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In One Place, But Not Another: When the Law Encourages Breastfeeding in Public While Simultaneously Discouraging It at Work

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STUDENT SCHOLARSHIP

IN ONE PLACE, BUT NOT ANOTHER: WHEN THE LAW ENCOURAGES BREASTFEEDING IN PUBLIC WHILE SIMULTANEOUSLY DISCOURAGING IT AT WORK

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ABSTRACT

In this Essay, the author takes a novel approach to the topic of breastfeeding and work by exploring the trend among states to exempt breastfeeding from criminal indecent exposure laws and comparing this trend to the support, or lack thereof, in laws and policy for breastfeeding at work. The author's comparison reveals that while there is a trend to support breastfeeding in public, there is no such trend in the law to support breastfeeding in the relatively more private work environment. The author argues that this disparity is both counterintuitive and serves to limit women's choices regarding breastfeeding and work. The author also provides an analysis of the law, arguing that the government action with respect to breastfeeding advances a particular public policy that limits women's choices with respect to breastfeeding at work and that furthers the already recognized divide between work and family. The author concludes with suggestions for how the government can and should use the already extant authority it holds to intervene in private employment with respect to breastfeeding and work and family policies to support work-

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place breastfeeding and to break down the divide between work and family.

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INTRODUCTION

While riding in an elevator recently, I overheard a conversation between two classmates who were shocked by the fact that our teacher had breastfed her infant son as she taught.[1] My

1. This Essay will address the topic of breastfeeding and its relationship to the larger issues of work and family as well as what the ideals of worker and mother entail. Throughout, the term "breastfeeding" will refer to the process of feeding a child directly from a woman's breast.

classmates' comments and tones revealed a dichotomy in their thought. They sanctioned the act of breastfeeding, but not the place where our teacher chose to do it — at work. This bifurcated perception of breastfeeding — the idea that breastfeeding should be done, but that it should not be done, except in certain spaces — is hardly unique. It is an idea that even the law supports.[2]

A number of recent articles and studies have been devoted to the topic of breastfeeding — whether, how, and where it should occur.[3] Numerous studies and professional organizations recognize and report the benefits of breastfeeding.[4] Breastfeeding helps to protect children against disease and infection.[5] It aids in the development of antibodies in infants' immune systems.[6] Studies also indicate that it can increase the cognitive capabilities of children.[7] Breastfeeding mothers benefit as well. Breastfeeding helps to decrease the incidence of postpartum blood loss in women.[8] Women also experience a reduced risk of ovarian and breast cancer as well as an increased sense of self-esteem.[9]

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2. *See infra* notes 23-24, 26, 29-30 and accompanying text.

3. The intersection of the law with respect to breastfeeding and work, for example, was the topic of two articles in law reviews and journals in the Spring of 2001. *See* Henry Wyatt Christup, *Litigating a Breastfeeding and Employment Case in the New Millenium*, 12 YALE J. L. & FEMINISM 263 (2000); Diana Kasdan, *Reclaiming Title VII and the PDA: Prohibiting Workplace Discrimination Against Breastfeeding Women*, 76 N.Y.U. L. REV. 309 (2001).

4. Gary L. Freed, *Breastfeeding: Time to Teach What We Preach*, 269 J. AM. MED. ASS'N, 243, 243 (1993). The American Academy of Pediatrics, the American College of Obstetricians and Gynecologists, and the American Academy of Family Physicians recommend breastfeeding. *Id.* at 243.

5. Ruth A. Lawrence, *A Review of the Medical Benefits and Contraindications to Breastfeeding in the United States*, MATERNAL & CHILD HEALTH TECH. INFO. BULL. (Nat'l Ctr. Educ. Maternal & Child Health), at 4-5 (1997). Breastfeeding protects against gastrointestinal, respiratory, and urinary tract infections. Breastfeeding has also been linked to reduced risks of cancer, insulin-dependent diabetes, and eczema in children. *Id.*

6. *Id.*

7. L. John Horwood & David M. Fergusson, *Breastfeeding and Later Cognitive and Academic Outcomes*, American Academy of Pediatrics, *Pediatrics, available at* http://www.pediatrics.org/cgi/content/full/101/1/e9 (last visited Mar. 15, 2001) (finding that, when variable factors were controlled, children who were breastfed had higher developmental scores and higher intelligence quotients than children who were not breastfed).

8. *See* DEPARTMENT OF HEALTH AND HUMAN SERVICES OFFICE ON WOMEN'S HEALTH, BLUEPRINT FOR ACTION ON BREASTFEEDING (2000) [hereinafter BLUEPRINT].

9. *Id.*

Recognizing the numerous benefits that children and their mothers derive from breastfeeding, a number of public and private organizations encourage women to breastfeed.[10] Medical manuals provide extensive training on breastfeeding for nurses, doctors, medical students, and breastfeeding educators.[11] La Leche League International devotes itself to the promotion of breastfeeding around the world.[12] Additionally, the Surgeon General has recently announced a "Blueprint" for the promotion of breastfeeding nationwide.[13] Moreover, Congress has passed legislation to acknowledge the many benefits of breastfeeding and to announce national policy in support of it.[14] The federal legislation provides funding for programs to increase the rate of breastfeeding across the United States.[15]

All of the support for and the promotion of breastfeeding might seem to provide a veritable legal mandate for allowing breastfeeding whenever and wherever it should need to occur. Instead, however, the law mirrors the dichotomy in thought expressed by my classmates. The law encourages women to

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10. *See generally* Freed, *supra* note 4.

11. *E.g.,* MARIE BANCUZZO, BREASTFEEDING THE NEWBORN: CLINICAL STRATEGIES FOR NURSES (1999); JUDITH LAUWERS ET AL., COUNSELING THE NURSING MOTHER (3d ed. 2000); RUTH A. LAWRENCE & ROBERT M. LAWRENCE, BREASTFEEDING: A GUIDE FOR THE MEDICAL PROFESSION (5th ed. 1999); JAN RIORDAN, A PRACTICAL GUIDE TO BREASTFEEDING (1991); JAN RIORDAN & KATHLEEN AUERBACH, BREASTFEEDING AND HUMAN LACTATION (2d ed. 1999).

12. La Leche League International, *What Is La Leche League International?, at* http://lalecheleague.org/whatisLLL.html (last visited Feb. 17, 2001). La Leche League, founded in 1956, dedicates itself solely to encouraging and supporting breastfeeding among women worldwide. *Id.*

13. BLUEPRINT, *supra* note 8, at 10-11 (noting that breastfeeding has been shown to reduce the incidence of diarrhea, ear and respiratory infections as well as polio, tetanus, diphtheria, asthma, and diabetes, and the Surgeon General has called for support of breastfeeding in society and in the workplace). Specifically, the Surgeon General's *Blueprint for Action on Breastfeeding* states that "significant steps must be taken to increase breastfeeding in the United States" and that "this goal can only be achieved by supporting breastfeeding in the family, community, workplace, health care sector, and society." *Id.* at 9.

14. *See* 42 U.S.C. §§ 1771-1790 (1994). In particular, the Child Nutrition Act of 1966 states that breastfeeding is the "best method of infant nutrition." *Id.* at § 1790(a).

15. *Id.* at § 1790. The legislation calls for the development of programs to promote breastfeeding. The Child Nutrition Act specifies that public funds should be used to develop breastfeeding education programs in hospitals and in health care organizations. In other words, the federal money is to be used for health care professionals to impress upon mothers the importance of breastfeeding immediately postpartum in the hospital. *Id.* at § 1790(b)(3). Notably, then, the federal money is being used to both promote breastfeeding and send a message to women about what it means to be a good mother: a good mother breastfeeds her child(ren).

breastfeed, but only in particular spaces. Given that breastfeeding has traditionally been deemed a private, domestic activity,[16] it might seem that if the law was going to support breastfeeding in spaces outside of the home, then those spaces would be the more private ones, such as the workplace. The opposite, however, is true. A relatively large number of states have laws that expressly permit breastfeedng in public,[17] whereas only one state has laws that require private employers to permit breastfeeding in the workplace.[18]

By promoting breastfeeding while simultaneously failing to support workplace breastfeeding policies, the law limits women's choices. It encourages them to breastfeed, but only at home or in public spaces. By taking this fragmented approach to breastfeeding, supporting breastfeeding but failing to encourage it in the workplace, the law helps to exclude women from work. It encourages, even pressures,[19] women to participate in an activity that very typically cannot be done at work.[20] The law provides practically no recourse for women who need to or want to breastfeed and work at the same time.[21] Women can either conform to pressures of federal breastfeeding policies and laws and breastfeed, or they can work. They cannot, however, do both with the support of the law.

This Essay will attempt to deconstruct this situation. Part I will compare trends in legislation and case law regarding breastfeeding in public spaces to legislation and case law regarding breastfeeding at work. This part will show that while many states have followed a trend to exempt breastfeeding from criminal indecent exposure laws, no such trend to permit breastfeeding at work has developed in the law. Part II will offer two possible explanations for this situation. The first of these expla-

16. NAOMI BAUMSLAG & DAI L. MICELLES, MILK MONEY AND MADNESS 193 (1995). Historically women have been relegated to the domestic sphere where they have had primary responsibility for many domestic activities such as child rearing and meal provision. *Id.* at 193. Breastfeeding is a form of both child rearing and meal provision. *Id.* at xxi. As such, it too has traditionally and persistently been considered an activity appropriate only for the home or other private spaces. *Id.* at 202-03.

17. *See infra* notes 23-24, 26 and accompanying text.

18. HAW. REV. STAT. § 378-2 (1991) (an employer who refuses to hire a woman or penalizes an employee in any way for breastfeeding has engaged in an "unlawful discriminatory practice").

19. 42 U.S.C. § 1790.

20. *See* cases cited *infra* notes 88, 91.

21. *See infra* notes 30, 32.

nations is that, given the nature and relative severity of criminal sanctions, there exists a stronger public policy mandate for altering the criminal status of breastfeeding than for interfering with employment sanctions for breastfeeding at work. The act of breastfeeding, moreover, has arguable constitutional implications that further justify eliminating the criminal punishments for the act. Even if the criminal and employment sanctions were equally severe, however, a problem would still exist with state regulation of employment regarding breastfeeding in private workplaces. Because private employers generally have the right to direct their operations free of government regulation, the state must have a significant public policy rationale to justify interfering with employers' rights of private control.[22] Thus, the second explanation is that in the context of breastfeeding in the private workplace, the state lacks a significant public policy justification for such interference. Part III will then reject the first of these two explanations as inaccurate with respect to breastfeeding. This part will also argue that the second explanation is a deceptive justification: the government, through case law and legislation regarding breastfeeding generally and at work, does not take a non-interventionist approach in the private sphere of the workplace concerning work/family issues such as breastfeeding. Instead, it furthers a particular policy regarding work and family issues. Through case law and legislation, the state supports the existing divide between work and family and the related ideal-worker and ideal-mother paradigms that serve to exclude breastfeeding, an act with arguable constitutional significance, from the workplace and thereby limit women's choices regarding breastfeeding and work/family issues generally. Part IV will suggest that since the government's intervention in the realm of private employment regarding work/family issues defeats the argument that it lacks authority to act on these issues, the state can take action to dismantle the work/family divide and the ideal-mother norm. This part will also suggest that this action should work to redefine the ideal-worker norm such that it considers and accommodates workers' care-taking responsibilities, which include, but are not limited to, breastfeeding responsibilities. Finally, this part will advance ways to advocate for and compel such state action.

22. *See, e.g.,* Priddy v. City of Tulsa, 882 P.2d 81 (Okla. Crim. App. 1994) (holding that in order to protect individual liberty, the state can only regulate the private sector if it is doing so to protect the public welfare).

I. BREASTFEED ON THE STREET, BUT DON'T DO IT AT WORK

The traditional notion that breastfeeding should only occur in private is changing, and shifts in indecent exposure laws reflect this. Currently, twenty-three states either expressly exclude breastfeeding from the language of their indecent exposure statutes,[23] or specifically identify it as a permissible act in independent statutes.[24] In these states women can breastfeed in public spaces with impunity.[25] Moreover, thirteen other states define indecent exposure such that exposure of the female breast, and therefore, breastfeeding, arguably are not acts included in those statutes.[26] Breastfeeding in public is becoming a permissible act.

The same cannot be said for breastfeeding in the private workplace. Women simply have little to no support under the

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23. FLA. STAT. Ch. 800.03 (1993); 720 ILL. COMP. STAT. 5/11-9 (West 1984); MINN. STAT. § 617.23 (1994); N.C. GEN. STAT. § 14-190.9 (1998); NEV. REV. STAT. § 201.220 (1997);; R.I. GEN. LAWS § 11-45-1 (1999); TENN. CODE ANN. § 39-13-511 (1999); UTAH CODE ANN. § 76-9-702 (1999); VA. CODE ANN. § 18.2-387 (Michie 1994); WASH. REV. CODE § 9A.88.010 (2000); WIS. STAT. § 944.20 (1996).

24. ALASKA STAT. § 29.25.080 (Michie 1998); CONN. GEN. STAT. § 46a-64 (1990); DEL. CODE ANN. tit. 31 § 310 (1997); HAW. REV. STAT. § 489-21 (2000); MO. REV. STAT. § 191.918 (West 1999); MONT. CODE ANN § 50-19-501 (1999); N.H. REV. STAT. ANN. § 132:10-d (1999); N.J. STAT. ANN. § 26:4B-4 (West 1997); N.M. STAT. ANN. § 28-20-1 (Michie 1999); N.Y. CIV. RIGHTS LAW §79-e (McKinney 1994); OR. REV. STAT. § 109.001 (1999); TEX. HEALTH & SAFETY CODE ANN. § 165.002 (Vernon 1995). The language in five of these states' statutes indicates that a woman is "entitled" to breastfeed in any public or private space. ALASKA STAT. § 29.25.080 (Michie 1998); MO. REV. STAT. § 191.918 (West 1999); N.M. STAT. ANN. § 28-20-1 (Michie 1999); N.Y. CIV. RIGHTS LAW §79-e (McKinney 1994); TEX. HEALTH & SAFETY CODE ANN. §165.002 (West 1995). States' limited authority to intervene in the operations of private employment coupled with the rather permissive nature of this language indicates that this language does not amount to a mandate to private employers to permit breastfeeding at work. Instead, it is nothing more than an acknowledgement of the rights of private employers to direct the operations of their businesses. If this direction happens to permit breastfeeding, the language of these statutes indicates that the state takes no issue with that particular employment policy. In short, these statutes provide no assistance to women who need to breastfeed at work. *See* cases cited *infra* note 61.

25. *See supra* notes 23-24.

26. ALA. CODE § 13A-6-68 (1977); COLO. REV. STAT. § 18-7-302 (1995); IDAHO Code § 18-4116 (Michie 1996); IOWA CODE § 709.9 (1978); KY. REV. STAT. ANN. § 510.150 (Michie 1974); ME. REV. STAT. ANN. tit. T. 17-A § 854 (1997); NEB. REV. STAT. § 28-806 (1977); N.D. CENT. CODE § 12.1-20-12.1 (1979); 18 PA. STAT. ANN. § 3127 (1995); S.D. CODIFIED LAWS § 22-24-1.2 (Michie 1998); W. VA. CODE § 61-8-9 (1992). The above cited statutes define indecent exposure as the exposure of the genitals. ARK. CODE ANN. § 5-14-112 (Michie 1997); KAN. STAT. ANN. § 21-3508 (1998). The above cited statutes define indecent exposure as an exposure of the sex organs.

law for making a decision to both breastfeed and work, that is, to breastfeed at work. Statutes[27] and cases[28] regarding breastfeeding at work overwhelmingly support private employment policies that prohibit women from breastfeeding at work. Only one state, Hawaii, has enacted a statute that bars employers from penalizing employees based on their decisions to breastfeed at work.[29] Four other states — Georgia, Minnesota, Tennessee, and Texas — offer varying levels of support for women who want to express breast milk at work.[30] They provide no support, however, for women who choose to breastfeed at work.[31]

Case law regarding breastfeeding at work indicates an even bleaker situation. Cases on the topic provide little to no support for breastfeeding at work.[32] The single case from the Eleventh

27. For example, even the few states that have laws offering some support for expressing breast milk at work limit the responsibilities of the employer. Employers in Georgia, Tennessee, and Minnesota do not have to provide time for the expression of breast milk if it would "unduly disrupt" the workplace. *See infra* note 30 and accompanying text.

28. *See* cases cited *infra* note 32.

29. HAW. REV. STAT. § 378-2 (1991).

30. GA. CODE ANN. § 34-1-6 (1999); MINN. STAT. § 181.939 (1998); TENN. CODE ANN. § 50-1-305 (1999); TEX. HEALTH & SAFETY CODE ANN. § 165.003 (Vernon, 1995). Only Minnesota and Tennessee go so far as to require that employers provide a place and "reasonable, unpaid" break time to express breast milk. MINN. STAT. § 181.939 (1998); TENN. CODE ANN. § 50-1-305 (1999). The Minnesota and Tennessee statutes, which are virtually identical, go on to state that if providing this break time "unduly disrupts" the operations of the employer, then the employer does not have to provide the break time. Notably, the Minnesota and Tennessee statutes are new. Enacted in 1998 and 1999, respectively, their standards (however generous) have not yet been subjected to interpretation. The Georgia and Texas workplace breast pumping statutes offer even less support. GA. CODE ANN. § 34-1-6 (1999); TEX. HEALTH & SAFETY CODE ANN. § 165.003 (Vernon 1995). The Georgia statute only states that employers "may" provide a reasonable, unpaid break for expressing breast milk. The Texas statute simply directs the Texas Department of Health to make recommendations to employers that they should support breastfeeding and breast pumping at work. Neither the Texas nor the Georgia statute imposes an obligation on employers to actually provide time to breastfeed or express breast milk.

31. GA. CODE ANN. § 34-1-6 (1999); MINN. STAT. § 181.939 (1998); TENN. CODE ANN. § 50-1-305 (1999); TEX. HEALTH & SAFETY CODE ANN. § 165.003 (West 1995).

32. *See* Baker v. Ohio Bureau of Employment Servs., 685 N.E.2d 1325, 1326-27 (Ohio Ct. App. 1996). In *Baker*, the court upheld a denial of an employee's unemployment compensation claim after she quit work because she was prohibited from breastfeeding there. The court asserted that her actions did not constitute just cause to quit. *Id.*; *see also* Wallace v. Pyro Mining Co., 951 F.2d 351, 351 (W.D.Ky. 1991) (holding that firing an employee who took unauthorized leave to breastfeed her baby, a baby who refused bottles, did not give rise to a valid sex discrimination claim); Bd. of Sch. Dir. of Fox Chapel Area Sch. Dist. v. Rossetti, 411 A.2d 486, 488-89 (Pa. 1979) (holding that firing a mother from her job as a teacher because she took leave to breastfeed her infant did not constitute unlawful discrimination on the basis of sex).

Circuit Court of Appeals that not only supported breastfeeding at work, but also found the act of breastfeeding to be a protected Constitutional right, has never been followed.[33] Instead, it has been limited.[34]

At a glance, then, the law regarding where a woman can breastfeed seems inconsistent. In at least twenty-two states, women can lawfully perform this traditionally private, domestic activity on public streets. In the typical private workplace, which is a smaller, more private space, however, women have no protection from penalties for breastfeeding — unless, of course, they live in Hawaii.[35]

II. TWO PURPORTED EXPLANATIONS

There are two possible explanations for this difference between the state's actions with respect to indecent exposure and employment laws. The first of these purported explanations is that the state has a strong public policy justification for eliminating the relatively severe penalties attached to public breastfeeding. The second purported explanation is that the state lacks any sufficiently strong justification for interfering with employment penalties for breastfeeding. Fully explaining these possible reasons requires a discussion of the severity and nature of criminal versus employment penalties as well as a discussion of the authority and justifications for government intrusion on the rights of private employers to control their businesses.

A. *The Severity and Nature of Criminal Sanctions*

Criminal sanctions result when the state brings an action against an individual for purportedly committing a crime that offends the state and its people.[36] Conviction of a crime amounts to public censure.[37] It also carries with it the possibility of monetary fines and a loss of freedom by incarceration.[38]

33. Dike v. Sch. Bd. of Orange County Fla., 650 F.2d 783 (Former 5th Cir. 1981).

34. *See* Ploski v. Feder, No. C98-2392CRB, 1999 U.S. Dist. LEXIS 2229, at *12-14 (N.D. Cal. March 1, 1999) (holding that, if a constitutional right to breastfeed exists, it does not exist on the facts of this case in which a Child Protective Services workers prevented a mother from breastfeeding because the drugs she was taking could contaminate her breast milk).

35. HAW. REV. STAT. § 378-2 (1991).

36. WAYNE R. LAFAVE, CRIMINAL LAW § 1.3 at 12 (West Group, 3d ed. 2000).

37. *Id.* at 12.

38. *Id.*

The state defines certain acts as "crimes" and subjects those acts to severe penalties in an attempt to prevent individuals from behaving in a way that society deems objectionable or dangerous.[39] The process of defining an act as "criminal," then, forces the state to interpret the public perception of that act.[40] Given the severity of criminal sanctions and the reason for their severity, a positive shift in social norms regarding a criminal act justifies state action to decriminalize it.[41] In other words, once the public gives some indication that an act is no longer objectionable, the state can justify eliminating the severe criminal penalties attached to it.[42]

Such a shift in public perception has occurred with respect to breastfeeding. Federal law,[43] as well as a number of organizations dedicated to maternal and infant health, strongly encourage women to breastfeed.[44] Given that indecent exposure laws are codified in state criminal codes and often exempt breastfeeding,[45] the changes in the public perception regarding breastfeeding have contributed to public pressure on the state to support breastfeeding.[46] This pressure has led to efforts to eliminate the punitive, criminal consequences associated with it.[47]

The decision to breastfeed and the act of breastfeeding arguably are of Constitutional stature, which only fortifies the state's justification for decriminalizing breastfeeding.[48] The deci-

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39. *Id.* at 22.

40. *Id.*

41. *Id.*

42. *Id.*

43. 42 U.S.C. § 1790 (1994). This section of the Child Nutrition Act is entitled "Breastfeeding Promotion Program." Its stated purpose is to "promote breastfeeding as the best method of infant nutrition." 42 U.S.C. § 1790(a).

44. *See* BLUEPRINT, *supra* note 8, at 9; Freed, *supra* note 4; La Leche League International, *supra* note 12.

45. *E.g.,* ARIZ. REV. STAT. § 13-1402 (1977); LA. REV. STAT. ANN. § 14:106.1 (West, Westlaw through 2000 Legis. Sess.); DEL. CODE ANN. tit.11 § 764 (1953); N.Y. PENAL LAW § 245.01 (McKinney 1984); TENN. CODE ANN. § 39-13-511 (1999).

46. Once the public learns about stories of women who have been threatened with criminal fines for breastfeeding in public, the public outcry in support of breastfeeding pressures the government to support it. Women have held "nurse-ins," demonstrations in support of breastfeeding, to vividly create this pressure on the government so that the state will support breastfeeding. *E.g., Mother's Outrage Prompts Bill on the Right to Nurse in Public*, N.Y. TIMES, Feb. 16, 1997, at A47.

47. *Id.*; *see also* LAFAVE, *supra* note 36, at 12.

48. Dike v. Sch. Bd. Of Orange County Fla., 650 F.2d. 783, 787 (Former 5th Circ. 1981) (holding that breastfeeding is a constitutionally protected liberty interest by comparing breastfeeding to other family-related privacy and liberty interests protected under the Constitution).

sion to breastfeed and the act of breastfeeding are comparable to fundamental liberty interests recognized in *Pierce v. Society of Sisters*[49] and *Griswold v. Connecticut*.[50] In *Pierce*, the Supreme Court invalidated a state law requiring that children attend only public schools.[51] The Court held that the right of parents to care for and control their children is a fundamental liberty right protected by the Fourteenth Amendment.[52] The decision to breastfeed has considerable, long-term implications that affect a child's physical health.[53] Breastfeeding helps to prevent myriad diseases, including cancer, diabetes, and asthma.[54] It also has been shown to significantly affect the cognitive development of children.[55] At least one study has shown that breastfed children have higher intelligence quotients than non-breastfed children do.[56] Parents' rights to control the decision to breastfeed, then, have as much, if not more, of an effect on the long-term well-being of their children than do parents' decisions regarding the education of their children. The decision to breastfeed, therefore, arguably constitutes a child rearing decision that is no less significant than the constitutionally protected decision to send one's child to a particular school.

In *Griswold*, the Supreme Court recognized that the marital relationship is an intimate association that the Constitution protects from unnecessary government interference.[57] Breastfeeding, like marriage, is also an intimate relationship.[58] Its intimacy is rooted in the nutritional, emotional, and psychological bonds that develop during the process of breastfeeding.[59] Thus, the arguable Constitutional significance of breastfeeding, the recognized health, developmental and cognitive implications, and the relative severity of the criminal sanctions for public breastfeeding

49. 268 U.S. 510 (1925).

50. 381 U.S. 479 (1965).

51. *Pierce*, 268 U.S. at 534.

52. *Id.*

53. *See* BLUEPRINT, *supra* note 8, at 11.

54. *See id*; Lawrence, *supra* note 5, at 4-5.

55. *See* Horwood & Fergusson, *supra* note 7.

56. *Id.*

57. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

58. *See* BAUMSLAG & MICELLES, *supra* note 16, at XXI.

59. Id. Breastfeeding is an "interactive process whereby mother and child work together." The process "nourishes the infant, protects both mother and child from a plethora of diseases, and establishes a warm and loving relationship between them." *Id.*

offer the state ample justification for abolishing any state-imposed criminal penalties for breastfeeding in public.

Because employment sanctions arguably are substantially less severe than criminal sanctions,[60] however, the state needs a more significant policy justification for interfering with them than it needs for altering the criminal penalties it imposes on certain acts.[61] An individual faces sanctions such as demotion or dismissal in the workplace,[62] but does not face imprisonment or the public censure that result from a violation of a criminal law.[63] Employment sanctions also do not subject the individual to the risk of direct monetary fines.[64] Even infringements on constitutionally protected interests by private employers do not warrant state interference against these comparatively minor employment sanctions.[65] Thus, the mere indication that public perception has shifted regarding breastfeeding, even when it arguably involves Constitutional liberty interests, seemingly does not constitute a sufficiently strong reason for the state to interfere with the relatively minimal private employment sanctions that may result from breastfeeding at work.

B. *Private Employers' Rights to Control Workplaces Free from State Interference*

While the state effectuates and controls criminal sanctions,[66] it does not generate private employment sanctions, which result

60. *See, e.g.*, Martinez v. N.B.C., Inc., 49 F. Supp. 2d 305, 307 (S.D.N.Y. 1999) (involving a mother who had to take a demotion in order to pump breast milk and accommodate her other family responsibilities). Pedrix-Wang v. Dir. Employment Servs. Dep't, 856 S.W.2d 636, 640 (Ark. App. 1993) (involving a mother who quit her job after her employer offered her a demotion in response to her request for workplace accommodations whereby she could breastfeed without exposing her to chemicals that could compromise the integrity of her breast milk).

61. *See, e.g.*, Priddy v. City of Tulsa, 882 P.2d 81 (Okla. Crim. App. 1994) (holding that the state's authority to intervene in the operations of private employers is limited such that it can only be exercised to protect the public welfare); Allinder v. City of Homewood, 49 So. 2d 108 (Ala. 1950) (holding that the state can regulate private business but only in the interest of the general welfare).

62. *See* cases cited *supra* note 60.

63. LAFAVE, *supra* note 36, at 12.

64. *See* cases cited *supra* note 60.

65. MARK A. ROTHSTEIN ET AL. EMPLOYMENT LAW § 4.1 (2d ed. 1999). Private employers, particularly if they are at-will employers, have authority to limit the Constitutional rights of their employees. *Id.* For example, employers can limit employees' First Amendment rights to free speech by imposing dress codes. *Id.* They can also limit their employees' Fourth Amendment rights to be free from unreasonable searches and seizures by imposing drug testing. *Id.* at § 4.6.

66. LAFAVE, *supra* note 36, at 13.

from a violation of policies developed by private employers.[67] Private employers not only have the right to create their own employment policies and direct the operations of their businesses, but they also have the right to do so free from the intrusion of the state.[68]

However, this right of private employers to control their operations is not absolute.[69] The state can and does intervene to regulate the operations of private employers.[70] The state, however, cannot intervene without a strong public policy justification that affects the public good.[71]

Interfering with the rights of private employers to prohibit breastfeeding at work arguably would serve no such public good.[72] It instead may likely have the negative effect of mandating disruptions at the workplace that would likely interfere with productivity. In order to breastfeed at work, babies have to be at the workplace. Smaller, more private workplace environments are particularly vulnerable to the disruptions babies frequently cause. Babies make noise.[73] They cry, and often they cry loudly.[74] They also tend to spit up, particularly after they have been fed.[75] The smell of baby spit up can be unpleasant.[76] When

67. *See* cases cited *supra* note 60.

68. *See* cases cited *supra* note 61.

69. *See* cases cited *supra* note 61.

70. *See infra* note 166 and accompanying text. The state not only intervenes in private employment, it does so in the realm of work/family issues. For example, the government has intervened in private employment on the issue of whether employees should have the right to take leave for family reasons through the Family and Medical Leave Act. 29 U.S.C. § 2601-2654 (2002).

71. *Id.*

72. While such policies would benefit individual mothers who choose to breastfeed, they do not necessarily directly benefit the public broadly. Such policies could only have a broad impact on the health and well-being of society if a great number, or most, mothers choose to breastfeed. So they are not comparable to other cases where the state has justifiably intervened to protect the public as a whole. *See generally* Mountain States Tel. & Tel. v. Pub. Serv. Comm'n of Wyo., 745 P.2d 563 (Wyo. 1987) (holding that the state could intervene to prevent monopolies even though none was present here); Steffey v. City of Casper, 357 P.2d 456 (Wyo. 1961) (holding that the state can regulate private businesses to help equalize competitive opportunities among businesses).

73. *See* MARY R. TULLEY & MARY L. OVERFIELD, BREASTFEEDING: A HANDBOOK FOR HOSPITALS 31 (1989).

74. *Id.*

75. *Id.* at 49.

76. *See e.g.,* Donaldson v. Am. Banco Corp., 945 F. Supp. 1456, 1462 (D. Colo. 1996). This case provides examples of disruptive comments made to women after they gave birth, began breastfeeding, and returned to work. One such comment illustrates the disruptive smells associated with breastfeeding and baby spit-up. A

mothers breastfeed, they have to hold babies, which can keep them from using their hands to perform their work.[77] Additionally, a woman's breast is exposed during breastfeeding.[78] Finally, bringing babies into the work environment would expose them to germs and potential infections, which could cause them to get sick and cause their mothers to take time off of work to care for them.[79] The government arguably cannot interfere in private employment policies and require that employers subject themselves to these types of productivity-inhibiting disruptions.[80]

III. INACCURATE AND SPECIOUS JUSTIFICATIONS

These justifications for the state's failure to intervene in private employment to eradicate penalties for workplace breastfeeding are inaccurate and specious. The sanctions that result from a worker's decision to breastfeed are at least as severe, if not more severe, than the criminal penalties imposed for public breastfeeding. Moreover, the state has the authority to intervene to change these penalties. Case law and legislation regarding breastfeeding expose the state's affirmative, if unacknowledged, use of this authority.

A. *The Relative Severity of the Employment Sanctions for Breastfeeding*

Reasonable though it may seem, explaining the failure of the law to protect women from employment sanctions for breastfeeding at work by pointing to the relative severity of criminal sanctions as compared to employment sanctions misconstrues the situation. Employment sanctions regarding breastfeeding are at least as severe as, and arguably more severe than, criminal sanctions. Employment sanctions force mothers to

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fellow employee asked a co-worker: "Are you still breast feeding, Virginia? You smell like curdled milk." *Id.* at 1462.

77. TULLEY & OVERFIELD, *supra* note 73, at 7.

78. *See* La Leche League International, *FAQ on Discreet Breastfeeding, at* http://www.lalecheleague.org/FAQ/FAQdiscreet.htm (last visited Feb. 17, 2001). Regardless of whether one condones the characterization of the female breast as a sexual object, popular culture views it that way. Consequently, social mores require that a woman's breasts be covered. *See* KATHERINE DETTWYLER, *Beauty and the Breast, in* BREASTFEEDING: BIOCULTURAL PERSPECTIVES 174 (Patricia Stuart-Macadam & Katherine A. Dettwyler, eds. 1995). Thus, uncovering the breast in the workplace could offend co-workers because it would violate this social norm. *Id.*

79. La Leche League International, *FAQ on Prevention of Illness, available at* http://lalecheleague.org/FAQ/prevention.htm (last visited Feb. 17, 2001).

80. *See* cases cited *supra* note 61.

choose whether to breastfeed or to be employed. Ultimately, this prospect coerces female employees into "choosing" not to breastfeed. By contrast, the potential for criminal sanctions if one breastfeeds in public is merely a temporary limit on mobility. It prohibits women from breastfeeding in certain public spaces. This is a restriction they can easily circumvent by leaving the restricted public space without any additional consequential penalties, much unlike workplace sanctions for the same act.

For a number of decades, courts have recognized the idea that employees are "captive" in their workplaces.[81] This concept is not novel. It is simply an acknowledgement of the fact that employers require that employees spend a certain amount of time at work.[82] Acceptable as this policy may be, courts do recognize that it leaves employees vulnerable to exploitation because employers have a significant measure of control over the actions of employees during this time.[83] Moreover, many, if not most, employees are dependent on their paychecks; for them, having a job is a necessity. This situation leaves employers with the power to impose restrictions on employees — even restrictions that impact employees' choices regarding their lives outside of work.[84] Thus, courts, as well as the National Labor Relations Board, have sought to protect employees from exploitation and coercion due to this vulnerability that is incident to their status as employees.[85]

Breastfeeding mothers, typically dependent on their jobs for survival and unable to leave work during work hours, are captive subjects of their employers' policies regarding breastfeeding at work. Because infants must be fed every three to four hours,

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81. *See* Raytheon Co. v. Int'l Union of Elec., Radio, and Mach. Workers, 160 N.L.R.B. 1603, 1610 (1966) (holding that the employer engaged in illegal captive audience speeches just before a vote to unionize workers); Peerless Plywood Co. v. United Furniture Workers of Am., 107 N.L.R.B. 427 (1953).

82. *See* cases cited *supra* note 81.

83. *See* cases cited *supra* note 61. Employers have the right to direct their businesses as they please free of state intervention absent a reason affecting the public good. Employers can, then, control actions of employees without state regulation as long as they are not violating the public good. *See* cases cited *supra* note 61.

84. *See infra* note 87 and accompanying text.

85. *See* DOUGLAS E. RAY ET AL., UNDERSTANDING LABOR LAW § 4.3(C)(3) (1999). *See, e.g.*, NLRB v. Peerless Plywood Co., 108 N.L.R.B. 427 (1953). The court in *Peerless* prohibited speeches by employers within 24 hours of a union vote. The speeches were deemed particularly egregious examples of employer coercion because employees have no choice but to listen to them during work time, which can cloud the employees' choice on the issue for the vote by limiting the time that employees have to assess the information provided by their employers. *Id.* at 429.

employees who breastfeed must do so during business hours.[86] If a breastfeeding mother cannot breastfeed at work and she cannot leave work, then she cannot breastfeed during work hours. Prohibiting workplace breastfeeding can limit a woman's decision to breastfeed because employees who have chosen to breastfeed their infants can do so only during certain hours of the day, such as during non-working hours, and thus may not receive the full benefits of breastfeeding that derive from having unlimited time to breastfeed.[87] A woman's choice, then, is limited by her status as a "captive" employee who cannot leave work to escape workplace breastfeeding policies.[88]

The way that employers frame their policies regarding workplace breastfeeding can also effectively coerce a mother's choice regarding breastfeeding. The employee's vulnerability to coercion results from the timing of the situation. The employee typically asks for breastfeeding accommodations after she has accepted employment.[89] At this point, the employee has very

86. *See* TULLEY & OVERFIELD, *supra* note 73, at 32.

87. *See id.* at 49. The authors discuss whether bottle-feeding is an adequate substitute for breastfeeding during a mother's work hours. *Id.* For a mother who does not want to bottle-feed or whose baby will not bottle-feed, such a proposed solution to bottle-feed rather than breastfeed at work continues to restrict a mother's choice to either breastfeed or work. *E.g.,* Wallace v. Pyro Mining Co., 951 F.2d 351, 351 (W.D. Ky. 1991) (involving a baby that refused to take a bottle instead of breastfeeding); *see also*, Dike v. Sch. Bd. of Orange County Fla., 650 F.2d 783 (Former 5th Cir. 1981). The mother in this case had her baby bottle-fed during the day and she breastfed the baby when she returned home from work at night. Her child, however, still felt the psychological effects of not being breastfed during the day. These psychological effects could be observed. Thus, at least one of her reasons for breastfeeding — to provide psychological comfort and stability to her child — was undermined by her situation as a captive subject of her employer's policies. *Id.* at 784.

88. The facts from *Dike* provide a glaring illustration of how captive a woman can truly be in this situation. The mother involved in this case was a schoolteacher who needed to breastfeed her baby because he developed "observable psychological changes" after he began to take expressed breast milk from a bottle. Even though the mother had a duty free lunch period in which she could breastfeed her child, her employer still prohibited her from breastfeeding due to a school board policy prohibiting teachers from bringing their own children to work. So, the mother had her husband bring her child in a camper van to school so she could breastfeed him there during her duty free period. The school board prohibited this activity too because it violated a rule barring teachers from leaving the school premises during the school day. *Id.* at 784.

89. *See, e.g.,* Barrash v. Bowen, 846 F.2d 927, 928 (4th Cir. 1988) (involving a mother who was employed with the Social Security Administration for over two years when she requested leave to breastfeed her child); Pedrix-Wang v. Dir. Employment Servs. Dep't, 856 S.W.2d 636, 637 (Ark. App. 1993) (concerning a mother

limited leverage to negotiate with her employer.[90] Thus, she is vulnerable to being offered only limited accommodations, if any, for her decision to breastfeed.[91] Historically, employers have responded to requests for such accommodation with options that are financially unworkable or detrimental to an employee's career.[92] An employer's response to a woman's request to be allowed to breastfeed at work, then, can leave a woman with a coerced "choice." She can "choose" an option that will benefit the financial viability of her career, or she can breastfeed.[93] She can work to the fullness of her capacity and earning potential, or she can breastfeed. She cannot do both.

The Supreme Court has held that forcing women into effectively making this kind of choice between their control over their bodies and lives and their employment is unconstitutional.[94] In *U.A.W. v. Johnson Controls, Inc.*, the Supreme Court held that a workplace policy that prohibited women from working in positions that exposed them to lead unless the women were infertile

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who had been employed by a chemical company for approximately one and a half years when she requested workplace accommodations so she could breastfeed).

90. There are limited situations in which some employees may be able to negotiate after they have accepted employment. In situations where employees are part of unions, employees may be able to negotiate, through union representatives, with their employer after their employment has commenced. *See, e.g.*, *Barrash*, 846 F.2d at 929 (recognizing that high-level employees may also have some semblance of bargaining power); Martinez v. N.B.C., Inc., 49 F. Supp. 2d 305, 307 (S.D.N.Y. 1999) (holding that a mother who worked as a television producer at MSNBC was able to negotiate employment accommodations for her family demands).

91. *See, e.g.*, *Dike*, 650 F.2d at 785 (involving an employer that told this mother she could not breastfeed at work); Baker v. Ohio Bureau of Employment Servs., 685 N.E.2d 1325 (Ohio Ct. App. 1996) (involving an employer who had told a breastfeeding mother that she could not breastfeed at work but instead could take a six month leave or reduce her hours to part time).

92. *See, e.g.*, *Baker*, 685 N.E.2d at 1326; *see also Pedrix-Wang*, 856 S.W.2d at 638 (involving an employer that offered a demotion to a woman who requested breastfeeding accommodations at work).

93. The employer can frame the policy such that it imposes a significant disadvantage on women in the workplace that men simply do not have to confront. This is analogous to Kathryn Abrams's description of the way sexual harassment operates to the detriment of women in the workplace. Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998). Abrams argues that sexual harassment forces women to choose between self-protections and economic opportunity. *Id.* at 1197. Framing the decision to breastfeed in such a way that it forces women to choose either their health and the health of their child or their economic viability, the employer can offer men a relative advantage in the workplace. This advantage can help sustain male control over the workplace, which may disadvantage women. *Id.*

94. UAW v. Johnson Controls, Inc., 499 U.S 187, 206 (1991).

facially discriminated against women.[95] The Court held that it violated Title VII of the Civil Rights Act of 1964.[96] It held that plaintiffs like Mary Craig, who underwent a sterilization procedure to avoid losing her job, could not be forced into making such a choice.[97] The Court held that "women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job."[98] In much the same way that Mary Craig and her co-plaintiffs were illegally forced to choose between their jobs and their fertility, breastfeeding mothers are often forced to make a choice that is comparable to that of Mary Craig and her co-plaintiffs. Both choices are forced by employers. Both choices prevent a woman from making a voluntary decision about her body. In both situations a woman has to consider whether she can afford to lose her job if she decides to makes a certain choice about her body. The difference between these "choices" is that one choice regards the potential to have children and the other regards the decision to provide nutritional and health benefits to their children and themselves. This latter choice is, then, arguably no less coercive or discriminatory than the former.

Remarkably severe sanctions accompany either option — work or breastfeed — even assuming that a mother can choose and does not have to work instead of breastfeed for financial reasons. If a woman refuses to accept an employer's ban on breastfeeding and is fired, a stigma will attach.[99] She will likely have to justify her decisions to subsequent potential employers who may see her actions as nothing short of insubordination.[100] These potential employers may therefore hesitate or refuse to employ her.[101] A mother, then, faces the possibility of having her freedom to choose her occupation partially or completely limited, which is a sanction similar to the criminal penalties that

95. *Id.*

96. *Id.*

97. *Id.* at 204.

98. *Id.*

99. Blackballing in the world of employment is real. *See generally* Barbara E. Koh, *Alterations Needed: A Study of the Disjunction Between the Legal Scheme and Chinatown Garment Workers*, 36 STAN. L. REV. 825 (1984) (discussing how blackballing affects low-wage workers, such as garment industry workers). It also impacts relatively high-wage workers such as attorneys. *See* Steve French, *Pitfalls and Possibilities: A Comprehensive Look at Female Attorneys and Law Firm Partnerships*, 21 WOMEN'S RTS. L. REP. 189, 212 (2000).

100. *See* French, *supra* note 99, at 212; Koh, *supra* note 99, at 844-45.

101. *See* Koh, *supra* note 99, at 844-45.

restrict individuals' freedoms.[102] In addition to this sanction, a breastfeeding employee can suffer another sanction that resembles a criminal penalty. She may have to endure the monetary sanction of lost wages.[103]

The alternative — not breastfeeding children — cannot be characterized as any less harsh. Indeed, its harshness can exceed that of criminal sanctions because it punishes not only the mother who cannot breastfeed because of workplace restrictions, but also her child.[104] Breastfeeding provides a number of health and psychological benefits to both the mother[105] and her child.[106] The employee who follows an employer's ban on breastfeeding at work risks foregoing all of these benefits.[107] Criminal sanctions do not subject both convicted criminals and

102. *See* Burns v. Brinkley, 933 F. Supp. 528, 531-32 (E.D.N.C 1996) (holding that there is a constitutional right to pursue work); Priddy v. City of Tulsa, 882 P.2d. 81, 84 (Okla. Crim. App. 1994) (holding that the right to obtain work is an inherent liberty right).

103. *E.g.,* Baker v. Ohio Bureau Employment Servs., 685 N.E.2d 1325 (Ohio Ct. App. 1996). The appellant in *Baker* sought and was denied unemployment benefits because her reason for leaving did not meet the "just cause" standard for voluntary terminations. The employee was working when her employer told her that, in spite of the fact that she could not afford a babysitter, the employer would not accommodate her child-care needs by allowing her to bring her children to work. *Id.* at 676-77; *see also* Pedrix-Wang v. Dir., Employment Servs. Dep't 856 S.W.2d 636 (Ark. App. 1993). Here the appellant sought review of her denial for unemployment compensation. The court found that her reason for quitting her job did not meet the "just cause" standard. This employee left work because her job exposed her to chemicals that could make her breast milk unhealthy and her employer refused to accommodate her request to limit her exposure to the chemicals at work. *Id.* at 637

104. This relative harshness of employment sanctions for breastfeeding is particularly apparent in comparison to the penalties for violating indecent exposure laws. Violations of indecent exposure laws typically only constitute misdemeanor violations and so result in relatively small monetary fines or short jail sentences. *See, e.g.,* D.C. CODE ANN. § 23-1112 (1973); MICH. COMP. LAWS. § 750-335a (1970).

105. BLUEPRINT, *supra* note 8, at 10-11.

106. Lawrence, *supra* note 5, at 4-5; Horwood & Fergusson, *supra* note 7. Studies have found that breastfeeding cannot only increase the cognitive abilities of children, but it also protects against life-long and life-threatening diseases. While the physical health benefits of breastfeeding may still be achieved by bottle-feeding a child, the immediate and long-term psychological benefits would be foregone if a child were not breastfed. *See* Freed, *supra* note 4, at 243; *see also supra* text accompanying note 87.

107. While it is possible to pump breast milk so that infants can still obtain some of the benefits of breast milk, they do not obtain all of the benefits. For example, infants cannot pass germs to their mothers if they are not suckling from their breast. Mothers, then, cannot help fight infections for their infants. La Leche League International, *supra* note 79. Additionally, some babies simply will not take breast milk from a bottle. *See, e.g.,* Wallace v. Pyro Mining Co., 951 F.2d. 351 (W.D. Ky. 1991). The mother in this case needed to breastfeed because her child would not take a bottle. *Id.* at 351.

their children to health risks.[108] Employment policies that prohibit workplace breastfeeding, however, can have this kind of punitive effect. They can punish both the breastfeeding mother and her child by effectively denying them the many benefits of breastfeeding.[109]

Prohibitions on public breastfeeding do not limit or punish women in the same way that employment sanctions do. If women are prohibited from breastfeeding in public, they do not have to stay in those public areas. They have the option of going elsewhere to breastfeed. Women, then, are not captive subjects of state laws governing public spaces. Although the rules regarding breastfeeding in public may be inconvenient, women can work around them. Because they can freely leave the public spaces where breastfeeding is prohibited, their choice to breastfeed itself is not constrained. In contrast, women who want to breastfeed in the workplace cannot avoid limitations on their choice to breastfeed that private employment prohibitions on breastfeeding impose. Thus, the effects of prohibitions on workplace breastfeeding are arguably more severe than the sanctions for and effects of any restrictions on public breastfeeding.

Such severe sanctions simply are not warranted for an act that not only benefits two lives in terms of their health and well-being,[110] but also arguably implicates Constitutional privacy and liberty interests.[111] The Constitution protects the intimacy of the marital relationship and parents' rights to direct the upbringing of their children. Breastfeeding forms an intimate family relationship comparable to a marital relationship and implicates parents' rights to make decisions regarding the upbringing of their children.[112] As such, it has Constitutional implications and so is an activity that has been inappropriately subjected to severe, criminal-like sanctions.[113]

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108. LAFAVE, *supra* note 36, at 12-13.

109. *See* BLUEPRINT, *supra* note 8, at 10-11.

110. *See id.*; Lawrence, *supra* note 5, at 4-5; Harwood & Fergusson, *supra* note 7.

111. *See* Griswold v. Connecticut, 381 U.S. 479 (1965); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Dike v. Sch. Bd. of Orange County Fla., 650 F.2d 783 (Former 5th Cir. 1981).

112. *Dike*, 650 F.2d at 787.

113. LAFAVE, *supra* note 36, at 22.

B. *The Established Authority of the State to Intervene in Private Employers' Breastfeeding Policies: An Illustration of the Work/Family Divide*

The state also cannot justify its failure to provide protections for workplace breastfeeding by asserting its lack of authority to regulate private employment policies regarding breastfeeding. The state already regulates private employment by reinforcing bans on workplace breastfeeding. Moreover, the state intervenes by actively promoting two mutually exclusive norms — the ideal-worker and the ideal-mother norms — that exemplify the work/family divide and serve to marginalize women from the workplace. This subsection will begin by providing context on the work/family divide and how it functions with respect to the ideal-worker and ideal-mother norms. It will then offer examples of case law and legislation that support the contention that the state not only has the authority to intervene in private workplace policies regarding breastfeeding, but that it already does so in a way that maintains the work/family divide.

1. The Work/Family Divide and the Ideal-Worker and Ideal-Mother Paradigms

A number of feminists have written about the divide that exists between the structures of work and family.[114] The work/family divide centers on the notion that two separately functioning types of work exist: domestic work and paid work.[115] This understanding about work developed with industrialization, which created paid employment opportunities outside of the home.[116] Paid work, valued by the wages offered for doing it, came to be considered legitimate work.[117] Men assumed the available paid-worker roles and women remained in the domestic sphere doing unpaid household and care-taking work.[118] Thus,

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114. *See, e.g.*, Nancy E. Dowd, *Resisting Essentialism and Hierarchy: A Critique of Work/Family Strategies for Women Lawyers*, 16 HARV. BLACKLETTER L.J. 185 (2000); Maxine Eichner, *Square Peg in a Round Hole: Parenting Policies and Liberal Theory*, 59 OHIO ST. L.J. 133 (1998); Mary Joe Frug, *A Postmodern Feminist Legal Manifesto* (an unfinished draft), 105 HARV. L. REV. 1045 (1992); Joan Williams, *Market Work and Family Work in the 21st Century*, 44 VILL. L. REV. 305 (1999).

115. *See* ALICE KESSLER-HARRIS, WOMEN HAVE ALWAYS WORKED 4 (1981).

116. *Id.*

117. *Id.*

118. *Id.*

geography separated legitimate work from domestic work, and gender separated legitimate workers from domestic workers.[119]

This work/family divide still persists today.[120] The norms of the ideal worker and the ideal mother exemplify the divide.[121] These norms embody the quintessential roles associated with the separate spheres of paid work and domestic, family work.

Exactly how the ideal worker is defined varies by the job.[122] It nevertheless has essential characteristics that transcend all job types and levels.[123] The ideal worker is always fully devoted to the job during work hours.[124] The ideal worker has no time for childrearing while on the job and typically has very little time for it during non-work hours.[125] The ideal worker does not miss job-related meetings.[126] The ideal worker acquiesces to the concept of "employer entitlement," the idea that employers are entitled

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119. *Id.*

120. Women in popular culture continue to espouse the idea that work and family are separate and that women bear the primary responsibility for child-care. Movie star Jamie Lee Curtis, for example, recently announced that she may give up her successful career to care for her children. Ms. Curtis noted her concern that mothers are neglecting their roles in order to work. *More Family Time*, NEWS & OBSERVER (Raleigh, NC), March 8, 2001 at 2A. Moreover, studies show that women still spend twice as much time on child-care and household work as do men. This suggests that regardless of whether they work, and especially if they do work, women must still take care of the domestic and family needs. Work Force Development, *Mid-Career Women Face Distinct Challenges in Advancing Leadership*, *at* http://www.wfd.com/pressreleases/3fr.htm (last visited Feb. 18, 2001).

121. *See* Joan Williams, *Toward a Reconstructive Feminism: Reconstructing the Relationship of Market Work and Family Work*, 19 N. ILL. U. L. REV. 89 (1998); Adrien K. Wing & Laura Wesselmann, *Transcending Traditional Notions of Mothering: The Need for Critical Race Feminist Praxis*, 5 J. GENDER RACE & JUST. 257 (1999).

122. *See* Williams, *supra* note 121, at 95. Some of the characteristics of the ideal worker norm, such as the necessary ability to travel, typically only apply to jobs that pay high salaries and carry prestige, such as executive level jobs. *Id.* Yet, studies have found that shift workers feel the burden of work/family conflicts acutely. Work Force Development, *Study Finds Corporate Work-Life Programs Fail to Meet the Needs of Shiftworkers, at* http://www.wfd.com/worklife/worklife.fr.htm (last visited Feb. 18, 2001).

123. A recent study by the Dupont Corporation found that manufacturing workers have numerous problems with the work/family balance, suggesting that they too are held to the ideal worker norms to the detriment of family responsibilities. Work Force Development, *Dupont Study on Work-Life Initiatives, at* http://www.wfd.com/worklife/worklife.fr.htm (last visited Feb. 18, 2001). The ideal worker norm and the work/family conflicts it creates, then, are by no means limited to upper echelon employment positions.

124. *See* PATRICIA A. MCBROOM, THE THIRD SEX 27 (1992); Williams, *supra* note 121, at 95.

125. *See* Williams, *supra* note 121, at 95.

126. *Id.*

to demand that their workers comply with the ideal-worker paradigm while they work.[127]

Similarly, the ideal-mother norm encompasses a number of qualities that apply to all women but are particularly onerous for women of minority or low-income status.[128] The ideal mother is female; that is, the ideal prescribes the notion that only women can truly fulfill its requirements.[129] The ideal mother spends all of her time selflessly devoted to her child(ren).[130] She is the primary caretaker of those children.[131] In much the same way that ideal workers acquiesce to employers' expectations of entitlement, the ideal mother acquiesces to the notion that her children are entitled to her devotion and her time.[132]

Notably, the significant aspects of the ideal-worker and the ideal-mother norms are largely the same. The ideal-worker and ideal-mother paradigms both require devotion by the ideal worker and the ideal mother to those persons — employers and children, respectively — entitled to their service.[133] A woman cannot be an ideal mother, unreservedly devoting herself full time to her children, however, and simultaneously devote her undivided attention to her job during work hours. One simply cannot be completely devoted to two things at once.[134] Thus, women cannot be both ideal workers and ideal mothers.[135] The ideals, then, are mutually exclusive. Consequently, mothers who work inevitably fall short of both the ideals.

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127. *Id.*

128. Wing & Wesselmann, *supra* note 121, at 273. Black mothers have traditionally been considered the "epitome of bad mothers." *Id.* at 259. They are held to the ideal-mother standard even though they are almost inevitably doomed to fall short because they are forced to participate in strenuous, low wage (or in the period of slavery, no wage) work. A study reported by Work Force Development also found that female shift workers, when compared to all employees, are three times as likely to be single parents. Work Force Development, *supra* note 122. Shift workers who are also mothers are more likely, therefore, to be solely responsible for financially supporting their children. They cannot live up then to the ideal-mother norm. *Id.*

129. Wing & Wesselmann, *supra* note 121, at 258.

130. McBroom, *supra* note 124, at 118.

131. Naomi R. Kahn, *Gendered Identities: Women and Household Work*, 44 Vill. L. Rev. 525, 528 (1999).

132. McBroom, *supra* note 124, at 118.

133. *See* McBroom, *supra* note 124, at 118; *see also supra* text accompanying notes 122, 123.

134. Eichner, *supra* note 114, at 146-147.

135. *See* Williams, *supra* note 114, at 314 (asserting that the economic realm has been divided into "mothers and others").

2. Supporting the Work/Family Divide and the Ideal-Worker and Ideal-Mother Paradigms Through State Interference in Private Workplace Breastfeeding Policies

The state has supported this work/family divide and the corresponding ideal-worker and ideal-mother paradigms through both case law and legislation governing workplace breastfeeding. The language and holdings of two cases unambiguously depict how the state has intervened in private employment to support prohibitions on workplace breastfeeding.[136] They further show that the state promotes the work/family divide as well as the ideal-worker and ideal-mother paradigms.

In *Baker v. Ohio Bureau of Employment Services*,[137] a mother appealed denial of unemployment compensation by the Ohio Bureau of Employment Services. She applied for unemployment compensation after she quit her job as an office manager because her employer told her that she could neither breastfeed her infant child at work nor allow her teenage children to come to work during after-school hours.[138] Under Ohio law, an individual who has voluntarily terminated her own employment without "just cause" is not entitled to unemployment compensation.[139] Upholding the Bureau's denial of benefits, the Ohio Court of Appeals stated that the mother's reasons for quitting her job did not constitute just cause.[140] The court held that the employee's reasons for leaving her job did not meet this standard because her employer offered her temporary leave or part-time work to deal with her child care concerns and she refused to accept either option.[141]

In making this determination, the court failed to consider important issues regarding this employee's situation. Her financial constraints would likely have prevented her from accepting the employer's offer for leave or part-time work.[142] She only made $4.75 per hour, the minimum wage. Yet she had to support

136. Baker v. Ohio Bureau of Employment Servs., 685 N.E.2d 1325 (Ohio Ct. App. 1996); Pedrix-Wang v. Dir., Employment Serv. Dep't, 856 S.W.2d 636 (Ark. App. 1993).

137. *Baker*, 685 N.E.2d. at 1326.

138. *Id.*

139. OHIO REV. CODE ANN. § 4141.29(D)(2)(a) (Baldwin 2001).

140. *Baker*, 685 N.E.2d at 1327.

141. *Id.*

142. *Id.*

herself and her three children.[143] She could not have done that by reducing her hours in half at this wage since, as her employer was aware, she could not have even afforded to pay for a babysitter with her full-time wages.[144] A six-month leave of absence would have been equally unfeasible. Her child-care responsibilities simply would not have ended after six months. The court not only failed to consider these aspects of the mother's case, but it also implied that her failure to accept the employer's proposals constituted a rejection of all reasonable options. The court stated that these options amounted to an offer of "everything possible to accommodate" the mother and that the mother's rejection of them proved that she "did not desire in any way to accommodate her employer."[145] In other words, the court suggested that, even though the employer did no more than offer options that would continue to keep family and work separate, the employer went beyond the call of duty and did everything imaginable to accommodate the mother.

These options offered her, however, did not constitute all that the employer could have done to accommodate the mother. The employer could have accommodated her family demands at work while letting her continue to work full time. This employer could have continued to allow her to bring her children to work and breastfeed her baby there. Also, the employer could have entered into a discussion with her regarding compromise solutions to the situation. The court, though, never considered these alternatives and thereby sent an unmistakable message: if a mother wants to devote herself to her children, she cannot do it on work time. She cannot be an ideal worker and an ideal mother at the same time because work concerns and family concerns are distinct. If she wants to care for her children, she must leave the workspace to do so even if that means she will be leaving permanently.

In *Pedrix-Wang v. Director, Employment Services Department*,[146] Jolie Pedrix-Wang also appealed her denial of unemployment compensation after she quit her job as a chemist at Cyro Industries (Cyro). Arkansas unemployment law states that employees who voluntarily terminate their employment must do so with "good cause connected to work" in order to be eligible

143. *Id.*
144. *Id.*
145. *Id.*
146. 856 S.W.2d 636 (Ark. App. 1993).

for unemployment compensation.[147] The court found that Ms. Pedrix-Wang did not quit with the requisite good cause. Ms. Pedrix-Wang left her job at Cyro because she was breastfeeding her baby and her job exposed her to certain chemicals that could compromise the integrity of her breast milk.[148] When Ms. Pedrix-Wang asked Cyro to make accommodations in her work as a chemist so that she could avoid contact with these chemicals, Cyro refused even though it had restricted her prenatal exposure to these chemicals.[149] Instead, Cyro offered Ms. Pedrix-Wang two other options.[150] Cyro informed her that she could stop breastfeeding and return to her job as a chemist without restrictions on her exposure to these chemicals.[151] Alternately, she could take a lower-level position available at Cyro that did not entail exposure to chemicals.[152] Taking this position meant accepting a demotion as well as a change to twelve-hour work shifts.[153] Finding both of these options unacceptable, Ms. Pedrix-Wang quit.[154]

Asserting that the Board of Employment Services reasonably concluded that these justifications for quitting did not constitute good cause connected to work, the Court of Appeals made it clear that Cyro asked nothing unusual of Ms. Pedrix-Wang.[155] In spite of the fact that the employer's failure to provide any accommodations to prevent the endangerment of the health of Ms. Pedrix-Wang's child was the direct cause of her voluntary termination, the court determined that this problem was a personal,

147. ARK. CODE ANN. § 11-10-513 (1987).

148. *Pedrix-Wang*, 856 S.W.2d at 637.

149. *Id.*

150. *Id.* at 638.

151. *Id.*

152. *Id.*

153. *Id.* at 640. Significantly, the facts of this case closely parallel the facts of *U.A.W. v. Johnson Controls, Inc.*, 499 U.S 187 (1991). In both cases, employers forced employees to choose between their jobs and the health of their children or potential children. In both cases, the employees faced severe repercussions for their choices. The difference in these cases, however, is that the Supreme Court held such a choice to be unlawful in *Johnson Controls* and the Arkansas Court of Appeals did not in *Pedrix-Wang*.

154. *Pedrix-Wang*, 856 S.W.2d at 638.

155. Stating that Cyro had "attempted to accommodate her by offering her another position," the court implies that Cyro's offers were reasonable. In doing so, though, the court ignores that the "accommodations" amounted to a demotion, which left Ms. Pedrix-Wang to choose between her job and the benefits of breastfeeding her child. *Id.*

not a work-related, cause for terminating her employment.[156] In doing so the court assumed that a cause could not be both personal and work-related. Thus, the court promoted a particular view of the relationship between work and family — a divided one. The court asserted that personal, family problems, even those with workplace-related causes, do not deserve workplace accommodations.[157] Moreover, it suggested that an employee who asks the workplace to breach the work/family divide by requesting that the workplace limit its negative impact on the family makes an unjustifiable demand on the workplace.[158] Thus, the Arkansas Court of Appeals also took a position on whether the ideal worker can also be the ideal mother: she cannot be both. If the workplace can justifiably deny her accommodations that would allow her to be an ideal mother while she works, then she cannot be both the ideal worker and the ideal mother. Ideal mothers then can be, and are, marginalized from the ideal-worker role and the workplace.

It can be argued that these cases are nothing more than examples of the government refusing to intervene in the policies of private employers by letting employers formulate policies as they see fit. The courts do not, though, state this non-intervention policy and then refrain from commenting on the work/family policies. Instead, they affirmatively support policies that keep paid work and family work separate and that favor the traditional ideal worker norm. In both *Baker* and *Pedrix-Wang*, moreover, the state denied breastfeeding mothers any support for workplace breastfeeding by denying them unemployment compensation.[159] In both *Baker* and *Pedrix-Wang*, then, the courts were not only supporting the private employers' decisions to divide family and work, they were affirming state action to separate

156. The court calls Ms. Pedrix-Wang's decision an "entirely personal one." *Id.* Its basis for making this conclusion is that Ms. Pedrix-Wang's decision was not the result of any doctor's order. Instead, her own research led her to decide to breastfeed. *Id.* The doctor's order would not make her decision to quit, however, any more closely connected to work. The court fails to note this problem in its definition of a "personal" decision as one not related to work, thus suggesting that its logic was forced so that it could conclude that these family concerns could justifiably be considered exclusive of work-related concerns.

157. *Id.* at 639.

158. The court insists that personal issues, however admirable, do not constitute legitimate reasons to quit work. So, Cyro was justified in its actions regarding Ms. Pedrix-Wang. *Id.*

159. Baker v. Ohio Bureau of Employment Servs., 685 N.E.2d 1325, 1326-27 (Ohio Ct. App. 1996); *Pedrix-Wang,* 856 S.W.2d at 639.

family and work in the private workplace.[160] That the states' interventions served to affirmatively reinforce the status quo does not change the fact that the state's actions were policy interventions.

The state also intervenes in private employment policies regarding breastfeeding through legislative action. Legislation regarding breastfeeding in public evidences both state support for the ideal-mother norm as well as state assertions about what private workplace policies regarding mothers should be.[161] By decriminalizing breastfeeding and concurrently promoting it through public-policy statements and government-sponsored campaigns,[162] the state makes an assertion about who the ideal mother is: the ideal mother is a mother who breastfeeds. Because an ideal mother cannot be an ideal worker, particularly if she chooses to breastfeed, state support of breastfeeding amounts to state support of women acting as ideal mothers and not as ideal workers.[163] Because women who are not ideal workers are excluded form the workplace,[164] this legislation also serves to support the marginalization of women in the workplace.[165] It excludes breastfeeding mothers and other non-ideal workers from the work sphere and consigns them to the domestic sphere.

IV. A NEW WORKPLACE, A NEW WORKER, AND A GENDER-NEUTRAL CARETAKER

The state's actions that support and promote prohibitions on workplace breastfeeding evidence its authority to intervene in private employment with respect to breastfeeding policies specif-

160. *Baker*, 685 N.E.2d at 1326-27; *Pedrix-Wang*, 856 S.W.2d at 639.

161. *See generally* sources cited *supra* notes 23-24, 26, 30-31.

162. *See* 42 U.S.C. § 1790(b)(3) (1994); BLUEPRINT, *supra* note 8, 3-4.

163. Fifteen states still include the breast implicitly or expressly in their indecent exposure laws and, therefore, potentially include breastfeeding in those criminal laws. *See, e.g.*, ARIZ. REV. STAT. § 13-1402 (1983); GA. CODE ANN. § 16-6-8 (1996); IND. CODE ANN. § 35-45-4-1 (Michie 1997); MASS. GEN. LAWS 272 § 16 (1987); MICH. COMP. LAWS § 97-29-31 (1971); WYO. STAT. ANN. § 6-4-201 (Michie 1982). In these states the ideal mother is not only not an ideal worker, she is completely relegated to the private sphere of the home.

164. *See* Eichner, *supra* note 114, at 147-48.

165. State support of breastfeeding is not negative state action in an absolute sense. It is negative because it conflicts with the ideal-worker paradigm and thus supports mothers' marginalization in the workplace. If the ideal-worker norm were redefined such that it considered family responsibilities, this effect could be avoided.

ically and work/family policies generally.[166] Instead of using this authority to prohibit breastfeeding, however, the state should use this authority to support it. Moreover, the state should exercise this authority more broadly to attack the work/family divide and to reformulate the ideal-worker norm so that it accommodates workers' care-taking responsibilities. These changes, though, will only come about when cultural reforms in the workplace and legal reforms occur. Thus, a picture of what these reforms should look like needs to be explored along with strategies for achieving these reforms.

A. *Cultural Reforms*

Workplaces can begin to dismantle the work/family divide by permitting breastfeeding at work and by allowing breastfeeding mothers to bring their children to work. Furthermore, workplaces should give mothers the choice to keep their children with them in their workspaces or to have them cared for in an on-site day care facility.[167] The workplace should also allow women to breastfeed in their workspaces if that is feasible.[168] Doing so would not cause disruptions to workplace productivity; it is entirely possible to breastfeed discreetly and non-disruptively.[169]

166. Significantly, the state has intervened in private employers' policies regarding work/family issues in a number of contexts. The Supreme Court decision in *Johnson Controls* illustrates the state's authority to intervene on behalf of women who are coerced into a choice between their bodies, childbirth and child rearing and their jobs. U.A.W. v. Johnson Controls, Inc., 499 U.S. 187 (1991). The Family and Medical Leave Act (FMLA) illustrates another instance of such government interference. 29 U.S.C. § 2601-2654 (Supp. 1977). The stated purposes of the FMLA include promoting "national interests in preserving family integrity" and helping families "balance the demands of the workplace with the needs of families." 29 U.S.C. § 2601 (Supp. 1977). Through legislation, then, the state not only determines what "family integrity" is but also demonstrates that it can intervene in conflicts between work and family.

167. Workplace accommodations of this sort are not unheard of. San Jose National Bank, for example, instituted a program that allows mothers to bring their babies into their workspaces until they begin to crawl or until they reach six months of age, whichever comes first. Marion Crain, *Where Have All the Cowboys Gone? Marriage and Breadwinning in Postindustrial Society*, 60 OHIO STATE L.J. 1877, 1957 (1999).

168. DETTWYLER, *supra* note 78, at 193.

169. There are a number of techniques that can be used to make breastfeeding unobtrusive. Moreover, infants are least likely to be disruptive when they are feeding. La Leche League International, *supra* note 78. Although some infants do have a tendency to spit up following feedings, which can result in unpleasant after-smells, this reaction can be avoided. Additionally, mothers do not have to have their movements or activities constrained by breastfeeding. The mother's breast also does not have to be exposed during breastfeeding. *Id.* Finally, the risk of babies becoming ill

The workplace should nevertheless also provide women with the option of breastfeeding in an alternative, private space in the workplace.[170] These changes would not only help to accommodate mothers' breastfeeding needs, but they would also help to ensure that women have choices regarding breastfeeding generally.[171]

While necessary, changes that accommodate breastfeeding in the workplace absent any other accommodations for work/family conflicts offer only a partial solution to the problem of the work/family divide. Accommodating workplace breastfeeding alone would constitute an accommodation for just one temporally limited aspect of female workers' care-taking responsibilities.[172] Furthermore, this unilateral focus would fail to encourage men to take responsibility for care-taking concerns and so would allow them to continue to devote themselves to paid work and to achieving the status of the traditional ideal worker.[173] Reforms focused on workplace breastfeeding policies

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due to exposure to germs, bacteria, and viruses in the workplace environment is actually counteracted by breastfeeding. La Leche League International, *supra* note 79. Thus, the risk of illness due to exposure to antigens in the workplace is not particularly significant when breastfeeding is available as a method to fight them. *Id.* The state, then, can intervene in private employment regarding the issue of breastfeeding without creating negative, disruptive effects in the work environment.

170. Such accommodations have historical precedent. During World War II, employers hired women because of the shortage of male workers. Employers helped women balance work and family by providing care-taking assistance, including nurseries for children and flexible work hours. KESSLER-HARRIS, *supra* note 115, at 141-42. These accommodations, though, are not merely relics of the past. They continue to occur. For example, a Texas organization called TG3 set up a separate space near employees' workspaces where their infants could stay until they begin to crawl. Crain, *supra* note 167, at 1957.

171. These kinds of changes must take care to avoid essentialism. They should not amount to the maternalization of the woman's body. They must recognize that some women do not want to have children, cannot physically bear them, or cannot financially support them and so should not create a mandate for motherhood or breastfeeding. MARY JOE FRUG, *A Postmodern Feminist Legal Manifesto, in* POSTMODERN LEGAL FEMINISM 138-140 (1992) (an unfinished work). The workplace, then, must clearly define these choices as that — choices.

172. Child rearing responsibilities simply do not end with breastfeeding. Workers' care-taking responsibilities, moreover, are not limited to child rearing. In a study conducted by the DuPont Corporation, sixteen percent of employees reported eldercare responsibilities. Work Force Development, *supra* note 123.

173. Currently, women continue to bear a disproportionate amount of the care-taking responsibilities. Williams, *supra* note 114, at 309. According to Williams, women bear the responsibility for eighty percent of the child-care duties and two-thirds of the housework duties in America today, which frees men to dedicate themselves to their work. *Id.*

alone, then, would only have a limited effect on the work/family divide and would do little to reformulate the ideal worker norm.

Breaking down the work/family divide and reformulating the ideal-worker norm can happen if the ideal-mother norm is replaced by a new, gender-neutral ideal: the care-taker norm.[174] If care-taking becomes gender-neutral, all workers will have conflicts between paid work and care-taking responsibilities. If all workers have these conflicts, the ideal-worker norm will have to be reformulated to account for the varied care-taking responsibilities of workers, and employers will have to begin to accommodate their employees' care-taking responsibilities. Accommodations should include a shift in workplace norms so that productivity is measured by outcomes instead of by the number of hours workers spend in the workplace. Doing so will allow workers to have the flexible working hours that they would all need to accommodate both their paid work and care-taking responsibilities.[175]

B. *Legal Reforms*

Legal reforms can encourage and compel these cultural changes. These legal reforms should take the form of state public policy statements in favor of breastfeeding, an expansion of unemployment compensation coverage to include terminations from work due to care-taking responsibilities, and state and federal statutory protections and mandated workplace accommodations for workers' care-taking responsibilities.

Employees who have been terminated from work because they breastfeed can assert a claim for wrongful discharge against their employers under current law. They can claim that their em-

174. Nancy E. Dowd has written about just such a model. Her ideas provide a useful place to begin the redefinition process. She argues that the caretaker role needs to be taken out of the context of gender. It needs to be family based. The definition of family, however, also has to be reconsidered so that it is more inclusive of all care-taking relationships. To do so, it must be defined by relationships instead of structures, and no one family type can have primacy over another. Only then can the definitions of family and care-taker avoid even inadvertent slips into ethnocentrism, racism, or sexism. NANCY E. DOWD, IN DEFENSE OF SINGLE-PARENT FAMILIES 155-58 (1997).

175. Even workers who must remain in their workspaces to accomplish their work could benefit from such flexible schedules if their management would, as it should, juggle their schedules and shifts so that work hours are covered and workers still have the option of flexible hours. A shift juggling system like the one proposed here was implemented during World War II to help accommodate workers' care-taking responsibilities. KESSLER-HARRIS, *supra* note 115, at 141.

ployers terminated their employment in violation of public policy in federal law that supports breastfeeding.[176] Some state courts, though, refuse to recognize wrongful discharge claims based on public policy statements in federal law; they will only recognize wrongful discharge claims if they are based on a violation of state public policy.[177] States should, therefore, pass legislation that defines breastfeeding as an important public policy so that wrongful discharge claims could rely on pro-breastfeeding policies in both state and federal statutes.[178]

Legal reforms should also include an expansion of states' unemployment insurance laws so that they cover workers whose jobs have been voluntarily and involuntarily terminated because of their care-taking responsibilities. In the context of voluntary terminations, all states require that employees demonstrate that they have terminated their employment for "good cause" or "good cause related to employment" in order to receive benefits.[179] Changes to states' unemployment compensation statutes should, then, explicitly include voluntarily terminating employment to attend to care-taking responsibilities as part of the definition of "good cause" or "good cause related to employment." In the context of involuntary terminations, employees must show that their employment was terminated through no fault of their own.[180] So, unemployment statutes regarding involuntary termination should state that employees who have had their employment involuntary terminated solely because of their care-taking responsibilities are not at fault for their terminations. "Care-taking" should include breastfeeding, breast pumping, child-care when the employer has failed to provide reasonable, viable assistance with child-care, and elder-care.

Legal reforms should not only compensate employees who have quit or who have been fired because of breastfeeding or other care-taking responsibilities; they should also compel employers to accommodate workers' breastfeeding and general care-taking responsibilities in the workplace. Federal and state statutes can encourage and compel employers to make these accommodations. These changes should include an expansion of

176. ROTHSTEIN ET AL., *supra* note 65, at 700. The federal Child Nutrition Act states that breastfeeding should be promoted because it is "the best method of infant nutrition." 42. U.S.C. §1790(a)(1994).

177. ROTHSTEIN ET AL., *supra* note 65, at 700.

178. *Id.*

179. *Id.* at 778.

180. *Id.* at 771.

the Fair Labor Standards Act to establish flexible work scheduling and mandated breaks for care-taking responsibilities, including breastfeeding.[181] The federal government as well as the states should offer tax breaks to businesses that provide day-care facilities in the workplace.[182] States should also follow Hawaii's example and enact statutes that define workplace penalties for breastfeeding as unlawful discrimination.[183] States should, however, enhance these statutory protections by defining workplace penalties imposed upon workers solely because of their care-taking responsibilities as unlawful and discriminatory.[184]

C. *Allies for Reform: Collaborating to Help Break Down the Work/Family Divide and Reformulate the Worker and Mother Norms*

Imagining such legal reform and compelling it are two decidedly different issues. Any woman, public policy organization that works towards making gains for women's rights, or lobbying group that focuses on women's issues and is interested in this type of reform should contemplate aligning with powerful, if curious, groups. Collaborations with strong lobbying groups with vested interests in the benefits of care-taking should be considered as a means to achieving these changes. Collaborations with employers, insurance companies, and groups such as the American Association of Retired Persons (AARP), for example, should be explored.

Employers could be tapped as allies in these efforts since they stand to benefit from employees whose children are health-

181. The purpose of the Fair Labor Standards Act (FLSA) is to provide minimum standards to protect workers. *Id.* at 261. It is, then, the appropriate tool to use to provide workers with minimum accommodations for their work and care-taking responsibilities. Just as the FLSA can require employers to pay overtime wages to employees who work over forty hours per week, it can require employers to provide employees with flexible work hours and care-taking breaks. *Id.*

182. Congress has the authority to offer tax exemptions that serve a public purpose. Bob Jones Univ. v. United States, 461 U.S. 574, 588 (1983) (accommodating care-taking needs of workers and their children arguably serves a public purpose in the same way that tax exemptions to non-profit day-care organizations also serve a public purpose).

183. HAW. REV. STAT. § 378-2 (1991).

184. States protecting care-taking responsibilities in this way would have to establish guidelines or mechanisms such that it would be clear that the sole cause of the workplace penalty was a worker's efforts to fulfill care-taking responsibilities. Thus, if a worker's efforts to fulfill care-taking responsibilities also caused the worker to fail to accomplish an employment task, then any consequential penalty would not result solely because of worker's care-taking responsibility.

ier because they were breastfed.[185] Because breastfed children do not get sick as often as non-breastfed children, parents of breastfed children do not need to take time off of work to care for them.[186] These parents, then, do not sacrifice productivity to care for their children. Thus, employers would benefit from breastfeeding initiatives and work-family accommodations because they would help maintain productivity levels among workers. Moreover, work-family accommodations are also likely to increase the retention rates of employees, which can only benefit employers financially.

Alliances with insurance companies should also be explored. Insurance companies would benefit financially from workplace policies supporting breastfeeding at work because effectively supporting a disease-fighting mechanism for workers' children would result in a decrease in the number of claims filed on behalf of employees' children.[187] Since employers pay the premiums on their employees' insurance policies regardless of the number of claims they file, a decrease in claims would amount to a decrease in the amount of money insurance companies pay out without any necessary, concurrent decrease in the amount of money they receive from insurance premium payments.[188]

The American Association of Retired Persons (AARP) could also be tapped as an ally in lobbying for new care-taker-worker legislation since it is concerned with eldercare needs.[189] Its stated goals of finding solutions to eldercare and long-term

185. *See* BLUEPRINT, *supra* note 8, at 10-11; Lawrence, *supra* note 5, at 4-5.

186. *See* BLUEPRINT, *supra* note 8, at 10-11; Lawrence, *supra* note 5, at 4-5.

187. Gordon G. Waggett & Regá R. Waggett, *Breast Is Best: Legislation Supporting Breast-feeding is an Absolute Bare Necessity — A Model Approach*, 6 MD. J. CONTEMP. LEGAL ISSUES 71 (1995). The authors state that breastfeeding can save millions of dollars in insurance, welfare and medical care costs. *Id.* at 76.

188. This tactic needs to be applied cautiously. Once persuaded that they can benefit financially from pro-breastfeeding initiatives, insurance companies could conceivably turn the initiatives into a mandate for breastfeeding that would serve to maternalize the female body and limit women's choices. *See* Frug, *supra* note 171, at 138-140; *supra* text accompanying note 171. Because they are such potentially strong allies in the effort to develop workplace accommodations for breastfeeding, they should not be abandoned because of this potentiality. Instead, the alliance should be coupled with consistent feminist advocacy against the maternalization of the female body. *Id.*

189. American Association of Retired Persons, *The Public Policy Agenda 2000, available at* http://www.aarp.org (last visited Mar. 20, 2001). The American Association of Retired Persons (AARP) has stated goals to work for the passage of legislation regarding effective care for the retired and elderly populations. American Association of Retired Persons, *The Public Policy Agenda 2000, Chapter 7: Long-Term Care, available at* http://www.aarp.org (last visited Mar. 20, 2001).

care problems would be furthered by advocating for changes to the workplace such as outcome-based programs and flextime policies.[190] Because these policies would accommodate the care-taking responsibilities of workers regardless of whom they are caring for, the elderly would benefit from them.

CONCLUSION

The Essay has not only attempted to wrestle with breastfeeding policies, it has also sought to do so in light of broader policy concerns regarding the work/family divide and the ideal-worker and ideal-mother paradigms. By focusing on why the government can and should intervene to rework these policies and paradigms in the private employment sphere, this Essay has sought to further the discussion on how to effect change. It has also sought to explore ways to compel government action to effectively break down the work/family divide and the ideal-mother norm and to simultaneously reformulate the ideal-worker norm. These kinds of changes center on helping women like the teacher who so dismayed my classmates by breastfeeding at work. As the law reflects, my classmates' attitudes are not unique. Their attitudes are rooted in cultural norms. Changing their attitudes and others like them, therefore, will require broad shifts in the cultural norms. While the law cannot mandate such broad cultural changes, it can open the door to them and begin to change them. The changes suggested in this Essay constitute an attempt to determine how to do that.

190. American Association of Retired Persons, *The Public Policy Agenda 2000, Chapter 7: Long-Term Care*, *available at* http://www.aarp.org (last visited Mar. 20, 2001). Outcome-based work policies focus on the work product an employee puts out instead of on the hours an employee spends working. Work policies that focus on output instead of hours would, by their very nature, offer employees some of the flexibility they need to address care-taking responsibilities. Policies that allow for the shift juggling system implemented in World War II to assist working mothers or that provide employees with the option of working from home would benefit employees with elder-care responsibilities as well as those with child-care responsibilities. *See* Kessler-Harris, *supra* note 115, at 141-142; *see also supra* text accompanying note 170.