THE HEALTH/CARE DIVIDE: BREASTFEEDING IN THE NEW MILLENNIUM

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Abstract

Given recent health and cultural pressures to breastfeed, this Article argues that legal and societal developments should enable working mothers to choose whether or not to breastfeed without sacrificing their employment. In analyzing current solutions for working mothers, we identify two major developments, which we term "separation strategies," to contend with the health push: limited and unpaid pumping breaks at work established by the Patient Protection and Affordable Care Act and the advent of an online market in human milk. We critique these developments, despite the limited relief they may provide, for the way these strategies do not provide sufficient breastfeeding support and separate the nurturing act of breastfeeding from the nutritional benefits believed to be contained in breastmilk as a sole recourse for working women. Separation strategies reflect the legal and societal undervaluing of direct, symbiotic parental care and the way scientific priorities tend to separate and sterilize nutritional and relational benefits while overlooking additional health benefits of the breastfeeding method, as well as the cost, threats to breastmilk supply, and distributive effects of separation strategies. We describe the way legislative measures, antidiscrimination law, and constitutional rights have failed to aid breastfeeding mothers

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in the workplace. Finally, we articulate ways in which the workplace can be restructured to accommodate breastfeeding and, as a result, parental care more generally.

INTRODUCTION

World health authorities have decreed that all mothers should be exclusively breastfeeding, suggesting that formula is not a suitable option.[1] Such an announcement has created a sea change in infant nutrition and a host of concerns and considerations to which law and society are only beginning to respond. This Article explores the effects that health-based guidelines urging breastfeeding are having on society, legislation, and case law, and the development of online markets in human milk. It evaluates and critiques the legal responses available thus far, adding consideration of these new developments to a larger discussion on the undervaluing of care[2] and the need to restructure workplace norms.[3]

Based on a myriad of scientific studies indicating health benefits of breastfeeding for children and women over the past decade, the World Health Organization (WHO) has been pressing the importance of increasing breastfeeding rates, treating breastfeeding as a global health priority.[4] In the United States, authoritative health bodies like the Centers for Disease

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1 WHO/UNICEF, BREASTFEEDING ADVOCACY INITIATIVE 2 (Feb. 2015), https://www.unicef.org/nutrition/files/Breastfeeding_Avocacy_Initiative_Two_Pager-2015.pdf [perma.cc/JW5A-4SDZ] [hereinafter WHO/UNICEF, ADVOCACY INITIATIVE]; WHO/UNICEF, GLOBAL STRATEGY FOR INFANT AND YOUNG CHILD FEEDING (2003), http://apps.who.int/iris/bitstream/10665/42590/1/9241562218.pdf?ua=1&ua=1 [perma.cc/48TF-F4JA] [hereinafter WHO/UNICEF, GLOBAL STRATEGY] (urging exclusive breastfeeding by mothers and, if not possible, indicating that the best alternative is human breastmilk as opposed to cow milk-based formula); *Breastfeeding*, UNICEF (July 29, 2015), https://www.unicef.org/nutrition/index_24824.html [perma.cc/92LM-NHW2] [hereinafter UNICEF, *Breastfeeding*].

2 *See, e.g.*, MARTHA FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY STRATEGIES 70 (1995); Mary Becker, *Care and Feminists*, 17 WIS. WOMEN'S L.J. 57, 61 (2002) ("We need to elevate care to this level of importance for the basic reason that it is essential to human health and balanced development."); Ann Laquer Estin, *Maintenance, Alimony, and the Rehabilitation of Family Care*, 71 N.C. L. REV. 721, 787–802 (1993); Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371 (2001) (arguing that the importance of caregiving should be considered in shaping and interpreting the law of employment discrimination).

3 JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 54–114, 243–70 (2000); *see also* Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989); Naomi R. Cahn, *The Power of Caretaking*, 12 YALE J.L. & FEMINISM 177, 188 (2000) (arguing that family status disproportionately burdens women in the employment sphere).

4 NAT'L CTR. FOR CHRONIC DISEASE PREVENTION AND HEALTH PROMOTION, CDC, 2016 BREASTFEEDING REPORT

Control and Prevention (CDC) and the American Academy of Pediatrics (AAP) have led the charge in urging breastfeeding by mothers nationwide.[5] These organizations use language that elevates breastfeeding to a "miracle investment" and advise that increasing rates of breastfeeding can decrease infant mortality and prevent ailments ranging from respiratory diseases to cancer.[6] Without judging the accuracy or reliability of scientific studies, it is clear that health-based guidelines are exerting pressure on mothers to breastfeed through doctors and health campaigns.[7] Some scholars argue this pressure created a cultural ideal of "lactivism," which dictates that good parenting includes breastfeeding.[8] Such pressures have turned the discussion of breastfeeding away from one of personal choice over reproductive capacities,[9] and towards one of health imperatives, despite the fact that health imperatives have a history of overwhelming women's sense of autonomy and control regarding their reproductive capacities.[10]

CARD (2016), https://www.cdc.gov/breastfeeding/pdf/2016breastfeedingreportcard.pdf [perma.cc/9T2A-4LTL] [hereinafter BREASTFEEDING REPORT CARD]; *Improving Breastfeeding, Complementary Foods and Feeding Practices*, UNICEF (Dec. 28, 2015), https://www.unicef.org/nutrition/index_breastfeeding.html [perma.cc/FG7X-X2XA] [hereinafter UNICEF, *Breastfeeding and Complementary Feeding*]; *see also supra* note 1.

5 Am. Acad. Pediatrics, *Policy Statement: Breastfeeding and the Use of Human Milk*, 129 PEDIATRICS e827, e829 (2012) [hereinafter AAP Policy Statement]; *Breastfeeding Report Cards*, CDC (Aug. 22, 2016), https://www.cdc.gov/breastfeeding/data/reportcard.htm [perma.cc/5D9D-HYTZ].

6 UNICEF, *Breastfeeding and Complementary Feeding*, *supra* note 4. The dissemination of the "breast is best" agenda occurs through the media, physicians, and advice books. *See* REBECCA KUKLA, MASS HYSTERIA: MEDICINE, CULTURE AND MOTHERS' BODIES 192 (2005).

7 AAP Policy Statement, *supra* note 5, at e827; UNICEF, *Breastfeeding and Complementary Feeding*, *supra* note 4; *see infra* notes 49–64 and accompanying text (discussing studies on the health benefits of breastfeeding).

8 COURTNEY JUNG, LACTIVISM: HOW FEMINISTS AND FUNDAMENTALISTS, HIPPIES AND YUPPIES, AND PHYSICIANS AND POLITICIANS MADE BREASTFEEDING BIG BUSINESS AND BAD POLICY (2015).

9 *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152–53 (1973) (suggesting that a woman's limited right to control over her own body may outweigh fetal interests before the point of viability); *see* Dike v. Sch. Bd. of Orange Cty., Fla., 650 F.2d 783, 785 (5th Cir. 1981) (discussing the constitutional right to breastfeed); Judith G. Waxman, *Privacy and Reproductive Rights: Where We've Been and Where We're Going*, 68 MONT. L. REV. 299, 315 (2007) (arguing that a woman's control over her body and her reproductive functions should be constitutionally protected because it implicates the meaning of personhood under the Constitution and allows all of us the autonomy and self-determination to protect and advance ourselves through our individual choices).

10 *See, e.g.*, RUTH HUBBARD, THE POLITICS OF WOMEN'S BIOLOGY 141–78 (1990); April L. Cherry, *Roe's Legacy: The Nonconsensual Medical Treatment of Pregnant Women and Implications for Female Citizenship*, 6 U. PA. J. CONST. L. 723, 732–36 (2004); Reva B. Siegel, *Roe's Roots: The Women's Rights Claims that Engendered Roe*, 90 B.U. L. Rev. 1875, 1899–1900 (2010) ("Roe explains the basis of the abortion right in physiology, medical science, the physician-patient relationship, and doctors' prerogatives to make medical

At the same time, breastfeeding demands time, resources, and energy from mothers who must also provide economically and emotionally for children, among other responsibilities. Additionally, the medical push to breastfeed clashes with a workplace that has traditionally not been amenable to breastfeeding. For the six months to two years of AAP-recommended breastfeeding, mothers face an impossible conflict: whether to prioritize providing medically advised nourishment or economic security and income.[11]

In this Article, we do not advocate for breastfeeding—we maintain that mothers should be able to choose whether or not to breastfeed. However, we consider the immense pressure to breastfeed that mothers face and the way the workplace, legal accommodations, and societal developments have reacted to the health push. We argue that, in light of this pressure, women's agency must be supported by enabling real choices when it comes to their bodies and their infants' nutrition. Formula feeding should remain an acceptable option for mothers, but working mothers should be enabled to breastfeed through sufficient workplace accommodations.

We identify two primary reactions to the push to breastfeed. In a groundbreaking provision, the 2010 Patient Protection and Affordable Health Care Act (ACA) for the first time acknowledged breastfeeding as a health priority and granted mothers the right to pumping breaks at work.[12] These breaks allow mothers to express milk[13] in private, which can then be preserved and offered to infants at a later time. Pumping breaks are important for breastfeeding mothers, as expressing while at work and away from infants is essential to maintaining milk supply and avoiding infection.[14] While such breaks remain unpaid

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judgments free of state interference, without relating constraints on government control of women's decisions about motherhood to a new understanding of women's status and role.").

11 *See* Laura Duberstein Lindberg, *Women's Decisions About Breastfeeding and Maternal Employment*, 58 J. MARRIAGE & FAM. 239 (1996); 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).

12 29 U.S.C. § 207(r)(1) (2012).

13 "Expressing" or "pumping" are terms to define the act of mechanically extracting breastmilk from the breast, by attaching a machine ("breast pump") to the mothers' breast and pumping the milk out of the mothers' breast into a container. The milk can later be served to the baby via a bottle. "Breastfeeding" or "direct breastfeeding" refers to the act of the baby sucking and drinking breastmilk directly from the mother's breasts. Lactating is the process by which the mothers' body produces breastmilk, a process that takes place in relation to both breastfeeding and expressing.

14 *See infra* notes 179–86 and accompanying text.

and are unreliably enforced, expressing milk has now become a modern mother's reality.[15] According to some estimates, eighty to ninety percent of lactating mothers pump, and some case law has recently begun to acknowledge claims of workplace discrimination pertaining to mothers fired because of their wish to pump at work.[16]

In the wake of the growing health push and in tandem with the prevalence of pumping milk, a second major development is the emergence of a thriving online market in human milk.[17] Families struggling to provide human milk to infants and seeking to procure the perceived ideal nutrition are increasingly looking to online portals. Many mothers have trouble breastfeeding and extended pumping of milk has met with little success. Mothers in the workplace, in particular, struggle to continue breastfeeding.[18] In light of health priorities, many parents have been replacing formula with other mothers' human milk bought in the market. The online market is "booming" and has become a resource for thousands of consumers with millions of ounces exchanged daily.[19]

These developments represent potentially significant changes. Arguably, such developments should be welcomed, as they relieve pressure on mothers in the workforce. Legal provisions enabling pumping and unregulated markets have encouraged pumping and purchasing milk. However, what is striking is the way these two developments have led to a prioritization of the provision of nutrition in a manner that is alienated from nurture and care. We call these developments—pumping and purchasing—"separation strategies." Responses to the push to breastfeed that accommodate expressing and enable purchasing of bottled human milk mask the fact that such developments require mothers to pump or to purchase rather than to breastfeed, which implies a message about the importance of the *breastmilk* rather than the process of breastfeeding itself. Separation strategies create an expectation that mothers mechanically remove their milk from their bodies or purchase other mothers' milk in order to remain in the labor market. These separation strategies, we argue, disconnect nurture from nutrition and care from a mother's own biological capacities in a manner that has not been sufficiently scrutinized.[20]

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15 *See infra* notes 206–10 and accompanying text.

16 Judith Labiner-Wolfe et al., *Prevalence of Breast Milk Expression and Associated Factors*, 122 PEDIATRICS S63 (2008); JUNG, *supra* note 8, at 131; *see also infra* note 151 and accompanying text.

17 *See infra* notes 230–47 and accompanying text.

18 *See infra* notes 97–102 and accompanying text.

19 *See infra* notes 237–47 and accompanying text.

20 *See infra* Part III.

Breastfeeding has been described as an ultimate act of maternal bonding, a symbiosis between nurture and nutrition.[21] The implicit assumption of separation strategies is that the biological caring act inherent to the breastfeeding process will be dismantled and instead will be replaced as a matter of course by a mechanical, detached alternative. The way that separation strategies contend with mothers' biological capacities and infant-mother interdependency in effect demands the separation of mothers from the breastfeeding process. This neglect of the relational process, we show, is consistent with the undervaluing of care more broadly in employment and family law.[22] Moreover, beyond the relational deficits, there are other downsides to separation strategies. First, the process of breastfeeding provides particular health benefits that cannot be entirely replicated by the separation strategies of pumping and purchasing, and that may even be compromised by them. Second, enabling only separation strategies creates costs and generates distributive concerns that may lead to a hierarchy in infant nutrition in which low-income mothers are least able to comply with the health push towards breastfeeding. The undervaluing of nurture and care is even starker in light of the willingness to overlook the health and distributive benefits of breastfeeding entailed in separation strategies.

Pumping and purchasing human milk may be necessary to provide nutrition to infants and relieve pressure from overtaxed mothers, especially in the workplace. But, why are such strategies the main and obvious way to accommodate breastfeeding women in the workforce? Why shouldn't breastfeeding itself be accommodated to some extent? We consider two possible reasons.[23] First, there seems to be an assumption that breastfeeding itself cannot be done at work because infants are a distraction and the workplace cannot properly function in their presence.[24] This assumption is part of the structuring of the workplace to an "ideal worker" who is unencumbered by family care responsibilities.

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21 *See, e.g.*, Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 YALE J.L. & FEMINISM 51, 56 (1997); *see infra* notes 251–53 and accompanying text.

22 *See infra* Part III.A.3.

23 A third concern may be raised: that other workers may be uncomfortable with seeing women's breasts at work. But this objection can largely be resolved by designing rooms to breastfeed on-site that can be shielded from view, and also by the fact that what constitutes "uncomfortable" is historically contingent, and in fact in recent years, in the context of breastfeeding in public spaces, indecency laws have been repealed in many states. *See, e.g.*, N.Y. PENAL LAW § 245.01 (McKinney 2017) (excluding breastfeeding from an indecent exposure statute which prohibits public exposure of female breasts); VA. CODE. ANN. § 18.2-387 (2017). Other states have exempted breastfeeding from public exposure prohibitions through case law. *See, e.g.*, State v. Jetter, 599 N.E.2d 733 (Ohio Ct. App. 1991) (per curiam) (concluding that the Ohio public indecent exposure statute, OHIO REV. CODE ANN. § 2907.09, does not consider female breasts a private part).

24 See *infra* Part III.C.2 for a discussion of how the workplace could be compatible with breastfeeding.

Workplace norms generally do not fathom women breastfeeding at work. Second, there is a concern that breastfeeding accommodations will harm mothers while simultaneously stereotyping all women in the workforce.[25] We argue that enabling breastfeeding through accommodations will allow for more caregiving by all parents, male or female, while remaining in the workforce.

This Article thus contributes to the theoretical discussion on restructuring the workplace to take into account the norm of parental care and the importance of caregiving.[26] Within this body of literature, breastfeeding has been underexamined and undertheorized, perhaps because, until recently, it was not such a salient topic. Given the current global health push and the lactivist culture in our midst, it now deserves more scholarly attention. Additionally, while breastfeeding is part of both the larger discussion on the importance of care and the way care has been undervalued in employment and family law, it is unique in that it is a biological capacity of mothers only, unlike caregiving more generally. Breastfeeding is an act of nurture, but it is also biological and gender specific.[27] Therefore, it poses its own challenges and concerns. Ultimately, we argue the resolution should focus on breastfeeding as part of parental care. Prioritizing caregiving by all parents will lay the foundation to allow for breastfeeding while women continue to work, rather than just the sterilized acts of pumping and purchasing. We posit three ways in which breastfeeding can be enabled at work: paid leave, shorter work hours, and on-site childcare. We argue that, if tailored correctly, these methods can enable breastfeeding for working mothers while simultaneously benefiting caregivers universally. Such reforms are part of the process of restructuring a more care-friendly workplace.

This Article critically evaluates the recent developments pertaining to breastfeeding in the new millennium, including the global health push and the separation strategies that have emerged, and connects them to a larger discussion in legal scholarship about care and the workplace. It proceeds in four parts. Part I sets the backdrop for current developments

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25 *See infra* notes 358–60 and accompanying text.

26 See *supra* notes 2–3 and accompanying text and *infra* notes 274–86 and accompanying text.

27 However, transgender men can breastfeed and there are even anecdotal cases of cisgender men breastfeeding after hormone treatment and stimulation. *See e.g.* Lara Karaian, *Pregnant Men: Repronormativity, Critical Trans Theory and the Re(conceive)ing of Sex and Pregnancy in Law*, 22 SOC. & LEGAL STUD. 211 (2013); Ashifa Kassam, *Breastfeeding as a Trans Dad, 'A Baby Doesn't Know What Your Pronouns Are,'* GUARDIAN (June 20, 2016), https://www.theguardian.com/society/2016/jun/20/transgender-dad-breastfeeding-pregnancy-trevor-macdonald [perma.cc/2FZW-26YZ]; Nikhil Swaminathan, *Strange but True, Males Can Lactate*, SCI. AM. (Sept. 6, 2007), https://www.scientificamerican.com/article/strange-but-true-males-can-lactate/ [perma.cc/2XWV-CUHS].

concerning breastfeeding, describing the health push, the way that the workplace is incompatible with breastfeeding, and the way societal and medical pressures are bearing down on mothers in a manner that compromises their agency. We also note how our Article intends to promote agency by enabling working mothers to breastfeed if they so choose. After setting this backdrop to the need for reform, Part II describes existing law and recent developments in light of the health push. We point to the reality that, while direct breastfeeding in the workplace has not been enabled, bottle-feeding pumped or purchased milk has become somewhat more feasible for working women. In Part III, we then critique these developments for the ways they separate—as a matter of course—the nurturing aspect of breastfeeding from the human milk that is extracted, expecting that mothers will provide nutrition devoid of the relational, biological connection that is integral to breastfeeding. We explain how separation strategies are different from direct breastfeeding and the health perspective itself, as well as illuminate crucial concerns about costs, distributive effects associated with these separation strategies, and the way separation strategies can undermine milk supply and the long-term success of breastfeeding. Finally, in Part IV, we demonstrate what a workplace that accommodates breastfeeding itself and not just separation strategies would look like. We contend that such a reimagined workplace may require structural changes, but enabling breastfeeding in the workplace is feasible. We take inspiration from legal measures now available in other countries, from women in positions of power who are de facto challenging the notion that breastfeeding is incompatible with work, and from a few U.S. companies already making strides to enable breastfeeding, in order to articulate ways in which the workplace can be restructured to accommodate breastfeeding, and as a result, care more generally.

I. The Breastfeeding Dilemma: Health, Pressure, Workplace Incompatibility and Choice

In this section, we describe the environment in which mothers in the workplace face the struggle to breastfeed. On one hand, there is an enormous health push towards breastfeeding. On the other hand, breastfeeding has traditionally been considered incompatible with the workplace. Moreover, as opposed to strengthening women's *rights* to breastfeed, the medical, scientific push to breastfeed instead puts incredible pressure on mothers to breastfeed, undermining choice and putting mothers in an increasingly difficult bind.

A. The Health Push Towards Breastfeeding

Breastfeeding has become a basic strategy in global efforts to improve public health.[28] In the United States, since 2010 the AAP, the CDC, and the U.S. Surgeon General have categorized breastfeeding as a public health issue.[29] The AAP refers to breastfeeding and human milk as the "normative standard[s] for infant feeding and nutrition."[30] Since 2012, the AAP's position has been that breastfeeding should not be considered a mere lifestyle choice; rather, it should be viewed as an imperative for improving public health.[31] Similarly, in its report on Breastfeeding and Complimentary Feeding, the United Nations Children's Fund (UNICEF) describes breastfeeding as no less than a "miracle investment," "the closest thing the world has to a magic bullet,"[32] and as the "cornerstone of children's survival, nutrition and early development."[33]

Parents—mothers in particular—face a storm of advice and mounting explicit pressure to breastfeed their infants.[34] This push is influencing hospital guidelines,[35] doctor advice,[36] and family decisions regarding infant nutrition.[37] Pediatricians are encouraged to not only provide mothers with information about breastfeeding, but also to promote breastfeeding and help mothers manage this optimal nutritional framework. Indeed, the AAP urges pediatric doctors to take leadership roles in their communities in advocating for breastfeeding and in warning parents about the health dangers of failing to breastfeed.[38]

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28 *See* BREASTFEEDING REPORT CARD, *supra* note 4.

29 *See* JUNG, *supra* note 8, at 7.

30 AAP Policy Statement, *supra* note 5, at e827.

31 *Id.*; *see also* JUNG, *supra* note 8, at 98.

32 UNICEF, *Breastfeeding and Complementary Feeding*, *supra* note 4.

33 WHO/UNICEF, ADVOCACY INITIATIVE, *supra* note 1.

34 *See, e.g.*, WHO/UNICEF, GLOBAL STRATEGY, *supra* note 1; *see also* KUKLA, *supra* note 6, at 192. A recent TIME magazine cover featured a mother nursing her three-year old son with the heading titled "Are You Mom Enough?." *See* Martin Schoeller, Cover Photograph, *in* Kate Pickert, *Are You Mom Enough?*, TIME (May 21, 2012), http://content.time.com/time/covers/0,16641,20120521,00.html [perma.cc/F7J2-MLGQ].

35 *See* AAP Policy Statement *supra* note 5, at e834.

36 *See id.* at e836.

37 See *infra* note 43 and accompanying text for statistics on increases in rates of breastfeeding.

38 AAP Policy Statement, *supra* note 5, at e827.

The WHO, in conjunction with UNICEF, AAP, and CDC, sets aggressive goals for increasing breastfeeding worldwide and actively engages in advocacy programs to increase rates of breastfeeding.[39] WHO/UNICEF contends that virtually all mothers can and should breastfeed provided they have accurate information and support within their families and communities as well as from the health care system.[40] The U.S. Department of Health and Human Services' 2020 objective is for 60.6% of infants to breastfeed for six months. As of 2016, the United States is at 51.8% although these high percentages reflect non-exclusive breastfeeding. Goals for exclusive breastfeeding are at 25.5%, and the United States is currently at 22.3%.[41] Some localities have subsequently issued high-profile breastfeeding campaigns, such as Latch On NYC, which promotes breastfeeding to the point that it requires New York City hospitals to keep formula under lock and key, to be used only in extraordinary circumstances.[42] The percentage of infants breastfeeding is quickly increasing, with over 80% of infants starting out breastfeeding in 2016. These statistics are indicative of how many mothers aim to breastfeed, although rates decline precipitously over the first year. That said, at twelve months, more than 30% of infants are still breastfeeding, reflecting a significant increase over years past.[43]

The imperative to breastfeed is both immediate and long-term. WHO/UNICEF asserts that skin-to-skin contact within the "first hour of life significantly reduces newborn mortality."[44] It sets as its goal:

> As a global public health recommendation, infants should be exclusively breastfed for the first six months of life to achieve optimal growth, development and health. Thereafter, to meet their evolving nutritional requirements, infants should receive nutritionally adequate and safe

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39 WHO/UNICEF, ADVOCACY INITIATIVE, *supra* note 1; WHO/UNICEF, GLOBAL STRATEGY, *supra* note 1 (intended as a guide for action to increase breastfeeding worldwide).

40 WHO/UNICEF, GLOBAL STRATEGY, *supra* note 1, at 8.

41 *See* BREASTFEEDING REPORT CARD, *supra* note 4.

42 JUNG, *supra* note 8, at 9.

43 *See* BREASTFEEDING REPORT CARD, *supra* note 4, at 2.

44 WHO/UNICEF, ADVOCACY INITIATIVE, *supra* note 1; *see also* Karen M. Edmond et al., *Delayed Breastfeeding Initiation Increases Risk of Neonatal Mortality*, 117 PEDIATRICS e380, e380−86 (2006) (noting that early initiation within the first hour could prevent sixteen percent of neo-natal deaths based on study in Ghana); Luke C. Mullany et al., *Breast-Feeding Patterns, Time to Initiation, and Mortality Risk Among Newborns in Southern Nepal*, 138 J. NUTRITION 599 (2008).

> complementary foods while breastfeeding continues for up to two years of age or beyond.[45]

WHO/UNICEF contends that exclusive breastfeeding from birth is possible except in the case of a few medical conditions, and unrestricted exclusive breastfeeding results in ample milk production.[46] Authoritative health care bodies like the Office of the U.S. Surgeon General and the American Academy of Family Physicians recommend comparable or longer durations of breastfeeding.[47] The AAP urges exclusive breastfeeding for the first six months and then continued breastfeeding for at least another six months, even if the baby is also consuming other foods and liquids, followed by continued breastfeeding as complementary foods are introduced.[48]

These guidelines are based on studies that highlight the significant and well-accepted health benefits of breastfeeding over commercial infant formula. The AAP indicates that the risk of hospitalization for lower respiratory tract infections in the first year is reduced by 74% when infants breastfeed exclusively for more than four months.[49] Any breastfeeding is associated with a 64% reduction in nonspecific gastrointestinal tract infections, an effect that lasts for months even after breastfeeding is terminated.[50] Some studies also indicate that breastfeeding reduces sudden infant death syndrome (SIDS) by 36%, and that the reduction is greatest for those who are exclusively breastfed as compared to partially breastfed. Other reported health benefits of breastfeeding over infant formula include significant reductions in allergies, celiac disease, inflammatory bowel disease, obesity rates, diabetes, childhood leukemia, and lymphoma.[51]

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45 WHO/UNICEF, GLOBAL STRATEGY, *supra* note 1.

46 *Id.*

47 Steven K. Galson, *The 25th Anniversary of the Surgeon General's Workshop on Breastfeeding and Human Lactation: The Status of Breastfeeding Today*, 124 PUB. HEALTH REP. 356, 356–58 (May–June 2009); AMERICAN ACADEMY OF FAMILY PHYSICIANS, BREASTFEEDING, FAMILY PHYSICIANS SUPPORTING (2001), http://www.aafp.org/about/policies/all/breastfeeding-support.html [perma.cc/P2WY-MP95].

48 AAP Policy Statement, *supra* note 5, at e829.

49 *Id.*; AMERICAN ACADEMY OF FAMILY PHYSICIANS, BREASTFEEDING, FAMILY PHYSICIANS SUPPORTING, *supra* note 47.

50 AAP Policy Statement, *supra* note 5, at e829; Robert Black et al., *Maternal and Child Undernutrition: Global and Regional Exposures and Health Consequences*, 371 LANCET 243 (2008).

51 AAP Policy Statement, *supra* note 5, at e829–30.

Overall, studies show that breastfeeding is associated with significantly lower rates of infant mortality. Worldwide, it is estimated that exclusive breastfeeding for six months would save over 1 million children per year, preventing 13% of the world's child mortality.[52] UNICEF indicates that breastfed children are 14 times more likely to survive into adulthood if they are exclusively breastfed for six months.[53] In the United States alone, it is estimated that breastfeeding exclusively for six months would save 900 lives per year,[54] and one study found a 21% decreased risk of mortality among breastfed infants.[55] For babies born prematurely, the AAP specifically indicates that they should only be fed human milk.[56]

Not only are breastfed babies believed to be significantly healthier and more likely to survive, studies also indicate that they appear to be smarter. UNICEF issued guidelines indicating that "[e]arly and exclusive breastfeeding helps children survive, but also supports healthy brain development, improves cognitive performance and is associated with better educational achievement at age 5."[57] Health authorities attribute better outcomes in early childhood development, increased IQ, and better school performance to nutrition by human milk as opposed to formula,[58] indicating there are documented differences in neurodevelopmental outcomes between breastfed and formula-fed infants.[59] The AAP highlights studies claiming that outcomes of intelligence scores and teachers' ratings are significantly higher in breastfed infants,[60] and exclusive breastfeeding was found to result in even higher scores.[61]

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52 *Id.* at e829; *see also* Black et al., *supra* note 50 (stating that breastfeeding exclusively for six months has the potential to prevent 10-12% of all under-five deaths in the developing world, or 1.4 million lives, according to the 2008 Lancet Nutrition Series).

53 UNICEF, *Breastfeeding*, *supra* note 1.

54 AAP Policy Statement, *supra* note 5, at e829.

55 Aimin Chen & Walter J. Rogan, *Breastfeeding and the Risk of Postneonatal Death in the United States*, 113 PEDIATRICS e435 (2004).

56 AAP Policy Statement, *supra* note 5, at e831.

57 *Breastfeeding: Nutrition*, UNICEF, https://www.unicef.org/nutrition/index_24824.html?p=printme [perma.cc/7XWJ-PHSK] [hereinafter UNICEF]; *see also* UNICEF, *Breastfeeding*, *supra* note 1.

58 AAP Policy Statement, *supra* note 5, at e831.

59 *Id.* at e830; *see* L. John Horwood et al., *Breastfeeding and Later Cognitive and Academic Outcomes*, 101 PEDIATRICS e9 (1998).

60 AAP Policy Statement, *supra* note 5, at e830.

61 *Id.* at e831.

Finally, the CDC contends that it is not only infants that benefit, but mothers as well. By breastfeeding, mothers may avoid the associations that have been noted between post-partum depression and mothers who formula feed or ween early.[62] Duration of breastfeeding is associated with a decrease in breast and ovarian cancers.[63] This "miracle substance" is also promoted as being economically prudent and friendly to the environment. The AAP estimates that breastfeeding would save thirteen billion dollars per year in the U.S.[64]

Ultimately, the strongest push towards breastfeeding comes with warnings that commercial infant formula is not an acceptable alternative:

> [F]ormula at its best, only replaces most of the nutritional components of breastmilk: it is just a food, whereas breastmilk is a complex living nutritional fluid containing anti-bodies, enzymes, long chain fatty acids and hormones, many of which simply cannot be included in formula. Furthermore, in the first few months, it is hard for the baby's gut to absorb anything other than breastmilk.[65]

Labeling formula as risky and inappropriate makes the imperative to breastfeed even more pressing.

As legal scholars, it is not within our expertise to judge the accuracy or strength of the science in this field. That said, some scholars doubt the exactitude of studies that not only recommend breastmilk and breastfeeding but which also indicate that failing to breastfeed costs lives.[66] Regardless, the weight and strength of premonitions advising

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62 Stanley Ip et al., *Breastfeeding and Maternal and Infant Health Outcomes in Developed Countries*, 153 EVIDENCE REP./ TECH. ASSESSMENT 1, 131 (2007).

63 AAP Policy Statement, *supra* note 5, at e832; *see* Alice S. Whittemore et al., *Characteristics Relating to Ovarian Cancer Risk: Collaborative Analysis of 12 US Case-Control Studies: II. Invasive Epithelial Ovarian Cancers in White Women*, 136 AM. J. EPIDEMIOLOGY 1184 (1992); Collaborative Grp. on Hormonal Factors in Breast Cancer, *Breast Cancer and Breastfeeding: Collaborative Reanalysis of Individual Data from 47 Epidemiological Studies in 30 Countries, Including 50,302 Women with Breast Cancer and 96,973 Women Without the Disease*, 360 LANCET 187 (2002).

64 AAP Policy Statement, *supra* note 5, at e832; *see also* JON WEIMER, THE ECONOMIC BENEFITS OF BREASTFEEDING: A REVIEW AND ANALYSIS (2001).

65 UNICEF, *Breastfeeding*, *supra* note 1.

66 *E.g.*, Jules Law, *The Politics of Breastfeeding: Assessing Risk, Dividing Labor*, 25 SIGNS 407 (2000); Linda C. Fentiman, *Marketing Mothers' Milk: The Commodification of Breastfeeding and the New Markets*

that breastfeeding is necessary and warning that failure to breastfeed endangers infants is increasing and the call to breastfeed is having a significant impact. Mothers are facing the push to breastfeed and this pressure exists regardless of whether the science is complete and accurate.

In fact, the sources of the benefits of breastfeeding remain "magical," in that they are largely elusive and difficult to explain. Researchers have only just begun to identify the mechanisms underlying breastmilk's powerful effects. The breastmilk women produce in the first day after birth, called colostrum, is rich in antibodies and white cells that are known to protect against infection and prevent jaundice. Colostrum also has growth factors which help the intestine mature, ward off harmful diseases, and is rich in Vitamin A.[67] Seen through a microscope, breastmilk is "abuzz with white blood cells, pearly fat globules, and fuzzy balls of protein."[68] Breastmilk is also filled with antibodies.[69] Produced by the mother's immune system in response to the pathogens in her environment, these antibodies aid the baby in fighting off illness. Although studies indicate that these antibodies may not be directly ingested into the infant's bloodstream, they are absorbed into the infant's body.[70] Moreover, since the mother synthesizes antibodies based on her environment, they are particularly tailored to the baby's own needs, providing protection against infectious agents that the infant is most likely to encounter in the first weeks of life.[71] Mothers' milk

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for Breast Milk and Infant Formula, 10 NEV. L.J. 29, 46–49 (2009) (summarizing scientific studies critical of the assumed health benefits of breastfeeding); Sydney Spiesel, *Tales from the Nursery: The Health Benefits of Breast-feeding May Not be What You Think*, SLATE (Mar. 27, 2006), http://www.slate.com/articles/health_and_science/medical_examiner/2006/03/tales_from_the_nursery.html [perma.cc/AR55-CCED] (suggesting that some or all health benefits attributed to breastfeeding may be due to other factors, including higher income, more education or fewer siblings). The benefits are based on correlations, associations, and predictions applying percentages of infant mortality and child survival rates to future populations. *See* JUNG, *supra* note 8, at 71–96.

67 Kiran Singh & Purnima Srivastava, *The Effect of Colostrum on Infant Mortality: Urban Rural Differentials*, 15 HEALTH & POPULATION: PERSP. & ISSUES 94, 95 (1992); George Wootan, *The Benefits of Breast Milk*, MOTHER EARTH NEWS (Jan.–Feb. 1985), https://www.motherearthnews.com/natural-health/an-update-on-breast-feeding [perma.cc/JBS8-NW8E].

68 Judy Dutton, *Liquid Gold: The Booming Market for Human Breast Milk*, WIRED (May 17, 2011), www.wired.com/2011/05/ff_milk/ [perma.cc/CCZ4-K9PM].

69 Wootan, *supra* note 67; Jack Newman, *How Breast Milk Protects Newborns*, KELLY MOM (Aug. 11, 2011), https://kellymom.com/pregnancy/bf-prep/how_breastmilk_protects_newborns/ [perma.cc/FM3R-XX6D].

70 *See* Spiesel, *supra* note 66.

71 Armond S. Goldman, *The Immune System of Human Milk: Antimicrobial, Antiinflammatory and Immunomodulating Properties*, 12 PEDIATRIC INFECTIOUS DISEASE J. 664, 665 (1993). The antibodies also provide useful bacteria to aid in a baby's gastrointestinal processes. *Id.*

has other protective agents beyond antibodies. Sugars called oligosaccharides are known to adhere to a baby's intestinal lining, allowing good bacteria to absorb while repelling harmful bacteria.[72] Protein molecules and fatty acids also ward off a variety of other infections and viruses.[73] For example, docosahexaenoic acid (DHA) and arachidonic acid (AA) stimulate neurological development. Breastmilk also contains a host of stem cells.[74] While scientists cannot pinpoint all the ways in which these complex enzymes enrich infant nutrition, researchers suspect that they may have the ability to differentiate into disease-fighting agents.[75]

Indeed, the science may be more inconclusive than the forceful imperative to breastfeed suggests. In the many studies that have been done, attributing the statistical effects to scientific causes is especially difficult.[76] Breastfeeding studies are largely based on observations, associations, and correlations without being able to attribute causality. Indeed, one study that identified a correlation between breastfeeding and certain health benefits simultaneously warns against attributing causality, arguing that more cautious studies are needed to control "confounding factors."[77] Smoking is one such confounding factor. It appears that mothers who breastfeed are less likely to smoke. It is therefore difficult to say that breastfeeding is the reason for fewer respiratory diseases in breastfed children when this effect could just as easily stem from the mother being a non-smoker.[78] Some scholars argue that the overall health benefits of breastfeeding are exaggerated and that they are in fact likely to be merely "modest."[79] Such scholars point to, for example, the director of the U.S. Agency for Healthcare Research and Quality noting that "at least 26 infants will have to be breastfed exclusively for four or more months to prevent one infant from hospitalization,"[80] or that a few IQ points do not make a dramatic difference in a child's

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72 Dutton, *supra* note 68; Goldman, *supra* note 71, at 666; Newman, *supra* note 69.

73 Dutton, *supra* note 68; Goldman, *supra* note 71, at 665; Newman, *supra* note 69.

74 Dutton, *supra* note 68; Goldman, *supra* note 71, at 666.

75 VERNAL PACKARD, HUMAN MILK AND INFANT FORMULA 68–69 (1982).

76 JUNG, *supra* note 8, at 71–95.

77 *See* Ip et al., *supra* note 62, at 91.

78 JUNG, *supra* note 8, at 76–77.

79 Anette E. Buyken et al., *Effects of Breastfeeding on Health Outcomes in Childhood: Beyond Dose-Response Relations*, 87 AM. J. CLINICAL NUTRITION 1964, 1965 (2008); JUNG, *supra* note 8, at 74.

80 JUNG, *supra* note 8, at 86.

cognitive abilities.[81] Some studies dispute the relationship between breastfeeding and SIDS,[82] type-1 diabetes,[83] or childhood leukemia.[84] Other studies indicate an inconclusive connection between breastfeeding and many of the health benefits typically attributed to it.[85] Yet, despite the possible inconclusiveness of some of the studies, the rising tenor of the AAP guidelines regarding the importance of breastfeeding to "save infant lives" along with their wholesale adoption by pediatricians resulted in a clear cultural and scientific push towards breastfeeding that has been highly influential with doctors and families.

B. The Labor Market as Incompatible with Breastfeeding

Assertive public messages from doctors and the media[86] about the significant benefits of breastfeeding often subject mothers to an untenable reality because giving their babies the recommended optimal nourishment jeopardizes and is in direct conflict with their ability to provide for their infants' economic security.[87] This conflict is a result of structural workplace norms that have been historically designed around men's bodies and lifestyles.[88] The workplace still largely assumes a worker with a male body, unencumbered by reproduction or family care.[89] Although working mothers, even mothers of very small children, comprise

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81 *Id.* at 91.

82 *Id.*, at 87–89; Task Force on Sudden Death Syndrome, Am. Acad. of Pediatrics, *The Changing Concept of Sudden Infant Death Syndrome: Diagnostic Coding Shifts, Controversies Regarding the Sleeping Environment, and New Variables to Consider in Reducing Risk*, 116 PEDIATRICS 1250 (2005).

83 Anette-G. Ziegler et al., *Early Infant Feeding and Risk of Developing Type 1 Diabetes—Associated Autoantibodies*, 290 J. AM. MED. ASS'N 1721, 1721–28 (2003).

84 Jeanne-Marie Guise et al., *Review of Case-Control Studies Related to Breastfeeding and Reduced Risk of Childhood Leukemia*, 116 PEDIATRICS, e724 (2005); JUNG, *supra* note 8, at 90–91.

85 JUNG, *supra* note 8, at 73–81, 84–87; *see also* Michael S. Kramer et al., *Promotion of Breastfeeding Intervention Trail (PROBIT): A Randomized Trial in the Republic of Belarus*, 285 J. AM. MED. ASS'N 413, 417 (2001) (finding breastfeeding has no effect on ear infections or respiratory tract infections); Michael S. Kramer et al., *Effect of Prolonged and Exclusive Breast Feeding on Risk of Allergy and Asthma: Cluster Randomized Trial*, 335 BRITISH MED. J. 815 (2007).

86 *See infra* notes 114–17 and accompanying text.

87 *See infra* notes 97–102 and accompanying text.

88 *See generally* DOROTHY SUE COBBLE, THE OTHER WOMEN'S MOVEMENT: WORKPLACE JUSTICE AND SOCIAL RIGHTS IN MODERN AMERICA (2004).

89 Abrams, *supra* note 3, at 1233–35; 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, 80 (2003); *see*

an important part of the labor force,[90] activities associated with women's bodies, such as maternity and lactation, are not routinely provided for in the modern workplace.[91] Scholars have long noted that caretaking is currently highly incompatible with market work, because the workplace is designed around a so-called "ideal worker," a worker who is fully and totally free to labor for long hours at the employer's service.[92] Joan Williams argues that market work is organized around workers who work full-time and have little time for caregiving. This structure poses considerable hurdles for working parents who wish to defy the ideal worker norm.[93] Feminists have been fighting for better working conditions for caretakers to better enable work/family balance.[94] Mothers still shoulder the bulk of childcare responsibilities and are often pushed out of high-paying, high-power jobs due to the fact that these positions often demand long hours and are incompatible with family-care.[95] Part time work, flexible work, or gig-based labor is often penalized, unaccompanied

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also JOANNA L. GROSSMAN, NINE TO FIVE: HOW GENDER, SEX, AND SEXUALITY CONTINUE TO DEFINE THE AMERICAN WORKPLACE 249–51 (2016); WILLIAMS, *supra* note 3.

90 HILDA L. SOLIS, U.S. DEP'T LAB., WOMEN IN THE LABOR FORCE: A DATABOOK 18 (2009); OFFICE OF MANAGEMENT AND BUDGET, U.S. DEP'T OF COMMERCE, WOMEN IN AMERICA: INDICATORS OF SOCIAL AND ECONOMIC WELL-BEING 27, 31–35 (2017).

91 Joan Acker, *Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations*, 4 GENDER & SOC. 139, 139–58 (1990).

92 Williams & Segal, *supra* note 89, at 88, 114; *see* Joan C. Williams & Stephanie Bornstein, *The Evolution of "FReD": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1320–21 (2008) (arguing that ideal worker norms discriminate against caregivers); Kessler, *supra* note 2, at 375–76. The hours worked by the Average American worker are longer in comparison to those in Canada, France, Germany, Sweden or the United Kingdom. JANET C. GORNICK & MARCIA K. MEYERS, FAMILIES THAT WORK: POLICIES FOR RECONCILING PARENTHOOD AND EMPLOYMENt 50 (2003); *Average Annual Hours Actually Worked per Worker*, ORG. FOR ECON. CO-OPERATION AND DEV., https://stats.oecd.org/Index.aspx?DataSetCode=ANHRS [perma.cc/JX3M-9EPS].

93 WILLIAMS, *supra* note 3, at 1–6. The "ideal-worker" norm is a workplace norm/standard that considers someone an ideal worker if a worker works full-time, and takes little or no time off for childbearing or childcare. Joan Williams writes that "eliminating the ideal worker norm in market work requires restructuring work around the values people hold in family life; in particular around the norm of parental care." *Id.* at 4–5. Work/family activists and scholars have demanded such a restructuring, although usually not primarily in the context of breastfeeding. *Id.*

94 Arianne Renan Barzilay, *Back to the Future: Introducing Constructive Feminism for the Twenty-First Century—A New Paradigm for the Family and Medical Leave Act*, 6 HARV. L. & POL'Y REV. 407, 422 (2012) [hereinafter Renan Barzilay, *Back to the Future*]; Nicole B. Porter, *Caregiver Conundrum Redux: The Entrenchment of Structural Norms*, 91 DENV. U. L. REV. 963 (2014).

95 JOAN C. WILLIAMS, RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER 12–41 (2010).

by benefits and unavailable for many rewarding jobs.[96]

Mothers inclined to breastfeed their children may be unable to combine breastfeeding with employment. Not surprisingly, social science studies show that employment of mothers outside of the home, especially full-time employment, poses an obstacle to breastfeeding.[97] Mothers who do not work outside the home are twice as likely as employed mothers to breastfeed at the six month mark.[98] Although likely to breastfeed at birth, working mothers stop breastfeeding sooner than other mothers;[99] while the vast majority of new mothers initiate breastfeeding at birth, by six and twelve months the numbers decline dramatically.[100] Returning to work impedes the ability of full-time working mothers to continue to lactate, and only ten percent continue until the six-month mark, usually by combining breastfeeding and pumping.[101] Studies further demonstrate that women are less likely to breastfeed as the hours they work increase.[102]

Educated, married, and wealthier women initiate and continue breastfeeding at higher rates, while less-educated, single, non-white, lower-income mothers show the lowest rates of initiation and continuation.[103] Lower-income women are hit harder than highly-educated

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96 *See* GORNICK & MEYERS, *supra* note 92, at 153; Renan Barzilay, *Back to the Future*, *supra* note 94, at 411; Arianne Renan Barzilay & Anat Ben-David, *Platform Inequality: Gender in the Gig Economy*, 47 SETON HALL L. REV. 393 (2017); Michelle A. Travis, *Equality in the Virtual Workplace*, 24 BERKELEY J. EMP. & LAB. L. 283 (2003).

97 Lindsey Murtagh & Anthon D. Moulton, *Working Mothers, Breastfeeding, and the Law*, 101 AM. J. PUB. HEALTH 217, 218–19 (2011).

98 Alan S. Ryan et al., *The Effect of Employment Status on Breastfeeding in the United States*, 16 WOMEN'S HEALTH ISSUES 243–51 (2006).

99 Linda Blum, *Mothers, Babies, and Breastfeeding in Late Capitalist America: The Shifting Contexts of Feminist Theory*, 19 FEMINIST STUD. 291, 295–96 (1993).

100 Marcy Karin & Robin Runge, *Breastfeeding and a New Type of Employment Law*, 63 CATHOLIC U. L. REV. 329, 334 (2014).

101 Shana M. Christup, *Breastfeeding and the American Workplace*, 9 AM. U. J. GENDER SOC. POL'Y & L. 471, 480 (2001).

102 Duberstein Lindberg, *supra* note 11, at 241.

103 Heather M. Kolinsky, *Respecting Working Mothers with Infant Children: The Need for Increased Federal Intervention to Develop, Protect, and Support a Breastfeeding Culture in the United States*, 17 DUKE J. GENDER L. & POL'Y 338, 346 (2010); Karin & Runge, *supra* note 100, at 334–35.

women in professional or white-collar jobs[104] who have more leverage at work.[105] Thus, the burden of breastfeeding hits lowest-income women, who are most in need of jobs, the hardest.[106] Furthermore, some arguments in favor of breastfeeding focus on the benefits of "free" or cost-effective nutrition for babies.[107] While this statement may be accurate for women who are in any event not working in the market, the time spent breastfeeding is extremely costly for women who are employed or who would otherwise be free to earn money.[108] Assuming that breastfeeding is cheaper than formula fails to acknowledge other costs, particularly the cost of leaving the labor market for breastfeeding women due to the labor market's incompatibility with breastfeeding.[109]

C. Pressure to Breastfeed, Mother's Agency, and the Medicalization of Breastfeeding

Some scholars note that breastfeeding can be a deeply satisfying experience of "intense engagement with and delight in one's child."[110] They argue that breastfeeding is an important form of resistance to the dehumanization of late-capitalist culture, and that it provides an

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104 Gerald Calnen, *Paid Maternity Leave and its Impact on Breastfeeding in the United States: An Historic, Economic, Political, and Social Perspective*, 2 BREASTFEEDING MED. 34, 36–37 (2007).

105 Lisa Hansen, Note, *A Comprehensive Framework for Accommodating Nursing Mothers in the Workplace*, 59 RUTGERS L. REV. 885 (2007).

106 Furthermore, workers have been harassed at work for breastfeeding. Karin & Runge, *supra* note 100, at 337; *see e.g.*, Jodi Kantor, *On the Job, Working Mothers Find a 2-Class System*, N.Y. TIMES (Sept. 1, 2006), http://www.nytimes.com/2006/09/01/health/01nurse.html [perma.cc/K82X-4FS3]. Some scholars note that low-wage workers in particular, who lack flexible schedules, private offices, and facilities for storing expressed milk, are more likely to be subject to harassment for breastfeeding. Hansen, *supra* note 105, at 893–96; Liz Watson & Jennifer Swanberg, *Flexible Workplace Solutions for Low-Wage Hourly Workers: A Framework for a National Conversation*, 3 LAB. & EMP. L. F. 380 (2013) (illustrating the disparities in workplace structures between low wage and other workers).

107 *See, e.g.*, AAP Policy Statement, *supra* note 5, at e832.

108 *See* Mary C. Noonan & Phyllis L.F. Rippeyoung, *The Economic Costs of Breastfeeding for Women*, 6 BREASTFEEDING MED. 325, 325 (2011).

109 For instance, women who receive food stamps are expressly encouraged to breastfeed, in part to reduce costs. *See Supplemental Nutrition Program for Women, Infants and Children (WIC)*, U.S. DEP'T OF AGRICULTURE, https://www.fns.usda.gov/wic/breastfeeding-priority-wic-program [perma.cc/S6UT-QA7K] (last updated Oct. 12, 2017). However, many welfare programs, such as TANF, specifically require being in the workforce in order to receive benefits, see, e.g., Noah D. Zatz, *What Welfare Requires from Work*, 54 UCLA. L. REV. 373 (2006), thus sending mixed messages to lowest income women.

110 Blum, *supra* note 99, at 300.

opportunity for female self-empowerment, and for positive relational experiences.[111] These sentiments regarding how breastfeeding can be a joy to women correlate seamlessly with the push to breastfeed we recount above.

However, breastfeeding also demands a large investment of time and resources, as well as emotional and physical commitment by the breastfeeding mother. This activity also has its costs, especially in the workplace as described above. Despite the benefits, not all mothers can be expected to be with their babies full-time for six months or up to a two-year period in order to engage in on-demand breastfeeding. Mothers may have a range of obligations or desires that may interfere with exclusive breastfeeding: they may need or want to continue working to earn money to support themselves and their children or fulfil their passions; they may need the rest that formula feeding allows them; and they may need to engage in leisure activities, to socialize with friends, or to participate in activities with other family members. Breastfeeding complicates a mother's ability to engage in these activities.

Furthermore, breastfeeding is an acquired technique, which entails effort and concentration until established, consuming further time and energy. Breastfeeding is not always successful or physically possible for some mothers due to physical constraints,[112] and it can cause significant pain due to topical or more internal health complications. Nursing is difficult for babies born prematurely, babies born of multiple births, as well as babies with health conditions or unexplained difficulty latching. While lactation experts can help mothers in breastfeeding, some women struggle with the process, which is neither intuitive nor "natural" for all mothers and may even be painful and cumbersome.[113]

The recommendation of public health organizations to breastfeed seems to be more enduring than a fleeting trend. The CDC has issued aggressive guidelines intended to significantly increase rates of breastfeeding, demonstrating its confidence in the benefits

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111 *Id.* at 306.

112 Olivia Campbell, *The Unseen Consequences of Pumping Breast Milk*, PAC. STANDARD (Nov. 17, 2014), https://psmag.com/the-unseen-consequences-of-pumping-breast-milk-ddb50b16d4a7#.wcl7mq65m [perma.cc/6GCZ-GDQT]; Kathleen M. Rasmussen & Sheela R. Geraghty, *The Quiet Revolution: Breastfeeding Transformed with the Use of Breast Pumps*, 101 AM. J. PUB. HEALTH 1356, 1357 (2011); Linda Sweet, *Expressed Breast Milk as "Connection" and its Influence on the Construction of "Motherhood" for Mothers of Preterm Infants: A Qualitative Study*, 3 INT. BREASTFEEDING J. 30 (2008).

113 *See* Teresa Pitman, *Ouch! How to Deal With Painful Breastfeeding: What to Do When Breastfeeding Hurts*, TODAY'S PARENT (Dec. 20, 2015), http://www.todaysparent.com/baby/breastfeeding/ouch-how-to-deal-with-painful-breastfeeding/ [perma.cc/D42N-EZUX].

of breastfeeding. These medical guidelines have ballooned into a pervasive cultural pressure to breastfeed, which even includes shaming for those who fail to comply with the newly established norms. Women today face enormous pressure to breastfeed from zealous breastfeeding advocates, doctors, nurses, social workers, the media, and even the government.[114] Social messaging transmitted in hospital maternity wards and the media portrays mothers who do not breastfeed as uncaring and not "motherly enough."[115] Such psychological attacks on women's "mothering," perhaps in order to incentivize breastfeeding, enhance deep feelings of guilt among those unable or unwilling to breastfeed, insinuating a motherly deficiency. Pressure to breastfeed exclusively during the first six months may exacerbate feelings of uncertainty and inadequacy in the fragile time after birth when many mothers already may suffer from degrees of post-partum depression, and may undermine mothers' recovery from birth and create emotional turmoil.[116] Anecdotal accounts demonstrate how mothers can suffer emotional desperation when they struggle to breastfeed.[117] Such emotional distress cannot benefit the mother or the baby. In fact, guilt as a tactic for incentivizing breastfeeding for the good of the infant can be detrimental to both.

Scholars recount how the scientific health push has generated a "lactivist" culture that has made breastfeeding a cultural ideal.[118] Courtney Jung argues that too often breastfeeding advocacy crosses the line into "lactivism," a moral crusade that portrays formula feeding as unhealthy and risky as smoking, obesity, or driving without a seatbelt; in other words, something that should unequivocally be avoided at all costs.[119] There have been cases of American children who die of starvation because the credo of lactivism convinced mothers struggling to breastfeed that only breastmilk is appropriate for babies' nourishment.[120]

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114 JUNG, *supra* note 8, at 208.

115 KULKA, *supra* note 6, at 192*; see also* Pickert, *supra* note 34.

116 *See* Terri Peters, *Widowed Dad Writes Touching Post to New Moms About Postpartum Depression*, TODAY (Jan. 20, 2017), http://www.today.com/parents/husband-florence-leung-writes-about-postpartum-depression-t107237 [perma.cc/82MW-W2M5].

117 Sweet, *supra* note 112 (discussing the importance and emotional desperation of pumping breastmilk for mothers of pre-term babies).

118 *See generally* JUNG, *supra* note 8.

119 *Id.* at 7, 101.

120 *See* Andrea Freeman, *First Food: Justice, Racial Disparities & Infant Feeding as Food Oppression*, 83 FORDHAM L. REV. 3053 (2015).

Given the cultural pressures to breastfeed, the perceived health benefits that influence families, and the burden that breastfeeding imposes on mothers, we argue that women must have the ability to choose how to use their bodies and how to nurture and raise their children. On the one hand, in light of the health push, more mothers are choosing to breastfeed and want to ensure that their babies receive breastmilk. These mothers and families require the resources to comply with this objective in a reasonable manner that does not force mothers to leave the workplace. On the other hand, workplace accommodations must not lead to a "mom-shaming" culture in which mothers who do not lactate are considered sub-par. Mothers and families must still be able to choose formula feeding without discomfort if that is what is best for their family given the complex considerations involved. As such, we argue that breastfeeding should be made feasible, even for working mothers, and formula feeding should remain an acceptable choice.

Reactions to the health push and the cultural pressure to breastfeed by mothers and families takes different forms: direct breastfeeding by mothers, pumping milk in order to ensure later supply and then bottle-feeding the expressed milk, and buying other mothers' human milk in the market. These options all involve infant nutrition but are not equivalent. While direct breastfeeding seems to involve the greatest health benefits,[121] many mothers prefer to pump and some may decide to forgo lactation altogether. However, pumping can impede milk availability and is usually considered more burdensome than breastfeeding, resulting in lower rates of long-term breastfeeding success.[122] Markets for human milk may ease the burden of breastfeeding or pumping, but may result in potentially harmful distributive effects or health concerns because they are largely unregulated.[123] However, as we demonstrate in Parts II and III, women's choices are, in fact, very limited, especially if

121 *See infra* Part III.B.1.

122 *See* Frances Biagioli, *Returning to Work While Breastfeeding*, 68 AM. FAM. PHYSICIAN 2201, 2204 (2003) (noting the stark decline of breastfeeding for women who pump after returning to work); Julia P. Felice et al., *Pumping Human Milk in the Early Postpartum Period: Its Impact on Long-Term Practices for Feeding at the Breast and Exclusively Feeding Human Milk in a Longitudinal Survey Cohort*, 103 AM. J. CLIN. NUTR. 1267 (2016) ("Nonelective pumping reasons and higher pumping frequency were associated with shorter [human milk]-feeding durations. Mothers who report that they use a breast pump for reasons related to either employment or [suckling] difficulty and their infants may be more vulnerable to risks associated with a shorter [human milk]-feeding duration"); Sarah A. Keim et al., *Pumping Milk Without Ever Feeding at the Breast in the Moms2Moms Study*, 12 BREASTFEED MED. 422 (2017) ("Pumping without feeding at the breast is associated with shorter milk feeding duration and earlier introduction of formula compared with feeding at the breast with or without pumping. Establishing feeding at the breast, rather than exclusive pumping, may be important for achieving human milk feeding goals.").

123 *See infra* Part III.B. Commodification and exploitation concerns may also be raised about markets in human milk, but these concerns are beyond the scope of the Article. *See infra* note 257.

they are in the workplace. Direct breastfeeding, in particular, is left unsupported in contrast to pumping accommodations and the availability of markets. While formula feeding must remain a valid option for mothers, we argue that in light of the health and cultural push, and in order to enable breastfeeding as a feasible option, pumping and markets cannot be the sole recourses for working mothers. Rather, real agency involves facilitating direct breastfeeding as well.

In large part due to the health push and the culture of lactivism that has arisen, the conversation around breastfeeding threatens to undermine mothers' agency as opposed to promoting bodily choices.[124] The health frame of the discussion not only undermines personal choice, but also co-opts parental care through a scientific frame. This medicalization of breastfeeding pressures women to breastfeed by reframing breastfeeding as a question of bodily responsibilities to children rather than as a question of bodily rights.[125] Medicalization may have benefits, but it is also heavily criticized for subordinating women's bodies to medical authority.[126] At the same time, society, employers, and the law do little to facilitate breastfeeding, especially in the workplace.[127] As we discuss in Part III, medicalization, coupled with the lack of breastfeeding accommodations, has resulted in further mechanization and sterilization of the breastfeeding process as accommodations focus on expressing and purchasing human milk that is then bottle-fed to children.[128] The scientifically based global push towards breastfeeding has co-opted the breastfeeding discussion, making it a matter of health as opposed to a matter of personal rights or a matter of parental care. The health push sets up a parenting standard that is currently impossible for most mothers to live up to, especially if they are working in the market.

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124 *See* WENDY KLINE, BODIES OF KNOWLEDGE: SEXUALITY, REPRODUCTION AND WOMEN'S HEALTH IN THE SECOND WAVE 159 (2010); Jennifer Bernstein, *Hospital Breastfeeding Laws in the U.S.: Paternalism or Empowerment?*, 44 U. BALT. L. REV. 163 (2015).

125 Bernstein, *supra* note 124, at 187 ("Public health interventions have long been vulnerable to the charge of paternalism."); *e.g.*, Michele L. Crossley, *Breastfeeding as a Moral Imperative: An Autoethnographic Study*, 19 FEMINISM & PSYCHOL. 71 (2009) (discussing the public health push and problems of maternal guilt); Kate Williams et al., *Discursive Constructions of Infant Feeding: The Dilemma of Mothers' 'Guilt'*, 23 FEMINISM & PSYCHOL. 339 (2013).

126 *See infra* notes 271–73 and accompanying text.

127 *See* discussion *infra* Part II.

128 *Id.*

II. Existing Law and Developments: The Failure to Support Breastfeeding and the Rise of Separation Strategies

In this part, we describe the range of developments in legislation, case law, and in the human milk market that followed the advent of the health push to breastfeed. As we describe these developments, we differentiate between developments to support (1) breastfeeding (at the breast) directly, (2) expressing milk, and (3) purchasing other mothers' milk. We make this differentiation because, although all three developments are reactions to the current medical and cultural preference for feeding infants human milk over formula, each involve different processes and comes with different drawbacks and benefits in terms of health, availability, and distributive effects, as we will describe in Part III.

First, we describe the negligible support women receive for breastfeeding in the workplace.[129] As we demonstrate, legislation and antidiscrimination law provide a dearth of accommodations to facilitate breastfeeding. Moreover, constitutional law, despite the potential to view breastfeeding as a matter of individual rights and familial prerogative, fails to provide breastfeeding accommodations or to facilitate breastfeeding at work. In light of the lack of breastfeeding support, two developments have emerged in the United States to provide human milk to infants: expressing accommodations introduced by the ACA and the growing availability of markets in human milk. These developments are both recent and may be of significant assistance to women who want to follow the international health push and to remain in the workplace.

A. The Failure of Legislation, Anti-Discrimination Law, and a Constitutional Right to Breastfeed to Enable Breastfeeding in the Workplace

1. The Dearth of Federal Legislation Supporting Breastfeeding

The Family and Medical Leave Act of 1993 (FMLA)[130] is the only statutory protection explicitly granted by federal law to protect caretaking when in conflict with market work; although it provides some family leave, which can temporarily help women to breastfeed for a limited period of time, it does not accommodate breastfeeding in a sufficiently tailored

129 Although some legal changes have improved conditions for women breastfeeding in public, as this Article is focused on supporting mothers' ability to breastfeed while working, we focus on laws that regulate mothers' behavior in the workplace. *See infra* Part II.A.

130 29 U.S.C. §§ 2601–54 (2012); *see* Maxine Eichner, *Families, Human Dignity and State Support for Caretaking: Why the United States' Failure to Ameliorate the Work-Family Conflict is Dereliction of Government's Basic Responsibilities*, 88 N.C. L. REV. 1593, 1602 (2010).

or ongoing manner. FMLA grants male and female employees the right to twelve weeks of leave annually to care for a child following birth[131] and guarantees the right to return to one's job following such leave. It does not protect workers who have ongoing, continuous family caregiving obligations,[132] largely women,[133] and does not enable a breastfeeding leave for the six-month duration recommended by the AAP and WHO. Furthermore, for childcare purposes, a parent can take FMLA leave only as a continuous leave rather than a pro rata reduced-hours scheme that could facilitate longer durations of breastfeeding.[134]

Importantly, the terms of FMLA's coverage strictly restrict the application of the guarantees it does afford.[135] FMLA does not provide paid leave or wage replacement, but only guarantees that a worker can return to her job after the leave.[136] New mothers eligible

131 29 U.S.C. § 2612(a)(1) (2012). The U.S. Code also provides the right to continued benefits during leave, *id.* §§ 2614(a)(2)–(c)(1), and the right not to suffer employment retaliation for taking unauthorized leave, *id.* § 2615(a)(1). FMLA creates a private right of action for equitable relief or money damages against an employer that denies its employees FMLA rights. *Id.* § 2615(a).

132 *See* Eichner, *supra* note 130, at 1602; Debbie N. Kaminer, *The Work-Family Conflict: Developing a Model of Parental Accommodation in the Workplace*, 54 AM. U.L. REV. 305, 307 (2004); *see also* Katharine B. Silbaugh, *Is the Work-Family Conflict Pathological or Normal Under the FMLA? The Potential of the FMLA to Cover Ordinary Work-Family Conflicts*, 15 WASH. U. J.L. & POL'Y 193, 205, 216 (2004).

133 *See* Scott Coltrane, *Research on Household Labor: Modeling and Measuring the Social Embeddedness of Routine Family Work*, 62 J. MARRIAGE & FAM. 1208, 1208, 1211–12 (2000); Katharine B. Silbaugh, *Turning Labor Into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 8–10 (1996); Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509, 520 n.18 (1998); Cahn, *supra* note 3, at 188.

134 Murtagh & Moulton, *supra* note 97. It is possible to take intermittent/reduced schedule leave to care for a seriously-ill family member, but for newborn care intermittent/reduced schedule leave is subject to employer consent. 29 U.S.C. § 2612(b)(1); WAGE AND HOUR DIVISION, U.S. DEP'T OF LABOR, THE EMPLOYER'S GUIDE TO THE FAMILY AND MEDICAL LEAVE ACT, https://www.dol.gov/whd/fmla/employerguide.pdf [perma.cc/5BFZ-U8Z4].

135 First, the statute applies only to employees working for companies with fifty or more employees, casting out gendered jobs such as waitressing or some retail work. 29 U.S.C. § 2611(2)(B). Second, despite research showing that precarious, part time, temp work is gendered, an employee eligible for leave must have been employed by the covered employer for at least a year prior to taking leave, and must have worked at least 1250 hours annually (meaning twenty-four hours each week for fifty-two weeks). *Id.* § 2611(2)(A). Third, highly salaried employees and some federal employees may be excluded from its application. *Id.* As a consequence, roughly half of the workforce (sixty-five million employees) are ineligible for leave. Renan Barzilay, *Back to the Future*, *supra* note 94, at 413.

136 *See* 29 U.S.C. § 2614(a). As a result of feminist activism, some states offer partial wage replacement, but even these states do not provide a fully paid leave. *See, e.g.*, CAL. UNEMP. INS. CODE § 2601 (West 2004); HAW. REV. STAT. § 392-1–77; N.Y. WORKERS' COMP. LAW § 204 (McKinney 2016); N.J. STAT. ANN. § 43:21-26 (2008); R.I. GEN. LAWS § 28-39-1–4; *see also Overview of Paid Family & Medical Leave Laws in the United States*,

to take leave and wanting to breastfeed during the twelve weeks allotted by FMLA may not be able to afford to so do. By one account, seventy-eight percent of covered employees cannot afford to make use of the available leave.[137] Most single working parents, who are predominantly women and disproportionately members of minority groups, cannot afford to take leave.[138] Lower-income employees cannot take leave even in dual income households.[139] The result is that low-income women are unlikely to benefit from FMLA,[140] making their ability to breastfeed formidably low.[141] FMLA is the only federal provision of caretaking accommodations in the United States, yet it is not tailored to accommodate breastfeeding and unpaid breaks are useless for the millions of women who lack paid leave from their employers, arguably those that need such paid leave the most.[142]

A BETTER BALANCE, https://www.abetterbalance.org/resources/paid-family-leave-laws-chart/ [perma.cc/75AM-UD2X] (last updated Sept. 27, 2017).

137 U.S. DEP'T OF LABOR, FOREWORD to DAVID CANTOR ET AL., BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: FAMILY AND MEDICAL LEAVE SURVEYS viii, x (2001), https://www.dol.gov/whd/fmla/foreword.pdf [perma.cc/YN4Z-8833].

138 *See* Nancy E. Dowd, *Race, Gender, and Work/Family Policy*, 15 WASH. U. J.L. & POL'Y 219, 238 n.84 (2004) (citing DEP'T OF LABOR, COMM'N ON LEAVE, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES 65, 198 (1997)).

139 Kaminer, *supra* note 132, at 324 n.128; *see also* NAT'L P'SHIP FOR WOMEN & FAMILIES, LATINOS AND THEIR FAMILIES NEED PAID SICK DAYS (2017), http://www.nationalpartnership.org/research-library/work-family/psd/latino-workers-need-paid-sick-days.pdf [perma.cc/Q2PZ-Z528] (noting more than half of Latinas are ineligible for paid leave); NAT'L P'SHIP FOR WOMEN & FAMILIES, AFRICAN AMERICANS AND THEIR FAMILIES NEED PAID SICK DAYS (2017) http://www.nationalpartnership.org/research-library/work-family/psd/african-american-workers-need-paid-sick-days.pdf [perma.cc/2829-BNKT] (stating that African American women are forced to choose between their jobs and the health of their families).

140 *See* Naomi Cahn & June Carbone, *Lifting the Floor: Sex, Class, and Education*, 39 U. BALT. L.F. 57, 62 (2009); Ann O'Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 6–8 (2007); Michael Selmi & Naomi Cahn, *Women in the Workplace: Which Women, Which Agenda*?, 13 DUKE J. GENDER L. & POL'Y 7, 16 (2006).

141 Sara B. Fein & Brian Roe, *The Effect of Work Status on Initiation and Duration of Breastfeeding*, 88 AM. J. PUB. HEALTH 1042 (1998) (working full-time by the time an infant is three months old has a strong negative effect on duration of breastfeeding).

142 Since the passage of the federal FMLA, a number of states have expanded access to unpaid leave either by extending coverage to more workers or by increasing the length of the leave. *See* NAT'L P'SHIP FOR WOMEN & FAMILIES, EXPECTING BETTER: A STATE-BY-STATE ANALYSIS OF PARENTAL LEAVE PROGRAMS (2005), http://www.nationalpartnership.org/site/DocServer/ParentalLeaveReportMay05.pdf?docID=1052 [perma.cc/8UR4-BG77]. Several states have enacted their own FMLA-type statutes, lowering their threshold to cover more workers or provide some partial wage replacement. *See, e.g.*, CAL. UNEMP. INS. CODE § 3301(a)(1) (West 2017); D.C. CODE § 32-516(2) (2017); ME. STAT. tit. 26, §§ 843(3)(A), (C) (2017); MINN. STAT. § 181.940(3)

2. Federal Anti-Discrimination Law Provides Marginal Support for Breastfeeding

Civil rights protecting against gender discrimination have generally been interpreted as negative rights to be free from discriminatory actions as opposed to affirmative accommodations.[143] Accordingly, civil rights laws provide little real relief to breastfeeding mothers. Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating on the basis of sex, though Title VII did not initially protect women from discrimination based on pregnancy or breastfeeding.[144] The Pregnancy Discrimination Act of 1978 (PDA) amended Title VII to protect against discrimination on the basis of "pregnancy, childbirth, or related medical conditions."[145] Thereby amended, Title VII now prohibits employment discrimination on the basis of pregnancy; that said, courts generally refuse to apply it to ongoing caregiving responsibilities like breastfeeding.[146] By contrast, the EEOC considers lactation a pregnancy-related condition.[147]

However, the judicial tide may be changing. In *EEOC v. Houston Funding II, Ltd*., a federal judge ruled that lactation discrimination is non-actionable under the PDA or Title VII because lactation is not "pregnancy, childbirth or a related medical condition."[148] In that case a company fired a lactating worker because of her request to pump breastmilk

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(2017); OR. REV. STAT. § 659A.153(1) (2017); R.I. GEN. LAWS §§ 28-48-1(3)(i), (iii) (2017); VT. STAT. ANN. tit. 21, §§ 471(3)–(4) (2017); *see also* SARAH FASS, PAID LEAVE IN THE STATES, A CRITICAL SUPPORT FOR LOW-WAGE WORKERS AND THEIR FAMILIES (2009), http://www.paidfamilyleave.org/pdf/PaidLeaveinStates.pdf [perma.cc/2BS9-U57S].

143 *See* Catherine Albitson, *Institutional Inequality*, 2009 WIS. L. REV.1093, 1095, 1134–51 (2011) (claiming that employment discrimination claims are usually more successful when they focus on eradicating discriminatory animus towards identity-based protected groups and not when they challenge the structures of work despite the latter's importance). For a recent development acknowledging some duty of accommodation, see the discussion of *Young v. UPS*, *infra* note 152 and accompanying text.

144 General Electric Co. v. Gilbert, 429 U.S. 125 (1976); Geduldig v. Aiello, 417 U.S. 484 (1974).

145 42 U.S.C. §§ 2000e(k), 2000e-2(a) (2012).

146 *See* Kaminer, *supra* note 132, at 328–30; Kessler, *supra* note 2, at 391–419; GROSSMAN, *supra* note 89, at 249–51.; *see also* Derungs v. Wal-Mart Stores, Inc. 374 F.3d 428 (6th Cir. 2004); Falk v. City of Glendale, No. 12–CV–00925–JLK, 2012 WL 2390556 (D. Colo. June 25, 2012).

147 OFFICE OF LEGAL COUNSEL, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: PREGNANCY DISCRIMINATION AND RELATED ISSUES, 15–17 (2015), https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm#IA4b [perma.cc/MU5T-T4KR] [hereinafter EEOC, ENFORCEMENT GUIDANCE].

148 EEOC v. Houston Funding II, Ltd., 2012 U.S. Dist. LEXIS 13644 (S.D. Tex. Feb 2, 2012).

at work. The Fifth Circuit reversed, stating that lactation is a medical condition directly caused by pregnancy and therefore related to pregnancy for purposes of the PDA, and that discharging a worker because she is lactating constitutes sex discrimination in violation of Title VII.[149] Hence, an employer who makes an employment decision based upon whether a woman is lactating could be engaging in unlawful sex discrimination.[150] Courts remarked that this case and the others following its precedent (primarily in the context of pumping rather than breastfeeding at work) represent a nascent shift in determining that lactation discrimination may be considered under the PDA.[151]

However, even in cases that begin to acknowledge that discrimination against lactating women violates the PDA, and even if the context extends from pumping to breastfeeding, courts make clear that employees are not entitled to any particular accommodations to facilitate breastfeeding.[152] While some scholars argue that the lines between discrimination

149 EEOC v. Houston Funding II, Ltd., 717 F.3D 425 (5th Cir. 2013).

150 The EEOC had thus satisfied the requirements of the inferential test for Title VII discrimination to proceed to trial. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Several state antidiscrimination laws have similarly prohibited breastfeeding-related employment discrimination. *See* Murtagh & Moulton, *supra* note 97, at 222.

151 Allen-Brown v. District of Columbia, 174 F.Supp.3d 463, 478 (D.D.C. 2016); Gonzales v. Marriot International, 142 F.Supp.3d 961, 976-77 (C.D.Cal. 2015); Wilson v. Ontario County Sheriff's Dept., No. 12–cv–06706 EAW, 2014 WL 3894493 at *8 (W.D.N.Y. Aug. 8, 2014).

152 EEOC v. Vamco Sheet Metals, Inc., No. 13 Civ. 6088 (JPO), 2014 WL 2619812, at *6 (S.D.N.Y. June 5, 2014) ("Where a plaintiff's claim focuses on adverse employment actions or conditions relating to her lactation breaks, as opposed to an alleged failure to accommodate a disability, an employer may be liable under Title VII."); Lara-Woodcock v. United Air Lines, Inc., 999 F. Supp. 2d 1027, 1045 (N.D. Ill. 2013) ("A number of courts have concluded that an employer is not required to offer additional accommodations for breastfeeding under Title VII or the PDA, beyond those offered to other employees who need to tend to personal needs at work."); *see also* Saru M. Matambanadzo, *The Fourth Trimester*, 48 U. MICH. J.L. REFORM 117, 143–44 (2014) ("In interpreting the PDA, the courts have adopted a comparator model that makes it exceedingly difficult for pregnant women seeking reasonable accommodations to receive relief. For the purposes of the Act, employers may treat pregnant employees differently than other employees if a similarly situated individual, even if only hypothetical, would be treated in a similar fashion. The federal circuits have defined comparators in reference to similarly situated male employees even though the PDA was passed to address the unique challenges that women face because of their role in procreation."). This understanding of the rule seems consistent with the Supreme Court's general observation about the PDA in *Young*, that the "Act requires courts to consider the extent to which an employer's policy treats pregnant workers less favorably than it treats nonpregnant workers similar in their ability or inability to work." Young v. United Parcel Service, Inc., 135 S. Ct. 1338 (2015); *see also* Mayer v. Professional Ambulance, LLC, No. 15-462 S, 2016 WL 5678306 (D. R.I. Sept. 30, 2016) (employer failed to provide reasonable break time for expressing milk and fired her in retaliation for her requests); Hicks v. City of Tuscaloosa, No. 7:13-cv-02063-TMP, 2015 WL 6123209 (N.D. Ala. Oct. 19, 2015). *But see* Martin v. Canon Business Solutions, Inc., No. 11–CV–02565–WJM–KMT, 2013 WL 4838913,

actions and the rights to accommodation can be blurred,[153] discrimination actions have overwhelmingly failed to provide practical relief for breastfeeding women in the workplace, such as direct breastfeeding accommodations, even if breastfeeding would be considered "pregnancy related" under the PDA.[154] The PDA guarantees two important rights: first, to not be treated adversely because of sex, thus protecting pregnant women from negative stereotypes when they function in an indistinguishable manner from men; and, the second, to be treated, when pregnant and unable to work, the same as other employees who are also unable to work due to temporary disability.[155] The comparable right means that employers must accommodate lactation at least to the same degree that they accommodate similar medical conditions, and that less favorable treatment of a lactating employee may raise an inference of unlawful discrimination.[156] Yet, scholars note that the actual application of the PDA in case law is limited and that, more importantly, the "PDA does not require employers to accommodate the actual needs of pregnancy" or related medical conditions.[157]

The right to be treated comparably to other employees with similar medical conditions was recently established in *Young v. UPS*.[158] In that case, the Supreme Court ruled that a pregnant UPS driver, who was denied a light-duty accommodation that was routinely made available to a significant number of employees with similar lifting restrictions, should have

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at *8 (D. Colo. Sept. 10, 2013) (holding that employer's denial of "access to facilities to express breastmilk is relevant to whether Defendant discriminated against [plaintiff] based on her pregnancy"). Pumping breaks are required according to the ACA. *See infra* Part II.B.

153 Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 STETSON L. REV. 1 (1995) (arguing that the workplace should accommodate pregnancy in order to ensure the health and well-being of children); Deborah Widiss, *Gilbert Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961 (2013) (arguing that the PDA creates a substantive accommodation right because it requires employers who accommodate employees who are limited in their ability to work to accommodate pregnant employees regardless of the reason for the accommodation). There is some debate as to whether accommodation and antidiscrimination are two distinct concepts or if the two concepts are overlapping or complementary. *See* Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 645 (2001) (making the claim that the two concepts are overlapping). *But see* Williams & Segal, *supra* note 89, at 78–79, 82, 85 (arguing that there is a sharp distinction between accommodation and antidiscrimination principles).

154 Matambanadzo, *supra* note 152, at 140.

155 *See* GROSSMAN, *supra* note 89, at 184–85.

156 *See id.* at 205–06; EEOC, ENFORCEMENT GUIDANCE, *supra* note 147, at 16.

157 GROSSMAN, *supra* note 89, at 185–87.

158 Matambanadzo, *supra* note 152, at 137.

the opportunity to prove that this denial was discriminatory under the PDA.[159] The limits of the *Young* approach are clear in the context of breastfeeding accommodations. Under *Young*, the plaintiff arguably experienced discrimination when she was denied a workplace accommodation that was available to other employees with similar physical restrictions; however, in practice, translating this premise to a claim for breastfeeding accommodations would be difficult. Accommodating breastfeeding would entail that employees have their babies with them at work every few hours, yet it is hard to imagine that there are many other similarly situated employees in a given workplace. Moreover, even if such a scenario could be litigated in a specific case, regarding a specific workplace, and even if it could be won, it would not follow that all workplaces are required to provide breastfeeding accommodations. Furthermore, courts rejected disparate impact claims challenging policies like long hours, which have a disproportionately negative effect on caregivers in general, and breastfeeding women in particular.[160] Given the magnitude and scale of the push towards breastfeeding, such a limited remedy is unlikely to create the overhaul in workplace policy needed to support breastfeeding women.[161]

3. Constitutional Law Does Not Provide Protections for Breastfeeding

It can be argued that women should have a right to breastfeed at work based on either equal protection or the right to privacy. The U.S. Constitution is the first line of defense when individuals seek to protect their right to make private choices[162] and the choice to breastfeed is an individual choice, not solely a public health mandate.[163] This right to choice

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159 *Id.*; GROSSMAN, *supra* note 89, at 208–15.

160 *See* Kaminer, *supra* note 132, at 330; Kessler, *supra* note 2, at 414–15. *But see* MARY C. STILL, CENTER FOR WORK LIFE LAW, HASTINGS, LITIGATING THE MATERNAL WALL: U.S. LAWSUITS CHARGING DISCRIMINATION AGAINST WORKERS WITH FAMILY RESPONSIBILITIES 2 (2006), http://www.worklifelaw.org/pubs/FRDreport.pdf [perma.cc/5SX5-5RC7] (reporting a growing number of suits filed on the grounds of their "family caregiving responsibilities"); Williams & Segal, *supra* note 89, at 103.

161 Some state antidiscrimination laws have similarly prohibited lactation-related employment discrimination. Murtagh & Moulton, *supra* note 97, at 222. Antidiscrimination laws in states such as California, Connecticut, and Hawaii prohibit lactation discrimination. *See, e.g.*, CAL. GOV. CODE § 12926 (2017); CAL. LAB. CODE § 1030–33; CONN. GEN. STAT. ANN. § 31-40W (2017); HAW. REV. STAT. § 378-2 (2017). A few state legislators have included an obligation to accommodate lactations, including breastfeeding. *See, e.g.*, CONN. GEN. STAT. ANN. § 31-40W (2017); UTAH CODE ANN. § 34A-5-106 (2017).

162 Eisenstadt v. Baird, 405 U.S. 438 (1972) (finding that the right of privacy also protects individuals and their rights to use contraceptives; the decision to bear a child should be free from government intrusion); Griswold v. Connecticut, 381 U.S. 479 (1965).

163 *See supra* notes 114–28 and accompanying text (discussing how public health mandates can create

predates the push to breastfeed, reflecting women's right to choose how to use their own bodies[164] and parents' rights to raise their children as they choose.[165] Although the push to breastfeed may make the need for accommodations more pressing, as more women are breastfeeding and thus need accommodations,[166] the right to breastfeed is not dependent on the public health rationales. Seeking a right to breastfeed instead of relying on public policy recommendations focused on health is attractive because a woman's right to use her body as she chooses and a family's right to raise their children as they wish should not be dependent on public health determinations.

Despite the appeal of rights talk,[167] the United States' constitutional law provides only negative protection from state laws and policies that discriminate or place an undue burden on liberty rights; it does not provide substantive accommodations when the workplace by its very structure impedes women's ability to breastfeed.[168] Furthermore, constitutional law

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hostile environments for women who feel pressured to breastfeed and undermine women's agency).

164 Roe v. Wade, 410 U.S. 113 (1973) (declaring that the right of privacy includes a woman's choice to terminate a pregnancy); *see also supra* note 9.

165 Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that a statute forbidding schools to teach foreign languages was unconstitutional as it interfered with parental rights to control the education of their children).

166 For increased rates of breastfeeding, see *supra* notes 39–43 and accompanying text.

167 *See* Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1910 (1987) (discussing the advantages of a rights discourse); Ann C. Scales, *The Emergence of Feminist Jurisprudence*, 95 YALE L.J. 1373, 1394 (1986) (advocating a legal system that does not make gender differences a basis for classification but rather rests on personal rights); Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 813–21 (1989) (arguing for the use of rights and anti-discrimination law to assist in reframing the workplace to be more in line with caregiving); *see, e.g.*, Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 COLUM. L. REV. 753, 805 (2006) ("Rights are a familiar part of the legal and political landscape. They command respect, convey authority, and establish a claim's moral status."); Barbara Bennett Woodhouse, *"Are You My Mother?": Conceptualizing Children's Identity Rights in Transracial Adoptions*, 2 DUKE J. GENDER L. & POL'Y, 107, 109 (1995). Rights talk has also been criticized for failing to take into account responsibility and mutual respect as opposed to setting battle lines for limited resources. *See, e.g.*, MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

168 Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 368 (2001) ("[S]pecial accommodations for the disabled . . . have to come from positive law and not through the Equal Protection Clause."); Webster v. Reprod. Health Servs., 492 U.S. 490, 509–10 (1989) (stating that state-action requirements insulates states from doing anything to further reproductive rights); ROBIN WEST, CARING FOR JUSTICE 66 (1997) (noting that egalitarian conceptions resting on individual rights are not always compatible with "embodied nurturance" and care); Neal E. Devins, *The Rhetoric of Equality*, 44 VAND. L. REV. 15, 22 (1991) ("[W]hile antidiscrimination laws that ensure access to public accommodations for handicapped individuals

only applies to state actors and policies.[169] Thus, even if the law acknowledges the private right to breastfeed, women currently cannot demand workplace accommodations as a matter of constitutional law. Under the equal protection doctrine established in *Geduldig*, positive accommodations are not provided as a general constitutional principle. The *Geduldig* Court did not find the consideration of biological differences in the context of pregnancy to be invidious discrimination subject to heightened scrutiny, reasoning that excluding pregnancy does not discriminate based on gender, but rather upon the physical condition of pregnancy.[170] However illogical and despite heavy criticism, this holding is still good law at least facially.[171] Accordingly, even if laws were to provide accommodations for a variety of physical needs but were to explicitly exclude breastfeeding, this exclusion may not even be considered gender-based discrimination.

However, a federal appellate court has recognized a right to breastfeed. In *Dike v. School Board of Orange County, Florida*, the Fifth Circuit announced that the right to breastfeed is a fundamental right that is protected from undue interference by the state.[172] The plaintiff was a new mother who returned to work as an elementary school teacher

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further equality, the Constitution does not mandate the enactment of this type of legislation."); William J. Rich, *Taking Privileges and Immunities Seriously: A Call to Expand the Constitutional Canon*, 87 MINN. L. REV. 153, 229 (2002).

169 DeShaney v. Winnebago Cty., 489 U.S. 189, 195–96 (1989) (noting that constitutional law is not intended to engender safety or security; it's only intended to prevent the government from abuses of power); United States v. Harris, 106 U.S. 629 (1882); United States v. Cruikshank, 92 U.S. 542 (1875) (stating that only state action subject to federal civil rights enforcement); United States v. Reese, 92 U.S. 214 (1875); *see also* Susan Frelich Appleton, *Obergefell's Liberties: All in the Family*, 77 OHIO ST. L. J 919 (2016) (arguing that constitutional cases limiting obligations owed by the state concern issues related to family law).

170 Geduldig v. Aiello, 417 U.S. 484, 493–94 (1974) (holding that excluding pregnancy is legitimate because covering women's pregnancy would be too costly for the state to run the benefit plan). The *Geduldig* Court did not consider this case as one of "gender-based" discrimination entitled to heightened scrutiny because "California does not discriminate with respect to the persons or groups which are eligible for disability insurance protection under the program. The classification challenged in this case relates to the asserted under-inclusiveness of the set of risks that the State has selected to insure." *Id.*

171 *Id.* at 502–03 (citing Muller v. Oregon, 208 U.S. 412 (1908); Goesaert v. Cleary, 335 U.S. 464 (1948); Hoyt v. Florida, 368 U. S. 57 (1961)); *see also* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 271 (1993) (relying on the precedential value of *Geduldig*); Peter Nicolas, *Gay Rights, Equal Protection, and the Classification-Framing Quandry*, 21 GEO. MASON L. REV. 329, 348 (2014) ("However, the Court's equal protection holding in *Geduldig*—at least for now—remains good law.").

172 Dike v. Sch. Bd. of Orange Cty., Fla., 650 F.2d 783, 787 (5th Cir. 1981) ("Nourishment is necessary to maintain the child's life, and the parent may choose to believe that breastfeeding will enhance the child's psychological as well as physical health.").

in a public school.[173] She arranged for her spouse or a babysitter to bring her baby to the school during her lunch hour and nursed the baby in a locked, empty room.[174] After months without complaint, the school principal ordered Dike to stop breastfeeding at school, citing a "school board directive prohibiting teachers from bringing their children to work with them for any reason."[175] She was also prohibited from leaving work during her lunch break.[176] The Fifth Circuit held that, in order to interfere with the protected right to breastfeed, the employer must establish that: (1) the interference "further[s] sufficiently important state interests" and (2) the interference is "closely tailored to effectuate only those interests."[177] On remand, the district court ruled in favor of the school, finding that the state interests in not having children on the job were compelling.[178] Significantly, the court assumed that any possibility that breastfeeding would occur within the work environment was disruptive and inappropriate even though there was no evidence that Dike was distracted at work.

B. Expressing Accommodations—Putting the Breast to the Pump

Because breastfeeding is often not permitted in the workplace, many working mothers rely on electric breast pumps for mechanical pumping (extracting milk and storing it for later use).[179] An electric pumping session takes, on average, 15 minutes using a double pump[180] and yields a range of between 2 and 6 ounces.[181] Babies need to intake an average of 25 ounces per day between the ages of 1 month and 6 months.[182] Expressing milk and then bottle-feeding milk to infants allows mothers to temporarily entrust their babies in another's care while they perform any of a myriad of competing responsibilities. In fact, studies

173 *Id.* at 784.

174 *Id.* at 785.

175 *Id.*

176 *Id.*

177 *Id.* at 787.

178 DIANE MASON & DIANE INGERSOLL, BREASTFEEDING AND THE WORKING MOTHER 181 (1986).

179 Blum, *supra* note 99, at 301.

180 Rasmussen & Geraghty, *supra* note 112, at 1356.

181 *See* Dutton, *supra* note 68 ("Breast-feeding can take as much as four hours a day; a pumping session takes, on average, 15 minutes and yields 6 ounces."); Kelly Bonyata, *How Much Expressed Milk Will My Baby Need?*, KELLY MOM, http://kellymom.com/bf/pumpingmoms/pumping/milkcalc/ [perma.cc/5YR4-S3XJ] (indicated that 2 ounces per breast may be a good output in a normal pumping session).

182 *See* Dutton, *supra* note 68; Bonyata, *supra* note 181.

indicate that at least 85% of breastfeeding mothers of newborn infants have expressed milk.[183] Returning to work even after a 12-week leave requires pumping in order to reach the 6-month, or 2-year, recommendations set by the medical community and may result in exclusive pumping to enable the mother to fulfill her work responsibilities.[184] Pumping at work is imperative because a woman's milk supply diminishes if she cannot extract milk at regular intervals, thus jeopardizing her ability to continue breastfeeding when at home.[185] Inability to extract milk at regular intervals is also painful: milk collects in a woman's lactiferous ducts and this unexpressed build-up causes engorgement, blocked milk ducts, and infections.[186]

Recently, federal law made substantial strides in providing accommodations for milk expression in the workplace. The ACA[187] amended the Fair Labor Standards Act[188] by adding a lactation provision that requires reasonable break time for nursing mothers to extract breastmilk during the workday.[189] The rationale behind this policy change was to improve infants' health by encouraging breastfeeding by working women.[190] The provision requires that employers provide "reasonable" breaks for working mothers to extract breastmilk (not breastfeed) for a period of up to one year after the child's birth.[191] It further stipulates that large employers (those with fifty or more employees) must provide a location for extracting breastmilk and that such location be shielded from view and free from intrusion.[192]

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183 Sweet, *supra* note 112, at 6 (describing expressing as the primary tool to balance work, family, and the burden that expressing can put on mothers); Rasmussen & Geraghty, *supra* note 112, at 1356 (citing Labiner-Wolfe et al., *supra* note 16) (noting that 85% of women express milk).

184 Jill Lepore, *Baby Food: If Breast is Best, Why Are Women Bottling Their Milk?*, NEW YORKER (Jan. 19, 2009), http://www.newyorker.com/magazine/2009/01/19/baby-food [perma.cc/9TDV-7KUN].

185 Karin & Runge, *supra* note 100, at 336.

186 *Id.*

187 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 4207, 124 Stat. 119 (2010).

188 29 U.S.C. § 207(r)(1)(A) (2012).

189 The provision applies only to those workers who are covered in the Fair Labor Standards Act. *See* 29 U.S.C. § 203(e)(1) (2012). Arianne Renan Barzilay, *Labor Regulation as Family Regulation: Decent Work and Decent Families*, 33 BERKELEY J. EMP. & LAB. L. 119, 149 (2012) [hereinafter Renan Barzilay, *Labor Regulation*].

190 Renan Barzilay, *Labor Regulation*, *supra* note 189.

191 *Id.*

192 *Id.*

Such a federal provision is groundbreaking in uniformly supporting the ability of women to express milk when returning to work and recognizing the importance of breastfeeding at the federal level.[193] Despite the scant attention to this provision, it is the first piece of nationwide legislation to specifically promote lactation.[194] The fate of this provision is unclear as Congress is consistently attempting to revise the ACA. It is especially significant that the expressing provision was passed not as a matter of individual rights or as a matter of caregiving provisions, like FMLA, but as a matter of public health as part of a piece of health care legislation.[195] In this regard, it is apparent that the health push is having an effect not only on women and families, but on the workplace as well. Neither women's rights nor policy arguments in favor of care accommodations have been as successful as science and public health mandates for achieving lactation accommodations. While the health push can be stressful to mothers struggling to meet its goals,[196] it has motivated the government to provide some mandated assistance at work.[197] When mandated by public health, policy and faciliatory regulations become more popular and understandable. However, as we will discuss in the next part, the focus on health has shaped accommodations that focus more on the benefits of the nutrition of providing human milk than on the nurture or care elements of the breastfeeding method.[198]

Moreover, FLSA's exclusions that limit breastfeeding breaks to non-exempt FLSA employees exclude approximately twelve million salaried women from qualifying,

193 A recent study found that when employers provided adequate breaks, employees reported that they were more satisfied at work. Amanda M. Jantzer et al., *Breastfeeding Support in the Workplace: The Relationships Among Breastfeeding Support, Work–Life Balance, and Job Satisfaction*, J. HUM. LACTATION 1–7 (2017). In theory, such a provision may also help in changing the gendered division of childcare, yet recent statistics do not demonstrate a significant change in the gendered division of household care since its enactment. *See, e.g.*, U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, ANNUAL SOCIAL AND ECONOMIC SUPPLEMENTS, 1994 TO 2015, https://www.census.gov/content/dam/Census/library/visualizations/time-series/demo/families-and-households/shp-1b.pdf [perma.cc/BSX6-TTMP] (tracking gender disparity in stay-at-home parents).

194 Jantzer et al., *supra* note 193.

195 *Breastfeeding Amendment Adopted Unanimously During Markup of Health Care Reform Legislation*, JEFF MERKLEY, U.S. SEN. FOR OR. (June 23, 2009), https://www.merkley.senate.gov/news/press-releases/merkley-health-care-amendment-looks-out-for-nursing-mothers [perma.cc/HAP8-97B9] (pumping breaks as response to health benefits).

196 *See supra* Part I (discussing the ways health can pressure and undermine women's confidence and agency).

197 Today, the ACA requires health insurance companies to cover the cost of breast pumps. JUNG, *supra* note 8, at 2, 144–46.

198 *See infra* Part III.

including many low-paid employees.[199] Smaller institutions are exempt from the location provision, if complying would create an "undue hardship."[200] Importantly, the ACA lacks a reliable enforcement mechanism.[201] There is no definition of "reasonable break time," no requirement for a permanent room for expressing, and no requirement to provide a refrigerator for storing the breastmilk.[202] Breastfeeding workers must negotiate the terms and conditions of expressing breaks. Thus, women report pumping in copier rooms, file rooms, and broom closets.[203] One study found that the majority of businesses do not provide specific private rooms for expressing breastmilk and forty percent of surveyed mothers reported that they did not meet their intended breastfeeding goal upon returning back to work due to lack of these facilities.[204] Importantly, mandated pumping breaks are also not required to be paid, which results in mothers working longer hours for less pay if they need to express milk.[205]

Yet, the law has set up a new social norm that mothers can and should pump. The effect of the pumping reform can be gauged by the massive consumer demand for breast pumps. In 2010, 2.3 million breast pumps were sold in the United States alone, accounting for 40% of the global market in breast pumps.[206] In 2012, 2.6 million women used breast pumps.[207] Sales have since soared. According to some estimates, the market for breast pumps is expected to stabilize at 3.5 million pumps per year, just below the annual number of live

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199 SUZANNE METTLER, DIVIDING CITIZENS: GENDER AND FEDERALISM IN NEW DEAL PUBLIC POLICY 184 (1998); *see also* Charlotte Alexander et al., *Stabilizing Low-Wage Work*, 50 HARV. C.R.-C.L. L. REV. 1, 1, 12–13 (2015) (arguing that FLSA provides no remedy for scheduling unpredictability and income instability, especially for low-wage workers, which has "dire implications" for workers with care responsibilities); Karin & Runge, *supra* note 100, at 349.

200 Fair Labor Standards Act of 1938, 29 U.S.C. 207 § 7(r)(3) (2012).

201 Karin & Runge, *supra* note 100, at 351; *see also* Salz v. Casey Mktg. Co., No. 11-CV-3055-DEO, 2012 WL 2952998, at *3 (N.D. Iowa July 19, 2012).

202 Karin & Runge, *supra* note 100, at 344–48.

203 JUNG, *supra* note 8, at 136.

204 Lisa Steurer, *Maternity Leave Length and Workplace Policies' Impact on the Sustainment of Breastfeeding: Global Perspectives*, 34 PUB. HEALTH NURSING 286 (2017).

205 JUNG, *supra* note 8, at 36.

206 *Id.* at 2.

207 *Id.* at 132.

births.[208] It is also estimated that between 80–90% of new breastfeeding mothers pump and 25% percent, comprised mostly of working mothers, are on a regular pumping schedule.[209] The prevalence of pumping in the workplace also correlates with increase in discrimination claims under the PDA, noted above, which have recently focused on discrimination against women who wish to pump at work.[210]

Many states offer similar break times to what is required by the ACA and some offer them for longer durations, enhancing coverage.[211] There is a correlation between states that offer support for expressing milk at work and breastfeeding rates.[212] Currently, fewer than half of nursing mothers who return to work actually have access to these supportive accommodations, and low-income and single mothers in particular are less likely to have time and space to pump at work.[213] Accordingly, professional women, who have more flexibility and private quarters, have greater success in maintaining breastfeeding than women in retail sales, administrative positions, and construction.[214] Yet, even professional women report having a hard time pumping while managing an uncompromising work schedule.[215] Women who work in service sectors, such as waitresses or clerks; women who work in hospitals, such as doctors or nurses; and women who work in schools, such as

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208 *Id.* at 145–46.

209 Labiner-Wolfe et al., *supra* note 16, at S63–S68; JUNG, *supra* note 8, at 131.

210 *See, e.g.*, EEOC v. Houston Funding II Ltd., No. H-11-2442, 2012 U.S. Dist. LEXIS 13644 (S.D. Tex. 2012).

211 *See Breastfeeding State Laws*, NAT'L CONF. ST. LEG. (June 5, 2017), http://www.ncsl.org/research/health/breastfeeding-state-laws.aspx [perma.cc/C2UN-9PSN]. Some states have also provided accommodations for pumping, for varying durations. *See, e.g.*, ARK. CODE ANN. § 11-5-116 (2017); COLO. REV. STAT. § 8-13.5-101–04 (2017); Nursing Mothers in the Workplace Act, 820 ILL. COMP. STAT. 260 (2017); N.M. STAT. ANN. § 28-20-2 (2017); Act of July 7, 2005, 2005 Or. Laws 466 (2005) (codified at OR. REV. STAT. § 653.077 (2017)); TENN. CODE ANN. § 50-1-305 (2017); VT. STAT. ANN. tit. 21, § 305 (2017).

212 *See* Murtagh & Moulton, *supra* note 97, at 217 (citing Michael D. Kogan et al., *Multivariate Analysis of State Variation in Breastfeeding Rates in the United States*, 98 AM. J. PUB. HEALTH 1872 (2008)).

213 Tara Haelle, *Employers Routinely Break the Law When it Comes to Breastfeeding Moms*, FORBES (Oct. 20, 2015), https://www.forbes.com/sites/tarahaelle/2015/10/20/less-than-half-of-breastfeeding-mothers-have-legally-required-pumping-accommodations-at-work/1 [perma.cc/3U5N-3LUL].

214 Calnen, *supra* note 104; Rachel Tolbert Kimbro, *On-the-Job Moms: Work and Breastfeeding Initiation and Duration for a Sample of Low-Income Women*, 10 MATERNAL CHILD HEALTH J. 19 (2006).

215 JUNG, *supra* note 8, at 126–27.

teachers, report that pumping is impossible because of lack of time and privacy to pump.[216]

C. Purchasing Other Mothers' Milk

In light of these challenges, markets in other mothers' milk are another alternative strategy for feeding infants human milk that is increasingly available and utilized.[217] The availability of milk-sharing and the sale of breastmilk could be beneficial for women and families who cannot or are struggling to breastfeed to secure sufficient breastmilk for their babies. While there may be an instinctual repulsion that using other mothers' milk is inappropriate and, perhaps, "disgusting," markets in other mothers' milk exist and are growing.[218] These markets have developed in an unregulated online "gray market" atmosphere with little governmental interference, enabling them to flourish.[219] The sale of breastmilk is not prohibited or regulated in the United States.[220] Although the FDA regulates the ingredients and labeling of infant formula, it does not regulate human milk.[221]

Milk banks have existed in different forms for decades,[222] though most have followed the unpaid donor model since the 1970s.[223] Women expressed milk at home, collected and stored it in their home freezers, and passed it on to those in need without fees.[224] In 1985, women representing numerous milk banks founded the Human Milk Banking Association of North America (HMBANA). Its main goal was to ensure the quality and safety of

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216 *Id.*

217 *See* WHO/UNICEEF, GLOBAL STRATEGY, *supra* note 1, at 10.

218 Stephanie Wood, *Other Mothers' Milk: Is Breast Still Best When it's Not Your Own?*, BABYTALK, Aug. 2008, at 53.

219 *See* Mathilde Cohen, *Regulating Milk: Women and Cows in France and the U.S.*, 65 AM. J. COMP. L. 469 (2017). By contrast Cohen notes that in France informal milk-sharing is prohibited and milkbanks are highly regulated. *Id.*

220 *Id.* at 27–28. Some states regulate donation-based milk banks. *See* CAL. HEALTH & SAFETY CODE § 1647–48 (West 2017); N.Y. COMP. CODES R. & REGS. tit. 10, §§ 52.9.1–52.9.8 (2017); N.Y. PUB. HEALTH LAW § 2505 (McKinney 2017); 25 TEX. ADMIN. CODE § 227.1 (2017); TEX. HEALTH & SAFETY CODE ANN. § 161.071 (2017).

221 *See generally* 21 C.F.R. § 107 (2009).

222 KARA W. SWANSON, BANKING ON THE BODY: THE MARKET IN BLOOD, MILK, AND SPERM IN MODERN AMERICA 186–87 (2014).

223 *Id.* at 184.

224 *Id.* at 186–88.

disembodied milk[225] given that the first case of HIV transmission through breastmilk was reported that same year. At the turn of the millennium, milk banks experienced a renewed boom, as new milk banks opened and followed HMBANA guidelines for donor testing for diseases like syphilis, HIV, Hepatitis B and C, and HTLV.[226] Between 2000 and 2005, the quantity of milk distributed by milk banks increased by almost fifty percent.[227] By 2016, HMBANA distributed about 4.4 million ounces of human milk to hospitals, reflecting an increase from less than half that amount five years earlier.[228] Today, it collects milk donated by mothers; screens, pools, and pasteurizes the milk; and ships it to hospitals to be distributed by physicians and fed to babies in need.[229]

Mothers with healthy term babies are not eligible to receive this milk, but parents can buy breastmilk with a click of the button online. Breastmilk is currently available for sale and purchase via online platforms, such as OnlyTheBreast.com,[230] Craigslist.com, and eBay.com. Human milk is also available through donations or through wet-nursing via sites such as EatsonFeets.org,[231] Milkshare.birthingforlife.com,[232] and Human Milk 4 Human Babies.[233] Whereas some sites offer the possibility to sell and purchase breastmilk, others contend that breastmilk should be obtained through donation alone.[234] Some sites

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225 *Id.* at 191.

226 *Id.* at 192.

227 Fentiman, *supra* note 66, at 67.

228 Eryn Brown, *Can You Buy Breast Milk? More and More Women are Selling and Donating Excess Breast Milk*, USA TODAY (Apr. 20, 2017), https://www.usatoday.com/story/news/2017/04/20/kaiser-going-1-ounce/100708268/ [perma.cc/E5LR-NEG8].

229 *See Donor Human Milk Processing*, HUM. MILK BANKING ASS'N OF NORTH AM., https://hmbana.org/milk-processing [perma.cc/G52A-9UQJ].

230 ONLY THE BREAST: A COMMUNITY FOR MOMS, http://www.onlythebreast.com/ [perma.cc/M4PV-FWBC]; Craig Hoyle, *New Tinder-Type App for Breastfeeding Mums Wanting to Share Milk with Each Other*, STUFF (Feb. 19, 2017,) http://www.stuff.co.nz/national/health/89509613/new-tindertype-app-for-breastfeeding-mums-wanting-to-share-milk-with-each-other [perma.cc/L32P-55XQ].

231 EATS ON FEETS, http://www.eatsonfeets.org/ [perma.cc/BN4Q-5WDW] (last updated Feb. 19, 2017).

232 *Breastmilk Donation*, MILK SHARE, http://milkshare.birthingforlife.com/ [perma.cc/2HRR-A3B8].

233 HUM. MILK 4 HUM. BABIES, http://www.hm4hb.net/ [perma.cc/CKU6-B93K].

234 *Compare* ONLY THE BREAST: A COMMUNITY FOR MOMS, *supra* note 230, *with* EATS ON FEETS, *supra* note 231.

champion notions of community and sisterhood[235] while others promote the health benefits and nutritional superiority of breastmilk.[236]

Sharing and selling milk via the Internet is growing in popularity[237] and there is a substantial and growing online trade in breastmilk in the United States.[238] A growing number of mothers in the United States who are unable to provide breastmilk of their own now forgo formula and instead buy other mothers' breastmilk through these websites.[239] While some male and female purchasers buy breastmilk online for their own health reasons or fetishes,[240] the vast majority seem to be looking for ways to feed their babies. Across the United States, online transactions have more than doubled in the past years, from around 22,000 in 2012 to about 55,000 in 2015.[241] According to other estimates, every day thousands buy and sell breastmilk online.[242] The demand for breastmilk has virtually "exploded" in the past few years.[243] The platform OnlytheBreast.com alone has

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235 HUM. MILK 4 HUM. BABIES, *supra* note 233.

236 *About Us*, ONLY THE BREAST, http://www.onlythebreast.com/about/about-us/ [perma.cc/DL9M-WQ5H].

237 Sarah A. Keim et al., *Cow's Milk Contamination of Human Milk Purchased via the Internet*, 135 PEDIATRICS e1157, e1158 (2015).

238 David Stephanie Dawson, *Legal Commentary on the Internet Sale of Human Milk*, 126 PUB. HEALTH REP. 165, 165 (2011); Sarah Boseley, *Sale of Cambodian Breast Milk to Mothers in US Criticised by UN*, GUARDIAN (Mar. 22, 2017), https://www.theguardian.com/world/2017/mar/22/unicef-condemns-sale-cambodian-breast-milk-us-mothers-firm-ambrosia-labs?CMP=share_btn_link [perma.cc/SS5A-VF2P]; Brown, *supra* note 228.

239 JUNG, *supra* note 8, at 161.

240 For reports of anecdotal stories, see, for example, Stephen Adams, *Breast Milk . . . the 'Accidental' Cure for Cancer: Scientists Find it Contains a Substance that Kills Tumour Cells*, DAILY MAIL (May 14, 2017), http://www.dailymail.co.uk/health/article-4503772/Breast-milk-accidental-cure-cancer.html [perma.cc/QS2E-WNUB] (pointing to breastmilk as tumor-fighting substance); Michael Day, *Adults Turn to Breast Milk to Ease Effects of Chemotherapy*, TELEGRAPH (Jan. 16, 2005), http://www.telegraph.co.uk/news/uknews/1481302/Adults-turn-to-breast-milk-to-ease-effects-of-chemotherapy.html [perma.cc/JYE8-NLDE] (noting adults turning to breastmilk to cure disease); Judy Dutton, *I Had Breast Milk to Sell & Men Coming Out of the Woodwork to Buy It*, CAFEMOM (Mar. 19, 2015), http://thestir.cafemom.com/being_a_mom/183877/i_had_breast_milk_to [perma.cc/W5TK-UTNB] (assuming that men buy breastmilk for sexual purposes).

241 Lauren Zanoli, *Mothers Are Buying Breast Milk Online—Because They Don't Have Better Options*, VERGE (Apr. 28, 2015), https://www.theverge.com/2015/4/28/8504443/mothers-buying-breast-milk-online-donors-risks [perma.cc/8YD9-H5QS].

242 JUNG, *supra* note 8, at 14.

243 Sandee LaMotte, *With Breast Milk Online, It's Buyer Beware*, CNN (Apr. 14, 2015), http://edition.cnn.com/2015/04/14/health/breast-milk-online-dangers/index.html [perma.cc/V25V-NU6R].

approximately forty-five million ounces of breastmilk on sale through its site at any given time.[244] Breastmilk is now a "hot commodity" and, according to estimates, it trades for 400 times the price of oil.[245] Breastmilk is big business: companies, like Prolacta Bioscience, solicit unpaid donations from mothers, process the donated milk into patented protected human-based infant formula, and sell it to hospitals at steep rates.[246] Other companies play intermediate roles in supplying breastmilk from women in third world countries to developed countries, like the United States.[247]

III. The Critique: Separating Nutrition from Nurture

Our conclusion in Part II is that the health push towards breastfeeding resulted in two primary developments relevant to working mothers: (1) legal provisions that facilitate expressing milk at work and (2) the development of a thriving market in human milk. In contrast, society, employers, and the law have done little to accommodate direct breastfeeding. In this part, we evaluate and critique these current developments. While pumping and purchasing milk may be necessary to supplement or replace direct breastfeeding under certain circumstances and in light of women's own preferences, we criticize the way expressing accommodations and milk markets assume and solidify the need to separate the nutrition in the human milk from the nurture of the breastfeeding method. This separation artificially disconnects the seamless nature of nurture and nutrition inherent in breastfeeding and undervalues caregiving and connection, even when connection is biological and medically indicated. We label these developments for facilitating lactation in the workplace "separation strategies." In addition, we demonstrate how bottle-feeding pumped or purchased milk is not equivalent to breastfeeding as a matter of health and in terms of distributive effect, cost, and availability. While separation strategies may provide helpful supports for breastfeeding as well as important solutions when women choose not to breastfeed or it is not an option, they are not equivalent substitutes to breastfeeding and therefore should not be the only legal recourse available to working

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244 Carolina Buia, *The Booming Market for Breastmilk*, NEWSWEEK (July 5, 2015), http://www.newsweek.com/2015/06/05/booming-market-breast-milk-335151.html [perma.cc/G9J2-P2JL].

245 Jon Street, *Women are Selling Their Breast Milk for Incredible Sums of Money*, BLAZE (July 18, 2017), http://www.theblaze.com/news/2015/07/07/women-are-selling-their-breast-milk-for-incredible-sums-of-money/ [perma.cc/JWM2-YYFM].

246 SWANSON, *supra* note 222, at 195.

247 *See* Boseley, *supra* note 238; Sarah Farnsworth, *Milk Money: Indian Company Looking to Sell Breast Milk to Australia*, ABC NEWS (June 15, 2017), http://mobile.abc.net.au/news/2017-06-15/indian-company-neolacta-looking-to-sell-breast-milk-to-australia/8619020?pfmredir=sm [perma.cc/ZW29-84YW].

mothers. Finally, we discuss potential obstacles to facilitating breastfeeding (as opposed to pumping and purchasing) in the labor market, such as the fear of gender stereotyping and the incompatibility of nurture and work.

A. Separating Care from the Caregiver: Breastfeeding v. Bottle-Feeding Human Milk

1. The Problem with Separation Strategies

As discussed in Part II, societal developments and legal reactions to the global health push towards breastfeeding, especially for mothers who work, have focused on separating the mother from the human milk she produces. Purchasing and pumping human milk are two ways of extracting the milk from a woman and then feeding the child that milk at a later time. While separation strategies may be essential for many women and important for supporting breastfeeding, it is troubling that they represent the main legal and societal response to the health push.

Breastfeeding is defined in medical dictionaries as "the method of feeding a baby with milk directly from the mother's breast."[248] Health guidelines strongly recommend breastfeeding, urging the provision of nutrition to a newborn up to six months exclusively through the nurturing act of breastfeeding and then mixed with food for up to two years.[249] Like the period of recovery and the onset of breastfeeding described in medical literature as the "fourth trimester," the stage of exclusive breastfeeding can be considered as an analogous extension of the biological connectedness of pregnancy or an intermediate phase before real separation, during which the infant is dependent on the mother for sustenance.[250] Even during the two years of recommended breastfeeding mixed with the introduction of food, a period of intense dependency continues. In other words, the child is more separate from the mother than during gestation, but is not yet an independent child.

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248 *Breastfeeding*, FREE DICTIONARY, http://medical-dictionary.thefreedictionary.com/breastfeeding [perma.cc/7TWS-DKBS].

249 *See supra* note 48 and accompanying text.

250 The fourth trimester is often assumed to be the three months after birth. Jill Cohen, *The Fourth Trimester*, MIDWIFERY TODAY, Spring 2002, at 26 (noting that "[m]idwives refer to the first three months following birth as 'the fourth trimester'"). However, others include up to six months after birth, which would be most consistent with breastfeeding guidelines that call for six months of exclusive breastfeeding. *See* Jennifer Benson & Allison Wolf, *Where Did I Go? The Invisible Postpartum Mother*, *in* PHILOSOPHICAL INQUIRIES INTO PREGNANCY, CHILDBIRTH, AND MOTHERING 34 (Sheila Lintott & Maureen Sander-Staudt eds., 2012). *Cf.* Matambanadzo, *supra* note 152, at 124 (describing the period of post-partum recovery as the fourth trimester).

Indeed, Dorothy Roberts claims that "[t]oday breastfeeding seems emblematic of the spiritual bond between mother and infant, the closest possible connection between two human beings. It is the epitome of maternal nurturing."[251] Judge Godbold of the Fifth Circuit Court of Appeals describes breastfeeding as "the most elemental form of parental care. It is a communion between mother and child that, like marriage, is intimate to the degree of being sacred."[252] Because it provides numerous immunities, antibodies, and a crucial amount of touch and sucking required by new infants, some scholars characterize breastfeeding as an "extension of the placenta."[253] Despite such holistic and nurturing perspectives of what breastfeeding entails, and the clear global health push towards breastfeeding, working women's reality requires them to remove the milk from their bodies or purchase milk in order to remain in the labor market.

At first blush, separation strategies appear to be a convenient strategy for working women who want to breastfeed and for society to promote and facilitate breastfeeding. However, such strategies—especially since they are *all* that are currently available—must be further examined. The biological nature and dependency of infant on mother during breastfeeding can be compared to the biological interconnectedness of gestation, yet it is not expected that women would outsource gestation to remain in the workforce. While gestation is separated from genetic connection in surrogate motherhood,[254] this option is considered a "last resort" when women suffer from infertility.[255] Why is it accepted that

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251 What counts as this epitome or "spiritual" aspect of motherhood may change over time, as women with various privileges are able to breastfeed. Roberts, *supra* note 21, at 56.

252 *See* Dike v. Sch. Bd. of Orange Cty., Fla., 650 F.2d 783, 783 (5th Cir. 1981) (internal quotation marks omitted).

253 CHRISTAINE NORTHRUP, MOTHER-DAUGHTER WISDOM CREATING A LEGACY OF PHYSICAL AND EMOTIONAL HEALTH 123 (2005).

254 Traditional surrogates are both genetic and gestational mothers of the fetus; gestational surrogates do not have a genetic connection to the fetus. For surrogate motherhood to work, either the contract must be enforceable or the legal mother must be the intended mother based on egg donation by the intended mother or the legal principle of intent. Lawrence Hill, *What Does It Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 419 (1991) (concluding that contractual intent provides a rule of certainty in favor of the prime movers of the conception); Ruth Macklin, *Artificial Means of Reproduction and Our Understanding of the Family*, 21 HASTINGS CENTER REP. 5 (1991) (considering the various methods, including genetics, to determine the real mother); Marjorie Maguire Schultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297; Suzanne F. Seavello, *Are You My Mother? A Judge's Decision*, *in* In Vitro *Fertilization Surrogacy*, 3 HASTINGS WOMEN'S L.J. 211 (1992).

255 *See, e.g.*, ONTARIO LAW REFORM COMMISSION, 2 REPORT ON HUMAN ARTIFICIAL REPRODUCTION AND RELATED

women will gestate their own babies while they continue their careers, but not that they will subsequently breastfeed? Why is expressing milk and giving it to someone else to bottle-feed their babies the obvious solution for working mothers? Or, even more attenuated, purchasing human milk from someone else?

One obvious answer would be that it is more medically invasive to separate motherhood from gestation and there are concerns about exploitation and commodification in surrogacy. However, surrogate motherhood is largely accepted in the United States despite these concerns.[256] Additionally, there are similar concerns regarding commodification and exploitation of milk extraction.[257] While extracting milk may be easier than surrogacy or using egg donors, it can be very burdensome, particularly as it must be done regularly while human milk is being provided.[258] Women who express milk describe the process as "horrible" and burdensome.[259] They describe feeling "shocked and betrayed" by how slow, laborious, and secretive the process was "often for a measly few ounces."[260] Expressing milk does not involve mothers directly connecting and bonding with the baby but rather securing their breasts to an electronic machine as part of a sterile, disconnected process.[261] Because breastfeeding involves a physiological "let down" to release the milk from the ducts that is stimulated by the emotional bonding between mother and child during nursing, mechanical pumping sometimes does not work, or at least not as quickly or in as much volume as a

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MATTERS 236–237 (1985) ("[S]urrogate motherhood should be a solution of last resort[.]"); Christine L. Kerian, *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children?*, 12 WIS. WOMEN'S L.J. 113, 158 (1997).

256 *See, e.g.*, J. Herbie DiFonzo & Ruth C. Stern, *The Children of Baby M.*, 39 CAP. U. L. REV. 345, 357 (2011) (commenting that the lack of litigation in surrogacy is remarkable); Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109, 137–44 (2009) (discussing the normalization and acceptability of surrogate motherhood in the United States despite initial skepticism).

257 The authors deliberately do not address the issue of commodification in the context of markets in milk, which is outside the scope of this Article and a complex topic in itself worthy of fuller exploration. *See, e.g.*, Sarah E. Waldeck, *Encouraging a Market in Human Milk*, 11 COLUM. J. GENDER & L. 361 (2002); Fentiman, *supra* note 66, at 46−49; Cohen, *supra* note 219.

258 *See infra* notes 179–86 and accompanying text (discussing the hardships of mechanical pumping and the way it leads to lower rates of breastfeeding).

259 Sweet, *supra* note 112, at 5.

260 S. Mitra Kalita, *Pain at the Pump, The Breastfeeding Problem No One Talks About*, QUARTZ (Nov. 30, 2012), https://qz.com/32630/a-womans-place-is-in-the-home-and-the-office-the-case-for-breastfeeding-stations-in-public-places/ [perma.cc/DQ4Z-EQ3D].

261 Sweet, *supra* note 112, at 5.

mother may desire.[262] While separation may be necessary to address hardships, including difficulties breastfeeding, such separation should not be the only recourse for working women. Separation in breastfeeding may appear less dramatic or troubling than separation in gestation, but it is also a form of biological separation between mother and child, and such separation should be part of the discussion regarding facilitating breastfeeding in the workplace.

Jennifer Hendricks explores the legal implications of a scientific fantasy: "building artificial wombs that could gestate a human child from conception to birth."[263] She postulates that, like surrogacy, artificial wombs separate the mother from the fetus[264] and argues that such separation "further entrench[es] an idealized norm of autonomous individuality that devalues connection, care, and dependence along with gestation."[265] Just as liberal individuality is a myth, so also is the prospect of reproduction and child-rearing without physical connection.[266] Even if artificial wombs were available to assist women who could not gestate, what would it mean for society to expect and insist upon such separation? Hendricks criticizes the impact of such separation and implores us to value the connection entailed in biological parenthood.[267] Unlike Hendricks' futuristic fear of the implications of separation for gestation, the separation of breastmilk from breastfeeding is not a fantasy, but rather the reality for mothers in the workplace. In fact, it is already the *expectation*. Mothers who want the benefits of human milk but cannot breastfeed at work increasingly rely upon expressing and purchasing milk.[268]

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262 The "let down" of the milk from the ducts in the mammary glands is stimulated by nursing or pumping and has a physiological, psychological, emotional component. For a review of the physiological and emotional aspects of milk extraction, see Sue Carter & Margaret Altemus, *Integrative Functions of Lactational Hormones in Social Behavior and Stress Management*, ANNALS N.Y. ACAD. SCI., Jan. 1997, at 164–174 (discussing the way in which environmental stressors affect lactation).

263 Jennifer Hendricks, *Not of Woman Born: A Scientific Fantasy*, 62 CASE W. RES. L. REV. 399 (2011). Indeed, artificial wombs have worked for pre-term animals and are thought to be possible for pre-term humans with future scientific development, although there is no significant advance in the technology for a fetus fully gestated in an artificial womb. *See, e.g.*, Hannah Devlin, *Artificial Wombs for Premature Babies Successful in Animal Trials*, GUARDIAN (Apr. 25, 2017), https://www.theguardian.com/science/2017/apr/25/artificial-womb-for-premature-babies-successful-in-animal-trials-biobag [perma.cc/2NCA-CXQB].

264 Hendricks, *supra* note 263, at 442.

265 *Id.*

266 *Id.*

267 *Id.* at 442–48.

268 *See supra* Parts II.B and II.C (discussing the increasing relevance in working women's lives of both

Indeed, it is not surprising that separation strategies resulted from an increasingly health-focused push to breastfeed, as opposed to a women's rights-centered movement that would likely prioritize accommodations regarding the choice to breastfeed. The separation of human milk from the mother's nurturing act of breastfeeding involves a focus on medical, quantifiable nutrition, enabling scientific control over the breastfeeding process down to the exact quantity of breastmilk that should be fed to the baby.[269] Expressing accommodations result from the ACA, further highlighting the emphasis on science and health as opposed to women's choice. While mothers were once discouraged from breastfeeding due to fears of insufficient nutrition, they now experience medical pressure to do so for the sake of the well-being of the child.[270] There has been significant feminist critique of medical and technological control over women's bodies in reproduction.[271] Similarly, separation strategies facilitate control of fetal nutrition through the quality and quantity of breastmilk.[272] Like the use of C-sections in lieu of natural birth to control the birth process,[273] the health push allows scientists and medical doctors more control over the

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expressing accommodations and markets in human milk).

269 Law, *supra* note 66, at 407–09.

270 Melanie Dupuis, NATURE'S PERFECT FOOD: HOW MILK BECAME AMERICA'S DRINK 50–55 (2002) (discussing how, historically, women were discouraged from breastfeeding as it was considered old fashioned and involving too much interference with women's independence and status in the workplace). Formula was advertised as scientific and well-adapted to infants' needs and thus could readily replace breastfeeding as appropriate nutrition to fulfill babies' needs. *See* SWANSON, *supra* note 222, at 19.

271 HUBBARD, *supra* note 10, at 141–78 (1990); Terri D. Keville, *The Invisible Woman: Gender Bias in Medical Research*, 15 WOMEN'S RTS. L. REP. 123 (1993–94) ("Once women have made the choice to become pregnant, medical science seeks to control their bodies and their fetuses through an ever-widening array of diagnostic and therapeutic technologies. The existence of these methods, combined with the pervasive technological imperative in medicine, increases the likelihood that medical interventions will be forced on women against their will, or at least that women will be coerced into complying with their doctors' recommendations, despite the fact that many of these techniques have not been extensively tested."); Siegel, *supra* note 10, at 1899–1900; Cherry, *supra* note 10 (arguing that the structure of *Roe* has led to restrictions on pregnant women's medical choices in the later stages of pregnancy by creating a constitutionally protected state interest in the fetus).

272 *See* Law, *supra* note 66.

273 Scholars have argued C-sections are over-used to allow medical control over the birth process as opposed to due to medical necessity. *See, e.g.*, Amy F. Cohen, *The Midwifery Stalemate and Childbirth Choice: Recognizing Mothers-to-Be as the Best Late Pregnancy Decisionmakers*, 80 IND. L.J. 849, 850 (2005); Nancy K. Kubasek, *Legislative Approaches to Reducing the Hegemony of the Priestly Model of Medicine*, 4 MICH. J. GENDER & L. 375, 375–93 (1997); Sylvia A. Law, *Childbirth: An Opportunity for Choice that Should Be Supported*, 32 N.Y.U. REV. L. & SOC. CHANGE 345, 364–66 (2008). One study into reasons for emergency C-sections found that physician convenience is a leading cause of "emergency Caesareans." Orly Goldstick et

process of providing nutrition to infants. Furthermore, just as many doctors and those in the medical establishment prefer C-sections due to the control they provide, so also expressing and purchasing human milk is an appealing solution for those who want to minimize the "messiness" of nurturing through physical birth and breastfeeding.

Breastfeeding shares some of the biological connectedness of birth and gestation, making separation—as the only recourse—troubling. However, breastfeeding also involves practical care of children by parents, and the assumption of "over-separation" of parents from childcare due to workplace norms has been the subject of significant criticism and debate. Joan Williams focuses her critique on a culture of separation between the workplace and caregiving. Criticizing the employer's reliance on the "ideal worker," Williams demands that the workplace acknowledge and accommodate the reality that parents have children and need to provide care for them.[274] Ignoring this need to care creates an artificial separation between parents and children that does not reflect the reality for mothers or fathers. Williams argues that caregivers are unfairly prejudiced in the workplace by an employer's assumption of the incompatibility of market-work and care-work, and suggests the workplace be restructured to take into account the parental connection between parents and their children.[275] Williams fights against the full commodification of parental labor in the market that results from the "ideal," non-caregiving, worker norm and suggests a new paradigm of market-work characterized by flexible work schedules and a thirty-hour work week.[276]

The critique of separation—both for mothers from their nurturing capacities in breastfeeding and for parents from nurture and care in the workplace—derives from a more general relational feminism critique of the devaluation of the caregiving role. Robin West outlines what she terms "the connection thesis."[277] West argues that reproduction, pregnancy and breastfeeding, and the overall experience of physical connectedness foster

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al., *The Circadian Rhythm of "Urgent" Operative Deliveries*, 5 ISR. MED. ASSOC. J. 564 (2003). Conservative estimates indicate that around 300,000 Caesarean sections are unnecessarily performed in the United States in a given year. The World Health Organization has indicated that no country should have more than a 10–15% C-section rate. WHO, *Appropriate Technology for Birth*, 2 LANCET 436–37 (1985).

274 WILLIAMS, *supra* note 3, at 54–55.

275 *Id.* at 56–57; *see also* Abrams, *supra* note 3, at 183.

276 *See* WILLIAMS, *supra* note 3, at 100 (elaborating on the need to revamp the ideal worker paradigm); *see also id*. at 205–08 (detailing a theory of alimony as income-equalization).

277 *See* Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 2–3 (1988).

in women a sense of connection to others and a capacity for empathy.[278] Regardless of the source of this connectedness, care-work should be valued. Other feminist theorists have recently distanced themselves from the idea that empathy and connectedness is an essential female trait born of female experience, instead arguing for the universality of vulnerability, connectedness, and dependence on others, which is too often masked by an emphasis on separation and individuality.[279] Martha Fineman, among others, argues for a policy shift away from a legal focus on autonomy and towards the need to value and support caregiving and dependency in society.[280] Caregiving contributes to society by supporting dependents and by helping to raise valuable and prosperous cohabitants and citizens.[281] Breastfeeding is part of that care. Though nurture and nutrition can be separated, this separation comes with significant costs and should not be provided as the *only* recourse.

A likely retort to our separation critique is that care is outsourced regularly and that the context of breastfeeding is no different. Like Williams, we believe that arguing for the importance of care "is not the same as saying that children need full-time mothercare."[282] Women need to work and to earn money to avoid impoverishment and disempowerment and to fulfill their passions.[283] This reality does not mean that parental care can be alienated completely or that the workplace is entitled to ignore caregiving responsibilities.[284] Fineman argues that de-gendering motherhood—making it "gender neutral"—is the ultimate signal by which caretaking is devalued.[285] Particularly in the context of breastfeeding, separation strategies act to alienate the baby from the source of nutrition, despite the biological way in which breastfeeding provides nutrition. In that sense, breastfeeding sits somewhere between biological gestation and parental provision of childcare as a form of biological and practical nurture and care. As such, it is noteworthy how quickly it has been assumed that pumping and purchasing are equivalent to breastfeeding and provide

278 *Id.*

279 *See* MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 31–40 (2004).

280 *Id.*; WILLIAMS, *supra* note 3, at 54–55.

281 *See supra* note 2.

282 WILLIAMS, *supra* note 3, at 52.

283 *Id.*

284 *Id.* at 53 ("We need to open a debate on how much parental care children truly need given the trade-offs between providing money and providing care. A good place to start is with the consensus that children are not best served if both parents are away from home eleven hours a day.").

285 FINEMAN, *supra* note 2, at 70.

the only necessary accommodations to breastfeeding mothers. In addition to market norms that expect outsourcing of childcare as described by Williams, biological outsourcing is also expected.[286] While this outcome is perhaps less extreme than outsourcing pregnancy altogether, outsourcing breastfeeding is expecting biological separation in addition to being part of the expectation that workers will outsource childcare more generally.

From a liberal feminist perspective, separation strategies allow women to work and compete with men without messy accommodations that involve nurture. Since breastfeeding extends the period of time during which child and mother are inseparable, it complicates employment for mothers for a longer period of time. Indeed, pregnancy-related leave took a long time to be provided, even unpaid,[287] and allowing mothers to breastfeed while still working may seem too much to expect from the workplace and the law. Mothers may prefer separation strategies to avoid burdening employers and to make themselves more attractive employees. Despite the intuitive biological connection between care and nutrition, society and the law cannot conceive of actually allowing breastfeeding in the workplace. However, as we demonstrate in Part IV, marketplace restructuring and re-imagination makes accommodating breastfeeding compatible with work. Our vision is to enable women to work and breastfeed and to restructure the labor market to value the biological care connection of the breastfeeding method.

2. What is Care? Is Bottle-Feeding Care? Are Wet-Nurses Providing Care?

This Article asks society, legislators, and policy-makers to reconsider the nature of breastfeeding accommodations to avoid the inevitability of the separation of nurture and nutrition and to revalue the care involved in breastfeeding. We do not argue that separation strategies may not be useful or necessary; rather, it is problematic that these strategies are the only line of defense in allowing mothers to continue their market work.

From the emphasis on nurture, a broader question follows: what is care? When we call for the revaluation of nurture in the context of breastfeeding, are we promoting wet-nurses over buying bottled milk? First, all care is valuable and should be valued even when done by nannies or surrogates.[288] To the extent care is provided by others, it should be valued

286 WILLIAMS, *supra* note 3, at 53.

287 *See supra* notes 130–42 and accompanying text (discussing FMLA).

288 For a discussion of the need to value care even when non-parents provide care, see, for example, Pamela Laufer-Ukeles, *Money, Caregiving and Kinship: Should Paid Caregivers Be Able to Obtain De Facto Parental*

both economically and relationally. However, while wet-nursing may provide some health benefits while implicating other potential drawbacks,[289] it is not the care we are asking society to revalue. [290]

The care to which we refer is parental care in the context of breastfeeding. We focus on how breastfeeding affects mothers in the workplace and their ability to breastfeed their own children. Williams argues that the expectation of outsourcing care is precisely what allows employers to maintain the ideal worker norm and mask what is actually a male-centered workplace.[291] Williams calls the outsourcing of childcare as demanded by current workplace norms "full-commodification."[292] The heart of her argument is a criticism of the full-commodification model: it is time to acknowledge "*the norm of parental care*."[293] Not only do women experience the "double-shift" of having to perform domestic work alone after they share in the market-work with their partners,[294] but also "many people in advanced industrialized countries feel that having both parents working the ideal-worker schedule is inconsistent with the level and type of parental attention children need."[295] Williams argues that the workplace be restructured to take into account the importance of parental childcare.

The second question concerns whether bottle-feeding is not care. Why do we argue that care is being undervalued when pumping and purchasing facilitates bottle-feeding of human milk? To be clear, we do not argue that bottle-feeding is not care. However, the workforce

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Status?, 74 MO. L. REV. 25 (2009).

289 JACQUELINE H. WOLF, DON'T KILL YOUR BABY: PUBLIC HEALTH AND THE DECLINE OF BREASTFEEDING IN THE NINETEENTH AND TWENTIETH CENTURIES 17–21 (2001); SWANSON, *supra* note 222, at 18. Wet-nursing is still available as a service. *See* EATS ON FEETS, *supra* note 231.

290 *Cf.* Meredith Johnson Harbach, *Outsourcing Childcare*, 24 YALE J.L. & FEM. 254 (2012) (arguing on policy grounds that outsourcing childcare and the extent of such outsourcing should be a matter of family choice, not economic or legal fiat).

291 WILLIAMS, *supra* note 3, at 40 ("The traditional feminist strategy for women's equality is for women to work full-time, with childcare delegated to the market. Economist Barbara Bergmann has christened this the 'full commodification strategy.'").

292 *Id.*

293 *Id.* at 52 (emphasis in original).

294 *See generally* ARLIE RUSSELL HOCHSCHILD & ANNE MACHUNG, THE SECOND SHIFT: WORKING FAMILIES AND THE REVOLUTION AT HOME (1989).

295 WILLIAMS, *supra* note 3, at 51.

should not demand separation of our biological capacities from the inherent nurturing component of breastfeeding as the only recourse for working women. Moreover, bottle-feeding bought or pumped milk usually assumes that someone other than a parent will be providing the nutrition.[296] What is so stark about the separation strategies in breastfeeding is that they are the *only* strategies available for most mothers in the workplace. Even when an act of nutrition is biologically tied to an act of nurture, mothers are expected to pump or purchase and not provide nurture and nutrition in the way their body is capable.

3. The Devaluing of Nurture in the Law—Between Biology and Childcare

Separation strategies are an inevitable consequence of a legal system that devalues parental care. As previously discussed, the workplace upholds the ideal worker norm, which devalues care, and the law fails to provide sufficient accommodations for parental caregiving to remedy this trend.

Undervaluing care occurs in other areas of the law as well, such as in the context of surrogacy. For example, courts undervalue gestation,[297] referring to the phenomenon as mere "incubation"[298] as opposed to a defining feature of parenthood[299] or the status of pregnant, surrogate women.[300] One court, which determined that intended parents were legal parents in gestational surrogacy, explained that the gestational surrogate was merely a caretaker, similar to a babysitter, wet nurse, or temporary foster mother, and therefore undeserving of legal status.[301] Evidently, the separation of nurture from nutrition is part of

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296 *See supra* Part III.A. While it is possible that fathers can provide valuable parental care by bottle-feeding expressed milk while the mother works, this is a relative rarity.

297 Buzzanca v. Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998); Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); Perry-Rogers v. Fasano, 715 N.Y.S.2d 19 (N.Y. 2000).

298 Surrogate Parenting Assocs., Inc. v. Commonwealth *ex rel.* Armstrong, 704 S.W.2d 209, 214 (Ky. 1986) (Vance, J., dissenting) (referring to surrogates as "human incubators").

299 For discussion of the possibility that gestation would create legal parenthood in surrogate motherhood, see SCOTT B. RAE, THE ETHICS OF COMMERICAL SURROGATE MOTHERHOOD: BRAVE NEW FAMILIES? (1994) (arguing that the woman who gives birth to the child should be considered the legal mother of the child).

300 For a discussion of the possibility of providing the surrogate mother with status vis-à-vis the child she births, even if not motherhood, see Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 IND. L.J. 1223, 1267–75 (2014).

301 *Johnson*, 851 P.2d at 786; *Surrogate Parenting Assocs*., 704 S.W.2d at 216 (Vance, J., dissenting) ("In my opinion, the safeguarding of marriage and the family is essential to the continuation of human society as we know it. The possibility of exploitation of women as surrogate mothers is totally undesirable.").

a pattern in the law of undervaluing physical care, which feminist thinkers have critiqued extensively.[302]

Moreover, caregiving is regularly undervalued in family law proceedings, such as custody and alimony.[303] Alimony awards payments to a divorcing spouse if a parent left the market due to marriage and caregiving[304] or based on partnership theories,[305] but not specifically to compensate parents for their ongoing caregiving responsibilities.[306] Caregiving is regularly deemed a private choice that is unworthy of state support or any investment beyond funding from co-parents.[307] Courts either assume that post-divorce care will be outsourced despite the high cost of daycare or simply ignore the issue as

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302 *See, e.g.*, Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 345–56 (1984–85) (critiquing the undervaluing of pregnancy and gestation in *Geduldig,* 417 U.S. 484); Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U. L. REV. 513, 533–39 (1983); Christine A. Littleton, *Restructuring Sexual Equality*, 75 CAL. L. REV. 1279, 1291, 1304–08 (1987) (critiquing use of the male norm of parenthood to define discrimination).

303 *See, e.g.*, Pamela Laufer-Ukeles, *Selective Recognition of Gender Difference in the Law: Revaluing the Caretaker Role*, 31 HARV. J.L. & GENDER 1, 33−37 (2008).

304 Joan Krauskopf, *Rehabilitative Alimony: Uses and Abuses of Limited Duration Alimony*, 21 FAM. L.Q. 573, 573–77 (1988); *see* UNIF. MARRIAGE AND DIVORCE ACT § 308, 9A U.L.A. 307 (1979); PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 5.06 cmt. a (AM. LAW INST. 2002) (identifying the expectation for rehabilitation as a rationale for the fixed term nature of the vast majority of alimony awards); Berland v. Berland, 264 Cal. Rptr. 210 (Cal. Ct. App. 1989); OR. REV. STAT. § 107.412(2) (2003) ("[I]f the . . . party receiving support has not made a reasonable effort during the previous ten years to become financially self-supporting and independent of the support provided under the decree, the court shall order that support terminated.").

305 *See* Sally F. Goldfarb, *Marital Partnership and the Case for Permanent Alimony*, 27 J. FAM. L. 351, 354–55 (1988–1989); Alicia Brokars Kelly, *Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life*, 19 WIS. WOMEN'S L. J. 141 (2004).

306 *See* Estin, *supra* note 2, at 802 ("If we believe in children, 'the family', and in marriage itself, we have no choice but to recognize these realities of family life. Thus, caregiver support remedies have a place in all family types . . . ."); Laufer-Ukeles, *supra* note 303, at 40–50 (discussing the ways in which caregiving is not expected to be compensated after divorce). *Cf.* CYNTHIA STARNES, THE MARRIAGE BUYOUT: THE TROUBLED TRAJECTORY OF U.S. ALIMONY LAW 154–165 (2014) (discussing the failure of alimony to have a consistent theoretical rationale).

307 *See, e.g.*, Ayelet Blecher-Prigat, *The Cost of Raising Children: Toward a Theory of Financial Obligations Between Co-Parents*, 13 THEORETICAL INQUIRIES L. 1 (2012) (discussing how co-parents are not expected to facilitate caregiving activities but rather only pay child support directly to children).

private and leave it to the custodial parent to resolve. The importance of past caregiving and relational attachments has also been undervalued in custody disputes. Custody awards in recent decades focus on joint custody and broad "best interests" analyses,[308] completely abandoning the primary caretaker model and approximations of past caregiving even though the American Law Institute promotes these inquiries.[309] Despite attempts to make caregiving a significant factor in awarding custody, evidenced by its explicit use as a factor in best interests analyses, concepts of fairness between parents and the importance of genetic connection that entitles non-caregivers to rights of visitation and joint custody frequently take precedence.[310] In relocation disputes, courts increasingly deem caregiving to be transferable despite attachments to the relocating parent;[311] negotiable, as custodial arrangements are rarely challenged;[312] and divisible despite the instability that relocation may cause and despite the sacrifices and investments of time and effort made by parents.[313] On the whole, care is undervalued; ignoring the fundamental nurture component of breastfeeding is analogous in this way to many other areas of law. In the next section, we demonstrate that the undervaluing of care is so pervasive that law and society are willing to forego the health and distributive benefits of accommodating breastfeeding.

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308 *See* Leslie J. Harris et al., *Child Custody*, *in* FAMILY LAW 621, 623, 694 (Leslie J. Harris et al. eds., 2005) (citing a trend toward joint custody as in the best interests of children as well as the use of broad best interests analyses as opposed to primary caretaker presumptions in all jurisdictions); Katharine T. Bartlett, *U.S. Custody Law and Trends in the Context of the ALI Principles of the Law of Family Dissolution*, 10 VA. J. SOC. POL'Y & L. 5, 26 (2002).

309 *See* Bartlett, *supra* note 308, at 15–16.

310 *See, e.g.*, Hollon v. Hollon, 784 So. 2d 943 (Miss. Sup. Ct. 2001) (listing the provision of care as one of a myriad of other factors involved in a best interest analysis).

311 *See* ALA. CODE § 30-3-169.4 (2017) (establishing rebuttable presumption that relocating is not in the best interest of the child); IDAHO CODE § 32-717(1) (2017) (not requiring a finding of changed circumstances if original custody decree was a matter of stipulation and not litigation as are most custody arrangements); MINN. STAT. § 518.175 (2017) (necessitating a court order or consent from the other parent so that a custodial parent may relocate with their children).

312 *See, e.g.*, Sara Abramowicz, *Contractualizing Custody*, 83 FORDHAM L. REV. 67, 111 (2014) ("In fact, custody agreements made at separation or divorce are routinely approved with minimal oversight.")

313 Bartlett, *supra* note 308, at 25; Martha Fineman, *Dominant Discourse, Professional Language and Legal Change in Child Custody and Decisionmaking*, 101 HARV. L. REV. 727, 728, 761 (1988) (arguing against the joint custody presumption); Elizabeth Scott & Anre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L. J. 455, 477–78 (1984).

B. Separation Strategies are an Imperfect Substitute from a Health & Distributive Standpoint

The reaction to the global push to breastfeed has given rise to two separation strategies: accommodations for expressing one's own milk and purchasing other mothers' milk. However, not only do separation strategies exclusive of parallel breastfeeding accommodations undervalue nurture and care, they promote a substitute which is not equivalent to direct breastfeeding even from a health oriented, medical standpoint as studies show reduced health benefits.[314] Moreover, the distributive effects of markets in milk are also significant. Finally, without initiating and continuing breastfeeding, as opposed to pumping or purchasing, breastmilk production will decline over time, making food availability an issue. Although separation strategies may help women to reach lactation goals, direct breastfeeding should also be an enabled option in order to provide real choices for working women.

1. Health Benefits of Breastfeeding over Separation Strategies

The focus of the health push promotes direct breastfeeding, but the resulting societal developments focus on separation strategies. While bottle-feeding one's own pumped or purchased human milk to an infant may be an important tool in providing nutrition, breastfeeding and separation strategies are not equivalent. Human milk has greater health benefits as opposed to formula,[315] but the studies driving the health push consider these benefits without considering the distinction between direct breastfeeding and bottle-feeding pumped or purchased human milk.[316] Indeed, some researchers warn that the transition to

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314 *See, e.g.*, Julia P. Felice et al., *"Breastfeeding" Without Baby: A Longitudinal, Qualitative Investigation of How Mothers Perceive, Feel About, and Practice Human Milk Expression*, 13 MATERNAL CHILD NUTRITION 124 (2017) (concluding that, although mothers find pumping useful to facilitate breastfeeding, the nature of pumping makes it an unrealistic and imperfect substitute for many mothers).

315 WHO/UNICEF, GLOBAL STRATEGY, *supra* note 1, at 10.

316 The WHO/UNICEF guidelines focus on breastfeeding alone. *Id.* The American Academy of Pediatrics recommends breastfeeding first and foremost, but also acknowledges that mother's milk alone provides nutrition. *See* AAP Policy Statement, *supra* note 5, at e827; *see, e.g.*, Campbell, *supra* note 112 (discussing how the literature surrounding the health push to breastfeed uses the term "breastfeeding" to refer to any breastmilk intake regardless of the source); C.J. Bortek, *Babies Fed Breastmilk by Breast Versus by Bottle: a Pilot Study Evaluating Early Growth Patterns*, 6 BREASTFEED MED. 117 (2011) (concluding that, in this limited study, growth differences in the first four months, although not statistically significant, indicated that bottle-fed babies were more likely to be overweight).

bottle-feeding human milk is occurring without sufficient study into the health effects.[317] Accordingly, it is difficult to distinguish between the benefits of bottle-feeding human milk and breastfeeding.

However, some benefits of the method of breastfeeding as opposed to the substance of human milk can be identified. For example, the WHO highlights the benefits of skin-to-skin contact between mother and infant.[318] Experts explain that "babies don't just breastfeed for nutrition, they nurse for comfort, closeness, soothing and security."[319] Studies indicate that babies who enjoy skin-to-skin contact are warmer, cry less, and have better-coordinated sucking and swallowing patterns.[320] Moreover, breastfeeding is less likely than bottle-feeding to result in overfeeding.[321] Bottle-feeding gives the baby less control over milk intake. Milk flows easily from a bottle nipple even when the baby is not actively sucking, and the faster flow can cause a baby to continue feeding after she is full, or the caregiver may be focused on having the baby finish the bottle as opposed to the baby taking as much as she needs. As a result, infants who are breastfed are better able to self-determine fullness as children and may have a lower risk of obesity later in life.[322] The act of breastfeeding also helps prevent rapid weight gain in infants[323] as well as coughing and wheezing episodes.[324]

Additionally, the process of mechanical extraction and storing, freezing, and thawing

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317 *See* Rasmussen & Geraghty, *supra* note 112.

318 UNICEF, *supra* note 57.

319 Sweet, *supra* note 112, at 4.

320 ER Moore et al., *Early Skin-to-Skin Contact for Mothers and their Healthy Newborn Infants*, COCHRANE (Nov. 25, 2016), http://www.cochrane.org/CD003519/PREG_early-skin-skin-contact-mothers-and-their-healthy-newborn-infants [perma.cc/ZE36-VSX2].

321 Ruowei Li et al., *Do Infants Fed From Bottles Lack Self-Regulation of Milk Intake Compared With Directly Breastfed Infants?*, 125 PEDIATRICS e1386 (2010). However, studies indicate that infants only gain more weight than breastfed babies when bottle-fed exclusively, suggesting the benefits of self-regulation learned from breastfeeding can carry over to bottle-feeding if breastfeeding is part of the baby's regular regime. *Id*.

322 Katherine I. DiSantis, *Do Infants Fed Directly from the Breast Have Improved Appetite Regulation and Slower Growth During Early Childhood Compared with Infants Fed from a Bottle?*, 8 INT'L J. BEHAV. NUTRITION & PHYSICAL ACTIVITY 89 (2011).

323 Ruowei Li et al., *Risk of Bottle-Feeding for Rapid Weight Gain in the First Year of Life*, 166 ARCHIVES PEDIATRICS & ADOLESCENT MED. 431 (2012).

324 Nelis Soto-Ramirez et al., *Modes of Infant Feeding and the Occurrence of Coughing/Wheezing in the First Year of Life*, 29 J. HUM. LACTATION 71 (2013).

breastmilk—practices common to those who express or purchase milk—may interfere with some of its beneficial properties.[325] Freezing can break down immunological cells, refrigeration can reduce ascorbic acid, and both freezing and refrigeration reduce antioxidant activity.[326] As breastmilk changes over time according to a baby's needs, pumping and storing can result in the infant being given less than optimal breastmilk.[327] In response to contact with the baby's saliva and other secretions, the mother's body produces breastmilk containing antibodies tailored to germs in the baby's environment.[328] While a bottle of milk from a previous date will provide the baby with health benefits, it will not contain the antibodies to germs to which the baby was exposed to that day. Furthermore, the process of pumping, storing and thawing increases the chances of bacterial contamination of the milk.[329]

Breastfeeding is also understood to support the development of a baby's jaw, teeth, facial structure, and speech by exercising the baby's facial muscles and promoting the development of the jaw and a symmetric facial structure. An increased duration of breastfeeding correlates with a decreased risk of the later need for braces or other orthodontic treatment.[330] Bottle-feeding requires a different tongue action than breastfeeding does, which may affect the growth and development of oral and facial tissue over time.

Moreover, studies indicate that breastfeeding carries significant benefits for mothers. Mothers who hold their babies skin-to-skin enjoy increased milk production, increased

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325 Cutberto Garza et al., *Effects of Methods of Collection and Storage on Nutrients in Human Milk*, 6 EARLY HUM. DEV. 295 (1982).

326 *Id.*; Charles Buckley, *Benefits and Challenges of Transitioning Preterm Infants to At-Breast Feedings*, 1 INT'L BREASTFEEDING J. 13 (2006); Cutberto Garza et al., *Effects of Methods of Collection and Storage on Nutrients in Human Milk*, 6 EARLY HUM. DEV. 295 (1982); Nazeeh Hanna et al., *Effect of Storage on Breast Milk Antioxidant Activity,* 89 ARCHIVES DISEASE CHILDHOOD: FETAL & NEONATAL EDITION F518 (2004) (pointing to the reduction of antioxidant activity in stored breastmilk).

327 Gaetano Chirico et al., *Antiinfective Properties of Human Milk*, 138 J. NUTRITION 1801S (2008).

328 *Id.* at 1803S.

329 Susan Landers & Kim Updegrove, *Bacteriological Screening of Donor Human Milk Before and After Holder Pasteurization*, 5 BREASTFEEDING MED. 117 (2010); Nem-Yun Boo et al., *Contamination of Breast Milk Obtained by Manual Expression and Brest Pumps in Mothers of Very Low Birthweight Infants*, 49 J. HOSP. INFECTION 274 (2001).

330 Brian Palmer, *The Influence of Breastfeeding on the Development of the Oral Cavity: A Commentary*, J. HUM. LACTATION 93 (2008) (indicating that the rate of misaligned teeth (malocclusion) requiring orthodontics could be cut in half if infants were breastfed for one year).

oxytocin release,[331] and improved mother-baby bonding.[332] Breastfeeding can provide an opportunity for heightened intimacy and bonding between mother and child.[333] Relational attachments have been proven to be fundamental to children's well-being and are also important to parents.[334] Research shows that breastfeeding directly correlates with a positive mood in mothers. One study found that, after breastfeeding, mothers experienced a reduction in perceived stress and a more positive mood. In contrast, after bottle-feeding, mothers experienced an increase in negative feelings. The researchers suggested that higher levels of oxytocin released by breastfeeding contribute to both stress reduction and improved mood.[335] The health benefits to mothers generally seem to turn on the method of breastfeeding[336] although pumping may retain some of these health benefits.

Although bottle-feeding human milk and breastfeeding are different and are associated with different health benefits as well as different levels of ease and accessibility, we note these differences only to highlight the need to enable women to engage in direct breastfeeding if they desire to undertake this method of care. There are reasons women prefer to pump milk, such as allowing fathers and other caretakers to take part in the bonding of early nutrition, but, bottle-feeding human milk and breastfeeding are not entirely interchangeable.

Assuming that a mother does not have a disease that can be transmitted through breastmilk, and is not ingesting dangerous prescription drugs,[337] illegal drugs, or alcohol, the baby's own mother's milk is preferable to other mother's milk. As long as served within a certain time frame, mother's milk is affected by the mother and child's environment as

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331 Nicole M. Else-Quest et al., *Breastfeeding, Bonding, and the Mother-Infant Relation*, 49 MERRILL-PALMER Q. 495, 496 (2003); Elizabeth Sibolboro Mezzacappa, *Parity Mediates the Association Between Infant Feeding Method and Maternal Depressive Symptoms in the Postpartum*, 10 ARCHIVES WOMEN'S HEALTH 250 (2007).

332 Moore, et al., *supra* note 320.

333 Virginia Schmied & Lesley Barclay, *Connection and Pleasure, Disruption and Distress: Women's Experience of Breastfeeding*, 15 J. HUM. LACTATION 325 (1999); West, *supra* note 277.

334 JOSEPH GOLDSTEIN, ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (1973).

335 Elizabeth Sibolboro Mezzacappa, *Breastfeeding is Associated with Reduced Perceived Stress and Negative Mood in Mothers*, 21 HEALTH PSYCHOL. 187 (2002).

336 *See supra* notes 62–63 and accompanying text (discussing the health benefits to mothers of breastfeeding).

337 Wendy Jones & David Brown, *The Medication vs. Breastfeeding Dilemma*, 11 BRITISH J. MIDWIFERY 550 (2002).

well as age, providing nutrition especially tailored for infants.[338] It is riskier to procure milk from other mothers whose health history is less known. Breastmilk may transmit diseases or be contaminated by alcohol, prescription drugs, or other substances like water or cow's milk. For-profit and online portals compensate providers, creating the risk of dilution, contamination, and disease when milk comes from unknown and untrusted sources.[339]

With increased online sales of breastmilk through peer-to-peer and informal sharing, these health concerns increase. While some online platforms recommend testing and pasteurizing received milk, the law does not mandate these safeguards but rather leaves them to the discretion of individual market participants. Breastmilk has been found to carry diseases, such as Hepatitis-B, Hepatitis-C, HTLV (T-lymphotrophic), and even HIV, and to transmit them to infants.[340] Furthermore, a recent study showed that milk provided through online websites was sometimes mixed with cow's milk.[341] Some doctors claim that there are significant health risks related to online exchange of unpasteurized breastmilk, including high bacterial growth and frequent contamination resulting from poor collection, storage, or shipping practices.[342] These concerns led the U.S. Food and Drug Administration and the AAP to recommend against purchasing human milk.[343] Despite the proposal of some solutions to these considerable health risks, it is unclear how effective and feasible they actually are.[344]

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338 *See supra* note 71 and accompanying text.

339 *See, e.g.*, Keim et al., *supra* note 237.

340 *See* Gopi Menon & Thomas C. Williams, *Human Milk for Preterm Infants: Why, What, When and How?*, 98 ARCHIVES DISEASE CHILDHOOD—FETAL & NEONATAL EDITION F559 (2013).

341 Keim et al., *supra* note 237.

342 *Id.* at e1160.

343 The FDA has issued a warning regarding the risks of obtaining human milk from sources such as the Internet. *See Use of Donor Human Milk*, U.S. DEP'T AGRIC., http://www.fda.gov/scienceresearch/specialtopics/pediatrictherapeuticsresearch/ucm235203.htm [perma.cc/SBG2-JDAY] (last updated Oct. 25, 2017); *see also* Susan Landers, *Warn Mothers Against Buying, Donating Breast Milk via Internet*, AAP NEWS, Dec. 2014, at 18 (commenting on the FDA warning); Allison Bond, *Got Breast Milk? Buying Human Milk Online From Strangers or Even Sharing Among Friends Puts Babies at Risk of Disease*, AAP NEWS, Sept. 2008, at 24.

344 In order to eliminate diseases like HIV that can be transferred by breastmilk, blood testing and pasteurization is necessary. *See* HUM. MILK BANKING ASS'N OF N. AM., GUIDELINES FOR THE ESTABLISHMENT AND OPERATION OF A DONOR HUMAN MILK BANK 16 (2013) [hereinafter HMBANA, GUIDELINES]; Susan L. Orloff et al., *Inactivation of Human Immunodeficiency Virus Type I in Human Milk: Effects of Intrinsic Factors in Human Milk and of Pasteurization*, 9 J. HUM. LACTATION 13, 16 (1993). In milk banks, for instance, milk is pasteurized, although online and other free markets do not usually share this control. Moreover, milk banks also

2. Cost, Distributive Effects & Availability

Breastfeeding is costly because it necessitates the investment of women's time, energy, and labor. By failing to provide breastfeeding accommodations, the law makes breastfeeding even more expensive, particularly for poor, low-income mothers who need to return to work sooner after birth. Currently only 14% of employers in the United States offer paid leave of any length beyond short term disability benefits. Considerable disparities underlie this statistic; 14% of management and professional women receive paid leave of some duration compared with only 4% of industrial workers and only 5% of those earning less $15 an hour.[345] The burden of breastfeeding also disproportionately burdens minority groups. On average, 30% of mothers take no maternity leave at all after birth, but when this statistic is characterized by race, it reflects that 40% of Hispanic women, 31% of African American women, and 27% of white women take no leave.[346] Low-income, single, and minority women are less likely to procure jobs that afford them paid leave, making their ability to initiate breastfeeding low.[347] Given their limited power in the workforce, it may also be harder for low-income mothers to negotiate part-time work and such work may be economically unfeasible. Educated, married, and wealthier women have higher rates of initiating and continuing breastfeeding than less-educated, single, non-white, lower-income mothers.[348] Class, thus, has a dramatic effect on the initiation and duration of breastfeeding.

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bacterially test milk even after pasteurization and it is not dispensed until the bacteriological count is zero. *Id.* at 23. Also, the process of flash-heating can eliminate the threat of HIV contamination in breastmilk. However, the methods used for pasteurization and processing human milk in milk banks does reduce the beneficial qualities of human milk. *See* Sarah Yang, *HIV in Breastmilk Killed by Flash-Heating, New Study Finds*, U.C. BERKELEY NEWS (May 21, 2007), http://www.berkeley.edu/news/media/releases/2007/05/21_breastmilk.shtml [perma.cc/BF6E-SV4C]. However, pasteurization and bacterial testing may not be entirely fool-proof. *Id.* The fact that, despite pasteurization, milk banks still require blood tests can be understood to hint at these concerns. HMBANA, GUIDELINES, *supra*, at 16. Although milk bank donors are instructed not to pump after consuming alcohol, smoking tobacco, or taking drugs, it cannot be ensured that they comply or are truthful, especially if there is a promise of cash payments. *Id.* at 12–15 (discussing the need to exclude donors who use certain drugs, vitamins, alcohol or nicotine or have had certain diseases based on oral interviews). These concerns can be contained although they cannot be eliminated. *See* Waldeck, *supra* note 257, at 375–76.

345 U.S. DEP'T HEALTH & HUM. SERVS., THE SURGEON GENERAL'S CALL TO ACTION TO SUPPORT BREASTFEEDING 30 (2011).

346 U.S. DEP'T HEALTH & HUM. SERVS., WOMEN'S HEALTH USA 2011 54 (Oct. 2011).

347 Christup, *supra* note 101, at 480 n.67; *see* Cahn & Carbone, *supra* note 140, at 62; O'Leary, *supra* note 140; Selmi & Cahn, *supra* note 140, at 16.

348 Karin & Runge, *supra* note 100, at 334–35; Kolinsky, *supra* note 103, at 346.

Separation strategies also play out differently for different groups and are likely to be more expensive than breastfeeding, creating distributive effects and threats to food availability. Pumping and purchasing involve external costs that may not be available to many mothers. Specifically with regards to expressing accommodations, many low-paid mothers, who are disproportionally minorities, are exempt from the coverage of these ACA provisions altogether.[349] Even for mothers who are eligible to take pumping breaks under the ACA, the cost falls disproportionately on low-income women; pumping breaks are unpaid, making this accommodation expensive and unfeasible. Low-income mothers are also more likely to work in jobs such as services and waitressing, in which private spaces to pump are rare, making their ability to express milk low. Moreover, since there is no definition of what constitutes a "reasonable break time" and given low-wage workers' generally limited negotiation power, sufficient time to pump may be hard to ensure. While breastfeeding and pumping are costly, it seems that purchasing human milk does not resolve this problem, and may even compound it.

Milk from a nonprofit milk bank sells for about $5 an ounce, which could result in costs of $150 a day, or more than $50,000 a year. Direct purchases over the internet cost from $1–3 an ounce, but this milk is unregulated and untested.[350] Babies consume between nineteen and thirty ounces of milk per day between one and six months, on average. If a family buys milk at $2 per ounce, they will pay $50 per day, or $1,500 per month. By contrast, formula costs $100 per month.[351] Therefore, human milk may be an option only for the wealthy, creating a hierarchy in infant nutrition. Based on historical analyses,[352] there is also concern that poorer women will become suppliers of breastmilk for wealthier women, perhaps foregoing breastfeeding their own children, and creating a hierarchy of breastmilk availability.

Finally, breastfeeding provides a greater source of food security than separation strategies for those who want to avoid formula. Expressing milk is criticized for being more taxing and less pleasurable.[353] This activity involves securing women's breasts to

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349 *See supra* note 199 and accompanying text.

350 Courtney Jung, *The New Business of Breast-Feeding*, TIME (Jan. 7, 2016), http://time.com/4170782/the-new-business-of-breast-feeding/ [perma.cc/AJ9B-3DWG].

351 *See* JUNG, *supra* note 8, at 162.

352 *See generally* JANET GOLDEN, A HISTORY OF WET-NURSING IN AMERICA, FROM BREAST TO BOTTLE (1996) (describing how, historically, poor women acted as wet-nurses for wealthier families).

353 Sweet, *supra* note 112, at 5.

an electronic machine for a sterile process that they describe as awkward, uncomfortable and sometimes painful and involves uncertain degrees of effectiveness in terms of milk production.[354] Expressing is also time-consuming because it separates the extraction of breastmilk from the feeding of breastmilk. The positive emotional effects of breastfeeding on mother and baby are diminished, even if some of the nutritional properties remain.[355] Therefore it is not surprising that women who pump, especially if they do so exclusively, express frustration and exhaustion with the process and usually wind up breastfeeding for a shorter period of time.[356] Once babies are bottle-fed, it is difficult for most to perform suckling, which lowers breastfeeding rates.[357] Thus, although separation strategies can be beneficial, overall, enabling breastfeeding can provide more security for infants regarding health, intimacy, and the simple availability of human milk.

C. The Risks and Obstacles in Accommodating Nurture

Facilitating breastfeeding, as opposed to relying on separation strategies to enable breastfeeding women to remain in the labor force while continuing to provide human milk to their children, is subject to at least two significant criticisms. The first is that it might reinforce gender stereotypes and the second is that work and breastfeeding are incompatible.

1. The Threat of Stereotypes

Accommodating breastfeeding may threaten to create a generalization or stereotype in the workplace that women require more benefits and accommodations than men, making their employment costlier and less attractive to employers.[358] Similar

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354 *Id.*; *see also supra* notes 259–62 and accompanying text.

355 Schmied & Barclay, *supra* note 333.

356 Sweet, *supra* note 112, at 5; *supra* note 122 and accompanying text. Other studies indicate that pumping can cure anxiety about the sufficiency of milk and help mothers increase milk supply when they struggle to breastfeed. *See* Yiska Weisband Loewenberg et. al., *Early Breast Milk Pumping Intentions Among Postpartum Women*, 12 BREASTFEED MED. 28 (2017) (explaining that women pump post-partum to ensure sufficient nutrition for babies and to enhance milk supply).

357 *See supra* note 122 (describing how pumping can reduce milk supply over time).

358 *See* Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219, 1233–37 (2011) (discussing how careful legislation can limit the essentializing role of pregnancy accommodations); Deborah Dinner, *The Cost of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 441 (2011) (discussing the historical stereotype that women were more committed to home and the family than market work, but observing that FMLA has the potential to

to fears about pregnancy-related leave or pumping breaks, it may be argued that if breastfeeding accommodations are too generous, the benefits will become burdens to female advancement in the workplace.[359] There is debate over whether accommodations intending to help women in the workforce ultimately hurt them, but even conceding the potential risk, the push towards breastfeeding must be faced. Accommodations contend with rather than create the problem of breastfeeding and mothers' subsequent difficulties in the workplace.[360] Particularly when mothers feel so compelled to breastfeed, not providing accommodations hurts mothers' advancement in the workplace.[361] Given the universal health push and the reactions of mothers, society, and doctors, offering accommodations is likely to facilitate mothers' participation and advancement in the workforce. The benefits of breastmilk nutrition, the nurturing quality of breastfeeding, and parental care should be universalized as part of a policy response to the universal vulnerability of human beings.[362] All people need care, and the value of care should be spread as a global value instead of being borne by caregivers alone. Providing accommodations in the workplace legitimizes the breastfeeding work that mothers already perform and demonstrates how employers and the government can participate in important health and care goals.

Breastfeeding accommodations benefit mothers, in particular. However, fears of the adverse effects that accommodating breastfeeding may have on women in the workforce, whether because of stereotypes that they are not ideal workers, or because of the additional cost their work might entail, can be alleviated by focusing on accommodations centered on nurture. Accommodations for breastfeeding can be tailored to accommodate mothers' breastfeeding needs, but can also be used to support caregiving more generally for all parents. Valuing nurture in breastfeeding can help all working parents balance their

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undermine stereotypes by protecting women's ability to remain in the labor force).

359 *Cf.* Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1, 2 (2005). *But see* Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 1 (2010) (arguing that business fears of abuse of sick leave foreclose the possibility of more generous maternity leave under a regime that ties the two types of leave together).

360 For similar arguments in the context of FMLA that relate how accommodations undermine as opposed to entrench stereotypes, see *supra* note 143. *See also* Williams & Segal, *supra* note 89; Williams & Bornstein, *supra* note 92 (arguing that ideal worker norms discriminate against caregivers).

361 *See supra* Part I.

362 *See* Martha Alberston Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J. L. & FEMINISM 1 (2008). Fineman notes that "[u]nderstanding the significance, universality, and constancy of vulnerability mandates that politics, ethics, and law be fashioned around a complete, comprehensive vision of the human experience if they are to meet the needs of real-life subjects." *Id.* at 10.

caregiving and workplace responsibilities more effectively. Accommodations for childcare need not be solely for mothers, as all parents need to be present and involved to some degree to raise their children, a process of which breastfeeding is only a part. If the workplace can be made to take care roles seriously regardless of who performs them, all caregiving work, including breastfeeding, will be made easier.

2. Is it Even Possible to Accommodate Breastfeeding?

As previously discussed, the incompatibility of breastfeeding and the workplace has been largely accepted by those who have defined the workplace. In *Dike*, even though the right to breastfeed was recognized as a protected liberty interest, and the plaintiff used her own resources to have her baby delivered to the school where she worked in order to nurse in a private room, the court dismissed her constitutional claim, finding that the workplace had an interest in keeping babies away that was sufficiently compelling to overwhelm her privacy rights.[363]

This perspective is unconvincing. As we will demonstrate in Part IV, there are many accommodations for breastfeeding that are compatible with the workplace and have been used to benefit employees and employers alike. Based on a male-centered frame, the idea of caring for children and working in the market seems incompatible—most men had wives to do that for them. A workplace that takes seriously mothers' needs and is reconstructed with women's bodies in mind can support breastfeeding at work or restructure work to allow for breastfeeding.

IV. Expanding Legal Imagination: What Would Non-Separation Solutions Look Like?

In this part, we contemplate breastfeeding accommodations that do not implicitly expect mothers to pump or purchase. We reflect upon what kinds of accommodations and developments could facilitate breastfeeding without assuming separation of nurture and nutrition as the primary solution. We suggest three non-separation strategies for facilitating breastfeeding in the workplace. While it is hard to imagine these proposals to be attainable in the current political landscape, it is now that they are most needed. In this section we challenge the assumption that breastfeeding at work is inappropriate and incompatible with employment as well as discuss how market work and job success could persist while facilitating breastfeeding. In sum, we argue that this assumption stems from traditional

363 *See supra* notes 172–78 and accompanying text.

perspectives and we suggest that a reframing and restructuring of the workplace can alter this reality.

We posit that breastfeeding and the workplace are compatible. Breastfeeding in the workplace raises concerns about discomfort with "public" breastfeeding and its potential to undermine productivity. However, our suggestions do not necessitate such exposure. Furthermore, discomfort with viewing the act of breastfeeding is largely a function of social norms. Because past nudity prohibitions that included breastfeeding in public have since been repealed, such discomfort can evidently be overcome.[364] Moreover, preventing change for fear of loss of productivity misses a chance for progress. Important studies indicate that enabling breastfeeding at work may actually increase productivity.[365]

Recently, Australian Senator Larrisa Waters made history by breastfeeding her two month old daughter, Alia, in the Australian Parliament.[366] Icelandic Member of Parliament Unnur Brá Konráðsdóttir took this a step further and spoke on the Legislative podium while breastfeeding, explaining:

> [My child] was hungry, and I wasn't expecting to speak, so I started feeding her. Then a representative asked a question about a proposal I had put forward, which I had to answer. I could choose to yank her off and leave her crying with another representative, or I could bring her with me, and I thought that would be less disruptive.[367]

These women are in positions of power and can set new trends. If these women create a new reality for themselves, a restructured workplace that does not assume a male ideal worker as the norm could be envisioned and could create a new reality for all working mothers.

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364 *See supra* note 23.

365 *See, e.g.*, *Business Case for Breastfeeding*, U.S. DEP'T HEALTH & HUM. SERVS., https://www.womenshealth.gov/breastfeeding/business-case-for-breastfeeding.html [perma.cc/U77Z-7X3F] (last updated Sept. 28, 2017) (demonstrating that breastfeeding leads to lower health care spending, decreased absenteeism, increased productivity, improved morale and positive company image).

366 Amanda Erickson, *This Australian Politician Made History by Breast-Feeding in Parliament*, WASH. POST (May 10, 2017), https://www.washingtonpost.com/news/worldviews/wp/2017/05/10/this-australian-politician-made-history-by-breastfeeding-in-parliament/?utm_term=.1d10ca4ad67e [perma.cc/Q3PW-ALYS].

367 Jesselyn Cook, *Icelandic Lawmaker Breastfeeds Her Baby Like A Boss While Addressing Parliament*, HUFFINGTON POST (Oct. 14, 2016), https://www.huffingtonpost.com/entry/iceland-lawmaker-breastfeeds-in-parliament_us_58011c05e4b0162c043bd142 [perma.cc/CGU5-CTTK].

Much more could be done to make breastfeeding a reality while mothers retain their jobs and influence in the market. Structuring accommodations for breastfeeding women while enabling all caregivers to enjoy these accommodations may alleviate many of the concerns addressed in Part III.C. Without these accommodations, mothers faced with the massive health push may be pushed out of the workforce altogether. Such restructuring is warranted given the strong health push and pressures experienced by mothers in the workforce.[368] Avenues to sustain market-work and breastfeeding that simultaneously acknowledge the value of nurture in relation to the importance of market-work must be contemplated.[369]

Specifically, a workplace that acknowledges breastfeeding's benefits may provide an array of measures to enable the option for working mothers who prefer to breastfeed. These measures include paid leave, flexible schedules, part-time work, shorter work days, and on-site day care. While employers may self-regulate to tailor their accommodations to the specifics of their businesses, some government regulation may be required to catalyze and standardize accommodations to support breastfeeding. While these measures are tailored to accommodate breastfeeding and thus are gender sensitive, they can benefit caregivers regardless of sex by making the workplace a more care-friendly environment. There are three paths towards a non-separation vision of ensuring that breastfeeding is consistent with marketplace labor: (1) providing some period of paid leave to establish breastfeeding, even if pumping is ultimately going to be a necessary accommodation; (2) normalizing flex-time, part-time, and shortened days so as to minimize time away from infants and enable breastfeeding while still participating in the labor market; and (3) allowing for on-site daycare centers (or, at least, daycare centers in industrial and commercial areas) to allow for proximity to infants in order to breastfeed while in the workforce.

A. Paid Leave

While paid leave is an accommodation for caregiving more generally, paid leave can have dramatic effects on breastfeeding initiation and breastfeeding rates. Facilitating breastfeeding requires a period of leave to establish breastfeeding with a newborn. Although paid leave has been criticized for its effects on market productivity and for hampering women's job prospects and advancement,[370] some paid leave is essential to attain breastfeeding goals. Not providing paid leave makes leave unobtainable for many workers. Breastfeeding should not be a luxury for wealthy professional women, but a real

368 *See supra* Part I.

369 Renan Barzilay, *Back to the Future*, *supra* note 94; GORNICK & MEYERS, *supra* note 92.

370 Lester, *supra* note 359.

option, as recommended by doctors and international guidelines, for all. For this ideal to be a reality, leave must be paid. The United States is the only developed country in the world with no mandatory paid maternity or parental leave.[371]

Studies found that mothers who expect to return to work shortly after giving birth are less likely to initiate breastfeeding at all. If they do initiate breastfeeding, they breastfeed for significantly shorter time, usually not reaching the six months mark.[372] A study published by the CDC and Prevention's National Center for Health Statistics found that, based on data from 2006–2010, women who received twelve or more weeks of paid leave were more likely to initiate breastfeeding compared to women with no paid leave, resulting in respective initiation rates of 87.3% and 66.7%.[373] Similarly, women with twelve or more weeks of paid leave were twice as likely to breastfeed at six months compared to women with no paid leave; respectively, 50.1% and 24.9% of these women were breastfeeding at six months.[374] An investigation of the impact of the partial paid family leave in California on the duration of breastfeeding concluded that the policy increased exclusive breastfeeding through the first three, six, and nine months following birth.[375]

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371 The EU-average of paid maternity leave amounts to 21.8 weeks and the OECD average is 17.7 weeks. *Key Characteristics of Parental Leave Systems*, OECD FAM. DATABASE, http://www.oecd.org/els/soc/PF2_1_Parental_leave_systems.pdf [perma.cc/XA3M-HKGJ] (last updated Mar. 15, 2017); *10th International Review of Leave Policies and Related Research*, INTERNATIONAL NETWORK ON LEAVE POLICIES AND RESEARCH (June 2014), https://www.leavenetwork.org/fileadmin/Leavenetwork/Annual_reviews/2014_annual_review_korr.pdf [perma.cc/3CUS-M473].

372 Sara B. Fein & Brian Roe, *The Effect of Work Status on Initiation and Duration of Breast-Feeding*, 88 AM. J. PUB. HEALTH 1042 (1998); Chinelo Ogbuanu et al., *The Effect of Maternity Leave Length and Time of Return to Work on Breastfeeding*, 127 PEDIATRICS e1414–27 (2011).

373 Kelsey R. Mirkovic et al., *Paid Maternity Leave and Breastfeeding Outcomes*, 43 BIRTH 233, 235 (2016); *see also* Kelsey R. Mirkovic et al., *Maternity Leave Duration and Full-time/Part-time Work Status are Associated with U.S. Mothers' Ability to Meet Breastfeeding Intentions*, 30 J. HUM. LACTATION 416 (2014).

374 Mirkovic et al., *Paid Maternity Leave and Breastfeeding Outcomes*, *supra* note 373, at 236; *see also* Mirkovic et al., *Maternity Leave Duration*, *supra* note 373, at 417 (showing that women who returned to work before three months were significantly less likely to meet their goal of breastfeeding for three months than women who did not work).

375 Rui Huang & Muzhe Yang, *Paid Maternity Leave and Breastfeeding Practice Before and After California's Implementation of the Nation's First Paid Family Leave Program*, 16 ECON. & HUM. BIOLOGY 45–59 (2015); Ann Bartel et al., *California's Paid Family Leave Law: Lessons from the First Decade*, U.S. DEP'T LAB. (June 23, 2014), https://www.dol.gov/wb/resources/california_paid_family_leave_law.pdf [perma.cc/NA2L-KLFP].

The case of Norway exemplifies the positive relationship between paid leave and breastfeeding. Norway provides very generous leave policies: 49 weeks at 100% pay coverage and 59 weeks at 80% pay coverage.[376] WHO identified Norway as having high rates of both initiation (99% of Norwegian mothers initiate breastfeeding) and duration of breastfeeding (at 6 months, 80% of Norwegian mothers still breastfeed).[377] Sweden, which also grants extensive paid leave of 55 weeks,[378] shows similar rates of initiation (98%) and duration (53% at 6 months).[379] Of course, not all countries show such a stark relationship between the length and availability of paid leave and breastfeeding,[380] but it is fair to assume that, for the 71% of American mothers who labor in the workforce, paid leave would make the AAP guideline of 6 months of exclusive breastfeeding more attainable.

While a few states offer partial wage replacement for a number of weeks,[381] private employers are making strides to provide more generous paid leave. For example, Change.org offers both parents 18 weeks of fully paid paternal leave.[382] Parents at Google are afforded 12–18 weeks paid parental leave, and Twitter offers 20 weeks of paid leave.[383] Despite this isolated progress, paid parental leave is overdue to be more uniformly provided in the United States.

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376 *Parental Benefit*, NAV (July 19, 2013), https://www.nav.no/en/Home/Benefits+and+services/Relatert+informasjon/parental-benefit [perma.cc/AV4A-LFJ4]. Out of this period, maternal and paternal quotas are 10 weeks each. *Id.*

377 *An International Comparative Study into the Implementation of the WHO Code and Other Breastfeeding Initiatives*, AUSTL. GOV'T DEP'T HEALTH (May 3, 2012), http://www.health.gov.au/internet/publications/publishing.nsf/Content/int-comp-whocode-bf-init [perma.cc/MBE7-P56C].

378 OECD FAM. DATABASE, *supra* note 371.

379 *Breastfeeding Statistics for Sept. 15, 2003*, LA LECHE LEAGUE INT'L, http://www.lalecheleague.org/cbi/bfstats03.html [perma.cc/XP5L-7FVV].

380 Countries with better support systems for mothers, like paid maternity leave, show a higher percentage of continuing breastfeeding. *Breastfeeding Rates*, OECD FAM. DATABASE (Jan. 10, 2009), http://www.oecd.org/els/family/43136964.pdf [perma.cc/B7F7-BUM8].

381 *See supra* notes 136 and 142.

382 Dana Covet, *7 Mom-Friendly Companies that are Redefining the Workplace*, MYDOMAINE (Aug. 3, 2015), http://www.mydomaine.com/best-companies-for-moms/ [perma.cc/2PHH-CG86].

383 *Id.*; *see also* Heidi Erdmann-Sullivan, *10 Companies Making Care Benefits Work*, CARE@WORK (July 19, 2017), http://workplace.care.com/companies-with-care-benefits [perma.cc/S9X7-5MP8].

B. Flexibility, Part-Time, and Reduced Hours

Ideal worker norms, illustrated above, evaluate job commitment and performance based on herculean time commitments.[384] The hours now worked by the average American amount to roughly five extra work weeks for the Swedish worker and are significantly higher than those worked in Canada, the United Kingdom, Germany, or France.[385] These ideal worker norms make breastfeeding difficult for mothers. Moderating these norms would advance the accommodation of breastfeeding and caregiving more generally. Some scholars argue for making work hours more flexible, while others argue for reduced schedules altogether.[386]

Because breastfeeding is dependent on feeding at regular intervals, a flexible schedule where employees have control over their own work hours may better allow for managing breastfeeding alongside market-work. Generally, more professional women and women with more flexibility in work hours fare better with breastfeeding.[387] Scholars note that flexibility may be a viable option in a variety of professional contexts, such as high-level professional jobs, manufacturing or clerical work, and in both large and small businesses.[388] In the United Kingdom, employers are required to consider employee requests regarding work schedule adjustments due to caregiving responsibilities.[389] Part-time schedules have been shown to increase breastfeeding duration and initiation.[390] Part-time work and telecommuting could both retain market attachment while also allowing mothers to be home more for nursing during their child's infancy.[391]

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384 Abrams, *supra* note 3.

385 Renan Barzilay, *Back to the Future*, *supra* note 94, at 411.

386 JENNIFER NEDELSKY & TOM MALLESON, A CARE MANIFESTO: PART TIME FOR ALL (forthcoming 2018); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881 (2000).

387 Hansen, *supra* note 105, at 894–95.

388 WILLIAMS, *supra* note 3, at 86–87.

389 Alexadra T. Beuregard & Lesley C. Henry, *Making the Link Between Work-Life Balance Practices and Organizational Performance*, 19 HUM. RES. MGMT. 9–22 (2009).

390 *See* Bidisha Mandal et al., *The Differential Effects of Full-Time and Part-Time Work Status on Breastfeeding*, 97 HEALTH POL'Y 79 (2010).

391 For a list of companies offering part-time and work-from-home options, see Laura Shin, *Work from Home: The Top 100 Companies Offering Flexible Jobs In 2014*, FORBES (Jan. 17, 2014), https://www.forbes.com/sites/laurashin/2014/01/17/work-from-home-the-top-100-companies-offering-flexible-jobs-in-2014/#436a105775f0 [perma.cc/355L-4ND8].

According to a recent study, a large majority of employers in the United States offer some employees flexible work arrangements to manage their schedules.[392] Some states like Vermont and cities like San Francisco and Berkeley recently issued laws granting a right to request flexibility,[393] and President Obama issued a Presidential Memorandum granting federal employees the right to request flexibility.[394]

However, flexible work policy usage rates are low; only eleven percent of full-time workers have a formal agreement with their employer regarding flexible hours.[395] Some scholars argue that employees fear engaging in flexible work arrangements because they are afraid to be stigmatized at work, and that flexibility has been associated with pay cuts and fewer promotions.[396] When the general workplace norm calls for long working hours, requests for flexibility, part time work, and telecommuting may entrench women's second class status in the workforce.[397] These options carry the risk of marginalizing workers if the workplace continues to adhere to full-time work norms. Part-time and telecommuting may offer fewer opportunities for workers to establish relationships with or to be promoted and valued by employers.[398] Moreover, sometimes, part-time work is a de facto expectation for full-time work with less pay.[399] Harvard economist Claudia Golden argues that flexibility comes at a high price when the ideal norm continues to be long hours of work and claims that flexibility requires fundamental changes in the structure of work to reduce the stigma,

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392 Kenneth Matos & Ellen Galinsky, *2014 National Study of Employers*, FAM. & WORK INST. at 18, 37 (2014), http://familiesandwork.org/downloads/2014NationalStudyOfEmployers.pdf [perma.cc/ZB3Q-F49T].

393 Charles Siegel, *Berkeley Passes Right-to-Request Law*, ONE MILLION FOR WORK FLEXIBILITY (Jan. 26, 2017), https://www.workflexibility.org/berkeley-passes-right-request-law/ [perma.cc/NS68-KNFY]..

394 Barack Obama, *Presidential Memorandum—Enhancing Workplace Flexibilities and Work-Life Programs*, 79 Fed. Reg. 36623 (June 23, 2014), https://www.federalregister.gov/documents/2014/06/27/2014-15334/enhancing-workplace-flexibilities-and-work-life-programs [perma.cc/7ZW9-PSUD]; U.S. OFF. PERS. MGMT., ENHANCING WORKPLACE FLEXIBILITIES AND WORK-LIFE PROGRAMS, Aug. 22, 2014.

395 Joan Williams et al., *The Flexibility Stigma: Work Devotion v. Family Devotion*, ROTMAN MAG., Winter 2013, at 2. A post-Presidential Memorandum pilot study by the Department of Labor confirms this finding. *See* DEMETRA NIGHTINGALE, DEP'T LAB., WORKPLACE FLEXIBILITIES, BALANCING WORK AND LIFE (2016), http://www.dol.gov/asp/evaluation/completed-studies/WFPEvaluation-Draft_3-1-2016.pdf [perma.cc/N6TA-NN6R].

396 Williams et al., *supra* note 395.

397 *See* Clare Lyonette, *Part-Time Work, Work-Life Balance and Gender Equality*, 37 J. SOC. WELFARE & FAM. L. (2015); Vicki Schultz, *Feminism and Workplace Flexibility*, 42 CONN. L. REV. 1203 (2010).

398 *See* Michelle A. Travis, *Equality in the Virtual Workplace*, 24 BERKELEY J. EMP. & LAB. L. 283 (2003).

399 WILLIAMS, *supra* note 3, at 72–74

penalty, and cost to mothers.[400] Some scholars have therefore argued for the need to shift to a norm of part-time work for everyone in lieu of the ideal worker model that prizes a 24/7 workplace.[401] They argue for offering part-time work to everyone that allows for a good job, promotion opportunities, and a reasonable wage.[402] In conjunction, these proposals posit that all adults should engage in care work comprised of emotional care, play, planning, and mundane material care, such as changing diapers or attending to feeding needs.[403] Normalization of flexible, part-time, and limited day work options for men and women could enhance the ability of mothers to breastfeed.

While a far cry from part-time work for all, Israel enables new parents returning from leave to work an hour less each day to allow breastfeeding and childcare while providing full pay.[404] Interestingly, this provision was until recently called the "breastfeeding provision" and is now called the "parenting provision" to enable a more gender neutral perspective. In Estonia, any person raising a child under eighteen months of age is granted breaks of at least thirty minutes every three hours to feed the child. In Italy, fathers can take breastfeeding breaks if mothers do not.[405] The International Labor Organization (ILO) stipulates that such a reduction of daily hours of work shall be counted as working time and remunerated accordingly.[406]

In the United States, no such federal policy exists but some companies are beginning to self-regulate in that direction. Adobe introduced a "Welcome Back" program to help employees transition back into the workplace after extended leave with part-time, flex-

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400 Claudia Goldin, *A Grand Gender Convergence: Its Last Chapter*, 104 AM. ECON. REV. 1091, 1117 (2014).

401 NEDELSKY & MALLESON, *supra* note 386. In Sweden, both parents have a legal right to reduce their working hours to 30 hours per week. However, mothers are significantly more likely to work part-time than fathers because of the full-time norm in male-dominated workplaces. Jörgen Larsson & Sofia Björk, *Swedish Fathers Choosing Part-Time Work*, 20 COMMUNITY WORK & FAM. 142 (2017); WILLIAMS, *supra* note 3, at 100 (describing a new paradigm of market work that eliminates the ideal worker by creating both a norm of flexible work schedules and a new ideal of the thirty-hour work week).

402 NEDELSKY & MALLESON, *supra* note 386. While some jobs might require short term intensity, such intensity will be offset by periods of time off, lest the intensity becomes the norm.

403 *Id.*

404 Employment of Women Law, 5714–1954, § 7 (1954) (Isr.).

405 INTERNATIONAL LABOR ORGANIZATION, MATERNITY AT WORK, 83 (2010).

406 ILO Convention No. 183, Article 10(2) (adopted June 15, 2000).

time, or work-from-home options.[407] Netflix recently announced a parental leave policy that enables employees to return to work part-time, full-time, or to take leave again as needed while maintaining their pay for one year.[408] Yet, the limits of company-based solutions are clear. At Netflix, the policy does not apply to their DVD division, comprised of entry-level, hourly paid employees, but only to high-skilled workers.[409] Normalizing a reduced work week for all workers should be encouraged if society is adamant about the global health push and enabling women's choice to breastfeed.[410]

C. On-Site Childcare and Breastfeeding on the Job

Whether the workplace is large or small, professional, service-oriented, or industrial, infants are generally not allowed to be present.[411] On-site childcare is extremely rare in the United States.[412] In the Netherlands, where generous parental leave is already in place, 12% of companies provide on-site daycare after returning to work.[413] While on-site childcare

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407 Donna Morris, *Being a Company with Heart*, ADOBE CONVERSATIONS (Apr. 4, 2017), https://blogs.adobe.com/conversations/2017/04/being-a-company-with-heart.html [perma.cc/ZS78-7ZMK].

408 Tawni Cranz, *Starting Now at Netflix: Unlimited Maternity and Paternity Leave*, NETFLIX BLOG (Aug. 5, 2015), https://media.netflix.com/en/company-blog/starting-now-at-netflix-unlimited-maternity-and-paternity-leave [perma.cc/2USH-LKP2].

409 Emily Peck, *Not All Netflix Workers Will Get 'Unlimited' Parental Leave*, HUFFINGTON POST (Aug. 6, 2015), http://www.huffingtonpost.com/entry/certain-netflix-workers-dont-get-newunlimited-parental-leave_55c38156e4b0f1cbf1e3edf6 [perma.cc/N7Z3-GEQE].

410 Some indicate the higher productivity of part-time work/reduced hours work. *See Part-Time Work*, ONE MILLION FOR WORK FLEXIBILITY, https://www.workflexibility.org/category/types-of-work-flexibility/part-time-work/ [perma.cc/6FR6-S73W]; Greg Katz, *Research Explainer: Family Focus Could Boost Employee Energy, Motivation*, ONE MILLION FOR WORK FLEXIBILITY (Sept. 19, 2017), https://www.workflexibility.org/research-explainer-family-focus-boost-employee-energy-motivation/ [perma.cc/542J-GHZT] (higher productivity due to supportive working environment for families).

411 2009 EMPLOYEE BENEFITS: EXAMINING EMPLOYEE BENEFITS IN A FISCALLY CHALLENGING ECONOMY, SOC'Y HUM. RESOURCE MGMT. (2009), https://www.shrm.org/resourcesandtools/hr-topics/benefits/documents/09-0295_employee_benefits_survey_report_spread_fnl.pdf [perma.cc/56EL-4XLX]; U.S. DEP'T HEALTH & HUM. SERVS., THE SURGEON GENERAL'S CALL TO ACTION TO SUPPORT BREASTFEEDING (2011).

412 WILLIAMS, *supra* note 3, at 86.

413 *See Reconciliation Between Work and Private Life*, EUR. COMM'N, http://ec.europa.eu/justice/gender-equality/economic-independence/economic-growth/index_en.htm [perma.cc/MY53-6HP8]; CATHERINE HEIN & NAOMI CASSIRER, WORKPLACE SOLUTIONS FOR CHILDCARE 65 (2010), http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_110397.pdf [perma.cc/V9JW-77UR]

may provide benefits to companies like improved productivity or lower absenteeism,[414] only 7% of companies nationwide offer on-site daycare to employees, a percentage that has stayed constant since 2005.[415]

Having a daycare center adjacent to the workplace could enable mothers to use expressing breaks to actually breastfeed, though these breaks would be more utilized if paid. Having breastfeeding facilities (a current rarity[416]) in the daycare center or in the adjacent workplace could facilitate breastfeeding. Moreover, on-site childcare has the additional potential of being structurally more available to all workers, not only those at the top of a firm who can negotiate for flexibility of private quarters to extract milk. These facilities could symbolically transform the workplace from an ideal-worker centered arena where men's bodies and life patterns determine work-practices to a place that practically values caretaking. Daycare centers on-site or in close proximity to workplaces are an underutilized option that may increase productivity and job satisfaction for all parents.

High-tech companies, such as Google and Cisco, are reportedly among the few offering on-site childcare.[417] Intel partners with local childcare centers that are close to its offices, which give admission priority to its employees in exchange for Intel's support.[418] Beyond the high-tech industry, Patagonia enables breastfeeding mothers working in their California headquarters to bring their babies during work to be cared for by another family member or by caretakers from its on-site daycare center.[419] The Campbell's Soup corporation offers a Family Center at its headquarters for infants through kindergarten.[420] General Mills offers

414 *See generally* RACHEL CONNELLY, DEBORAH S. DEGRAFF, & RACHEL A. WILLIS, KIDS AT WORK: THE VALUE OF EMPLOYER-SPONSORED ON-SITE CHILD CARE CENTERS (2004).

415 Matos & Galinsky, *supra* note 392, at 22. Exact numbers are hard to come by, but industry experts estimate that roughly four to eight percent of employers offer on-site childcare as a benefit. *The Fortune 100 Companies that Offer On-Site Day Care to Employees*, OUTLINE (May 31, 2017), https://theoutline.com/post/1610/the-fortune-100-companies-that-offer-on-site-day-care-to-employees [perma.cc/4XZT-XBLM] (noting companies that offer on-site childcare in some of their locations).

416 *See About PIWI*, BABIES AT WORK, https://www.babiesatwork.org/ [perma.cc/53ZU-LZ7F] (indicating 200 companies with programs supporting babies at work).

417 Jennifer Alsever, *Which Tech Company Offers the Best Child Care?*, FORTUNE (Oct. 14, 2013), http://fortune.com/2013/10/14/which-tech-company-offers-the-best-child-care/ [perma.cc/L2HM-8X9L].

418 *Id.*

419 *See* Alicia Barney, *16 Companies with Innovative Parent-Friendly Policies*, PARENTS, http://www.parents.com/parenting/work/parent-friendly-companies/?slideId=53169 [perma.cc/RC5Y-7T42].

420 Julia Beck, *How Some Companies Are Making Child Care Less Stressful for Their Employees*, HARV.

access to on-site childcare and daycare for infants ages six weeks to sixteen months, and discounts at near-site childcare facilities.[421] While some companies may self-regulate in this manner, public policy may be nonetheless required to incentivize such re-imagination and re-configuration of the workplace more broadly, especially for low-wage workers.

On the whole, legislative and civil rights options for supporting breastfeeding could provide more accommodations to mothers who want to breastfeed. FMLA could be enhanced by providing paid and incremental leave, for example, and by mandating on-site daycares for large employers. If health organizations, whose pressure on women catalyzed much of the "lactivist" push, would equally push to offer a reasonable way to adhere to their imperative and provide women with a realistic option to breastfeed, this prioritization could lead to a strong legislative effort that would codify such proposals in concrete statutory language.

Ultimately, women's and work/family organizations need to make sure that health imperatives do not overshadow women's choices. While a constitutional right to breastfeed currently seems unrealistic, "rights talk" and focus on real choices may be of importance. As Robin West remarked, "rights rhetorically acknowledge what we fundamentally value."[422] Although not constitutionally protected, rights language is still a relevant and important rhetorical tool. Women have a right to control their own bodies and to breastfeed their children if they so choose. As shown, breastfeeding and the workplace need not be incompatible, so legislative measures could be provided to support breastfeeding accommodations in the workplace.

CONCLUSION

While the ACA pumping provision is important in acknowledging mothers' health and family responsibilities and markets in milk can provide human milk for women in need, these developments provide insufficient support or accommodations for mothers who wish to breastfeed. Given the health push, the relational and health deficits of separation

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BUS. REV. (Apr. 14, 2017), https://hbr.org/2017/04/how-some-companies-are-making-child-care-less-stressful-for-their-employees [perma.cc/EQK5-4EZE].

421 Covet, *supra* note 382; *see also* Lisa McGreevy, *Oh Baby! These 11 Companies Will Help You Pay for Child Care*, PENNY HOARDER (Feb. 8, 2017), https://www.thepennyhoarder.com/life/subsidized-child-care-benefits/ [perma.cc/SCB9-6LX5] (noting additional companies that offer on-site child-care).

422 Robin West, *A Right to Care*, BOS. REV. (Apr./May 2004), http://bostonreview.net/archives/BR29.2/west.html [perma.cc/89R7-3C5V].

strategies, and their costliness and the distributive concerns they raise, we should go further to restructure the workplace to enable breastfeeding. Such a reconfiguration may seem infeasible in the current political climate, but it is precisely now, amidst the massive health push and the lactivist culture that ensued, that such a discussion of breastfeeding, as part of the larger discourse on care and the workplace, is needed.