breastfeeding: Hearing Before the S. Judiciary Comm.*, A.B. 157, Reg. Sess. (Cal. 1997) ("This bill has come about in response to published reports of nursing mothers being asked to stop breastfeeding in public places, such as malls and restaurants. Some of these women were threatened with being charged with a violation of some state or local law."). Attempts to attack these laws as impermissible gender classifications have been mostly unavailing. See *Book v. City of Daytona Beach*, No. 6:08-cv-1180-Orl-28DAB, 2009 WL 3720932 (M.D. Fla. 2009) (granting state's motion for summary judgment over plaintiff's objection that a state law that criminalized the baring of a female, but not a male, breast violated equal protection, and stating that the statute served the important government interest of "protecting the moral sensibilities of that substantial segment of society that still does not want to be exposed willy-nilly to public displays of various portions of their fellow citizens' anatomies that traditionally in this society have been regarded as erogenous zones" (citing *United States v. Biocic*, 928 F.2d 112, 115 n.3 (4th Cir. 1991))).

69. 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, 56 (2009) ("[W]omen have been harassed and arrested for breastfeeding on public transportation and in other public venues."). A particularly tragic case occurred when Jacqueline Mercado was charged with child pornography for a photo she took of her breastfeeding her infant son. Thomas Korosec, *1-Hour Arrest*, DALL. OBSERVER (Apr. 17, 2003), <http://www.dallasobserver.com/news/1-hour-arrest-6419852> [<https://perma.cc/5B3P-4SK6>].

70. ALASKA STAT. § 01.10.060 (1998); ARIZ. REV. STAT. ANN. § 13-1402 (2012); ARK. CODE ANN. § 5-14-112 (2007); D.C. CODE § 2-1402.81 et seq. (2007); FLA. STAT. § 800.02 (2012); 720 ILL. COMP. STAT. 5/11-30 (2011); KY. REV. STAT. § 211.755 (2006); LA. STAT. ANN. § 51:2247.1 (2001); MASS. GEN. LAWS ch. 111, § 221 (2008); MICH. COMP. LAWS § 37.232 (2014); MINN. STAT. § 617.23 (1998); MISS. CODE ANN. § 97-29-31 (2012); MO. REV. STAT. § 191.918 (2014); MONT. CODE ANN. 50-19-501 (2007); NEV. REV. STAT. § 201.220 (2015); N.H. REV. STAT. ANN. § 132:10-d (1999); N.Y. PENAL LAW § 245.01 et seq. (1984); N.D. CENT. CODE § 12.1-20-12.1 (2009); 35 PA. CONS. STAT. § 636.4 (2012); 11 R.I. GEN. LAWS § 11-45-2 (2008); S.C. CODE ANN. § 16-15-130 (2006); S.D. CODIFIED LAWS § 22-24A-2 (2002); TENN. CODE ANN. § 68-58-102 (2006); UTAH CODE ANN. § 10-8-41 (1995); VA. CODE § 18.2-387 (1994); WASH. REV. CODE § 9A.88.010 (2003); W. VA. CODE § 61-8-9 (2007); WIS. STAT. § 944.20 (2013); WYO. STAT. ANN. § 6-4-201 (2007).

71. FLA. STAT. § 800.02 (2012).

72. ALA. CODE § 22-1-13 (2006); ALASKA STAT. § 01.10.060 (1998); ARIZ. REV. STAT. ANN. § 41-1443 (2006); ARK. CODE ANN. § 20-27-2001 (2012); CAL. CIV. CODE § 43.3 (1997); COLO. REV. STAT. § 25-6-302 (2004); CONN. GEN. STAT. § 46a-64 (2012); DEL. CODE ANN. tit. 31, § 310 (1997); D.C. CODE § 2-1402.82 (2007); FLA. STAT. § 383.015 (1994); GA. CODE ANN. § 31-1-9 (2002); HAW. REV. STAT. § 489-21 (2000); 740 ILL. COMP. STAT. 137/10 (2004); IND. CODE § 16-35-6-1 (2003); IOWA CODE § 135.30A (2000); KAN. STAT. ANN. § 65-1,248 (2006); KY. REV. STAT. § 211.755 (2006); LA. STAT. ANN. § 51:2247.1 (2001); ME. STAT. tit. 5, § 4634 (2001); MD. CODE ANN., HEALTH-GEN. § 20-801 (2003); MASS. GEN. LAWS ch. 111, § 221 (2008); MINN. STAT. § 145.905 (1998); MISS. CODE ANN. § 17-25-9 (2006); MO. REV. STAT. § 191.918 (2014); MONT. CODE ANN. § 50-19-501 (2007);

simply state that a woman is permitted to breastfeed her child anywhere she is otherwise lawfully allowed to be. For instance, Vermont's Fair Housing and Public Accommodations Act provides: "Notwithstanding any other provision of law, a mother may breastfeed her child in any place of public accommodation in which the mother and child would otherwise have a legal right to be."⁷³ While there is no federal law that provides for a right to breastfeed in public generally, federal law does provide that "a woman may breastfeed her child at any location in a Federal building or on Federal property, if the woman and her child are otherwise authorized to be present at the location."⁷⁴

State laws also sometimes incorporate an antidiscrimination approach to public breastfeeding. Hawaii's public breastfeeding law, for example, states that, "[i]t is a discriminatory practice to deny, or attempt to deny, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodations to a woman because she is breastfeeding a child."⁷⁵

C. Other Lactation Laws

In addition to enacting laws that encourage employers to provide workplace accommodations for lactating employees and that protect the right to publicly breastfeed, states have also passed other types of legislation that encourage or regulate breastfeeding. For instance, fifteen states have laws that allow breastfeeding women to defer jury service.⁷⁶ The Kansas law excuses "a mother

NEB. REV. STAT. § 20-170 (2011); NEV. REV. STAT. § 201.232 (1995); N.J. STAT. ANN. § 26:4B-4 (West 1997); N.M. STAT. ANN. § 28-20-1 (West 1999); N.Y. CIV. RIGHTS LAW § 79-e (1994); N.C. GEN. STAT. § 14-190.9 (2015); N.D. CENT. CODE § 23-12-16 (2009); OHIO REV. CODE ANN. § 3781.55 (West 2005); OKLA. STAT. tit. 63, § 1-234.1 (2004); OR. REV. STAT. § 109.001 (1999); 35 PA. CONS. STAT. § 636.3 (2012); 23 R.I. GEN. LAWS § 23-13.5-1 (2008); S.C. CODE ANN. § 63-5-40 (2008); S.D. CODIFIED LAWS § 25-5-35 (2015); TENN. CODE ANN. § 68-58-101 (2011); TEX. HEALTH & SAFETY CODE ANN. § 165.002 (1995); UTAH CODE ANN. § 17-15-25 (1995); VT. STAT. ANN. tit. 9, § 4502 (2015); VA. CODE § 2.2-1147.1 (2002); WASH. REV. CODE § 49.60.030 (2009); W. VA. CODE § 16-1-19 (2014); WIS. STAT. § 253.165 (2011).

73. VT. STAT. ANN. tit. 9, § 4502(j) (2015).

74. 41 C.F.R. pt. 102-74, app.; Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 357 (2004). With few exceptions, laws that protect public breastfeeding do not explicitly protect the expression of breast milk outside of breastfeeding. *But see* MO. REV. STAT. § 191.918 (2014) ("A municipality shall not enact an ordinance prohibiting or restricting a mother from breast-feeding a child or expressing breast milk in a public or private location where the mother and child are otherwise authorized to be.").

75. HAW. REV. STAT. § 489-21 (2000). *See also* D.C. CODE § 2-1402.82 (2007) (including breastfeeding as part of the definition of discrimination on the basis of sex, to ensure a woman's right to breastfeed her child in any location, public or private, where she has the right to be with her child); MICH. COMP. LAWS § 37.232 (2014) (prohibiting the denial of "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service to a woman because she is breastfeeding a child"); N.H. REV. STAT. ANN. § 132:10-d (1999) (noting that "to restrict or limit the right of a mother to breast-feed her child is discriminatory").

76. COLO. REV. STAT. § 13-71-119.5 (2015); CONN. GEN. STAT. § 51-217(b) (2012); DEL. CODE tit. 10, § 4511 (2015); HAW. REV. STAT. § 612-6 (2017); IDAHO CODE § 2-212 (1971); KAN.

breastfeeding her child” from jury service “until such mother is no longer breastfeeding the child.”⁷⁷

Although the majority of lactation laws focus on jury exceptions, public decency exceptions, and workplace accommodations, there are many other less common types of laws related to lactation. One such area of legislation includes the rules for licensing and regulating lactation consultants, who are professional individuals trained to assist women in preparing for lactation and dealing with any problems that may arise while lactating.⁷⁸ Other state laws have created “baby-friendly” hospital designations, which indicate that a particular hospital voluntarily offers breastfeeding support to women who give birth at that hospital.⁷⁹ Additionally, some states have similar laws that create special designations for businesses that support women expressing breast milk at work by providing areas necessary to pump, and materials required for storage.⁸⁰ There are also a limited number of state laws that regulate the collection, processing, and storage of donated human breast milk generally,⁸¹ although many other states specifically regulate donor breast milk banks.⁸² While some laws address the sale of breast milk, the market is still mainly unregulated.⁸³

STAT. ANN. § 43-158 (2006); KY. REV. STAT. § 29A.100 (2007); MISS. CODE ANN. § 13-5-23 (2008); MONT. CODE ANN. § 3-15-313 (2009); OKLA. STAT. tit. 38, § 28 (2014); OR. REV. STAT. § 10.050 (1999); 42 PA. CONS. STAT. § 4503 (2015); S.D. CODIFIED LAWS § 16-13-10.4 (2012); UTAH CODE ANN. § 78B-1-109 (2015); VA. CODE ANN. § 8.01-341.1 (2012). In fact, this is the only law in Idaho that addresses breastfeeding rights at all. *See* IDAHO CODE § 2-212 (1971) (“A person who is not disqualified for jury service . . . may have jury service postponed by the court or the jury commissioner only upon a showing of undue hardship, extreme inconvenience, or public necessity, or upon a showing that the juror is a mother breastfeeding her child.”).

77. KAN. STAT. ANN. § 43-158 (2006).

78. *See* R.I. Code § 23-13.6-3 (West 2014); 23 R.I. GEN. LAWS § 23-13.6-3 (2014); GA. CODE ANN. § 43-22A-3 (2016); LA. STAT. ANN. § 40:2213 (1999).

79. *See, e.g.*, FLA. STAT. § 383.016 (1994).

80. *See* N.D. CENT. CODE § 23-12-17 (2009); TEX. HEALTH & SAFETY CODE ANN. § 165.003 (1995); WASH. REV. CODE § 43.70.640 (2001).

81. *See, e.g.*, N.Y. C.L.S. PUB. HEALTH § 2505 (2015).

82. *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. § 161.071 (2001); CAL. HEALTH & SAFETY CODE § 1648 (2007).

83. In addition to the legal questions that arise from the commodification of breast milk, there are policy questions about how such a market might operate. Some common concerns within the literature discussing breast milk commodification and the regulation of breast milk markets include the high costs of breast milk, the potential exploitation of women, the safety of the breast milk for public health and welfare, and the potential to help women financially. *See, e.g.*, Linda C. Fentiman, *Marketing Mothers' Milk: The Commodification of Breastfeeding and the New Markets for Breast Milk and Infant Formula*, 10 NEV. J.L. 29, 69, 75, 66, 80 (2009) (discussing the cost per ounce of breast milk, the debate surrounding potential commodification risks in the sale of breast milk, the health risks associated with informal breastfeeding markets, and the payment to women for their breast milk); Sarah E. Waldeck, *Encouraging a Market in Human Milk*, 11 COLUM. J. GENDER & L. 361, 398, 369 (2002) (suggesting that the safety protocols for the distribution of breast milk used by donor milk banks could also be used by women selling breast milk and that the potential exploitation of women as a result of selling bodily material is an academic argument that does not help poor women in the same way that the selling of breast milk could); Crystal Oparaake, *White Milk, Black Market: A Call for the Regulation of Human Breast Milk over the Internet*, 60 HOW. L.J. 561, 592 (2017) (proposing that the government should regulate the sale of breast milk like it regulates other bodily products to make breast milk safer to

Other types of lactation laws create regulations for medical assistance programs and coverage related to breastfeeding supplies and related healthcare,⁸⁴ boards and councils intended to improve maternity care by health professionals,⁸⁵ minimum hospital requirements and standards in terms of maternity care,⁸⁶ public health campaigns to promote and educate the public on breastfeeding,⁸⁷ and funds for the nutritional support and resource costs of lactating women.⁸⁸ Some individual states have also created protection where no others do. For example, Louisiana has prohibited discrimination against children “on the basis of . . . whether the child is being breastfed.”⁸⁹

D. *The Language of Modern Lactation Laws*

The statutory language of state and federal lactation laws is relatively homogenous, with most laws containing three common textual characteristics. First, the laws often refer to lactating women, either solely or in conjunction with other terms, as “mothers” instead of as individuals, employees, or even just as “women.”⁹⁰ Of the forty-nine states with laws addressing breastfeeding, forty include the statutory term “mother” in place of, or in conjunction with, the term “woman.”⁹¹ For instance, Colorado’s exception to the public indecency laws that

consume); Jenine Kenna, *Got Milk? A Call for Federal Regulation and Support of Human Donor Milk*, 36 WOMEN’S RTS. L. REP. 435, 462 (2015) (proposing that breast milk should be federally regulated, like blood is, to ensure its safety and to increase the supply of breast milk for people who need it).

84. See 40 PA. STAT. & CONS. STAT. ANN. § 1583 (West 1996); 42 U.S.C. § 1396a(53) (2012); 10 U.S.C. § 1079(a)(17) (2012); OR. ADMIN. R. 410-122-0250 (2008); D.C. MUN. REGS. tit. 29, § 10002 (2017); MISS. ADMIN. CODE 23-209:1.15 (West 2014); OHIO ADMIN. CODE 5160-10-25 (2017).

85. See N.M. STAT. ANN. § 61-36-3 (West 2017); OHIO REV. CODE ANN. § 3711.20 (West 2016).

86. See CAL. HEALTH & SAFETY CODE § 123366 (West 2014); 210 ILL. COMP. STAT. ANN. 81/10 (West 2013); MISS. CODE ANN. § 41-135-5 (West 2016); N.J. ADMIN. CODE § 8:43G-19.14 (2012).

87. See 42 U.S.C. § 1790 (2012); 20 ILL. COMP. STAT. ANN. 2310/2310-442 (West 2000); 1 GUAM CODE ANN. § 1036 (2013); P.R. LAWS ANN. tit. 1, § 5165 (2003).

88. See MINN. STAT. § 145.893 (1978); 42 U.S.C. § 18203 (2012); 20 ILL. COMP. STAT. ANN. 1305/10-25 (West 2000).

89. LA. STAT. ANN. § 46:1407(e) (2016).

90. In addition, government literature on breastfeeding likewise relies on the language of “mothers” instead of women or individuals to discuss breastfeeding protection and promotion. See SURGEON GENERAL’S CALL TO ACTION, *supra* note 49 (relying primarily on the term “mother” or “maternal” to discuss breastfeeding women, or specifying that a woman is breastfeeding “her child” to reinforce the maternal relationship being described).

91. ALA. CODE § 22-1-13 (2006); ARIZ. REV. STAT. ANN. § 41-1443 (2006); CAL. CIV. CODE § 43.3 (1997); COLO. REV. STAT. § 25-6-302 (2004); CONN. GEN. STAT. § 53-34b (1997); DEL. CODE ANN. tit. 31, § 310 (1997); D.C. CODE § 2-1402.82 (2007); FLA. STAT. § 383.015 (1994); GA. CODE § 31-1-9 (2002); 740 ILL. COMP. STAT. 137/10 (2004); KAN. STAT. ANN. § 65-1,248 (2006); KY. REV. STAT. ANN. § 211.755 (2006); LA. STAT. ANN. § 51:2247.1 (2001); ME. STAT. tit. 5, § 4634 (2001); MD. CODE ANN., HEALTH-GEN. § 20-801 (2003); MASS. GEN. LAWS ch. 111, § 221 (2008); MICH. COMP. LAWS § 750.335a (2014); MINN. STAT. § 145.905 (1998); MISS. CODE ANN. § 17-25-9 (2006); MO. REV. STAT. § 191.918 (2014); MONT. CODE ANN. 50-19-501 (2007); NEB. REV. ST. § 20-170 (2011); NEV. REV. STAT. § 201.232 (1995); N.H. REV. STAT. ANN. § 132.10-d (1999); N.J. STAT. ANN. § 26:4B-4 (West 1997); N.M. STAT. ANN. § 28-20-1 (West 1999); N.Y. CIV. RIGHTS LAW § 79-e

otherwise prohibit female toplessness states that, “[a] mother may breastfeed in any place she has a right to be.”⁹² State lactation laws addressing workplace accommodations likewise use “mother” in place of, or in conjunction with, the term “woman” or “employee” to describe who is covered by the law.⁹³ Nine of the fifteen jury deferral laws also use “mother” in the statutory language.⁹⁴

Second, the laws protect an action (e.g., breastfeeding, pumping, lactating) while simultaneously assuming the beneficiary of that action—an infant, child, or baby. Twenty state lactation laws refer to breastfeeding or expressing breast milk for an “infant” or “baby.”⁹⁵ In every state with a lactation law, at least one of the laws uses the more generic term “child.” Thus, the act of pumping or breastfeeding “for” a child is protected, while pumping or breastfeeding generally is not. For example, the Georgia law that provides unpaid break time for lactating women states that, “[a]n employer may provide reasonable unpaid break time each day to an employee who needs to express breast milk for *her infant child*.”⁹⁶ State lactation laws also often limit the protection afforded to lactation depending on the age of the child beneficiary, usually between birth and three years old.⁹⁷

(1994); N.C. GEN. STAT. § 14-190.9 (2015); OHIO REV. CODE ANN. § 3781.55 (West 2005); OKLA. STAT. tit. 63, § 1-234.1 (2004); 35 PA. CONS. STAT. § 636.3 (2012); S.C. CODE ANN. § 63-5-40 (2008); S.D. CODIFIED LAWS § 25-5-35 (2015); TENN. CODE ANN. § 68-58-101 (2011); TEX. HEALTH & SAFETY CODE ANN. § 165.002 (1995); VT. STAT. ANN. tit. 9, § 4502 (2015); VA. CODE § 2.2-1147.1 (2002); WASH. REV. CODE § 49.60.030 (2009); W. VA. CODE ANN. § 16-1-19 (2014); WIS. STAT. ANN. § 253.165 (2011).

92. COLO. REV. STAT. §§ 25-6-301, 25-6-302 (2004).

93. 820 ILL. COMP. STAT. 260/10 (2001); N.M. STAT. ANN. § 28-20-2 (West 2007); N.Y. LAB. LAW § 206-c (2007); N.D. CENT. CODE § 23-12-17 (2009); VT. STAT. ANN. tit. 21, § 305 (2013); WASH. REV. CODE § 43.70.640 (2001).

94. IDAHO CODE § 2-212 (1971); KAN. STAT. ANN. § 43-158 (2006); KY. REV. STAT. § 29A.100 (2007); MISS. CODE ANN. § 13-5-23 (2008); MONT. CODE ANN. § 3-15-313 (2009); OKLA. STAT. tit. 38, § 28 (2014); S.D. CODIFIED LAWS § 16-13-10.4 (2012); UTAH CODE ANN. § 78B-1-109 (2015); VA. CODE § 8.01-341.1 (2012).

95. See, e.g., 720 ILL. COMP. STAT. 5/11-30 (2011) (“Breast-feeding of infants is not an act of public indecency.”); WYO. STAT. ANN. § 6-4-201 (2007) (“The act of breastfeeding an infant child, including breastfeeding in any place where the woman may legally be, does not constitute public indecency.”); CAL. LAB. CODE § 1030 et seq. (2001); FLA. STAT. § 383.015 (1994); FLA. STAT. § 800.02 (2012); GA. CODE ANN. § 31-1-9 (2002); GA. CODE ANN. § 34-1-6 (1999); 740 ILL. COMP. STAT. 137/10 (2004); 720 ILL. COMP. STAT. 5/11-30 (2011); 820 ILL. COMP. STAT. 260/10 (2001); IND. CODE § 5-10-6-2 (2008); KY. REV. STAT. ANN. § 211.755 (2006); LA. STAT. ANN. § 51:2247.1 (2001); ME. STAT. tit. 5, § 4634 (2001); MINN. STAT. § 181.939 (2014); N.J. STAT. ANN. § 26:4B-4 (West 1997); N.Y. CIV. RIGHTS LAW § 79-e (1994); N.Y. PENAL LAW § 245.01 et seq. (1984); N.D. CENT. CODE § 23-12-17 (2009); OHIO REV. CODE ANN. § 3781.55 (West 2005); OKLA. STAT. tit. 63, § 3781.55 (2005); 23 R.I. GEN. LAWS § 23-13.2-1 (2008); S.D. CODIFIED LAWS § 22-24A-2 (2002); TENN. CODE ANN. § 50-1-305 (1999); TEX. HEALTH & SAFETY CODE ANN. § 165.002 (1995); WASH. REV. CODE § 43.70.640 (2001); WYO. STAT. § 6-4-201 (2007).

96. GA. CODE ANN. § 34-1-6 (1999) (emphasis supplied).

97. S.D. CODIFIED LAWS § 16-13-10.4 (2012) (“a baby younger than one year”); COLO. REV. STAT. § 8-13.5-104 et seq. (2008) (“for up to two years after the child’s birth”); HAW. REV. STAT. ANN. § 612-6 (West) (“for a period of two years from the birth of the child”); LA. STAT. ANN. § 17:81 (2014) (“for up to one year following the birth of her child”); ME. STAT. tit. 26, § 604 (2009) (“for up to 3 years following childbirth”); N.Y. LAB. LAW § 206-c (2007) (“for up to three years following child birth”);

Finally, the statutory language assumes the nature of the relationship between the lactating woman and the beneficiary of her lactation. The presence of possessives, such as “her” or “her own,” in the statutory text to modify the words “child,” “baby,” or “infant” make it clear that the statutes expect—and quite possibly require—that the woman is not only lactating exclusively for the benefit of an infant child, but that she is doing so for the benefit of her own, biologically related, infant child. Of the forty-nine states that protect public breastfeeding in some fashion, thirty-seven include possessive language that presupposes the relationship between the lactating woman and the beneficiary of the lactation.⁹⁸ An Iowa law, for example, states that, “[n]otwithstanding any other provision of law to the contrary, a woman may breast-feed the woman’s own child in any public place where the woman’s presence is otherwise authorized.”⁹⁹ Eighteen of the twenty-eight workplace accommodation laws likewise include language that ties the protection of the act of lactation to the assumed relationship between the lactating woman and the beneficiary of the lactation.¹⁰⁰

Not every lactation law has each of these three textual features, but every state and federal lactation law contains at least one of these common characteristics and many have two or all three. Taken together, many modern lactation laws read like this Alabama law: “A mother may breastfeed her child

OR. REV. STAT. § 653.077 (2007) (“for her child 18 months of age or younger”); UTAH CODE ANN. § 34-49-202 (2016) (“for at least one year after the birth”); VT. STAT. ANN. tit. 21, § 305 (2015) (“for three years after the birth of a child”); VA. CODE § 22.1-79.6 (2014) (“until the child reaches the age of one”).

98. ALA. CODE § 22-1-13 (2006); CAL. CIV. CODE § 43.3 (1997); CONN. GEN. STAT. § 53-34b (1997); DEL. CODE ANN. tit. 31, § 310 (1997); D.C. CODE § 2-1402.82 (2007); FLA. STAT. § 383.015 (1994); GA. CODE ANN. § 31-1-9 (2002); 740 ILL. COMP. STAT. 137/10 (2004); IND. CODE § 16-35-6-1 (2003); IOWA CODE § 135.30A (2000); KY. REV. STAT. ANN. § 211.755 (2006); LA. STAT. ANN. § 51:2247.1 (2001); ME. STAT. tit. 5, § 4634 (2001); MD. CODE ANN., HEALTH-GEN. § 20-801 (2003); MASS. GEN. LAWS ch. 111, § 221 (2008); MISS. CODE ANN. § 17-25-9 (2006); MO. REV. STAT. § 191.918 (2014); MONT. CODE ANN. § 50-19-501 (2007); NEB. REV. STAT. § 20-170 (2011); NEV. REV. STAT. § 201.232 (1995); N.J. STAT. ANN. § 26:4B-4 (West 1997); N.H. REV. STAT. ANN. § 132:10-d (1999); N.M. STAT. ANN. § 28-20-1 (West 1999); N.Y. CIV. RIGHTS LAW § 79-e (1994); N.D. CENT. CODE § 23-12-16 (2009); OHIO REV. CODE ANN. § 3781.55 (West 2005); OKLA. STAT. tit. 63, § 1-234.1 (2004); OR. REV. STAT. § 109.001 (1999); 35 PA. CONS. STAT. § 636.3 (2012); 23 R.I. GEN. LAWS § 23-13.5-1 (2008); S.C. CODE ANN. § 63-5-40 (2008); S.D. CODIFIED LAWS § 22-24A-2 (2002); TENN. CODE ANN. § 68-58-101 (2011); TEX. HEALTH & SAFETY CODE ANN. § 165.002 (1995); VT. STAT. ANN. tit. 9, § 4502 (2015); WASH. REV. CODE § 49.60.030 (2009); WIS. STAT. § 253.165 (2011).

99. IOWA CODE § 135.30A (2000).

100. ARK. CODE ANN. § 11-5-116 (2009); CAL. LAB. CODE § 1030 et seq. (2001); COLO. REV. STAT. § 8-13.5-101 et seq. (2008); D.C. CODE § 2-1402.81 et seq. (2007); GA. CODE ANN. § 34-1-6 (1999); 820 ILL. COMP. STAT. 260/10 (2001); IND. CODE § 5-10-6-2 (2008); LA. STAT. ANN. § 17:81 (2014); ME. STAT. tit. 26, § 604 (2009); MINN. STAT. § 181.939 (2014); MONT. CODE ANN. § 39-2-215 et seq. (2007); N.Y. LAB. LAW § 206-c (2007); OKLA. STAT. tit. 40, § 435 (2006); OR. REV. STAT. § 653.077 (2007); R.I. GEN. LAWS § 23-13.2-1 (2008); TENN. CODE ANN. § 50-1-305 (1999); UTAH CODE ANN. § 34-49-202 (2016); VA. CODE § 22.1-79.6 (2014).

in any location, public or private, where the mother is otherwise authorized to be present.”¹⁰¹

E. Public Response to Modern Lactation Laws

Feminist activists have not always agreed on how to approach breastfeeding.¹⁰² Movements advocating for reproductive rights were much more likely to focus on the freedom from reproduction that contraception and abortion afforded women, than on rights associated with lactation and breastfeeding. Not all feminists even consider breastfeeding to be a part of the bundle of reproductive rights.¹⁰³ Indeed, as feminists have actively resisted the idea that “biology is destiny,” there has been some tension with the breastfeeding promotion movement that can seem to reduce women’s choices by pressuring women to breastfeed.¹⁰⁴ Whether or not all feminists agree with breastfeeding promotion, the feminist community’s response to the type of lactation laws discussed in this Article has been overwhelmingly positive because the laws are seen as protecting the *choice* of a woman to breastfeed by providing additional protections to those who do. The National Organization for Women has heralded workplace accommodation laws as promoting “real respect for the job of being a mother.”¹⁰⁵

Even groups and individuals not traditionally known to champion feminist causes have overwhelmingly supported the passage of lactation laws.¹⁰⁶ In support of lactation laws, conservative groups or individuals often praise the “family values” they believe that breastfeeding promotes, as well as the “commonsense” nature of the statutes. As humorously noted by one Republican member of Pennsylvania’s state legislature, “What can I say? When we get hungry here, we do not say, let us wait for the budget until we get fed lunch. We cannot let the baby citizens of this State, some of whom are Republicans, go hungry until we feed them.”¹⁰⁷ Thus, lactation laws are often seen as a rare “win-win” proposition that enables groups not traditionally in political alignment to promote a shared legislative goal.

101. ALA. CODE § 22-1-13 (2006).

102. See BARSTON, *supra* note 37, at 111 (“Feminism and breastfeeding have a highly dysfunctional relationship.”).

103. *Id.* at 112.

104. See BEYOND HEALTH, BEYOND CHOICE: BREASTFEEDING CONSTRAINTS AND REALITIES xii–xiii (Paige Hall Smith, Bernice L. Hausman, & Miriam Labbok eds., 2012) (describing tensions within the feminist community concerning breastfeeding and women’s autonomy).

105. Press Release, Nat’l Org. for Women, NOW Appreciates AAP Recommendations on Breast Feeding, Calls on Business and Society to Support Findings (Dec. 3, 1997).

106. See Marissa Evans, *Breastfeeding Protections Get a Hearing Before House Lawmakers*, TEX. TRIBUNE (Mar. 6, 2017), <https://www.texastribune.org/2017/03/06/house-business-committee-hears-bills-breastfeeding/> [<https://perma.cc/67AR-GDVH>] (noting that breastfeeding laws are “a rare issue that enjoys wide bipartisan support”).

107. H. JOURNAL, 191st Gen. Assemb., 59th Sess. (Pa. 2007).

III.

CRITIQUE OF MODERN LACTATION LAWS

While providing much needed legal protections for breastfeeding that were previously absent, modern lactation laws are nevertheless problematic from a feminist perspective because the legal protection they contain are conditioned on women's adherence to culturally-defined expectations instead of objective standards and actions. Only certain lactating women are protected, and only certain types of lactation are protected. The line delineating who and what is protected is based on cultural assumptions regarding women, gender, reproduction, and motherhood. The framing of lactation laws as protection for "mothers" and "their infants" assumes the naturalness, cultural homogeneity, and stasis of the concept of "motherhood." Moreover, such framing places the interests of women as secondary or tertiary to the interests of children and the state, if those interests are considered at all. The following Sections consider three problematic aspects of modern lactation laws in greater detail. The first is the tendency of lactation laws to conceptualize breastfeeding rights as the right of children to access breast milk, instead of the right of women to lactate. The second is the tendency to protect lactation only when it comports with the narrowly-defined cultural assumptions regarding appropriate womanhood. The third problem is modern lactation law's potential exclusion of non-traditional families from legal protections and benefits.

Before embarking on this critique, however, it is worthwhile to acknowledge that for many people, including many lactating women, the current legal framework used for this bundle of lactation rights is not problematic. Indeed, it may affirm their values and worldview. Many individuals believe that sex differences, and the social norms that have become intertwined with these differences, are natural and desirable.¹⁰⁸ Traditional ideas about gender—particularly ideas about the special, almost sacred bond between mother and child—are often deeply held and based on religious or moral understandings of the world. Such beliefs are not cast aside lightly, nor do they need to be on an individual level. Nevertheless, the unexamined adoption of this traditional worldview into a legal scheme that affects both public health and the rights of individuals who might not share those beliefs deserves careful scrutiny.¹⁰⁹ And, for reasons explored in-depth below, even individuals with traditional ideas about the role of women and appropriate lactation may find that a different legal framework nevertheless results in unexpectedly desirable outcomes.

108. See McCormick, *supra* note 15, at 309 ("[S]ex differences are more often seen as legitimately based in biology, or in social norms that are not themselves problematic, and those differences have justified treating people differently.").

109. See Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 817 (2007) ("Custom is an important source of social meaning, value, and structure and, precisely because it is, it is also an object of critical reflection and revision.").

A. Lactation Rights as Infants' Rights

Feminist legal theorists are well-versed in conceptualizing the rights of women as in tension with the rights of their unborn children because of the limits that contraceptive and abortion restrictions place on women's autonomous decision-making at various stages of the reproductive process.¹¹⁰ This tug of rights between a woman and her potential offspring is at the core of many feminist critiques of the law's treatment of women. When fetal rights are allowed to restrict a woman's right to make choices about her body, feminists correctly argue that women's autonomy is curtailed in a way that men's autonomy is not. Less recognized, but also potentially insidious, is the way that the law expands the rights of women—but only to the extent that they exercise those rights in accordance with culturally determined maternal roles. Modern lactation laws provide a powerful example of an expansion of rights predicated on motherhood.

Modern lactation laws are often conceived of and constructed as protective of an infant's right to breast milk, and not necessarily protective of an individual woman's right to lactate or breastfeed. This legislative focus on the right of infants to access breast milk is apparent in both the statutory text of lactation laws and their legislative history. For instance, West Virginia's law exempting breastfeeding from public indecency laws is entitled "[c]hild's right to nurse."¹¹¹ The legislative history of the Connecticut law which protects public breastfeeding likewise discusses the "right" of infants to breast milk.¹¹² Employers in North Dakota and Washington who allow women to take unpaid break times to express breast milk during the work day are permitted to identify themselves as "infant friendly" workplaces.¹¹³

In addition, many lactation laws are drafted to protect lactation only if the lactation benefits a woman's own, biologically related infant child. By utilizing some variation of the phrase "for [the woman's] infant child" as a modifier,¹¹⁴ the statutes limit their protection to lactation that benefits a specific infant. Under a plain meaning interpretation of this language, a woman would be entitled to

110. See Burkstrand-Reid, *supra* note 13, at 255 ("Society focuses myopically on abortion as the defining concern in women's health.").

111. W. VA. CODE § 16-1-19 (2014).

112. CONN. LABOR & PUBLIC EMPS. COMM. (Mar. 15, 2001) (transcript) ("Breast milk is the gold standard for infant feeding and as such, it is not only the goal but it is the right of all of our babies.").

113. N.D. CENT. CODE, § 23-12-17 (2009); WASH. REV. CODE § 43.70.640 (2001). Texas employers who allow such breaks, however, can designate themselves as "mother-friendly." TEX. HEALTH & SAFETY CODE ANN. § 165.003 (1995).

114. See *supra* Part II.D and accompanying notes; see also GA. CODE ANN. § 34-1-6 (1999) ("An employer may provide reasonable unpaid break time each day to an employee who needs to express breast milk for her infant child."); 820 ILL. COMP. STAT. 260/10 (2001) ("An employer shall provide reasonable unpaid break time each day to an employee who needs to express breast milk for her infant child."); MINN. STAT. § 181.939 (2014) ("An employer must provide reasonable unpaid break time each day to an employee who needs to express breast milk for her infant child."); TENN. CODE ANN. § 50-1-305 (1999) ("An employer shall provide reasonable unpaid break time each day to an employee who needs to express breast milk for that employee's infant child.").

publicly breastfeed or take breaks at work to express breast milk only if the milk expressed was used to feed a biologically related infant child, regardless of the possibility that other reasons may exist. A woman is not entitled to take breaks at work to express breast milk, or to breastfeed or be topless in public, for her own benefit or for any other reason than to feed her own infant child. She is entitled to these rights and protections only because she is the conduit through which her biological child benefits. This legal framework protects the benefits that children receive from their mothers' lactation but does not protect the right of a woman to the internal processes of her body, thus laying bare the law's paramount concern for the rights of children and its disinterest—or disregard—for the rights of women.¹¹⁵

The legislative history of modern lactation laws shows that state legislatures were authentically concerned about the obstacles to breastfeeding because of legal impediments and public opinion. The concern expressed most frequently, however, is that, absent effective lactation laws, infants would lack access to breast milk and the positive health outcomes associated with breastfeeding. The legislative history of modern lactation laws includes voluminous testimony on the various benefits to infant health that breastfeeding affords. For instance, in Alaska's four paragraphs of legislative findings regarding its law to exempt breastfeeding from public indecency laws, the health benefits of breastfeeding to the infant dominate all but the last paragraph.¹¹⁶ Similarly, the legislative findings of a Colorado law devote six paragraphs to the positive health outcomes for infants, one paragraph each to the positive outcomes for women and society, and one paragraph that states that breastfeeding is "a basic and important act of nurturing that should be encouraged in the interests of

115. Even scientific articles are apt to frame the purpose of breastfeeding as primarily, or solely, to promote infant health. *See* Murtagh & Moulton, *supra* note 42 (noting health benefits for mothers, but focusing on infant health and societal benefit). Other scholars have proposed conceptualizing breastfeeding rights as belonging to the "mother/child dyad" because of the intertwined role that women and children play in breastfeeding. *See generally*, Benjamin Mason Meier & Miriam Labbok, *From the Bottle to the Grave: Realizing a Human Right to Breastfeeding Through Global Health Policy*, 60 CASE W. RES. L. REV. 1073 (2010).

116. Alaska S.B. 297(2d RLS) (1998):

Section 1. LEGISLATIVE FINDINGS. The legislature finds that

- (1) the medical profession in the United States recommends that children from birth to the age of one year should be breast-fed unless, under particular circumstances, it is medically inadvisable;
- (2) in addition to the benefit of improving bonding between mothers and their babies, breast-feeding offers better nutrition, digestion, and immunity for babies than does formula-feeding, and it may increase the intelligence quotient of a child;
- (3) babies who are breast-fed have lower rates of death, meningitis, childhood leukemia and other cancers, diabetes, respiratory illnesses, bacterial and viral infections, diarrheal diseases, otitis media, allergies, obesity, and developmental delays; and
- (4) any promotion of family values should encourage public acceptance of this most basic act of nurture between a mother and her baby, and a mother should not be made to feel incriminated or socially ostracized for breast-feeding her child.

maternal and infant health.”¹¹⁷ Likewise, a Mississippi law that covers many facets of legal protections for breastfeeding makes clear that the intent of the law is singular, and it is to promote children’s health: “It is the intent of the Legislature to proclaim that breast milk is life sustaining and the perfect food to ensure optimal growth, development and survival of Mississippi children.”¹¹⁸

In fact, state legislatures were so concerned with the health and well-being of infants, that they often seemed to forget how children access the health benefits of breast milk in the first place. For example, the legislative findings of a Delaware law regarding public breastfeeding mention only the positive health outcomes for infants and is even introduced as “[a]n act . . . relating to Infant Nutrition.”¹¹⁹ Although the law does mention that “social constraints” may “impede a woman’s choice to breastfeed due to embarrassment and the lack of public acceptance,” the next paragraph recognizes that the legality of public breastfeeding is important because doing so will “promote child health.”¹²⁰ Similarly, the purpose section of Illinois’ Right to Breastfeed Act reads:

“Purpose. The General Assembly finds that breast milk offers better nutrition, immunity, and digestion, and may raise a baby’s IQ, and that breastfeeding offers other benefits such as improved mother-baby bonding, and its encouragement has been established as a major goal of this decade by the World Health Organization and the United Nations Children’s Fund. The General Assembly finds and declares that the Surgeon General of the United States recommends that babies be fed breastmilk, unless medically contraindicated, in order to attain an optimal healthy start.”¹²¹

Although “mother-baby bonding” is mentioned, women are absent from the statutory purpose as individual entities separate and distinct from their role as mothers. In fact, they are even erased as participants in the breastfeeding relationship through the use of the passive voice in the last sentence which simply recommends that “babies be fed breastmilk.”¹²² The rights and interests of the person who is feeding this Illinois baby breast milk are not discussed or otherwise addressed.

In addition to their almost singular focus on the rights and interests of infants, state legislative histories reveal that many state legislatures were not able or willing to discuss the right to breastfeed as situated in a woman’s autonomous control of her body. For instance, Arizona House Bill 2376, which exempts breastfeeding from public indecency laws, includes supportive testimony from a woman who stated that “breasts were created for the purpose of feeding

117. COLO. REV. STAT. §§ 25-6-301, 25-6-302 (2004).

118. Mississippi House Amendment, 2006 Reg. Sess. S.B. 2419 (2006).

119. H.B. 31, 139th Gen. Assemb. (Del. 1997).

120. *Id.*

121. 740 ILL. COMP. STAT. 137/5 (2004).

122. *Id.*

children,” and thus “she is asking to do what God intended.”¹²³ Encapsulated in this testimony is the idea that women’s bodies (in this case their breasts) are valuable only insofar as they are being used for their maternal function. In addition, the woman’s testimony notes that “mothers choose to breast-feed because of the health benefits to the child, not to expose themselves.”¹²⁴ This language obscures the existence or validity of any *other* reason to lactate besides health benefits to a child.

What might those reasons be? One reason might be the health benefits of continued lactation for women themselves.¹²⁵ Physical benefits of lactation for women have been firmly established, and include weight loss,¹²⁶ speedier recovery from childbirth,¹²⁷ better cardiovascular health,¹²⁸ reduced risk of type 2 diabetes,¹²⁹ osteoporosis,¹³⁰ rheumatoid arthritis,¹³¹ and breast and ovarian cancers.¹³² The extent of these maternal health benefits are closely associated with the frequency, intensity, and duration of lactation; the longer and more frequently a woman breastfeeds or expresses breast milk, the more likely she is to experience the associated positive health benefits.¹³³

123. Arizona H.B. 2376, Arizona House Committee Minutes (Feb. 15, 2006) (statement of Amy Milliron in support of the bill).

124. *Id.*

125. That is assuming, of course, that women have access to information regarding how breastfeeding affects their own health and well-being. See BLUM, *supra* note 17, at 50–51 (“Research and advice literature each pay less attention to maternal health and breastfeeding. Assumptions of maternal altruism run high, and mothers particularly curious about the effects of breastfeeding on their bodies are likely to meet with frustration.”).

126. See Gilberto Kac, Maria HDA Benício, Gusatvo Velásquez-Melendez, Joaquim G Valente & Claudio J Struchiner, *Breastfeeding and Postpartum Weight Retention in a Cohort of Brazilian Women*, 79 AM. J. CLINICAL NUTRITION 487 (2004).

127. See WORLD HEALTH ORG., INFANT AND YOUNG CHILD FEEDING: MODEL CHAPTER FOR TEXTBOOKS FOR MEDICAL STUDENTS AND ALLIED HEALTH PROFESSIONALS 12 (2009) (explaining that breastfeeding releases oxytocin, which causes a postpartum woman’s uterus to contract and reduces bleeding).

128. See Sanne A. E. Peters et al., *Breastfeeding and the Risk of Maternal Cardiovascular Disease: A Prospective Study of 300,000 Chinese Women*, 6 J. AM. HEART ASS’N 1 (2017).

129. See Eleanor Bimla Schwarz, Jeanette S. Brown, Jennifer M. Creasman, Alison Stuebe, Candace K. McClure, Stephen K. Van Den Eeden & David Thom, *Lactation and Maternal Risk of Type 2 Diabetes: A Population-based Study*, 123 AM. J. MED. 863 (2010).

130. See Marina F. Rea, *Benefits of Breastfeeding and Women’s Health*, 80 J. PEDIATRIA S142, S142 (2004).

131. J. E. Oliver & A. J. Silman, *Risk Factors for the Development of Rheumatoid Arthritis*, 35 SCANDINAVIAN J. RHEUMATOLOGY (2006).

132. See Msolly Awatef et al., *Breastfeeding Reduces Breast Cancer Risk: A Case-control Study in Tunisia*, 21 CANCER CAUSES CONTROL 392 (2010).

133. See Jennifer Bernstein & Lainie Rutkow, *Hospital Breastfeeding Laws in the U.S.: Paternalism or Empowerment*, 44 U. BALT. L. REV. 163, 167 (2015). In addition to these health benefits, a woman may also choose to express breast milk at work simply to maintain her ability to lactate, so that she can continue to breastfeed a child during non-work hours. Finally, she may require breaks to express milk for a period of time while gradually decreasing lactation in order to stop entirely.

Additionally, breastfeeding has been linked to mental health benefits for women.¹³⁴ This is compellingly illustrated by the story of Ms. Anderson, the public-school teacher who donated breast milk following a stillbirth because she felt that expressing breast milk for donation was a critical component in processing her grief and healing from her loss.¹³⁵ It is not uncommon for bereaved mothers to pump and donate to milk banks as an important part of processing their grief following a stillbirth or the loss of a young child.¹³⁶ Women will also pump for the benefit of a nursing infant whose mother has passed away.¹³⁷ Though these women are cheered on social media,¹³⁸ the law offers them no protection.

In addition to the health benefits of lactation, there are demonstrable health problems associated with the premature or rushed discontinuation of lactation, including blocked ducts, mastitis, and abscesses.¹³⁹ These reasons, although comparatively less common than the expressing of milk for an infant, should not be discounted as valid reasons for providing legal protections to lactating women.¹⁴⁰ Whether the aim is to access the positive health benefits of lactation or avoid negative health consequences, a lactating woman requires legal protections. It is patently unfair that the law would protect a recently pregnant woman for the purpose of promoting the health of her infant but not to promote the woman's own postpartum health.

There is an additional concern that by situating the right as an infant's right to breast milk, there is a potential argument that such a "right" may overcome

134. See generally Carley J. Pope & Dwight Mazmanian, *Breastfeeding and Postpartum Depression: An Overview and Methodological Recommendations for Future Research*, DEPRESSION RES. & TREATMENT, Mar. 21, 2016.

135. Evans, *supra* note 2.

136. WAMBACH & RIORDAN, *supra* note 46, at 523; see also Rebecca Gale, 'I did it for Remy.' Her 8-Month-Old Died, but Now Her Breast Milk Nourishes Other Babies, WASH. POST (Nov. 16, 2017) (recounting a story of a woman who donated 3,000 ounces of breast milk to nonprofit milk banks that supply neonatal intensive care units following the death of her son).

137. Vanessa A. Simmons, *Breastfeeding Moms Join Forces to Donate Milk to Baby After Tragic Loss of Mother*, NORMALIZE BREASTFEEDING (Jan. 5, 2015), <https://normalizebreastfeeding.org/2015/01/breast-milk-donors-rally-for-breastfed-baby-after-tragic-loss-of-mother/> [<https://perma.cc/VA5D-ETFQ>].

138. Susan Rinkunas, *Mom Donates 18 Gallons of Breast Milk After Her Son Died at 11 Days Old*, CUT (Dec. 27, 2016), <https://www.thecut.com/2016/12/mom-donates-18-gallons-of-breast-milk-after-sons-death.html> [<https://perma.cc/7DTJ-PN7U>]. Medical professionals recognize the potential benefits of such sharing while also warning about the potential dangers of informal milk sharing arrangements. See Natasha K. Sriraman et al., *Academy of Breastfeeding Medicine's 2017 Position Statement on Informal Breast Milk Sharing for the Term Healthy Infant*, 13 BREASTFEEDING MED., no. 1, 2017.

139. *When Breastfeeding Ends Suddenly*, LA LECHE LEAGUE GB (Nov. 2017), <https://www.laleche.org.uk/breastfeeding-ends-suddenly/> [<https://perma.cc/SBG9-89CS>].

140. Indeed, discounting such reasons may force lactating women into an impossible choice. See Lara M. Gardner, *A Step Toward True Equality in the Workplace: Requiring Employer Accommodation for Breastfeeding Women*, 17 WIS. WOMEN'S L.J. 259, 268 (2002) ("Because of the positive impact breastfeeding has on a woman's health, when we fail to accommodate breastfeeding in the workplace, we effectively force her to choose between her health and her employment.").

the right of a woman to *not* breastfeed.¹⁴¹ Such a conception of breastfeeding as a duty has been articulated at various times throughout history, as exemplified by early Harvard president Benjamin Wadsworth's statements that women who failed to breastfeed their children were "criminal and blameworthy."¹⁴² And previous government efforts to encourage breastfeeding have certainly skirted the line between encouragement and coercion.¹⁴³ Indeed, in 2014, the United Arab Emirates passed a law requiring women to breastfeed for two years because it was the "right" of the child and the "duty" of the mother.¹⁴⁴ At least one judge in India agrees, recently suggesting in a written opinion that infants have a constitutional right to at least six months of exclusive breastfeeding.¹⁴⁵ With these chilling examples in mind, it is crucial that any law that protects the choice to breastfeed does not stigmatize the decision to formula feed—for whatever reason—in a way that coerces women to breastfeed.

Tying a postpartum woman's right to perform an action that is a biological consequence of her pregnancy, and results in physical and mental benefits for her, to the secondary benefit experienced by her infant child, reinforces the troubling idea that women are merely reproductive vessels whose worth is measured by their ability to promote their children's well-being.¹⁴⁶ By using the term "mother," instead of "woman" or "individual," lactation laws conflate the health of the lactating woman with the health and needs of her child such that

141. See Kedrowski and Lipscomb, *supra* note 39, at 116 ("The right to breastfeed . . . should not be transformed into a duty to breastfeed."); Barston, *supra* note 37, at 112-13 (noting the possibility that breastfeeding advocacy can "turn[] the argument from one of protecting the rights of those who want to breastfeed, to one of biological imperative or social responsibility.").

142. BLUM, *supra* note 17, at 21; see also Laura Brace, *Rousseau, Maternity and the Politics of Emptiness*, 39 POLITY 361, 362-68 (2007) (describing Jean-Jacques Rousseau's descriptions of breastfeeding as a civic and moral duty).

143. See LINDA C. FENTIMAN, *BLAMING MOTHERS: AMERICAN LAW AND THE RISKS TO CHILDREN'S HEALTH* 165 (2017). Discussing the 2004 "Babies Were Born to Be Breastfed" campaign run by the federal government and describing it as

[d]eeply disturbing, because it removed breastfeeding from the realm of normal childrearing choices, which are guided by the advice of health care professionals but remain decisions for individual parents to make. Like the rhetoric of the 'bonding' movement thirty years earlier, the government's pro-breastfeeding government marketing campaign articulated a narrow range of acceptable maternal behaviors as being *medically* necessary for a healthy childhood.

Id.

144. See Emma Graham-Harrison, *UAE Law Requires Mothers to Breastfeed for First Two Years*, GUARDIAN (Feb. 7, 2014), <https://www.theguardian.com/world/2014/feb/07/uae-law-mothers-breastfeed-first-two-years> [<https://perma.cc/MC9Z-3YTR>].

145. See Nisha Susan, *Why a Madras High Court Judge Wants the Union Government to Declare Breastmilk a Fundamental Right This Year*, LADIES FINGER (Jan. 9, 2018), <http://theladiesfinger.com/fundamental-right-breastmilk-breastfeeding-madras-hc/> [<https://perma.cc/T2V5-AVYU>].

146. See Siegel, *supra* note 109, at 819 (noting the "customary assumption that women exist to care for others"); see also KEDROWSKI & LIPSCOMB, *supra* note 39, at 116 ("It is important to note that the claim for a right to breastfeed is not entirely dependent upon the scientific case that breast is best, or on any moral obligation that might arise on the basis of that evidence.").

she is no longer a distinct legal entity.¹⁴⁷ The state's interest in her becomes subsumed by the state's interest in her adherence to the maternal role and her ability to promote positive health outcomes for her infant.¹⁴⁸ The individual woman's interest in making decisions to promote her own health is erased as a potential consideration, because the woman's interest is assumed to be completely commensurate with that of her child.¹⁴⁹

Lactation laws also raise the troubling question of who is empowered to police the laws' boundaries. Can employers legally inquire into their postpartum employees' plans for milk expressed at work? Can they require documentation that any milk expressed at work is only for the consumption of that employee's biological child? Is law enforcement endowed with a legal right to inquire about the biological parentage of an infant being nursed in public to ensure that nothing "lewd" is happening? The potential privacy concerns are immediate and pressing. These concerns are amplified by the fact that the law enforcement officers who decide which acts of lactation are legally permissible in the face of narrowly worded laws will often be white, middle-class men.¹⁵⁰

Far from being a mere academic concern, employers have already begun testing the boundaries of their ability to prevent employees from taking breaks to express breast milk if the employees are not using that milk to feed their own biological infant. For example, in *Gonzales v. Marriott International, Inc.*,¹⁵¹ the defendant employer argued that Mary Gonzales, a longtime Marriot employee who had recently acted as a gestational surrogate, was not entitled to lactation breaks.¹⁵² The employer relied on the language of California Labor Code section

147. See Burkstrand-Reid, *supra* note 13, at 219–22 (discussing how the descriptor "maternal health" ties together the health of the pregnant woman with that of her unborn child even before birth, with the result that the law focuses "primarily on how the medical treatment [of the pregnant woman] impacts her ability to fulfill her socially defined role as a mother").

148. Indeed, as the data supporting the health benefits to infants from breastfeeding builds, mothers who choose not to breastfeed are at risk of being pathologized as "bad mothers." KEDROWSKI & LIPSCOMB, *supra* note 39, at 124. Additionally, if the right to breastfeed is framed as an infant's right to access breast milk, it is not hard to imagine the scenario in which a woman may be compelled to provide breast milk against her wishes, or at least to be otherwise liable for the "harm" she caused to an infant for not breastfeeding. See, e.g., *supra* note 112.

149. See Jamie R. Abrams, *Distorted and Diminished Tort Claims for Women*, 34 CARDOZO L. REV. 1955, 1991 (2013) (noting the ways that courts essentialize maternal decision-making in pregnancy and birth by assuming that women will always choose medical treatment that results in the best potential outcome for a fetus, regardless of the potential risks to the woman herself).

150. U.S. DEP'T OF JUSTICE, PERCENTAGE OF LOCAL POLICE OFFICERS WHO WERE RACIAL OR ETHNIC MINORITIES NEARLY DOUBLED BETWEEN 1987 AND 2013 (May 14, 2015), <https://www.justice.gov/tribal/pr/percentage-local-police-officers-who-were-racial-or-ethnic-minorities-nearly-doubled> [<https://perma.cc/5FA6-FU8G>] (reporting that racial or ethnic minorities accounted for 27 percent of local police officers and female officers accounted for approximately 12 percent of local police forces).

151. 142 F. Supp. 3d 961 (C.D. Cal. 2015). The author served as a member of the plaintiff's counsel team. All information discussed here is contained in the public record of the case.

152. Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss Pursuant to Rule 12(B)(6), *Gonzales v. Marriott Int'l, Inc.*, No. 2:15-cv-03301-E, 2015 WL 12406671 (C.D. Cal. June 9, 2015).

1030, which provides that employers must “accommodate an employee desiring to express breast milk for the employee’s infant child.”¹⁵³ Ms. Gonzales argued that she was entitled to the breaks as a reasonable accommodation for a pregnancy-related condition under the California Fair Employment and Housing Act and that she was continuing to express milk to maintain her own health, to give it to the intended parents of the child she carried, and later, to donate it to nonprofit milk banks.¹⁵⁴ Marriott argued that the plain reading of California Labor Code section 1030 provided no protection to Ms. Gonzales, who was not providing milk to her own infant child. In a ruling on Marriott’s motion to dismiss for failure to state a claim, the court ruled that Ms. Gonzales’s case could proceed, but did not directly address the validity of Marriott’s argument regarding the language of Labor Code section 1030.¹⁵⁵

It is not surprising that enterprising counsel for employers would seek to enforce these laws according to their plain meaning, limiting lactation breaks to breaks only where breast milk is expressed for the benefit of the employee’s own infant child. It is troubling, however, that the framing of the laws—as protective of an infant’s right to expressed breast milk and not a woman’s right to lactation breaks—allows employers to delve into intimate details of their employees’ lives to ascertain whether breaks are being taken for the purpose of expressing breast milk for an employee’s own, biologically related infant child.

This narrow statutory language also presents potential problems in protecting the right to breastfeed in public. At least one court has found that the language of public breastfeeding statutes could be interpreted to convict a woman of public indecency were she to nurse a child in public who was not her own child.¹⁵⁶ Considering the backlash that women breastfeeding lawfully in public already experience,¹⁵⁷ it is possible to imagine a scenario in which law enforcement officers would intercede were they to perceive that a woman was nursing an infant that was not her own. Law enforcement officers still regularly stop, harass, and threaten to arrest women who are lawfully breastfeeding their own children.¹⁵⁸ They have also arrested women whom they perceived to be

153. CAL. LAB. CODE § 1030 (2001).

154. Complaint, *Gonzales v. Marriott Int’l, Inc.*, No. 15-3301, 2015 WL 3609313 (C.D. Cal. May 1, 2015).

155. *Gonzales*, 142 F. Supp. 3d.

156. *State v. Castaneda*, 245 P.3d 550, 559 (Nev. 2010), *opinion modified on denial of reh’g*, No. 52911, 2010 WL 5559401, at *1 (Nev. Dec. 22, 2010) (noting that the district court had originally struck down the Nevada statute exempting breastfeeding from public indecency laws because it was unconstitutionally overbroad, in part based on the concern that the statute could be used to convict “a woman nursing a child who is not the child’s mother” of indecency).

157. See *supra* note 66 and accompanying text.

158. See, e.g., Patrick Clarke, *Mom Claims She Was Kicked Out of North Carolina Courtroom for Breastfeeding*, ABC NEWS (Apr. 12, 2016, 4:50 PM), <http://abcnews.go.com/US/mom-claims-kicked-north-carolina-courtroom-breastfeeding/story?id=38338631> [<https://perma.cc/YC4C-JHCD>] (describing a judge who told a breastfeeding mother to “[s]tep outside, and cover up”); David Moye, *Breastfeeding Mom Claims an Officer Threatened to Arrest Her*, HUFFINGTON POST (Sept. 26, 2016, 9:34 PM), <http://www.huffingtonpost.com/entry/breastfeeding-mom-georgia-savannah>

breastfeeding in an “inappropriate way”—such as one Arkansas woman arrested for child endangerment for nursing her six-month-old child after consuming two beers with dinner.¹⁵⁹ There is particularly high risk of harassment or intervention if the race of the mother varies (or appears to vary) from that of the infant she is nursing.¹⁶⁰ Exceptions to public indecency laws that protect only women nursing their own biologically related infants are thus ripe for potentially troubling interventions by overzealous law enforcement bent on enforcing their own moral or cultural ideals.

This lack of interest in the rights of lactating women is also apparent from the near-total lack of an enforcement mechanism for vindicating lactation rights.¹⁶¹ Only thirteen states and the District of Columbia have created a private right of action for lactating women whose rights have been violated.¹⁶² And

shukla_us_57e9a8c1e4b0c2407cd8d7ae [https://perma.cc/P26U-RVT9] (discussing the actions of a police officer, who told a nursing mother to cover up and threatened to arrest her because some people might be offended); *Woman Says She Was Kicked out of Indiana Courtroom for Breastfeeding*, INDY CHANNEL (June 15, 2016, 10:08 PM), <http://www.theindychannel.com/news/local-news/woman-kicked-out-of-indiana-courtroom-for-breastfeeding> [https://perma.cc/EW8M-7M2N] (describing a mother who was breastfeeding in a courtroom hallway while waiting for her case to be called in court when a clerk, under an order from the judge, told her that she could continue in the hallway but had to cease breastfeeding once she entered the courtroom); Alex Derencz, *Woman Says She Was Kicked Out Of Court for Breastfeeding: Court Says It Was a Misunderstanding*, WRBL.COM (July 29, 2016, 6:26 PM), <http://wrbl.com/2016/07/29/woman-says-she-was-kicked-out-of-court-for-breastfeeding-court-says-it-was-a-misunderstanding/> [https://perma.cc/8UMU-9XMM] (depicting an incident where a deputy told a mother who was breastfeeding in a courtroom that she was unable to breastfeed there because men were present and asked her to finish in the bathroom); Thomas Warren, *Woman Files Complaint After Being Barred from Breast-feeding* (Dec. 13, 2011, 7:43 AM), <http://wtop.com/news/2011/12/woman-files-complaint-after-being-barred-from-breast-feeding/> [https://perma.cc/SA8H-GAXX] (describing an incident where a security guard barred a woman from breastfeeding while waiting for a Department of Motor Vehicles hearing); Kasandra Brabaw, *Three Breastfeeding Moms Were Harassed at IHOP & the Police Joined in*, REFINERY 29 (Mar. 8, 2017, 11:55 AM), <https://www.refinery29.com/2017/03/144364/breastfeeding-harassment-ihop-police> [https://perma.cc/5GM4-5VQ3] (describing how a police officer directed women who were lawfully breastfeeding to cover up or go to the bathroom).

159. Susan Welsh & Alexa Valiente, *Mom Jailed for Breastfeeding While Drinking, Waitress Fired over It*, ABC NEWS (Mar. 26, 2014), <http://abcnews.go.com/US/mom-jailed-breastfeeding-drinking-waitress-fired/story?id=21622331> [https://perma.cc/9U8A-5EU7].

160. Indeed, this type of harassment of mixed-race families already happens in other contexts. See *Virginia Parents Outraged After Walmart Security Allegedly Suspected Father of Kidnapping Biracial Daughters*, HUFFINGTON POST (May 21, 2013), https://www.huffingtonpost.com/2013/05/21/virginia-parents-walmart-biracial-daughters_n_3313143.html [https://perma.cc/2Y4T-J8GM] (detailing the story of a white father of biracial children, who was followed to his home by a state police after a customer at a local Walmart reported a possible kidnapping because the customer “didn’t think that [the biracial children] fit” with the white father).

161. See, e.g., Stephanie Sikora, *A Permission Slip to Breastfeed: Legislating a Mother’s Choice in Pennsylvania*, 16 WM. & MARY J. WOMEN & L. 781, 783 (2010) (attacking the Pennsylvania Freedom to Breastfeed Act as “toothless” because it “lacks remedies a mother can use to protect her personal choice”).

162. Arizona, California, DC, Hawaii, Illinois, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Nebraska, Rhode Island, and Washington state all provide some private right of action. ARIZ. REV. STAT. ANN. § 41-1471 (2002); CAL. CIV. CODE § 52.1 (2015); D.C. CODE § 2-1403.16 (2015);

remedies for violations of the laws often limit the relief available to minimal damages,¹⁶³ ensuring that there is little incentive for women to pursue their claims.¹⁶⁴ A significant number of states do not even empower women to seek these remedies on their own behalf, instead limiting enforcement power to state attorneys general or state agencies.¹⁶⁵ Even the federal law that creates a right to break time under the Fair Labor Standards Act has been inadequate to provide women with the ability to bring claims on their own behalf, as the statute's only remedy is lost wages, which women are not entitled to for the loss of the *unpaid* break time used to express breast milk.¹⁶⁶ Additionally, women who do bring claims are often treated poorly by judges, further disincentivizing enforcement.¹⁶⁷

Thus, the rights afforded to women in current lactation laws are largely symbolic in that most state laws place the onus on women to defend these rights and provide slim avenues for women to vindicate these rights when the laws are violated.¹⁶⁸ Indeed, the fact that the *state* is sometimes empowered to prosecute violations, even when women are not, underscores the premise that these laws are protective of an infant's right to breast milk (and the state's interest in

HAW. REV. STAT. § 489-22 (2000); 740 ILL. COMP. STAT. 137/15 (2004); LA. STAT. ANN. § 51:2264 (1988); ME. STAT. tit. 5, § 4621 (2011); MASS. GEN. LAWS ch. 111, § 221(e) (2009); MICH. COMP. LAWS § 37.233 (2014); MINN. STAT. § 181.944 (2014); NEB. REV. STAT. § 20-148 (1977); 23 R.I. GEN. LAWS § 23-13.5-2 (2008); WASH. REV. CODE § 49.60.030(2) (2009). Colorado provides for a private right of action for employees who want to challenge an employer's failure to provide workplace accommodations, but only after the employee engages in non-binding mediation with the employer. COLO. REV. STAT. § 8-13.5-104(5) (2008). Such additional procedural hurdles placed on would-be litigants are likely to dissuade action.

163. See HAW. REV. STAT. § 489-21 (2000) (limiting recovery to one hundred dollars in damages, plus attorneys' fees and costs).

164. Danielle M. Shelton, *When Private Goes Public: Legal Protection for Women Who Breastfeed in Public and at Work*, 14 LAW & INEQUALITY 179, 189 (1995) ("The availability of a remedy is important in deterring much of the informal harassment surrounding breastfeeding.").

165. See, e.g., CAL. LAB. CODE § 1033 (2001) (limiting enforcement of break time law to a one-hundred-dollar fine levied by the state Labor Commissioner); GA. CODE ANN. § 34-2-12 (1937) (specifying the Labor Commissioner as the party with the power to enforce the workplace accommodation law).

166. See Kierstin Jodway, *Pumping 9 to 5: Why the FLSA's Provisions Provide Illusory Protections for Breastfeeding Moms in the Workplace*, 4 BELMONT L. REV. 217 (2017) (arguing that FLSA's workplace breastfeeding accommodations do not protect the ability to breastfeed because they only apply to employers with fifty or more employees, provide a broad exception, contain only two requirements that leave employers with too much discretion, and lack an enforcement mechanism).

167. See Gardner, *supra* note 140, at 265 ("[J]udges hearing these cases are often insensitive to breastfeeding women, frequently demonstrating ignorance, bias, value judgments, and outright disdain toward women who have been harmed and sought relief in the judicial system.").

168. KEDROWSKI & LIPSCOMB, *supra* note 39, at 111 ("Most of the breastfeeding rights legislation offers symbolic benefits to women. Women have to defend their right to breastfeed in public, if it is challenged, and are rarely provided with remedies.").

ensuring infants' access to it) and are unconcerned with a lactating woman's own rights.¹⁶⁹

This is not to say that there is no room for the protection of children's rights in lactation laws. An argument could be made that lactation laws are appropriately focused on protecting infant health, and thus should be tailored to protect only those instances of lactation that serve that end. This argument is buttressed by the idea that the most vulnerable members of society, including infants, warrant additional state protection in a way that adult women may not. Indeed, there may be some legal contexts in which protecting the right of a child to breastfeed would be appropriate. As one example, the interests of a nursing infant may properly be taken into account for purposes of structuring custody arrangements between parents.¹⁷⁰ Some state laws that protect children's right to breastfeed do so to prohibit discrimination against a breastfed child for purposes of access to childcare or other benefits.¹⁷¹ These laws appropriately protect aspects of a child's right to breastfeed without simultaneously re-envisioning the rights apportioned in a breastfeeding relationship as solely those of the child. By envisioning and crafting legal schemes that protect *only* infants' right to breast milk and not women's right to lactate, however, lactation laws obscure the existence of women as independent legal actors.¹⁷² This conception carries real risks to women as it increases the ability of the state to lawfully interfere with women's autonomous decisions under the guise of its interest in their children.¹⁷³ Protecting women as only mothers and not as individuals solidifies the cultural understanding that motherhood is women's primary social role.¹⁷⁴

169. See BARSTON, *supra* note 37, at 120 (arguing that breasts are "not the property of the state; framing the need to increase breastfeeding rates as a way to improve our nation's health leads to an equally stifling view of women's bodies.").

170. KEDROWSKI & LIPSCOMB, *supra* note 39, at 119–20. Courts' willingness to consider breastfeeding as a factor in child custody determinations varies from state to state. See generally Kristen D. Hofheimer, *Breastfeeding as a Factor in Child Custody and Visitation Decisions*, 5 VA. J. SOC. POL'Y & L. 433 (1998). In a recent custody dispute in Maryland, a trial court ruled that a mother's wish to exclusively breastfeed her child was not sufficiently compelling to overcome the father's interest in having overnight visits with the child, in accordance with court visitation documents. See Justin Wm. Moyer, *Maryland Mom Ordered to Give Breast-fed Infant Formula at Father's Request*, WASH. POST (Aug. 30, 2017), https://www.washingtonpost.com/local/public-safety/maryland-mom-ordered-to-give-breast-fed-infant-formula-at-fathers-request/2017/08/30/600b0566-8d85-11e7-8111-e841db675815_story.html?utm_term=.6b89caa4f61b [<https://perma.cc/6QPJ-457F>].

171. See, e.g., LA. STAT. ANN. § 46:1407(e) (2016).

172. See Abrams, *supra* note 149 (describing how the individual rights of, and harms to, pregnant and birthing women are lost in the focus on the rights of the fetus or baby).

173. Burkstrand-Reid, *supra* note 13.

174. Cf. Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1418 (2004):

It is vital that we bear in mind that state recognition does not merely impose legal order on 'facts in the world.' State ordering actually brings those facts into being in a range of ways, whether it be how individuals come to understand themselves in the shadow of law, by and through the law's summons, or by the state's creation of explicit and implicit incentive systems.

The important strides taken in the last half-century towards women's full political equality have been counter-balanced by a "revived veneration" for motherhood and female domesticity.¹⁷⁵ Legal scholars have explored and critiqued both traditional maternalism, and its more modern incarnations, in a variety of legal contexts including criminal law, tort law,¹⁷⁶ international law,¹⁷⁷ and progressive political activism.¹⁷⁸ Current state interest in the public health of reproductive-age women in particular has been fairly criticized for having a maternalist edge.¹⁷⁹ This modern incarnation of maternalism risks undermining reforms that promote women's equality by placing the fulfillment of the traditional role of "mother" as prerequisite for women's access to legal rights.¹⁸⁰ In the face of the documented health advantages that lactation affords women (and the potentially detrimental effects of preventing lactation), it seems unremarkable that women should advocate for the legal right to engage in this activity for their own sake, not only for the benefit of their children. Framing the right to lactation as *only* a right of women to altruistically benefit biologically related children, and not also as their own individual right, replicates a historical pattern of maternalist law and policy that sublimates the interests of women and reinforces their culturally defined role as mothers.¹⁸¹

B. Protecting the "Right" Kind of Lactating Woman

Modern lactation laws also presume that lactating women will adhere to traditional gender roles—and sometimes explicitly require that they do so. Specifically, expectations that women are modest, private, and above all, maternal, are apparent in both the text and the legislative history of many state lactation laws. This incorporation of culturally based ideas regarding women and the primacy of the maternal role in women's lives replicate a long-standing

175. Mezey & Pillard, *supra* note 10, at 232.

176. See Abrams, *supra* note 149.

177. Griffin Ferry, *Oppression Through "Protection": A Survey of Femininity in Foundational International Humanitarian Law Texts*, 35 LAW & INEQUALITY 57 (2017) (discussing the marginalization of women through the focus on maternalism in international humanitarian law foundational texts).

178. Mezey & Pillard, *supra* note 10.

179. See Bernstein & Rutkow, *supra* note 133, at 200; see also Olga Khazan & Julie Beck, *Protect Your Womb from the Devil Drink*, ATLANTIC (Feb. 3, 2016), <https://www.theatlantic.com/health/archive/2016/02/protect-your-womb-from-the-devil-drink/459813/> [<https://perma.cc/VP2G-ED9U>] (discussing the CDC's new guidelines for alcohol consumption among reproductive-aged women).

180. See Mezey & Pillard, *supra* note 10, at 234 ("[M]aternal romanticization seems destined to work against the legal reforms for which the group [MomsRising] advocates.").

181. *Id.* at 249 (noting that "maternalist advocacy" is "unwilling[] to make the mother herself the object of advocacy; each of the rights and benefits she seeks, even in her own job, are to enable her better to care for her children").

tendency of the law to conflate women with their reproductive and maternal roles¹⁸²—often to the detriment of their rights as individuals.¹⁸³

A few states' lactation laws explicitly mandate that women adhere to societal expectations for women's supposed natural tendency for modesty. For instance, Missouri's breastfeeding exception to the state's public indecency law protects only public breastfeeding that is done "with discretion" on the part of the breastfeeding woman.¹⁸⁴ Similarly, North Dakota's law states that "[i]f the woman acts in a discreet and modest manner, a woman may breastfeed her child in any location, public or private, where the woman and child are otherwise authorized to be."¹⁸⁵ Several other states, including West Virginia,¹⁸⁶ California,¹⁸⁷ Kansas,¹⁸⁸ South Carolina,¹⁸⁹ Utah¹⁹⁰ and Georgia¹⁹¹ have either considered including language that mandates or encourages "discretion" on the part of a breastfeeding woman or have included such language in prior versions of state legislation. Texas state representative Debbie Riddle expressed her

182. This tendency is often discussed as an aspect of legal maternalism, which "conflat[es] women with mothers" such that women become defined as mothers, whether or not they are currently fulfilling that role biologically or socially. Eileen Boris, *What About the Working of the Working Mother?*, 5 J. OF WOMEN'S HIST. 104, 104 (1993).

183. Maternalist legal frameworks which "protect" women and simultaneously restrict their rights or reaffirm their primarily maternal role have a long pedigree. The ancient law of coverture provided that women were not distinct legal entities, instead "covered" by their fathers and husbands. These laws were ostensibly there to protect women from the harsh sphere of public life. But they also ensured that "wives were barred from making choices for themselves." Brief of Historians as *Amici Curiae* in Support of Petitioners at 4, *Whole Woman's Health v. Cole*, 790 F.3d 563 (5th Cir. 2016) (No. 15-274). Stereotypes concerning both women's capacity and their natural inclinations towards home and family "leaked out" of the law of domestic relations and came to permeate a wide variety of laws and regulations. *Id.* at 7. By the start of World War I, all but nine states had laws which restricted the labor of women. *Id.* at 12.

184. MO. REV. STAT. § 191.918 (2014). This law superseded a prior law which required that a woman breastfeed with "as much discretion as possible."

185. N.D. CENT. CODE § 23-12-16 (2009).

186. See H.B. 4335, 81st Leg., Reg. Sess. (W. Va. 2014) (introducing an amendment to protect public breastfeeding, "[p]rovided, [t]hat the mother shall use discretion while breast feeding in a location open to the public").

187. *Personal Rights—Breastfeeding: Hearing Before the S. Judiciary Comm.*, A.B. 157, Reg. Sess. (Cal. 1997) (bill analysis):

While there is no opposition to this bill, a concern has been raised that the proposed ability to breastfeed would be without limitation, so long as the mother and child have the legal right to be in that public or private place. A suggested change was to amend the bill to require the mother to exercise discretion, reasonable to her under the circumstances, when she breastfeeds.

188. KEDROWSKI & LIPSCOMB, *supra* note 39, at 99.

189. *Id.*

190. See Cathy McKittrick, *Breastfeeding Bill Draws Pushback but Clears Committee on 6-5 Vote*, STANDARD EXAMINER (Feb. 8, 2018, 2:10 PM), <http://www.standard.net/Government/2018/02/09/Utah-2018-Breastfeeding-bill-draws-pushback-but-clears-committee-on-6-5-vote> [https://perma.cc/XB2Z-BB9G] (describing a failed attempt to add a modesty requirement to a bill protecting public breastfeeding in Utah). One of the state representatives arguing for the modesty requirement was concerned that the bill "seems to say you don't have to cover up at all. I'm not comfortable with that . . . it's really in your face." *Id.*

191. KEDROWSKI & LIPSCOMB, *supra* note 39, at 96.

opposition to Texas legislation aimed at protecting women who were breastfeeding in public because she felt it was “important for women to be modest while feeding their baby,” and she believed that a business owner should retain the right to “object[] to a woman who is not being modest.”¹⁹² While Illinois’s law does not mandate wholesale discretion, it does state that “a mother considering whether to breastfeed her baby in a place of worship shall comport her behavior with the norms appropriate in that place of worship.”¹⁹³ This similarly restricts a woman’s right to breastfeed on deeply gendered cultural norms, albeit in more limited circumstances.¹⁹⁴

The town of Springfield, Missouri passed a local ordinance in 2015 that restricted exposure of “the female breast below a point immediately above the top of the areola” unless such exposure is “necessarily incident to breast feeding an infant.”¹⁹⁵ Enconced in this language is the idea that public breastfeeding will be tolerated as long as the exposure that occurs with breastfeeding is limited to only that which is absolutely necessary for the woman to fulfill her expected maternal role. If a woman were to step outside of that role, even to a slight degree, the law would not protect her.¹⁹⁶

In the context of public expectations of modesty, as well, the lack of an enforcement provision can undermine the right of an individual to breastfeed. One example is the story of a woman who was lawfully breastfeeding her son in a public area of a Texas Ronald McDonald house following a surgical procedure

192. Dan Hirschhorn, *Texas Rep. Debbie Riddle Wants Breast-feeding to be ‘Modest’*, N.Y. DAILY NEWS (Mar. 15, 2013, 11:10 AM), <http://www.nydailynews.com/news/politics/texas-rep-debbie-riddle-breast-feeding-modest-article-1.1289507> [<https://perma.cc/HRX4-B8VG>].

193. 740 ILL. COMP. STAT. ANN. 137/10 (2004).

194. Religious rights are often afforded additional protections that reproductive rights are not, even when there is not a statutory basis for such additional protections. See Meghan Boone, *The Autonomy Hierarchy*, 22 TEX. J. C.L. & C.R. 1 (2016) (arguing that the Supreme Court’s different interpretations of the religious discrimination and pregnancy discrimination provisions in Title VII reflect an underlying and deeply gendered worldview which places rights to religious autonomy above rights to physical autonomy).

195. *Free the Nipple et al. v. City of Springfield, Missouri*, 153 F. Supp. 3d 1037, 1040 (W.D. Mo. 2015) (quoting SPRINGFIELD, MO., CODE ORDINANCES § 78–222(b)(1) (1981)).

196. Following a challenge to the Springfield Ordinance by a nonprofit organization claiming that the law encourages “arbitrary and discriminatory enforcement” because of the likelihood of different perspectives on how much exposure is “necessarily incident to breastfeeding an infant,” the ordinance was altered to omit this language. *Free the Nipple*, 153 F. Supp. 3d at 1041. In addition to the due process arguments raised in the *Free the Nipple* litigation, and accompanying text, a few scholars have made arguments that such limitations on female toplessness violates the First Amendment because toplessness is protected speech, see Elizabeth Hildebrand Matherne, *The Lactating Angel or Activist? Public Breastfeeding as Symbolic Speech*, 15 MICH. J. GENDER & L. 121 (2008), or that it violates the right of privacy because it touches on the decision of whether or not to have a child. See Carmen M. Cusack, *Boob Laws: An Analysis of Social Deviance Within Gender, Families, or the Home*, 33 WOMEN’S RTS. L. REP. 197, 211–14 (2012) (“When the state penalizes women for exposing their breasts because the women are not breastfeeding at the time, the state is impermissibly intruding into a woman’s right to not bear children.”)

to remove a tumor from his brain.¹⁹⁷ The Ronald McDonald House administration allegedly threatened to evict the family from the premises unless they moved to a private location. Following a meeting between the family and the administration, the Ronald McDonald house allowed the family to stay but insisted that the young mother announce her intention to breastfeed in public areas before doing so and breastfeed “discreet[ly].”¹⁹⁸ Neither of these requirements are contained in the Texas law, which simply states that a “mother is entitled to breast-feed her baby in any location in which the mother is authorized to be.”¹⁹⁹ Without an enforcement provision in the law, however, the family had no viable option but to abide by the extra-legal requirements of “discretion” placed on them.

Most actions, if legal, are not subject to additional requirements that they be performed in ways that do not offend conservative or traditional sensibilities. Breastfeeding laws such as Missouri’s and North Dakota’s, however, codify as law cultural expectations that women be discrete, cover up, and not make a fuss²⁰⁰—never mind the difficulty in applying such an indeterminate legal standard as “with discretion” or “modestly” to actual breastfeeding.²⁰¹

Even the legislative history of lactation laws that do not contain explicit requirements for modesty reveal a similar concern with encouraging appropriately discrete maternal behavior. A state legislator and supporter of Pennsylvania’s law exempting breastfeeding mothers from public indecency laws described reports, in which “people have very modestly tried to nurse their baby in public, hardly noticeable, but some busybody reports it to some other busybody, and these women are getting harassed.”²⁰² Implicit in these comments is the idea that only a “modest” woman, who was breastfeeding in a way that is “hardly noticeable” is worthy of protection.

197. Ralph Blumenthal, *A Houston Fuss over Breast-feeding Strikes a Responsive Nerve*, N.Y. TIMES (Apr. 19, 2007), <http://www.nytimes.com/2007/04/19/us/19nurse.html> [<https://perma.cc/U6K4-FVG9>].

198. Thread Starter (bluegreenturtle), *The Outcome of the Ronald McDonald House Breastfeeding Meeting*, MOTHERING (Apr. 16, 2007, 10:01 PM), <http://www.mothering.com/forum/25-lactivism/656346-outcome-ronald-mcdonald-house-breastfeeding-meeting.html> [<https://perma.cc/6KPU-GYV3>].

199. TEX. HEALTH & SAFETY CODE ANN. § 165.002 (1995).

200. Even in states where it is not a legal requirement to be discreet, nursing women are often told that such a requirement exists. See, e.g., Suzannah Weiss, *This Mom Had the Best Response When She Was Told to Breast-feed ‘Discreetly’*, GLAMOUR (June 20, 2017), <http://www.glamour.com/story/mom-claps-back-pool-manager-shamed-breastfeeding> [<https://perma.cc/E2RF-WN24>] (detailing the story of young mother who was told by the manager at a public pool that she had to “be more discreet because you’re offending other people”).

201. As one commentator aptly noted, “Who decides what ‘manner’ is ‘discreet and modest’? The law doesn’t say. Until a court decision offering further guidance on the language, this distinction will be drawn by store owners and local police.” See Jake Aryeh Marcus, *Lactation and the Law Revisited*, MOTHERING (Aug. 11, 2011), <http://breastfeedinglaw.com/articles/lactation-and-the-law-revisited/> [<https://perma.cc/6YGC-RUBB>].

202. PA. HOUSE JOURNAL, No. 59, Reg. Sess. (2007).

Similarly, the legislative history of Arizona House Bill 2376, which exempts breastfeeding from public indecency laws, includes a statement from a state legislator and law enforcement officer that the law should be drafted so that a woman who was breastfeeding in a manner “that is not normal would be held accountable for reckless actions.”²⁰³ He noted that “he recognize[d] the distinction between when a decision has to be made whether something is indecent or not” and requested that the language of the bill should not allow “someone who is very reckless” to “take a case to court and cite this law as allowing someone to do whatever they want.”²⁰⁴ But who decides what is “not normal”? And from where do these standards of normalcy come? The answer is that they rise from our deeply engrained stereotypes regarding appropriate female behavior.²⁰⁵

In addition to the implied or stated requirements for modesty and discretion, the text and legislative history of lactation laws is replete with references to the “natural”²⁰⁶ and nurturing²⁰⁷ relationship between mother and child, and how breastfeeding is an expression of this relationship.²⁰⁸ This type of language conflates the physical act of lactation with our cultural assumptions about the centrality of the maternal role in women’s lives, leading legislators to assume that lactation only occurs because women “know in their hearts it’s the best thing for their babies.”²⁰⁹ Lactation laws thus reinforce the idea that motherhood is “self-sacrificing” and that “a good mother is the mother that does everything for her child.”²¹⁰

An additional excerpt from the legislative history of Arizona House Bill 2376 highlights the societal expectations of mothers. A speaker in support of the law stated on the record that “[m]others have to go about errands and tend to

203. Arizona H.B. 2376, Arizona House Committee Minutes (Feb. 15, 2006) (statement of Rep. Gray).

204. *Id.*

205. Our expectations in this regard are not only reflective of traditional notions of gender but also reflect strong racial and class biases. *See generally* BLUM, *supra* note 17, at 147–79 (describing the history of black women’s exploitation as wet nurses and how racism continues to subject them to additional state surveillance as mothers).

206. N.Y. CIV. RIGHTS LAW § 79–e (Consol. 1994) (“The legislature finally finds and declares that the breast feeding of a baby is an important and basic act of nature which must be encouraged in the interests of maternal and child health and family values.”).

207. P.R. LAWS ANN. tit. 24, § 3518 (2004) (“[I]n the genuine interest of promoting family values, our society shall encourage public acceptance of the most basic natural act between a mother and her child.”).

208. FLA. STAT. § 383.015 (1994) (“The breastfeeding of a baby is an important and basic act of nurture which must be encouraged in the interests of maternal and child health and family values.”). References to the “natural” in breastfeeding promotion are problematic because they can simultaneously reinforce gender roles and stereotypes about women and men’s roles in the family generally. *See* Jessica Martucci & Anne Barnhill, *Unintended Consequences of Invoking the “Natural” in Breastfeeding Promotion*, PEDIATRICS, Mar. 4, 2016, at 2.

209. CONN. LABOR & PUBLIC EMPS. COMM. (Mar. 15, 2001) (transcript).

210. BARSTON, *supra* note 37, at 39.

other children, and no mother wants to expose herself.”²¹¹ The sheer weight of cultural assumptions to be unpacked in this relatively short sentence is staggering. First, mothers are referred to by their role (mother) and not as an individual (woman, person, or citizen). This completely subsumes the woman into her maternal role. Further, the supposition that mothers are interested primarily in “errands” and “tend[ing] to other children,” assumes no other interests outside the tasks of traditional mothering—no career, no political involvement, no other interest in the public sphere. Finally, the presumption that a true “mother” would never want to intentionally “expose” herself reinforces the image of a mother as demure and interested primarily in making others comfortable.²¹² Thus, at the same moment as the legislature exempts breastfeeding from public indecency laws, the conversations around breastfeeding perpetuate the idea that there is a “right” kind of breastfeeding woman. Breastfeeding, like much of motherhood, is a culturally constructed act, however, and different people will assign different expectations and meanings to it.²¹³ Modern lactation laws—in their conception and formulation—assume the homogeneity of the motherhood experience and seek to reinforce a particular experience as the only valid one.²¹⁴

Through the assumption of the prevalence and desirability of traditional motherhood, modern lactation laws also implicitly reject motherhood that is deviant from the predominant norm. For instance, public breastfeeding laws often protect only women who are breastfeeding infants under a year or two years old.²¹⁵ While breastfeeding for longer than a year is not the cultural norm at present in the United States, for most of human history and across cultures,

211. Arizona H.B. 2376, Arizona House Committee Minutes (Feb. 15, 2006) (statement of D. Christia Bridges-Jones).

212. Later in the testimony for the same Arizona law, another supporter noted, “It is necessary to be able to go to the mall, bank, or grocery shopping, and if their children are hungry, they have to feed them.” Arizona H.B. 2376, Arizona House Committee Minutes (Feb. 15, 2006) (statement of Amy Milliron in support of the bill). Again, the list of assumed tasks is reflective of traditional assumptions of women’s lives and roles.

213. See Saru M. Matambanadzo, *Reconstructing Pregnancy*, 69 S.M.U.L. REV. 187, 190 (2016) (describing how biomedical essentialism “reduces the process of pregnancy to its biological and physiological facets, obscuring the important ways in which society and culture shape the meaning of pregnancy and structure our experience of it,” and noting that such an experience and expectation varies across time and culture).

214. For a general discussion of how the law encourages or requires mothers to adhere to a narrow set of cultural expectations, see Purvis, *supra* note 12, at 44–53 (detailing how legal protection of breastfeeding is only extended to breastfeeding that occurs according to a narrow cultural script).

215. S.D. CODIFIED LAWS § 16-13-10.4 (2012) (“a baby younger than one year”); COLO. REV. STAT. § 8-13.5-104 et seq. (2008) (“for up to two years after the child’s birth”); HAW. REV. STAT. § 378-2 (2013) (“for one year after the child’s birth”); LA. STAT. ANN. § 17:81 (2014) (“for up to one year following the birth of her child”); ME. REV. STAT. tit. 26, § 604 (2009) (“for up to 3 years following childbirth”); N.Y. LAB. LAW § 206-c (2007) (“for up to three years following child birth”); OR. REV. STAT. § 653.077 (“for her child 18 months of age or younger”); UTAH CODE ANN. § 34-49-202 (2016) (“for at least one year after the birth”); VT. STAT. ANN. tit. 21, § 305 (2015) (“for three years after the birth of a child”); VA. CODE § 22.1-79.6 (2014) (“until the child reaches the age of one”).

breastfeeding a child past infancy was completely acceptable and expected.²¹⁶ Thus, laws that offer protection solely for breastfeeding that occurs for the culturally determined “right” amount of time reinforce a narrow conception of appropriate womanhood and motherhood. And limiting legal protection to mothers who meet cultural expectations can result in devastating consequences for mothers who do not adhere to these expectations, including the risk of criminal prosecution²¹⁷ or the termination of parental rights based on the idea that extended breastfeeding is “perverse.”²¹⁸

Laws that protect lactating women at work also often contain deeply traditional assumptions about women’s relationship to the world of paid work.²¹⁹ Workplace lactation laws are generally framed as an imposition on the rights of employers by requiring them to accommodate lactating women, instead of assuming that some percentage of workers will lactate and preventing employers from imposing on such employees’ right to lactate.²²⁰ For instance, most laws contain an exception to the requirement for an employer to provide breaks for lactation if providing such breaks causes “undue hardship” on the employer.²²¹ Further, many state laws merely encourage employers to provide break times for women, without requiring that they do so. For instance, Oklahoma law states that “[a]n employer may provide reasonable unpaid break time each day to an employee who needs to breast-feed or express breast milk for her child to

216. JENNIFER GRAYSON, *UNLATCHED: THE EVOLUTION OF BREASTFEEDING AND THE MAKING OF A CONTROVERSY* (2016).

217. See Simone dos Santos, *Breastfeeding Mom Accused of Indecent Exposure*, HUFFINGTON POST (Dec. 14, 2011), https://www.huffingtonpost.com/2011/12/14/simone-dos-santos_n_1148455.html [<https://perma.cc/42SB-8VFE>] (describing an incident where a woman was approached by security guards in a government building in the District of Columbia and told to stop breastfeeding because it was indecent); Johanna Iwaszkowicz, *Missouri Revises Breastfeeding Law to Provide Better Protection for Mothers*, ST. LOUIS BREASTFEEDING COALITION (Apr. 5, 2014) <http://www.stlbreastfeedingcoalition.org/2014/04/missouri-revises-breastfeeding-law-to.html> [<https://perma.cc/R4RV-32DS>] (recounting story of a mother held in contempt of court for bringing her five-month-old son to jury duty due to her nursing schedule and lack of childcare); see also Purvis, *supra* note 12, at 369 (“Mothers operate within an often invisible framework of legal regulation, however, that they ignore at their peril.”).

218. Lauri Umansky, *Breastfeeding in the 1990s: The Karen Carter Case and the Politics of Maternal Sexuality*, in “BAD” MOTHERS: THE POLITICS OF BLAME IN TWENTIETH-CENTURY AMERICA 299 (Molly Ladd-Taylor & Lauri Umansky eds., 1998) (describing the story of Karen Carter, who lost her parental rights for a year after contacting a helpline when she felt sexually aroused while nursing her two-year-old daughter).

219. See Grossman, *supra* note 20, at 847 (“[W]hat we see in many cases of pregnancy discrimination is not animus towards the pregnant woman per se, but a reflection of cultural ambivalence about pregnant women at work.”).

220. The presumption that some workers will lactate is in the spirit of a “reconstructive feminism” that argues for a replacement of the “ideal [male] worker” as the assumed norm. See Joan C. Williams, *Reconstructive Feminism: Changing the Way We Talk About Gender and Work Thirty Years After the PDA*, 21 YALE J.L. & FEMINISM 79 (2009).

221. See, e.g., ARK. CODE ANN. § 11-5-116(c) (2009) (“This section does not require an employer to provide break time if to do so would create an undue hardship on the operations of the employer.”).

maintain milk supply and comfort.”²²² These laws often contain the implicit “assumption that child-rearing should come before work for women, that the professional world should accommodate [women], and if it can’t, then it’s [women’s] responsibility to choose the welfare of our kids over professional or financial gain.”²²³

Much of the legislative history of lactation laws also contains the assumption that expressing breast milk at work is necessarily a woman’s second choice to staying at home with her children. In the legislative history of the Connecticut law providing for unpaid break time for women to express breast milk, supporters stated that they “believe[d] that this bill is needed for mothers who return to work while still nursing their infants” and that “employers should not penalize the mothers because they return to work earlier than they would like, either by choice or economic necessity.”²²⁴ Even the addition of “by choice” in the second clause of the sentence does not erase the assumption that women are returning to work “earlier than they would like.” Testimony in support of the bill also includes a statement that “[m]any of these women also work to maintain a certain quality of life.”²²⁵ This testimony contains echoes of the outdated notion that women only work for “pin money” and not because they rely on paid work for their own economic survival and for the survival of their families. The testimony also completely fails to contemplate a woman who would choose to work outside the home not because of financial need but because of the personal fulfillment paid employment can bring.²²⁶

Even laws exempting lactating women from jury service can be seen as a “mixed blessing.”²²⁷ Though allowing women the choice to defer jury service when they are nursing is doubtless a positive option for some women, it harkens back to the not-so-distant past when women were not permitted to serve on juries in part because of the assumption that their frail constitution and natural inclination toward the private sphere of home and family made them incapable

222. OKLA. STAT. tit. 40, § 435(A) (2006).

223. BARSTON, *supra* note 37, at 107.

224. CONNECTICUT JOINT FAVORABLE COMMITTEE REPORT, H.B. 5656 (Apr. 2, 2001) (including the statement of Leslie Brett, Executive Director of the Permanent Commission on the Status of Women).

225. *Id.* (including the statement of Dr. Gerald Calnen, Co-Chair of the American Academy of Pediatrics Breastfeeding Medicine Committee).

226. Certainly, some women likely *would* prefer to have access to the maternity leave necessary to stay home with breastfeeding children. Advocating for the choice and ability to take such leave does not require the expectation that all women would chose it if it was available. But the assumption that all women, or at least good mothers, would elect to stay out of the workforce is a damaging stereotype. Julie E. Artis, *Breastfeed at Your Own Risk*, 8 CONTEXTS 28, 30 (2009):

The cultural imperative to breastfeed is part of the ideology of intensive mothering—it requires the mother be the central caregiver, because only she produces milk; breastfeeding is in line with expert advice and takes a great deal of time and commitment; and finally, the act of breastfeeding is a way to demonstrate that the child is priceless, and that whatever the cost, be it a loss of productivity at work or staying at home, children come first.

227. KEDROWSKI & LIPSCOMB, *supra* note 39, at 100.

jurors.²²⁸ In addition to allowing lactating women to defer jury service, should states not also offer women the option of serving on a jury *while* nursing by providing the necessary accommodations? Offering accommodations to lactating women would not be particularly burdensome and would counteract any implication that women's role in the reproductive process is at odds with full participation in the rights and duties of citizenship.²²⁹

Looking holistically at the history of lactation laws, it is clear that the legislatures that considered and passed these laws were concerned with maintaining and promoting a traditional notion of women's maternal role. According to researchers Karen Kedrowski and Michael Lipscomb, Republican-controlled state legislatures and those that had moralistic or traditionalistic political cultures passed breastfeeding laws earlier, on average, than Democratic-controlled state legislatures or those that had a more individualistic political culture.²³⁰ Thus, despite the feminist community's embrace of state lactation laws, it is clear that the architects of such legislation were not always influenced by a contemporary feminist worldview. Instead, the laws were often conceived and drafted in a manner that reinforces—and sometimes demands adherence to—traditional notions of women and motherhood.²³¹

Thus, modern lactation laws are not necessarily designed to protect women but to encourage women's adherence to their expected societal role.²³² If protection for lactating women is predicated not on the biological act of lactation but on women's adherence to the cultural expectations of mothers, and our cultural expectations for mothers include narrow prescriptions for appropriately maternal behavior,²³³ then ultimately our protections for breastfeeding do not protect women or women's choices, but only the women who adhere to societal

228. See BARSTON, *supra* note 37, at 115 (quoting Maureen Rand Oakley) (“As soon as you allow that, yes, women are different so maybe policies should be different. . . . That is what was used against women for so long. They were kept out of jury duty, they were out of all kinds of areas of life, and the justification was always, well, they are first and foremost mothers.”).

229. Judith P. Miller, *My Attempt at Jury Duty Failed—Because I'm a Nursing Mother*, CHI. TRIBUNE (Oct. 13, 2017), <http://www.chicagotribune.com/news/opinion/commentary/ct-perspec-jury-duty-breastfeeding-1015-story.html> [<https://perma.cc/8PK2-VZ9Q>] (“Since 2006, Illinois has allowed nursing women to be excused from jury duty. But that doesn't help those of us who want to serve. Motherhood and citizenship are not incompatible; Illinois courts shouldn't treat them as if they are.”).

230. KEDROWSKI & LIPSCOMB, *supra* note 39, at 102–03.

231. *Id.* at 103 (noting the “historical link” between breastfeeding and “more traditional forms of mothering,” which may have made conservative legislatures comfortable supporting breastfeeding legislation).

232. This is not the only scenario in which the law protects only individuals who conform to certain stereotypical expectations regarding their appropriate role. *Cf.* Franke, *supra* note 174, at 1399 (arguing that *Lawrence v. Texas* accepts the right of same sex partners to engage in sexual conduct only when this conduct is conducted privately and within the context of a relationship).

233. See generally Purvis, *supra* note 12, at 367 (describing the legal and sociocultural “rules of maternity”). Professor Purvis begins her article with the straightforward assertion that “[m]otherhood is all about judgment.” *Id.* at 368.

expectations of female behavior. As one Utah state senator articulated, these laws “respect[] motherhood”²³⁴—not necessarily women.

C. *Lactation Rights and the Family*

Family structure and parenting “is a major preoccupation in law and culture.”²³⁵ Legal frameworks, however, have not kept pace with the evolution of the family. Modern family structures and caregiving relationships span a variety of types, and family-building mechanisms are varied and growing more so with the ongoing expansion of assisted reproductive technology.²³⁶ Modern lactation laws are an example of the law’s failure to respond to these evolving family structures. Instead, lactation laws promote a traditional conception of family by limiting the protection afforded to families that conform to the traditional family model—primarily heterosexual, fertile parents of genetically related children.²³⁷

As discussed in the previous two Sections, women who are lactating for the benefit of infants who are not their biologically related children are often excluded from the protection of lactation laws. Consequently, the individual rights of these women are harmed. This harm also flows to those that might benefit from “non-traditional” lactation. By limiting which women are protected under the law, these laws have the inescapable effect of also limiting which types of families can access the benefits of breast milk for their own children. After all, women who are lactating for reasons other than feeding their own biological infants may be doing so for their own benefit, but they may also be donating or selling breast milk to other families who need it. Indeed, both the formal and informal markets for donated breast milk are robust.²³⁸ Donor milk may be the

234. Daniel Woodruff, *Bill to Protect Breastfeeding in Public Fails in Senate Committee*, KUTV.COM (Mar. 1, 2016), <http://kutv.com/news/local/bill-to-protect-breastfeeding-in-public-fails-in-senate-committee> [<https://perma.cc/JEX5-2MQ4>] (quoting Utah state senator Jim Dabakis).

235. Mezey & Pillard, *supra* note 10, at 230.

236. See Matambanadzo, *supra* note 213, at 229:

In the twenty-first century, pregnancy has become untethered from the binary patriarchal heterosexual family unit in important ways. The increasing use of assisted reproductive technologies and other interventions has had a significant impact on how pregnancy takes place, who becomes pregnant, and the reasons people do so. Further, the changing nature of family and the diversity of ways in which families are formed also creates complications.

237. See Laura T. Kessler, *Transgressive Caregiving*, 33 FLA. ST. U. L. REV. 1, 8 (2005) (discussing how the law has defined a “normal” family as one in which a heterosexual breadwinner man and a woman reproduce biologically). Government materials designed to promote breastfeeding often assume the heterosexual, genetically-related family as well. See SURGEON GENERAL’S CALL TO ACTION, *supra* note 49, at 12, 17–18 (referring only to the effect on breastfeeding rates of “fathers,” or citing to studies that primarily discuss father’s impact on breastfeeding, and failing to discuss gay, lesbian or transgender parents or families).

238. Julian Robinson, *400 Times the Price of Crude Oil: Breast Milk Is Now Big Business but Mothers Warn Against Moves to Stop Them Giving It Away to Those Who Need It*, DAILY MAIL (July 7, 2015) <http://www.dailymail.co.uk/news/article-3152161/It-cost-400-times-price-crude-oil-2-000-iron-ore-Breast-milk-big-business-mothers-warn-against-moves-stop-giving-away-need-it.html> [<http://perma.cc/E2AM-7TCR>] (describing the intense battles occurring at the state level to regulate the

only option for adoptive parents, male parents in same-sex relationships, single fathers, or mothers who have a medical condition that prevents them from breastfeeding (such as a mastectomy).²³⁹ For better or worse, we are in a cultural moment in which “the way we feed our infants has become the defining moment of parenthood.”²⁴⁰ Restricting the ability of non-traditional families to provide breast milk to their children by failing to protect all lactating women disadvantages these families.

Restricting legal protections to women expressing breast milk or breastfeeding nonbiological children—as in adoptive families, for example—is particularly troubling because it undermines access to breast milk for children who could most benefit from it. For premature or otherwise sick infants, lacking access to donated human milk places them at additional risk.²⁴¹ Donated human milk is sometimes used therapeutically for older infants as well because of its effectiveness at treating certain medical conditions.²⁴² If lactation laws are intended, in part or in whole, to ensure that children have access to the health benefits of breast milk, then why limit the laws to prevent some infants from accessing those benefits?²⁴³ Indeed, the New York legislature recently approved a budget plan for the 2017–2018 year that allows Medicaid to cover the cost of donor breast milk for premature babies in neonatal intensive care units, in part because it recognized that donor milk “give[s] these babies a fighting chance.”²⁴⁴ The legislature did this even though New York’s lactation laws only protect women who are publicly breastfeeding or expressing milk at work for “their own infant children.”²⁴⁵ Thus, New York has publicly endorsed the use of state funds for donated human breast milk after recognizing its important public health

market for human milk, which can sell for more than 150 times the price of cow’s milk—or 400 times the cost of crude oil).

239. WAMBACH & RIORDAN, *supra* note 46, at 525–26.

240. BARSTON, *supra* note 37, at 2–3.

241. WAMBACH & RIORDAN, *supra* note 46, at 523.

242. For instance, breast milk is an effective therapeutic intervention for infants with a formula allergy or other feeding intolerance, those with metabolic disorders or certain respiratory illnesses, or some congenital abnormalities. *Id.* at 524–25.

243. See Mezey & Pillard, *supra* note 10, at 235–36 (noting that while the “new maternalism” promotes the traditional values of motherhood, it fails to explain why these values—such as nurturance, responsiveness, and non-commodification—are not deemed equally important to non-mothers and non-traditional caregivers of all types). Expanding this picture even farther, the benefits from human breast milk can flow to non-infants as well. Human milk products have also been used to successfully treat adults with hemorrhagic conjunctivitis, immunoglobulin A deficiency in liver transplant recipients, and some gastrointestinal issues. Preliminary studies also suggest that human milk may contain unique proteins that are effective at treating cancer. WAMBACH & RIORDAN, *supra* note 46, at 541.

244. Marie Solis, *New York State Will Subsidize Breast Milk for Premies Born to Low-Income Families*, MIC.COM (Apr. 25, 2017), <https://mic.com/articles/175174/new-york-state-will-subsidize-breast-milk-for-preemies-born-to-low-income-families> [<https://perma.cc/KK7U-HNH2>].

245. N.Y. CIV. RIGHTS LAW § 79-e (1994) (“Notwithstanding any other provision of law, a mother may breast feed her baby in any location, public or private, where the mother is otherwise authorized to be”); N.Y. LAB. LAW § 206-c (2007) (“Right of Nursing Mothers to Express Breast Milk. An employer shall provide reasonable unpaid break time or permit an employee to use paid break time or meal time each day to allow an employee to express breast milk for her nursing child”).

function, while also leaving the would-be suppliers of this donated breast milk outside the law's protection.²⁴⁶ Several other states either already use Medicaid dollars to buy donated breast milk or are considering doing so—all while not providing legal protection for would-be milk donors.²⁴⁷

Modern lactation laws are written so narrowly, in fact, that they could even exclude adoptive parents from protection. Induced lactation, whereby a woman uses a combination of stimulation and pharmaceutical drugs to induce her body to lactate, is becoming more common in the United States.²⁴⁸ Breastfeeding an adopted child may help build an adoptive parent's confidence, encourage bonding, and assuage potential disappointment at not experiencing a biological pregnancy.²⁴⁹ Many state laws that protect breastfeeding, however, limit protection to a particular period following the birth of the child.²⁵⁰ For instance, a Maine law states that: “[a]n employer . . . shall provide adequate unpaid break time or permit an employee to use paid break time or meal time each day to express breast milk for her nursing child for up to 3 years following childbirth.”²⁵¹ Connecting the protection of lactation to a time period following “childbirth” makes it unclear whether women who did not give birth would have the same rights under the law. This limitation could affect adoptive mothers who

246. See N.Y. LAB. LAW § 206-c (2007). Further, while the 2011 Surgeon General's Call to Action to Support Breastfeeding promotes the use of donor milk and notes the lack of a sufficient source of such milk, it does not discuss how to support or protect the women who are donating breast milk. It only discusses the positive outcomes that the donated breast milk could have on infants. In fact, while the Call to Action mentions “donated milk” or “donor milk” thirty-nine times, it only contains three references to the women who donate the milk. This begs the question, where does the Surgeon General expect this donor milk to come from? SURGEON GENERAL'S CALL TO ACTION, *supra* note 49.

247. Olivia Campbell, *When Babies Need Donated Breast Milk, Should States Pay?*, STAT (Oct. 4, 2016) <https://www.scientificamerican.com/article/when-babies-need-donated-breast-milk-should-states-pay/> [<https://perma.cc/STR4-2H5R>] (noting that California, Texas, Missouri, Kansas, Utah, and the District of Columbia have covered the cost of donated breast milk for some low-income newborns).

248. WAMBACH & RIORDAN, *supra* note 46, at 926–27 (quoting a 40-year-old adoptive mother who induced lactation):

My brothers' and sisters' responses differed from disbelief, to thinking I was nuts, to wondering how it would work and why I would want to do it, to excitement. In the end, they all supported my actions. Afterwards, the key response was fascination that I really could breastfeed without having been pregnant.

249. *Id.* at 581–82.

250. See, e.g., La. Acts, P.A. 87(W)(1)(b) (2013) (“[E]ach city, parish, and other local public school board shall adopt a policy to require each school under its jurisdiction to provide . . . [a] reasonable amount of break time to accommodate an employee needing to express breast milk that, to the extent possible, shall run concurrently with the break time already provided to the employee, and that shall be available to the employee for up to one year following the birth of her child.”). *But see* P.R. LAWS ANN. tit. 29, § 478(h) (2018) (defining a “[n]ursing mother” as “[a]ny woman working in the public or private sector who has given birth to a child, be it through natural methods or surgery, who is breastfeeding her baby; as well as any woman who has adopted a child, and who by the intervention of scientific methods is able to breastfeed the child”).

251. ME. STAT. ANN. tit. 26, § 604 (2009).

are breastfeeding a child through induced lactation, as well as lesbian couples who are co-breastfeeding.²⁵²

State laws also explicitly connect the promotion of breastfeeding to the promotion of “family values,” with the legislative history referring to the “most basic family value of all, the bond between a mother and child.”²⁵³ The Florida legislature found that, “any genuine promotion of family values should encourage public acceptance of this most basic act of nurture between mother and baby.”²⁵⁴ As one state legislator succinctly stated, these laws are “about mother and apple pie.”²⁵⁵ But the promotion of “family values” is an ill-defined legislative goal, and one that will necessarily be tied to the majority’s values and not necessarily the values of an individual who does not conform to culturally based directives regarding appropriately maternal behavior or family structure.²⁵⁶ These laws do nothing to protect, for instance, the family values of a single father who wants to access the benefits of breast milk for his own child.

Finally, workplace accommodation laws that only offer women unpaid breaks for lactation ensure that the women who are in a financial position to take advantage of these laws are in a high socioeconomic stratum.²⁵⁷ Over the course of six months, a woman who takes two unpaid thirty-minute breaks per workday to express breast milk will lose approximately fifteen days of paid work.²⁵⁸ Thus, laws that provide only for unpaid breaks to workers benefit only the most advantaged families.²⁵⁹ By conferring benefits on already advantaged families, the laws contribute to the disparities in breastfeeding rates between white, middle and upper-class families and racial minorities and disadvantaged socioeconomic

252. Kasandra Brabaw, *This Same-Gender Couple Takes Turns Breast-Feeding Their Baby*, REFINERY29 (Feb. 28, 2017, 11:00 AM), <https://www.refinery29.com/2017/02/143037/same-sex-couple-breastfeeding-lgbtq> [<https://perma.cc/32R9-Z9WY>].

253. Arizona H.B. 2376, Arizona House Committee Minutes (Feb. 15, 2006) (statement of D. Christia Bridges-Jones).

254. FLA. STAT. § 383.015 (1994).

255. PA. HOUSE JOURNAL, No. 59, Reg. Sess. (2007).

256. See Abrams, *supra* note 149, at 1991 (arguing that the assumption that women will necessarily make healthcare decisions in the best interest of their children and not themselves “essentializes and over-simplifies women’s decision-making, and marginalizes or even villainizes non-conforming mothers”).

257. Murtagh & Moulton, *supra* note 42, at 220 (discussing how hourly workers may be unable to take advantage of unpaid breaks because of economic concerns).

258. Assuming two weeks of vacation, a woman who takes an unpaid break of an hour a day, or five hours a week, would lose just over fifteen eight-hour days over the course of a six-month period. See also Phyllis L. F. Rippeyoung & Mary C. Noonan, *Is Breastfeeding Truly Cost Free? Income Consequences of Breastfeeding for Women*, 77 AM. SOC. REV. 244, 253–62 (2012) (describing losses in income for mothers generally, and breastfeeding mothers specifically).

259. See generally Nancy Ehrenreich & Jamie Siebrase, *Breastfeeding on a Nickel and a Dime: Why the Affordable Care Act’s Nursing Mothers Amendment Won’t Help Low-Wage Workers*, 20 MICH. J. RACE & L. 65, 65 (2014) (arguing that the Affordable Care Act’s Nursing Mothers Amendment “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”).

groups who already lack access to breastfeeding support.²⁶⁰ For instance, there is a significant gap between the number of black infants who were ever breastfed (58.9 percent) and the number of infants overall who were ever breastfed (74.6 percent).²⁶¹ This gap persists through the six-month postpartum mark, with 30.1 percent of black infants being breastfed at six-months compared to 44.4 percent of infants overall.²⁶² This gap not only affects infants, but also women who are often judged harshly for failing to breastfeed their children—even when such “failure” is outside of their control.²⁶³

Moreover, workers who are seen as fungible, or are otherwise devalued, are less likely to be entitled to accommodations and to receive non-mandated accommodations if they request them.²⁶⁴ Because pregnant workers and mothers are already more likely to experience animus in the workplace, they are more likely to be viewed as non-essential by their employers and thus less likely to receive accommodations simply by their status as lactating women.²⁶⁵

Laws that fail to protect and support marginalized individuals and families run the risk of reinforcing the dominant paradigm of the “right” kind of mother and family.²⁶⁶ Moreover, these laws may actually exacerbate the gap in breastfeeding rates through statutory language that offers additional protection to heterosexual, white, and socioeconomically advantaged families and at the same time fails to protect marginalized families. This results in harm to both the lactating woman and to the children who may benefit from such lactation.²⁶⁷

260. See generally Freeman, *supra* note 55 (detailing the institutional and structural barriers to breastfeeding experienced by minority women); see also Kozhimannil et al., *supra* note 62, at 9 (“Strategies to address systemic disparities in health outcomes, including infant access to breast milk, must focus on the social determinants of health which include the overall environment where people live and work.”).

261. Bernstein & Rutkow, *supra* note 133, at 171.

262. *Id.*

263. BARSTON, *supra* note 37, at 14–15 (“[T]hese days, women who do not breastfeed are portrayed as lacking—lacking in education and support; lacking in drive; and, in the harshest light, lacking in the most fundamental maternal instinct.”); see also Artis, *supra* note 226 at 29 (“Breastfeeding is a way to achieve so-called good mothering, the idealized notion of mothers as selfless and child-centered.”).

264. See Freeman, *supra* note 55, at 3076.

265. See Grossman, *supra* note 20, at 849.

266. KEDROWSKI & LIPSCOMB, *supra* note 39, at 126 (“[T]he icon of the good mother has been defined as white, middle class, nonworking, and nursing.”); see also Bernstein & Rutkow, *supra* note 133, at 172–73:

The large disparity in breastfeeding rates between black women and women of other races and ethnicities means that breastfeeding-related programs and legislation must be examined from an anti-essentialist, intersectionality perspective. When developing laws, it is important to consider the multiple intersections or identities that exist for all women, not just based on gender but also race, class, age, sexuality, and culture. Breastfeeding cannot truly be a choice for all women when protective laws are based on the experiences of 30-something, white, heterosexual, middle class women.

267. KEDROWSKI & LIPSCOMB, *supra* note 39, at 121 (“[O]ur failure to take breastfeeding rights seriously discriminates against children along class, and by extension racial, lines.”).

By protecting only lactation that occurs within the narrow framework of culturally acceptable motherhood, we reinforce a culture that devalues other types of family arrangements and caregiving relationships.²⁶⁸ By focusing on biological and culturally acceptable motherhood as the basis for lactation rights, the law leaves out of its protection many people who we should be interested in protecting—not just the mothers who defy the cultural script about motherhood, but also a host of people who are non-traditional caregivers and children who might benefit from the extension of lactation rights to all lactating women.

IV.

A PROPOSAL FOR A NEW LACTATION LAW FRAMEWORK

The goal of this Article is emphatically not the elimination of laws that protect and support breastfeeding and lactating women. Such an outcome would be a step back for the social and political equality of women. Modern lactation laws, however, should not fall into the historical trap of protecting some women while simultaneously reaffirming traditional, outdated gender roles.²⁶⁹ The goal of this project is to promote legal standards that protect lactation without requiring lactating women to conform to a narrow cultural script concerning the appropriate feminine role.²⁷⁰

To do so, three changes to modern lactation laws should be implemented.²⁷¹ First, laws should protect all lactating women, not only “mothers.”²⁷² Legislation should be based on common physiological experience, such as lactation, instead

268. Mezey & Pillard, *supra* note 10, at 250 (arguing that the “new maternalism” reinforces a culture which “does not value the public potential of women or the domestic potential of men and which continues to imagine families in the most conventional ways”); *see also* Kessler, *supra* note 237, at 1 (arguing that non-traditional forms of caregiving relationships can constitute political resistance and expression).

269. Just as the protective labor legislation that was popular until the middle of the twentieth century was undoubtedly positive for the working conditions of women, it was simultaneously detrimental because of its reaffirmation of sex stereotypes that held women back from equal participation in the labor market. *See* Brief of Historians, *supra* note 183, at 12 (“[T]hese protections were not inherently detrimental, but rather were harmful primarily because they were sex-specific.”).

270. *See* Burkstrand-Reid, *supra* note 13, at 254 (“The goal, then, should be to develop health regulations that are designed to maximize health outcomes with a minimal degree of legal interference and avoid the legal manufacturing of mothers . . .”).

271. Other commentators have argued that some of the problems identified here may be addressed in a discrimination framework. *See* Matambanadzo, *supra* note 213, at 261–62 (arguing that a surrogate who is prevented from taking employer-provided lactation breaks because the surrogate has been “inappropriately pregnant” according to the social norms of her employer has been discriminated against under the Pregnancy Discrimination Act); *see also* Memorandum in Opposition to Motion to Dismiss Case, Docket No. 33 (Sept. 4, 2015), *Gonzales v. Marriott Int’l, Inc.*, Docket No. 33 (C.D. Cal. Sept. 4, 2015) (arguing that failure to provide surrogate with lactation breaks constitutes discrimination under state and federal laws). The discrimination framework may provide relief for certain women under broadly worded anti-discrimination laws such as the PDA. It will likely be unavailing for women attempting to secure lactation rights under the state laws described herein, however, as they explicitly require lactating women to have a biological relationship with the nursing child.

272. *See* Gardner, *supra* note 140, at 288 (advocating use of terms like “woman” and “child” versus “mother” and “infant” in breastfeeding legislation).

of culturally constructed identities, such as motherhood. Second, the laws should be purged of language that ties protection for lactating women to the eventual benefit of a biologically related infant child. These requirements undermine the simple premise that it is a basic right of each individual to make autonomous decisions about her own body,²⁷³ and ignore the benefits that flow to needy infants and the public generally from donated human breast milk. Third, legislatures should recognize that the promotion of women's health in its own right—not just infants' health—is a worthwhile public health goal. Maternal health has evolved into a matter of public concern and scrutiny in part because of the effect it has on the health of women's children.²⁷⁴ But ceding this point does not necessarily dictate that maternal health cannot also be the subject of interest and support for its own sake. Both goals can exist simultaneously, especially in the lactation context.

Using this framework, a model public breastfeeding law might read:

Notwithstanding any other provision of law, an individual has the right to breastfeed or express breast milk in any public or private location where they are otherwise authorized to be.

This language makes no assumptions about the woman or the child she is breastfeeding and instead focuses on protecting the act of lactation itself. Through the use of neutral language, which is neither over-inclusive nor under-inclusive, breastfeeding laws would reflect society's interest in protecting lactation without further entrenching maternalist ideas.²⁷⁵

Model legislation that provides protection for lactating women in the workplace will require the consideration of employers' interests as well. Although lactation laws should avoid the assumptions contained in current laws regarding lactating women and family structures, employers may reasonably be concerned about a requirement that they provide breaks to lactating women without limitation. These concerns could be addressed by adopting the "reasonable accommodation" model contained in California's Fair Employment and Housing Act, which simply requires employers to engage in an interactive

273. KEDROWSKI & LIPSCOMB, *supra* note 39, at 116 ("The decision of whether or not to breastfeed, after all, involves a decision about women's bodies and whether or not women will have the ability to autonomously control them.").

274. See Greg R. Alexander & Milton Kotelchuck, *Assessing the Role and Effectiveness of Prenatal Care: History, Challenges, and Directions for Future Research*, 116 PUB. HEALTH REP. 306, 307 (2001) (noting that the early development of prenatal care was focused on preventing fetal abnormalities).

275. Additionally, research is needed to determine whether the laws that are enacted are effective in both protecting breastfeeding women and encouraging employers and the public to support breastfeeding women. There is no empirical evidence regarding the success of the current legislative scheme to promote these objectives. See Murtagh & Moulton, *supra* note 42, at 222 ("We . . . are unaware of empirical studies of the effect of laws on . . . women's perception of support for breastfeeding in the workplace and employers' perception of the benefits they may realize from employees' continued breastfeeding.").

process with the employee to determine the necessary accommodation.²⁷⁶ Or it might take the approach of several states by incorporating an “undue burden” standard. Such a law could state:

An employer shall provide reasonable break time for an employee to express milk each time the employee has a need to do so, unless the employer can show that the requirements would impose an undue hardship.

Such a law would protect all lactating employees but would also allow employers to assert their own interests if a requested accommodation would result in an undue burden on the employer’s workplace operations.²⁷⁷

Additionally, lactation laws should include enforcement mechanisms that allow women—not only the state or its subdivisions—to vindicate their rights in court. Lactation laws will only have real “teeth” that can affect behavior if legal remedies are created that allow women to demand adherence to the law.²⁷⁸ Both the World Health Organization and UNICEF have recommended legislation that “protect[s] breastfeeding rights of working women and establish[es] means for its enforcement.”²⁷⁹

One potential critique of this Article’s proposals is that the problems described above will likely affect a very small population of women and families. This is both true and untrue. As reproductive technology and family structures continue to evolve, the types of legal challenges to breastfeeding rights undertaken by employers or the state described above are likely to increase, but they are also likely to remain comparatively rare. In that sense, the effect of the

276. CAL. GOV’T CODE § 12940(n) (West 2017) (mandating that employers “engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition.”). A reasonable accommodation standard raises both practical and theoretical problems. Practically, it is difficult and fact-intensive to determine what constitutes reasonable accommodation in any given circumstance. See Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN’S L.J. 77, 84 (2003) (noting that the diverse range of needs for individuals makes universal standards difficult). Further, by individualizing treatment for each lactating woman, we run the risk of translating “cultural bias against breastfeeding workers to produce cramped and ungenerous accommodations.” Ehrenreich & Siebrase, *supra* note 259, at 68.

277. Employers might re-think the burden of providing lactation breaks, however, if they were presented with the evidence that allowing breaks reduces employee health care costs, reduces lost productivity, and decreases absenteeism. See Jennifer B. Saunders, *The Economic Benefits of Breastfeeding*, NCSL LEGISBRIEF, Jan. 2010; Maureen Minehan, *Advocates Lobby For Breastfeeding Rights in Public . . . and at Work*, 21 No. 24 EMP. ALERT 1, 2 (2004):

In a 1995 study of two corporate lactation programs, infants who were breastfed had 33 percent fewer illnesses than formula-fed infants and 21 percent fewer illnesses that led to a parent’s absence from the workplace. The programs’ overall impact led to a 28 percent decrease in absenteeism and 36 percent reduction in sick child health care claims.

278. For instance, a proposed Texas state bill would have allowed women to sue for up to \$500 in damages for every day their rights were violated. See Evans, *supra* note 106.

279. WORLD HEALTH ORG., GLOBAL STRATEGY FOR INFANT AND YOUNG CHILD FEEDING (2003).

problematic aspects of current lactation laws is likely to remain limited to a small population of lactating women.

Critically, however, the discursive effect²⁸⁰ of these laws will be to provide state sanction to essentialized and culturally based assumptions about women, motherhood, and family structure. Such state speech affects all women.²⁸¹ Indeed, the force of cultural norms is strong enough that it often overpowers legal precedents.²⁸² The law should not willingly aid and abet the force of stereotype maintenance.

Even if legislators did not intend the laws to be interpreted according to the narrow construction described here,²⁸³ the cases discussed above show that there are litigants willing to use the plain language of the statutes to exclude women, children, and families from the protection of the lactation laws. Indeed, states have recently begun passing “natural meaning” laws that dictate that “undefined words shall be given their natural and ordinary meaning, without forced or subtle construction that would limit or extend the meaning of the language, except when a contrary intention is clearly manifest.”²⁸⁴ Though these laws are clearly motivated by the desire to exclude LGBT families from the protection of various parentage and marriage laws,²⁸⁵ they would apply with equal force in the lactation context.

Finally, although the current lactation laws are a considerable improvement from the previous dearth of legal protections for lactating women, a critical eye toward how such laws could be improved is worthwhile.²⁸⁶ Every law that seeks to offer protection to women, but does so through an undivided focus on her

280. In using this term, I intend to invoke the idea that language does not only describe the world around us, but also brings that world into being. Thus, society, through discourse, “systematically form[s] the objects of which they speak.” MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE AND THE DISCOURSE ON LANGUAGE* 49 (1972).

281. KEDROWSKI & LIPSCOMB, *supra* note 39, at 127 (“What we worry about, and what we want to insist upon in our general advocacy for breastfeeding rights, are the way rights, in terms of their very power and importance, risk fixing identities.”).

282. CYNTHIA R. DANIELS, *AT WOMEN’S EXPENSE: STATE POWER AND THE POLITICS OF FETAL RIGHTS* 7 (1996):

Although women’s rights may ultimately be upheld in the courts, a broader public culture may continue to endorse resentment toward women and more subtle forms of social coercion against those who transgress the boundaries of traditional motherhood. Social anxiety and resentment are most easily projected onto those women who are perceived as most distant from white, middle-class norms. Political power may ultimately rest not on the technical precedent of legal rights, but on the symbols, images, and narratives used to represent women in this larger public culture.

283. In this instance, the legislative intent overwhelmingly shows that legislators were contemplating a very traditional type of motherhood when they drafted these laws. *See infra* Part III.B.

284. *See, e.g.*, TENN. CODE ANN. § 1-3-105(b) (2017).

285. Adrian Mojica, *Lawsuit Challenging Tennessee’s “Natural Meaning” Bill Filed in Nashville*, FOX 17 NASHVILLE (May 8, 2017), <http://fox17.com/news/local/lawsuit-challenging-tennessees-natural-meaning-bill-filed-in-nashville> [<https://perma.cc/2HXP-PAYM>].

286. *See* Burkstrand-Reid, *supra* note 13, at 253 (“Health protection may come with a price. It may very well be a price worth paying, but that decision should take into account the history of health protection and current law and politics before it is made.”).

reproductive function, should be carefully scrutinized.²⁸⁷ Many laws that were passed out of a sincere desire to protect women have nonetheless been rightly discarded because the protection afforded by the law was inextricably intertwined with a resulting impediment to women's full legal equality.²⁸⁸ Over the last half century, courts have been increasingly willing to accept that laws, which aim to protect or support women, can be based on the very stereotypes that hold women back from true equality.²⁸⁹ For instance, in *UAW v. Johnson Controls, Inc.*, the Supreme Court rejected the argument that a company had a right to exclude women of childbearing age from certain jobs which exposed them to potentially harmful chemicals, stating that “[c]oncern for a woman’s existing or potential offspring historically has been the excuse for denying women equal employment opportunities.”²⁹⁰

The cultural assumptions underpinning modern lactation laws undermine the very equality that women seek through these laws, by firmly tying lactation rights to a reliance on retrograde ideas about the primacy of women’s biological maternal roles.²⁹¹ So even if the modern lactation laws do “protect” the majority of women, they do so at an unnecessary price—the reaffirmation of women’s reproductive role as her primary role.

And yet, even if a state legislature is unpersuaded by arguments regarding the negative discursive effects of the implementation of lactation laws that assume and reconfirm gendered expectations of lactating women, there are still compelling reasons to alter the framing of these laws. As New York’s recent adoption of a budget that provides Medicaid dollars for donated human breast milk makes clear, there are compelling public health reasons to protect the act of lactation whether it is occurring for the sole purpose of nourishing the lactating woman’s own biological child for a pre-determined number of weeks or years following childbirth. If state legislators believe their own voluminous legislative findings about the health benefits that breast milk affords women and infants and are even passingly aware of the lack of a reasonably priced supply of donor breast milk for the critically ill infants who need it,²⁹² then they should protect all

287. Brief of Historians, *supra* note 183, at 2 (“[A]ny new law that claims to protect women’s health and safety should be scrutinized carefully to assess whether its ostensibly protective function actually serves to deny liberty and equal citizenship to women.”).

288. *Id.* at 21–22 (“[E]ven when protection is a genuine goal, not a pretext, and even where an apparently protective regulation in theory might serve to safeguard health, such laws may function in practice to limit women’s freedom and autonomy.”).

289. *Id.* at 9 (“Since the 1970’s, courts and legislatures, pressed by women’s rights claimants, have recognized that laws reflecting gender stereotypes are harmful to both women and society.”); see also *Rosenfeld v. S. Pac. Co.*, 293 F. Supp. 1219 (C.D. Cal. 1968) (holding that refusal to hire female employees due to weight and lifting restrictions is impermissible).

290. 499 U.S. 187, 211 (1991).

291. *Cf.* Mezey & Pillard, *supra* note 10, at 233 (noting that while many reforms touted by maternalist women’s political activists are laudable, “the cultural package they are using to sell them perpetuates sex stereotypes that work at cross-purposes with their important goals”).

292. See SURGEON GENERAL’S CALL TO ACTION, *supra* note 49, at 28.

lactation purely as a matter of public health. Lactation, like pregnancy, is an activity that benefits society as a whole, even though its costs are exclusively borne by women.²⁹³ At the very least, lactation laws should remove some of the most burdensome costs to women in light of the benefit that their labor affords society generally.

CONCLUSION

Much of the feminist project of the last fifty years has been focused on guaranteeing women's bodily autonomy, particularly their reproductive autonomy. In seeking the same bodily autonomy already afforded to men, feminists have employed a number of strategies and frameworks, each of which came along with attendant risks and benefits. The evolution of lactation law is, in many ways, a microcosm of the struggles within feminist theory to advocate for autonomy and equality while accounting for difference.²⁹⁴ Thus while lactation itself is vastly undertheorized by feminists,²⁹⁵ the story of lactation and the law is merely a facet of the overarching fight for women's equality. A woman's right to breastfeed, after all, is merely a specific subset of a woman's right to make autonomous decisions about her own body.

Lactation, like pregnancy, poses a unique challenge for legal theorists because of the difficulty in analogizing it to other circumstances.²⁹⁶ This squarely implicates the "sameness" or "difference" debates.²⁹⁷ Using maternalist

293. See Matambanadzo, *supra* note 213, at 194:

Legal and economic institutions, however, are not designed to distribute the costs of pregnancy evenly between those individuals who benefit from it. Instead, the majority of costs are borne by women. For this reason, feminist legal commentators have argued that to ensure equality, the costs must be distributed such that all individuals benefiting from pregnancy internalize its costs.

294. See McCormick, *supra* note 15, at 311 ("Figuring out what equality looks like when people are different is a project with which we continue to struggle."); Deborah Dinner, *Strange Bedfellows at Work: Neomaterialism in the Making of Sex Discrimination Law*, 91 WASH. U. L. REV. 453, 530 (2014) ("We still struggle as a nation with the question whether reproduction represents a private choice and, hence, a private economic responsibility or a public good deserving of societal support. We continue to wrestle with the question of how men and women's different roles in biological reproduction should inform our understanding of sex equality.").

295. See Galtry, *supra* note 11, at 296 ("[F]eminist theorizing in relation to breastfeeding and labor market concerns needs to catch up with recent policy developments.").

296. See Grossman, *supra* note 20, at 827 ("Women in the workforce encountered a system that openly and perhaps obviously treated pregnancy as a *sui generis* condition. It was, according to the conventional wisdom at the time, like nothing else that workers experienced.").

297. In the 1970s and 1980s, feminist legal theorists disagreed sharply about whether embracing "difference" and crafting legal policy that took account of that difference, or embracing an equality framework that emphasized the "sameness" of women's and men's experience in the workplace and beyond, was the better legal strategy. See Williams, *Reconstructive Feminism*, *supra* note 220, at 86–87 (2009). The "sameness" framework resulted in an insistence on formal legal equality, allowing women to access heretofore male-only spaces and professions to the extent that women could perform equally well. The "difference" framework suggested that institutions, including legal institutions, should be restructured to reflect women's different approaches, strengths, and inclinations. While often the "difference" framework relied on stereotypical assumptions about women, it also sought to address the

language to describe breastfeeding can be an effective tool in the promotion of breastfeeding laws because it will appeal to conservative legislators in a way that an argument focused on individual rights might not. The utilization of such language, however, carries the risk of reinforcing the naturalness of the maternal category in a way that is ultimately constraining to women. The “double-edged sword of maternal politics”²⁹⁸ must be wielded with care.

On the other hand, in the absence of maternalist arguments for increasing the legal protections for women and families, courts and legislatures may revert to a strictly formal equality framework which often fails to consider the experiences and unique needs of lactating women. Courts’ historical refusal to view lactation rights as falling within the purview of laws which prohibit sex, pregnancy, or disability discrimination is an archetypical example of formal equality that “le[aves] women vulnerable to a system that, while making it possible for women to be more engaged in the labor force, still define[s] the male body and mind as the norm.”²⁹⁹ Dislodging the male as the norm has proven difficult, however. Therefore, this path, too, is potentially fraught. And although there is no direct corollary in men’s reproductive rights, it is problematic that breastfeeding laws are crafted in such a way that women’s rights are sublimated to the public good in a way that men’s rights are not—and cannot be.³⁰⁰

Further, much of feminist theory in the past thirty years has been engaged in pushing back against the simplification of women’s experience into a monolith and making feminist theory responsive to a larger range of lived experience. Flattening the array of women’s lived experience to that of the most common experience not only risks leaving individuals and groups out of the conversation, it also risks naturalizing the primary experience such that any other experience is viewed as deviant and abnormal.³⁰¹ Analyzing how laws affect marginalized

real physical differences between women and men in a way that the feminists advocating for formal legal equality often ignored.

298. Dinner, *supra* note 294, at 530 (discussing how the “new maternalism illustrates the double-edged sword of maternal politics: its potential to reify gender norms even as it uses gender as a category by which to make demands upon the state.”).

299. Paige Hall Smith, “*Is It Just So My Right?*” *Women Repossessing Breastfeeding*, 3 INT’L BREASTFEEDING J. (2008).

300. See ANNE BALSAMO, TECHNOLOGIES OF THE GENDERED BODY 110 (noting that the prosecution of women for harm inflicted on the fetus in utero “establishes unequal treatment of women in that there is no corresponding scrutiny of men and male body behavior” and that as a result “a discriminatory system of surveillance is established”); Siegel, *supra* note 109, at 815–16 (“Whatever sex role differences in intimate and family relations custom may engender, government may not entrench or aggravate these role differences by using law to restrict women’s bodily autonomy and life opportunities in virtue of their sexual or parenting relations in ways that government does not restrict men’s.”); see also Brief of Historians, *supra* note 183, at 12–13 (discussing the protective labor legislation enacted at the beginning of the twentieth century, which “[w]hile couched in arguments for women’s health, morals, and physical safety . . . frequently invoked the public health, suggesting that women did not have the right to decide the uses of their own bodies or the control of their own morals, and that women’s, but not men’s, rights could be subordinated to the interests of a ‘public.’”).

301. See Adele E. Clarke & Virginia L. Olesen, *Revising, Diffracting, Acting, in REVISIONING WOMEN, HEALTH, AND HEALING* 8 (Adele E. Clarke & Virginia L. Olesen eds., 1999) (“Simplification

individuals helps us to more clearly see who and what the law is structured to protect.³⁰² By conceiving of lactation rights as only responsive to one type of experience, and then writing laws that reinforce that experience as the only valid one, any experiences that differ from the norm will not only be left without legal protection but will also be subject to the double weight of both cultural and legal pressure to conform.³⁰³ If we accept that only certain women should be afforded the protection of lactation laws—those who fit within our culturally defined conception of traditional motherhood—we run the risk of transforming our cultural preferences into seemingly inarguable biology.³⁰⁴ When it comes to lactation, however, it seems clear that our biology and history point in a vastly different direction toward a landscape in which women nurse far past a year postpartum or nurse children that are not biologically related to them.³⁰⁵

Just as lactation law is a microcosm for the problems inherent in the feminist project—crafting laws that address difference without reliance on stereotypes, responding to the range of women’s lived experience, and avoiding the tendency towards a male norm—it also has the potential to be a powerful example of how the law can succeed in promoting real equality. Lactation rights are an area in which there is room for both difference and equality feminist arguments; women’s unique biological ability to lactate should be the basis for legal protection and yet the act of lactation should not serve as a justification to treat women as economic, political, or social inferiors or to unduly associate women with outdated maternal stereotypes.

But perhaps as a result of the failure to take lactation seriously as a subject for careful feminist thought and analysis, the state lactation laws discussed above, replete with explicit and implicit gender stereotypes, were passed without

often involves the deletion of the context or ‘situatedness’ [citation] of something and the erasure of the mundane and often messy work that has gone into creating it. Simplification can be naturalizing in the critical sense of rendering something as taken-for-granted and intrinsically accepted and acceptable. [Citation.]”); *see also* Matambanadzo, *supra* note 213, at 191 (“[P]regnant bodies in law do not exist as pre-cultural artifacts that lie outside of social interactions; instead, pregnant bodies are forged through discourse, experienced through social interactions, and endowed with meaning by cultural expectations.”).

302. Here, the tradition of standpoint epistemology within feminism suggests that “preferable outcomes result when we theorize from the position of the most disadvantaged, because those deeply situated within oppression are better able to see it, describe it, and develop less partial strategies for its elimination.” Kessler, *supra* note 237, at 8.

303. KEDROWSKI & LIPSCOMB, *supra* note 39, at 116 (“By approaching breastfeeding issues from the materially situated contexts of different women’s lives, we can get the best picture of what the right to breastfeed should look like.”).

304. Mezey & Pillard, *supra* note 10, at 236 (“Likewise, we consider the ways in which cultural default rules—especially those regulating gender—can become so entrenched and self-perpetuating that they fuel adaptive preference formation and may even come to be regarded as biological.”).

305. *See generally* Grayson, *supra* note 216. Indeed, the archetypical historical example of the use and acceptance of women nursing children who are not their own is the biblical story of Moses, who ended up being breastfed by his mother Yocheved in the guise of a wet nurse. Wet-nursing is, in fact, one of the oldest professions that was open to women. *See* Valerie A. Fildes, *BREASTS, BOTTLES AND BABIES: A HISTORY OF INFANT FEEDING* (1986).

drawing a more thoughtful critique from the feminist community.³⁰⁶ On the other hand, if the deficiencies in lactation law, much like pregnancy discrimination law forty years ago, are “rooted more in confusion than resistance,” then they may present an opportunity and “invitation to advocates and academics to provide guidance for developing a theory”³⁰⁷ of lactation rights. This Article aims to start that conversation by recognizing that while the unique legal needs of lactating women can and should be met, lactation laws need not rely on outdated ideas about women and families to do so.³⁰⁸

306. Galtry, *supra* note 11, at 309 (“[P]ractical policy developments to support breastfeeding among women in paid work have outstripped developments in feminist thinking.”).

307. See Grossman, *supra* note 20, at 828.

308. Galtry, *supra* note 11, at 309 (“In recognizing the uniquely female-specific nature of breastfeeding, both the development of theory and the implementation of appropriate policies must not reinforce either essentialist notions of motherhood or existing labor market inequalities.”).

