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## Unsexing Breastfeeding

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UNSEXING BREASTFEEDING  
Naomi Schoenbaum\*

*Minnesota Law Review* (forthcoming 2022)

*For half a century, constitutional sex equality doctrine has been combating harmful sex stereotypes by invalidating laws that treat women as caregivers and men as breadwinners. Yet decades after the constitutional sex equality revolution unsexed parenting roles, one area of parenting has escaped this doctrine's exacting gaze: breastfeeding. Beginning in the 1990s in the wake of public health efforts to promote breastfeeding, a raft of laws were enacted, from insurance coverage mandates under the Affordable Care Act to workplace accommodations under the Fair Labor Standards Act, that provide substantial breastfeeding protections and benefits, but only to women. Although the sexed law of breastfeeding exists in stark contrast with the unsexed law of parenting, it has not been challenged or even noticed.*

*This Article makes visible the sexed law of breastfeeding, exposes the tension it creates in the law of sex equality, and considers how to resolve this tension. Courts, lawmakers, and commentators assume that breastfeeding entails only the physical fact of lactation, and thus likewise assume that it affects only women. As an initial matter, transgender men and nonbinary persons can lactate, and thus it is questionable whether even laws that regulate lactation should be sexed. Still further, breastfeeding—a method of nutrition for 85% of infants at birth and 60% of infants at six months—encompasses a host of carework that does not turn on lactation. Fathers can, for example, buy a breastpump, take a breastfeeding class, choose a lactation consultant, or feed a baby a bottle of breastmilk. Because much breastfeeding carework can be separated from sex, the legal assignment of this carework to women is premised in sex stereotypes. Sexed breastfeeding law thus wrongly pigeonholes women for care and men for career in just the way that sex equality law has long tried to counter in other areas of parenting.*

*After surfacing sex equality law's distinct treatment of breastfeeding, this Article considers how to cohere the law's treatment of breastfeeding with its treatment of the rest of parenting. The answer can be found in existing Supreme Court precedents teaching that sex-based rules must be carefully scrutinized, even in the presence of relevant physical sex differences, to ensure that the reliance on sex extends no further than necessary. Applying this jurisprudence to breastfeeding can promote not only equality between men and women, but also the equality of lesbian, gay, transgender, and nonbinary parents.*

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\* Associate Professor of Law, George Washington University School of Law. For extremely helpful comments, I thank Michael Abramowicz, Albertina Antognini, Meghan Boone, Naomi Cahn, Mathilde Cohen, Clare Huntington, Deborah Widiss, and participants in the AALS Program on Hidden Harms in the Regulation of Reproduction, AALS Breastfeeding Discussion Group, Twelfth Annual Constitutional Law Colloquium, Family Law Scholars and Teachers Conference, and GW Law School Faculty Workshop. For extraordinary research assistance, I thank Felicia Kalkman, Maayan Sachs, and Tracy Wolf. As ever, the personal is political—and legal. My deepest debt of gratitude is owed to my greatest teachers here, David Fontana, Tobias Abel Fontana, and Thaddeus Nathaniel Fontana.

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## INTRODUCTION

Former presidential candidate Pete Buttigieg made headlines last year when he took four weeks of leave from his job as U.S. Secretary of Transportation to care for his newborn twins.<sup>1</sup> Buttigieg's decision was lauded in many corners, but not on Fox News.<sup>2</sup> Tucker Carlson had this to say: "Pete Buttigieg has been on leave from his job . . . after adopting a child. Paternity leave, they call it, trying to figure out how to breastfeed. No word on how that went."<sup>3</sup> Carlson was derided for his failure to recognize men as caregivers deserving of parental leave.<sup>4</sup> Yet one of the logics of Carlson's comment—the absurdity of male involvement in breastfeeding—went unremarked.

The notion that male involvement in breastfeeding is off-the-wall<sup>5</sup> is not limited to the right-wing media. We can see it echoed across our lawbooks, from cases proclaiming breastfeeding "immaterial" to men,<sup>6</sup> to statutes limiting breastfeeding protections and benefits to women only.<sup>7</sup> Extensive public health efforts to promote breastfeeding in the 1990s<sup>8</sup> led to an explosion of laws at the federal<sup>9</sup> and state<sup>10</sup> level that regulate breastfeeding on the basis of sex. To cite just a few examples, laws from the Affordable Care Act to the Fair Labor Standards Act require insurers to cover the cost of breastfeeding classes, but for women only;<sup>11</sup> mandate that workplace breastfeeding accommodations be provided, but for women only;<sup>12</sup> and provide protection against ejection from public places on the basis of breastfeeding, but, again, for women only.<sup>13</sup>

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<sup>1</sup> See Katie Rogers, *Pete Buttigieg Joins the Parental Leave Debate: "This Is Work,"* N.Y. TIMES (Oct. 15, 2021), <https://www.nytimes.com/2021/10/15/us/politics/pete-buttigieg-parental-leave.html>.

<sup>2</sup> Ian Duncan, *Republicans Fault Buttigieg for Time Off with Newborns. Democrats Say He's Showing the Need for Paid Parental Leave,* WASH. POST (Oct. 15, 2021), <https://www.washingtonpost.com/transportation/2021/10/15/pete-buttigieg-time-off-parental-leave>.

<sup>3</sup> *Tucker Carlson Tonight* (Fox News television broadcast Oct. 14, 2021), <https://video.foxnews.com/v/6277204328001#sp=show-clips>.

<sup>4</sup> See Rogers, *supra* note 1 (noting criticism of the comments as "sexist" and "homophobic" and quoting Senator Tammy Duckworth's response: "It's just as important for fathers to be there as mothers to be there.").

<sup>5</sup> See Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27, 52 (2005) (noting how certain legal claims are considered so outside of the jurisprudential mainstream as to be considered "off-the-wall").

<sup>6</sup> *Martinez v. N.B.C., Inc.*, 49 F. Supp. 2d 305, 309 (S.D.N.Y. 1999) (explaining that breastfeeding requires "the drawing of distinctions among persons of one gender [women] on the basis of criteria that are immaterial to the other [men]").

<sup>7</sup> See *supra* Part II.B.

<sup>8</sup> See Anne L. Wright & Richard J. Schanler, *The Resurgence of Breastfeeding at the End of the Second Millennium*, 131 J. NUTRITION 421S, 423S (2001).

<sup>9</sup> See, e.g., 42 U.S.C. § 300gg-13(4) (requiring insurance coverage "with respect to women" for breastfeeding support services); 29 U.S.C. § 207(r) (requiring "[r]easonable break time for nursing mothers"); *infra* Parts II.B.1-3; Appendix A.

<sup>10</sup> See *infra* Parts II.B; Appendices B-H.

<sup>11</sup> See *infra* Part II.B.1.

<sup>12</sup> See *infra* Part II.B.2; Appendix C.

<sup>13</sup> See *infra* Part II.B.3; Appendix E.

This regime of sex-based law regulating breastfeeding warrants significant attention, as it sits in deep tension with the law's other efforts to avoid regulating parenting on the basis of sex.<sup>14</sup> The Constitution's sex-equality guarantee aggressively scrutinizes laws that classify individuals by sex and that are premised in stereotypes.<sup>15</sup> Nowhere have these unsexing efforts been targeted more than at the carework of parenting, where sex stereotypes "ha[ve] been . . . strongest."<sup>16</sup> Because sex rarely if ever dictates one's ability to parent, courts have consistently struck down laws that assign carework to women and market work to men.<sup>17</sup> This doctrine has been crucial for dismantling the legal infrastructure of "separate spheres" that for centuries pigeonholed women as caregivers and men as breadwinners in ways so harmful to the cause of sex equality.<sup>18</sup> To police sex stereotypes in law, equal protection requires careful scrutiny of laws that regulate parenting on the basis of sex.<sup>19</sup> Other laws, like the Family and Medical Leave Act (FMLA) and Title VII, bar private actors from relying on these same stereotypes.<sup>20</sup>

By contrast, the law enshrines a view of breastfeeding as for women only,<sup>21</sup> and thus treats the carework associated with breastfeeding as for women only, too.<sup>22</sup> While it is typically women who lactate,<sup>23</sup> breastfeeding entails far more than the physical fact of lactation.<sup>24</sup> Instead, breastfeeding is a social process that not only can involve men, but is

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<sup>14</sup> Breastfeeding is the singular instance of post-birth parenting that has escaped unsexing, but the law has also failed to unsex pregnancy. See David Fontana & Naomi Schoenbaum, *Unsexing Pregnancy*, 119 COLUM. L. REV. 309 (2019); Christine Emba, *It's Time to Unsex Pregnancy*, WASH. POST (Apr. 3, 2019), [https://www.washingtonpost.com/opinions/its-time-to-unsex-pregnancy/2019/04/03/5e876188-564e-11e9-9136-f8e636f1f6df\\_story.html](https://www.washingtonpost.com/opinions/its-time-to-unsex-pregnancy/2019/04/03/5e876188-564e-11e9-9136-f8e636f1f6df_story.html) (advocating for the "startlingly common-sensical" approach articulated in Fontana & Schoenbaum, *supra*). This Article builds upon *Unsexing Pregnancy*, *supra*, to show that sex equality law has a reproduction exception, encompassing both pregnancy and breastfeeding, that unjustifiably escapes unsexing on the false assumption that these reproductive features are based in biology alone, when in reality they entail carework that can—and thus must—be unsexed.

<sup>15</sup> See Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 88 (2010) (explaining that the doctrine "dictated that the state could not act in ways that reflected or reinforced traditional conceptions of men's and women's roles").

<sup>16</sup> See, e.g., *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 738 (2003).

<sup>17</sup> See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) ("[T]he sex characteristic frequently bears no relation to ability to perform or contribute to society."); sources cited *infra* note 105.

<sup>18</sup> See Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1204 n.124 (1992) (explaining that sex classifications "promoting the woman's 'natural' role as selfless homemaker, and correspondingly emphasizing the man's role as provider, . . . impede[] both men and women from pursuit of the opportunities . . . that could enable them to break away from familiar stereotypes").

<sup>19</sup> The large body of case law here is discussed in Part I.B.

<sup>20</sup> See *infra* notes 118-22 and accompanying text.

<sup>21</sup> See *Derungs v. Wal-Mart Stores, Inc.*, 141 F. Supp. 2d 884, 889, 893 (S.D. Ohio 2000) (stating that "breast-feeding . . . is unique to women"); *Martinez v. N.B.C., Inc.*, 49 F. Supp. 2d 305, 310-11 (S.D.N.Y. 1999) (same); *infra* Part II.A.2

<sup>22</sup> See *E.E.O.C. v. Houston Funding II, Ltd.*, 717 F.3d 425, 428 (5th Cir. 2013) (concluding that breastfeeding "clearly imposes upon women a [workplace] burden that male employees need not—indeed, could not—suffer"); *infra* Part II.A.2.

<sup>23</sup> Some transgender men and nonbinary persons lactate. See Trevor MacDonald, et al., *Transmasculine Individuals' Experiences with Lactation, Chestfeeding, and Gender Identity: A Qualitative Study*, 16 BMC PREGNANCY & CHILDBIRTH 106 (2016); *infra* notes 178-81 and accompanying text.

<sup>24</sup> See *infra* Part II.A.1.

improved by their involvement.<sup>25</sup> The social process of breastfeeding includes a range of carework, from purchasing a breastpump, to taking a breastfeeding class, to finding a lactation consultant, to feeding a baby expressed breastmilk, that can be performed by any parent, regardless of sex. This breastfeeding carework is consistent with the types of parenting carework that the Constitution has long recognized can be—and thus must be—unsexed.<sup>26</sup> That fathers can play an integral role in breastfeeding is coming to be recognized in a wide range of places—academic literature,<sup>27</sup> mainstream media,<sup>28</sup> parenting blogs,<sup>29</sup> celebrity Twitter feeds,<sup>30</sup> and apps<sup>31</sup>—but, so far, not in law.

Despite the serious constitutional concern it generates, the sexed law of breastfeeding has not been critiqued or even noticed. Like courts and lawmakers, feminist legal scholars have assumed that breastfeeding is almost exclusively for women, and thus have failed to appreciate how the law of breastfeeding can and should be unsexed. The seminal scholarship on unsexing parenting drew a line between pregnancy, which entails a real physical difference, and parenting, which does not.<sup>32</sup> In an effort to avoid blurring this line, scholars downplayed breastfeeding, relegating it to a footnote.<sup>33</sup> Today, breastfeeding can no longer be so minimized. It is a leading topic in public health,<sup>34</sup> a key feature of early childhood,<sup>35</sup> and a core subject of the law regulating parenting.<sup>36</sup>

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<sup>25</sup> See sources cited *infra* note 133.

<sup>26</sup> See *infra* Part II.A.1.

<sup>27</sup> See, e.g., Havinder Sihota, et al., *Fathers' Experiences and Perspectives of Breastfeeding: A Scoping Review*, 13 AM. J. MEN'S HEALTH 1 (2019) (reviewing “a growing body of research studying fathers in the breastfeeding context that focuses on . . . interventions to assist fathers to fulfill their role as support providers to their breastfeeding partners”); See Melissa Bartick, et al., *Academy of Breastfeeding Medicine Position Statement and Guideline: Infant Feeding and Lactation-Related Language and Gender*, 16 BREASTFEEDING MED. 1, 1 (2021) (adopting “desexed or gender-inclusive language” to “be inclusive of all people”); sources cited *infra* note 133.

<sup>28</sup> See, e.g., *ABC News: Dad's Photo Campaign for Breastfeeding Goes Viral* (ABC television broadcast Apr. 2, 2014), <https://abcnews.go.com/GMA/video/dads-photo-campaign-breastfeeding-goes-viral-23159783> (describing photography campaign aimed at raising awareness of the ways that men can support breastfeeding); Carl Cederstrom, *Are We Ready for the Breastfeeding Father?*, N.Y. TIMES (Oct. 18, 2019), <https://www.nytimes.com/2019/10/18/opinion/sunday/men-breastfeeding.html> (discussing transgender men breastfeeding); sources cited *infra* Part II.A.1.

<sup>29</sup> See, e.g., *The Fatherly Guide to Breastfeeding*, FATHERLY, <https://www.fatherly.com/breastfeeding-guide/> (last visited Jan. 15, 2022) [hereinafter *The Fatherly Guide*]; sources cited *infra* Part II.A.1.

<sup>30</sup> See, e.g., Ellen Wallwork, *Dwayne 'The Rock' Johnson Shows Why Teamwork Is Key To Breastfeeding*, HUFFINGTON POST (Dec. 6, 2018, 11:37 AM), [https://www.huffingtonpost.co.uk/entry/dwayne-the-rock-johnson-shows-breastfeeding-teamwork\\_uk\\_5b1f98bfe4b09d7a3d76d820](https://www.huffingtonpost.co.uk/entry/dwayne-the-rock-johnson-shows-breastfeeding-teamwork_uk_5b1f98bfe4b09d7a3d76d820) (reporting on a Tweet showing an actor father feeding his partner a meal while she is breastfeeding).

<sup>31</sup> See Becky White, et al., *Gamifying Breastfeeding for Fathers: Process Evaluation of the Milk Man Mobile App*, 2 JMIR PEDIATR. PARENT. (2019) (evaluating the results of Milk Man, a father-focused breastfeeding app).

<sup>32</sup> See *infra* notes 198-203 and accompanying text. Recent legal scholarship also fails to recognize men's role in breastfeeding. See, e.g., Meghan Boone, *Lactation Law*, 106 CALIF. L. REV. 1827, 1829 n.7 (2018) (noting that transgender men can lactate but otherwise treating breastfeeding as for women, arguing that this area of law reinforces sex stereotypes by how it regulates the appropriate role of mothers, not by its failure to include men).

<sup>33</sup> See sources cited *infra* note 201.

<sup>34</sup> See Office of the Surgeon General, *The Surgeon General's Call to Action to Support Breastfeeding* (2011), [https://www.ncbi.nlm.nih.gov/books/NBK52682/pdf/Bookshelf\\_NBK52682.pdf](https://www.ncbi.nlm.nih.gov/books/NBK52682/pdf/Bookshelf_NBK52682.pdf).

This Article exposes the sexed law of breastfeeding, reveals its marked contrast with the law's otherwise pervasive efforts to unsex parenting, and explores how to resolve this divide in sex equality law.<sup>37</sup> Unsexing breastfeeding—a central and growing part of the care of many infants<sup>38</sup>—is crucial because the stereotypes of women as caregivers and men as breadwinners that undergird these laws are a key barrier to sex equality.<sup>39</sup> Unsexing such a critical part of caregiving from the start is necessary to ensure that mothers are not assigned the role of primary caregiver, with fathers as mere back-ups—sticky roles that are hard to reverse.<sup>40</sup> And because sex stereotypical laws impact not only the behavior of their intended beneficiaries, but also the behavior of regulated entities, namely employers, sexed breastfeeding laws can reinforce “generalizations” about the proper roles of women and men,<sup>41</sup> even in families that choose not to breastfeed. The pervasive sexing of breastfeeding thus risks re-erecting the legal edifice of separate spheres that the law spent decades dismantling.

The sexed law of breastfeeding not only undermines equality between women and men, but also equality for gay, lesbian, transgender, and nonbinary parents, and parents of color. Those who do not identify as women, including nonbinary persons<sup>42</sup> and transgender men,<sup>43</sup> can lactate, but they are excluded from a law that distributes its protections and benefits to women alone.<sup>44</sup> The sexed law of breastfeeding also excludes gay men from its reach, and excludes lesbian partners to the extent that it applies only to “breastfeeding women” rather than to women generally.<sup>45</sup> Finally, the sexed law of breastfeeding reduces the support that the law provides for breastfeeding,

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<sup>35</sup> See World Health Organization/UNICEF, *Global Strategy For Infant And Young Child* (2003), <https://www.who.int/nutrition/publications/infantfeeding/9241562218/en/> (emphasizing the impact of feeding practices on young children and recommending exclusive breastfeeding for first six months).

<sup>36</sup> See *infra* Part II.B; Appendices A-H.

<sup>37</sup> This Article is, at its heart, doctrinal. It takes its normative stance—unsexing parenting—as the dictate of the Equal Protection Clause, and applies that stance to the law of breastfeeding. While one could critique the goal of promoting breastfeeding that is at the root of many sexed breastfeeding laws, *see infra* notes 431-32 and accompanying text, this Article takes as given the policy ends of the laws it interrogates, and applies constitutional scrutiny to these laws, evaluating how they should be unsexed under the current constitutional mandate.

<sup>38</sup> Compare Centers for Disease Control and Prevention, *Breastfeeding Report Card* (2020) <https://www.cdc.gov/breastfeeding/data/reportcard.htm> (documenting that in the U.S. in 2017, 84.1% of infants breastfed at birth, and 58.3% of infants were breastfeeding at six months), with Wright & Schanler, *supra* note 8, at 421S (documenting that in the U.S. in 1997, 62.4% of infants breastfed at birth, and 26% of infants were breastfeeding at six months).

<sup>39</sup> See *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (“These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers’ stereotypical views about women’s commitment to work and their value as employees.”).

<sup>40</sup> See *infra* Part III.A.

<sup>41</sup> *United States v. Virginia*, 518 U.S. 515, 524 (1996) (forbidding reliance on “generalizations” on the basis of sex).

<sup>42</sup> See Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 896-97 (2019) (discussing how some states now allow a nonbinary sex designation on a birth certificate).

<sup>43</sup> See MacDonald, *supra* note 23, at 106.

<sup>44</sup> See *infra* notes 363-68 and accompanying text.

<sup>45</sup> See *infra* notes 371-77 and accompanying text.

disproportionately impacting families of color, who have lower breastfeeding rates and thus need more rather than less support.<sup>46</sup>

Resolving the divide between the sexed law of breastfeeding and the unsexed law of parenting requires no great leap. The tools for doing can be found in existing sex equality precedents. While it has long been clear that laws cannot rely on sex when physical sex differences are irrelevant,<sup>47</sup> the Court has more recently applied equal protection's exacting gaze to areas where physical sex differences are at play. In cases like *United States v. Virginia*<sup>48</sup> and *Nevada Department of Human Resources v. Hibbs*,<sup>49</sup> the Court has required that any law's reliance on sex extend no further than necessary in light of the relevant physical difference.<sup>50</sup> The answer to remedying the sexed law of breastfeeding then is to extend to sexed breastfeeding laws the close scrutiny that equal protection doctrine already applies to other sexed parenting laws, and to invalidate those sex classifications that are not justified by a physical sex difference.<sup>51</sup>

This Article then evaluates whether the appropriate remedy for constitutionally infirm breastfeeding regulations would be to "level down" by scrapping the invalidated provision, or to "level up" by extending breastfeeding protections and benefits to all parents.<sup>52</sup> Any parent, regardless of sex, can meaningfully utilize many breastfeeding protections and benefits.<sup>53</sup> Providing breastfeeding protections and benefits to all parents, regardless of sex, will further the law's goal of eradicating sex stereotypes.

This Article proceeds in four parts. Parts I and II contrast the law's otherwise pervasive scrutiny of sex-based rules in parenting with the law's acquiescence to sex-based rules in breastfeeding. Part III demonstrates that the law's distinct treatment of breastfeeding is unjustified. The sexed law of breastfeeding, like other sexed parenting regulations, reinforces a gendered distribution of labor at home and in the market that is contrary to the goals of sex equality law. Even though breastfeeding involves the body in a way that parenting typically does not, this does not support breastfeeding's unique legal treatment, because many breastfeeding regulations do not implicate the body at all. Part IV suggests how to resolve the tension that the sexed law of breastfeeding generates in sex equality law. This Part explains how current case law can be read to resolve the tension, and details how courts should do so.

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<sup>46</sup> See Office of the Surgeon General, *supra* note 34, at 7 (reporting that in 2007, breastfeeding rates of black infants were about 50% lower than those of white infants); *infra* notes 378-84 and accompanying text.

<sup>47</sup> See *infra* notes 104-06 and accompanying text.

<sup>48</sup> 518 U.S. 515 (1996).

<sup>49</sup> 538 U.S. 721 (2003).

<sup>50</sup> See *infra* notes 391-97 and accompanying text.

<sup>51</sup> See, e.g., *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017) (explaining that when legislatures "[p]rescrib[e] one rule for mothers, another for fathers . . . heightened scrutiny is in order" because "[l]aws according or denying benefits in reliance on stereotypes about women's domestic roles . . . create a self-fulfilling cycle of discrimination") (internal quotation marks and alterations omitted).

<sup>52</sup> See, e.g., *id.* at 1698 ("[W]hen a statute benefits one class . . . and excludes another[,] . . . [a] court may either . . . order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute . . .") (internal quotation marks omitted).

<sup>53</sup> See *infra* Parts II.A.1, II.B.



## I. UNSEXING PARENTING

One of the primary aims of sex discrimination law is unsexing: if sex need not determine one's ability because of a real difference between the sexes, then sex should not be made to determine one's ability by law.<sup>54</sup> The central target of the law of unsexing is carework within the family. Dictating sex roles within the family has devastating consequences for sex equality outside of it, particularly at work.<sup>55</sup> Applying heightened scrutiny under the Equal Protection Clause, the Supreme Court has decided that women are not better suited for care than men, and that laws assuming they are reinforce sex stereotypes that cabin women's roles at work and men's roles in the family.<sup>56</sup> Beyond equal protection scrutiny, the law unsexes parenting with legislation aimed at abolishing sex-based roles in the family and at work.<sup>57</sup> This Part addresses why and how the law generally unsexes parenting.

### A. *Why We Unsex Parenting*

Before it adopted unsexing as its goal, the law of gender relations was the law of separate spheres: “[i]t was man’s lot, because of his nature, to be breadwinner, head of household, representative of the family outside the home; and it was woman’s lot, because of her nature, not only to bear, but also to raise children, and keep the home in order.”<sup>58</sup> Under rational basis review, the bar was low for justifying the complex of sex-based laws that undergirded this separate spheres ideology.<sup>59</sup> The Supreme Court upheld

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<sup>54</sup> See *Frontiero v. Richardson*, 411 U.S. 677, 686-87 (1973) (recognizing that “statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members”).

<sup>55</sup> See, e.g., *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 738 (2003) (“[T]he faultline between work and family[] [is] precisely where sex-based overgeneralization has been and remains strongest . . .”).

<sup>56</sup> See *id.* at 736 (“These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers’ stereotypical views about women’s commitment to work and their value as employees.”); sources cited *infra* note 105 (collecting cases).

<sup>57</sup> See *infra* notes 118-22 and accompanying text.

<sup>58</sup> See Ruth Bader Ginsburg, *Remarks on Women Becoming Part of the Constitution*, 6 *LAW & INEQ.* 17, 19 (1988); see also *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1683 (2017) (referring to “an era when the Nation’s lawbooks were rife with overbroad generalizations about the way men and women are”).

<sup>59</sup> See, e.g., *Hoyt v. Florida*, 368 U.S. 57, 58-62 (1961) (allowing a state law that made women’s jury service voluntary, because women’s place was at “the center of home and family life”); *Goesaert v. Cleary*, 335 U.S. 464, 465-67 (1948) (permitting a state law that no women except wives and daughters of tavern owners could tend bar); *Muller v. Oregon*, 208 U.S. 412, 416-17, 423 (1908) (validating a state law restricting women’s work hours); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring in the judgment) (“The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.”).

these laws on the basis of “belief”<sup>60</sup> that there is “a wide difference in the respective spheres and destinies of man and woman.”<sup>61</sup>

As for the domestic sphere, constitutional law long appreciated that parenting is work, but work that was the domain of women. Parenting involved two aspects—“home [life]” and “family life”<sup>62</sup>—with “women’s place at ‘the center’” of both.<sup>63</sup> “Family life” entailed a range of childcare responsibilities, from physical maintenance and supervision,<sup>64</sup> to moral education,<sup>65</sup> to emotional bonding with the child.<sup>66</sup> The Court has also pointed to an administrative component of carework, things like keeping grocery lists, registering children for school, and doing family paperwork.<sup>67</sup> All of these aspects of carework that were part of maintaining “the domestic sphere” were deemed to “properly belong[] to the domain and functions of womanhood.”<sup>68</sup>

The equality principle at the heart of the Equal Protection Clause—treat likes alike—dismantled separate spheres.<sup>69</sup> In the 1970s, the Supreme Court came to appreciate men and women as likes (or at least potential likes) in many if not most aspects of carework. Because much of the work of parenting is not biologically or otherwise necessarily sexed, women and men were equally capable of doing the work of the domestic sphere.<sup>70</sup> This, coupled with the recognition that the legal assignment of

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<sup>60</sup> *Muller*, 208 U.S. at 420 (explaining that the “widespread belief that woman’s physical structure, and the functions she performs in consequence thereof,” supports legislation limiting women’s work hours); *accord Goesaert*, 335 U.S. at 466-67 (upholding sex classification on the basis of “entertainable” legislative “belief”).

<sup>61</sup> *Bradwell*, 83 U.S. (16 Wall.) at 141 (Bradley, J., concurring in the judgment) (“Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.”).

<sup>62</sup> *Hoyt*, 368 U.S. at 62; *see also Muller*, 208 U.S. at 419-23 & n.1 (holding that a state law limiting women’s work hours was permissible in part due to women’s role in “the rearing . . . of the children,” and “the maintenance of the home”).

<sup>63</sup> Ginsburg, *supra* note 58, at 19 (setting forth women’s twin domestic duties as “rais[ing] children[] and keep[ing] the home in order”).

<sup>64</sup> *See Weinberger v. Wiesenfeld*, 420 U.S. 636, 652 (1975) (addressing the significance of “care” and “custody” of children).

<sup>65</sup> *See Muller*, 208 U.S. at 419 n.1 (listing “education of the children” as a woman’s responsibility).

<sup>66</sup> *See Weinberger*, 420 U.S. at 652 (addressing “companionship” of children); *id.* at 655 (Rehnquist, J., concurring) (emphasizing “personal care and attention” of a parent).

<sup>67</sup> *See Weinberger*, 420 U.S. at 652 (noting the “management” aspects of parenting (internal quotation marks omitted)); *Hoyt*, 368 U.S. at 62 (assigning women to the “center of home and family life,” indicating that they run the domestic sphere); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring in the judgment) (referring to the “noble and benign offices of wife and mother” and thus pointing to the administrative features of these roles (emphasis added)). *See generally* Elizabeth F. Emens, *Admin*, 103 GEO. L. J. 1409, 1412-17 (2015) (defining “admin” as the “the office-type work that people do to manage their lives”).

<sup>68</sup> *Bradwell*, 83 U.S. (16 Wall.) at 141 (Bradley, J., concurring in the judgment) (“The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.”).

<sup>69</sup> *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439-42 (1985) (acknowledging that the Fourteenth Amendment requires that “all persons similarly situated should be treated alike”).

<sup>70</sup> *See Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (“[T]he sex characteristic frequently bears no relation to ability to perform or contribute to society.”).

roles in the family by sex undermined sex equality, brought about the constitutional unsexing revolution, with heightened scrutiny applied to sex classifications to rid the law of sex stereotypical regulations.<sup>71</sup>

The Court applied these twin principles—that work and family roles need not be assigned by sex, and that doing so did distinct damage to the cause of sex equality—in the “most critical”<sup>72</sup> sex discrimination case of this period, *Weinberger v. Wiesenfeld*.<sup>73</sup> In that case, a father whose wife had passed away challenged a provision of the Social Security Act that granted benefits to mothers upon the death of a husband but not to fathers upon the death of a wife.<sup>74</sup> The challenged rule was meant “to permit women to elect not to work and to devote themselves to the care of children” following the death of their husbands.<sup>75</sup> The Court invalidated the rule, acknowledging that men and women are similarly situated in their ability to care for children, and that the longstanding assumption to the contrary was not grounded in any biological or other necessity.<sup>76</sup> Remarkably, the Court reached this conclusion in the context of a mother who had died in childbirth,<sup>77</sup> thereby recognizing fathers as caregivers equal to mothers from the moment of birth.<sup>78</sup>

The Court recognized not only that mothers and fathers were equally capable parents, but also the harms generated by sex stereotypical laws that assumed they were not. Laws treating similarly situated mothers and fathers differently, like the one at issue in *Weinberger*, are part of “a much broader pattern of sex-role enforcement that associated men with the marketplace and women with the home.”<sup>79</sup> Such laws are so troubling because they reinforce these stereotypes. If stay-at-home dads are not granted benefits when their working wives die, they will choose not to stay at home, and their wives will instead assume this role.<sup>80</sup> As Justice Ginsburg well explained, sex stereotypical regulations “enshrining and promoting the woman’s ‘natural’ role as homemaker, and correspondingly emphasizing the man’s role as provider, . . . impeded

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<sup>71</sup> See Ginsburg, *supra* note 50, at 20 (“To turn in a new direction [of sex-equality law], the Court first had to comprehend that legislation apparently designed to benefit or protect women could often, perversely, have the opposite effect.”).

<sup>72</sup> Ruth Bader Ginsburg, *Interpretations of the Equal Protection Clause*, 9 HARV. J.L. & PUB. POL’Y 41, 43 (1986).

<sup>73</sup> 420 U.S. 636 (1975).

<sup>74</sup> *Id.* at 637-38.

<sup>75</sup> *Id.* at 648.

<sup>76</sup> See *id.* at 652.

<sup>77</sup> *Id.* at 639.

<sup>78</sup> The Court makes no mention of breastfeeding, consistent with the judicial silence on this topic in constitutional sex equality cases. See *infra* notes 183-91 and accompanying text.

<sup>79</sup> Franklin, *supra* note 15, at 124; see also *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (explaining that the “practical effect” of sex stereotypical laws was to “put women, not on a pedestal, but in a cage”).

<sup>80</sup> This analysis relies on a heterosexual family structure, the only one legally recognized at the time. See *infra* Part III.C on the harms of sexing parenting roles for other families.

both men and women from pursuit of the very opportunities that would have enabled them to break away from familiar stereotypes.”<sup>81</sup>

The notion that sex-based laws would reinforce sex stereotypes in this way was no idle concern, as demonstrated by a host of sex-based laws premised on this separate spheres ideology catalogued in *Nevada Department of Human Resources v. Hibbs*.<sup>82</sup> For example, state laws excluded women from working in certain occupations, like law<sup>83</sup> or bartending,<sup>84</sup> or in excess of a set number of hours.<sup>85</sup> By circumscribing where and when women could work, these laws not only reflected the notion that women’s proper place was in the home, but made it far more likely to be so. These stereotypes have helped to generate a world in which “the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men.”<sup>86</sup> Indeed, Congress has placed the blame for women’s narrower field of work opportunities on “the pervasive presumption that women are mothers first, and workers second,” which has engendered “discrimination against women when they are mothers,”<sup>87</sup> depressing women’s pay, benefits, and job security.<sup>88</sup>

Stereotypical sex classifications “creat[e] a self-fulfilling cycle of discrimination”<sup>89</sup> not only by circumscribing women’s roles, but by circumscribing men’s roles, too. By “presuming a lack of domestic responsibilities for men,” these types of sex-based laws not only push women into domestic roles, but also pull men out of the domestic sphere and into the workplace.<sup>90</sup> Just a few years ago, the Court made clear that “such laws may disserve men who exercise responsibility for raising their children.”<sup>91</sup> Stereotyping men as market workers hurts women too, by encouraging women further into family roles (and away from work),<sup>92</sup> and by continuing to devalue these family roles.<sup>93</sup>

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<sup>81</sup> Ginsburg, *supra* note 58, at 21; *see also* Califano v. Westcott, 443 U.S. 76, 89 (1979) (noting that sex-based rules reflect and reinforce stereotypes that women are at “the center of home and family life”) (internal quotation marks omitted).

<sup>82</sup> *See* 538 U.S. 721, 729 (2003).

<sup>83</sup> *See* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 131 (1873).

<sup>84</sup> *See* Goesaert v. Cleary, 335 U.S. 464, 465 (1948).

<sup>85</sup> *See* Muller v. Oregon, 208 U.S. 412, 416–17 (1908).

<sup>86</sup> Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 728 n.2 (2003) (internal quotation marks omitted).

<sup>87</sup> *Id.* at 736 (internal quotation marks omitted).

<sup>88</sup> *See* Califano v. Goldfarb, 430 U.S. 199, 212 (1977).

<sup>89</sup> Sessions v. Morales-Santana, 137 S. Ct. 1678, 1693 (2017) (alteration in original) (internal quotation marks omitted).

<sup>90</sup> *See* Hibbs, 538 U.S. at 736 (“Because employers continued to regard the family as the woman’s domain, they often denied men similar accommodations or discouraged them from taking leave.”).

<sup>91</sup> Morales-Santana, 137 S. Ct. at 1693.

<sup>92</sup> *See* Hibbs, 538 U.S. at 736 (acknowledging that employers’ refusal to extend caregiving leave to men “forced women to continue to assume the role of primary family caregiver”).

<sup>93</sup> *See* Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 3 (1995) (“So long as stereotypically feminine behavior,” including “nurturing or raising children, is forced into a female ghetto, it may continue to be devalued.”).

Finally, sex stereotypes become self-reinforcing not only by their effect on regulated individuals, but by their effect on third parties. For example, laws premised in sex stereotypes can have an impact on employers. As the Supreme Court recognized in *Hibbs*, state laws that provided family leave only to women cemented “employers’ stereotypical views about women’s commitment to work and their value as employees”<sup>94</sup> and created “serious potential for encouraging employers to discriminate against [female] employees and applicants.”<sup>95</sup>

### *B. How We Unsex Parenting*

As a matter of blackletter law, intermediate scrutiny is the means by which the Equal Protection Clause goes about unsexing. A law that classifies on the basis of sex can survive this scrutiny when the government demonstrates that the law aims to advance an important government interest by means that are substantially related to that interest.<sup>96</sup> When it comes to constitutional sex discrimination claims, though, the jurisprudence is best understood in terms of stereotypes, not scrutiny.<sup>97</sup> The Court has unanimously agreed that “[o]verbroad generalizations” about the sexes run afoul of equal protection, even if these generalizations are true in “many” situations.<sup>98</sup> Professor Mary Anne Case has explained how rigorously this rule has been applied: “[T]he assumption at the root of the sex-respecting rule must be true of either all women or no women or all men or no men; there must be a zero or a hundred on one side of the sex equation or the other.”<sup>99</sup> This means that while the doctrine of sex discrimination is intermediate scrutiny, it can in fact be quite strict.<sup>100</sup>

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<sup>94</sup> 538 U.S. at 736.

<sup>95</sup> 29 U.S.C. § 2601(a)(6).

<sup>96</sup> See *Craig v. Boren*, 429 U.S. 190, 197 (1976). The Court has alternatively described intermediate scrutiny as demanding an “exceedingly persuasive” justification. *United States v. Virginia*, 518 U.S. 515, 533 (1996) (internal quotation marks omitted).

<sup>97</sup> See Mary Anne Case, “*The Very Stereotype the Law Condemns*”: *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1449 (2000) (arguing that “the components of the intermediate scrutiny standard . . . have rarely been the moving parts in a Supreme Court sex discrimination decision” and that “the bulk of the work in these decisions . . . [is] the proposition that there are constitutional objections to ‘gross, stereotyped distinctions between the sexes’”) (quoting *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973)); Franklin, *supra* note 15, at 138 n.296 (stating that “[t]he anti-stereotyping principle . . . shap[es] what constitutes an important interest and what means qualify as sufficiently narrowly tailored to serve this interest” and documenting that “the Court has never upheld a sex classification after determining that it reflects or reinforces sex stereotypes”).

<sup>98</sup> *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1692-93 (2017) (“Overbroad generalizations . . . have a constraining impact, descriptive though they may be of the way many people still order their lives.”); see also *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994) (“[G]ender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization.”); Case, *supra* note 97, at 1450 (“[V]irtually every sex-respecting rule struck down by the Court in the last quarter century embodied a proxy that was overwhelmingly, though not perfectly, accurate.”).

<sup>99</sup> Case, *supra* note 97, at 1449-50.

<sup>100</sup> See *id.* at 1453 (“The perfect proxy test has always had the capacity to be more strict even than strict scrutiny.”).

Across the range of sex-based laws subject to heightened scrutiny under this doctrine, parenting has been seen as the most important area to unsex, because “the faultline between work and family” is “precisely where sex-based overgeneralization has been and remains strongest.”<sup>101</sup> The Court has consistently invalidated sex classifications related to “family duties,”<sup>102</sup> because these classifications are not grounded in any physical sex differences, but instead simply reflect stereotypes about men’s and women’s proper roles in the home and the market.<sup>103</sup>

When courts scrutinize sex-based laws, it is generally only laws grounded in “[p]hysical differences between men and women” that will pass constitutional muster.<sup>104</sup> A sex classification that is not justified by a physical sex difference is typically verboten.<sup>105</sup> Because there is no inevitable connection between sex and the classification, such a classification amounts to a mere stereotype.<sup>106</sup> This does not mean the Equal Protection Clause gives a pass to sex classifications when physical differences between the sexes are relevant. These classifications must still be scrutinized to ensure that the physical difference justifies the law’s reliance on sex.

The Court applied these principles in *United States v. Virginia*, which considered a challenge to the male-only admissions policy at Virginia Military Institute (VMI), a state-run military academy. Even though men could, on average, more easily attain the academy’s required “[p]hysical rigor” than women,<sup>107</sup> the Court still struck down the

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<sup>101</sup> Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 738 (2003).

<sup>102</sup> *Id.* at 730, 736 (collecting cases); see also Weinberger v. Wiesenfeld, 420 U.S. 636, 652 (1975) (recognizing that working men and women “will encounter the same child-care related problems”).

<sup>103</sup> See Ginsburg, *supra* note 58, at 23-24 (noting that “[t]he framework evolving at the time of the *Wiesenfeld* case . . . has enabled the Supreme Court effectively to break the hold of the breadwinner-homemaker dichotomy . . .”).

<sup>104</sup> *Virginia*, 518 U.S. at 533. Two other circumstances have historically justified sex classifications—when sex classifications are “used to compensate women ‘for particular economic disabilities [they have] suffered,’” and when another sex-respecting classification not before the Court results in a perfect proxy between sex and the challenged classification—but have not been relied on in decades. See Case, *supra* note 97, at 1457-58 (quoting *Virginia*, 518 U.S. at 533).

<sup>105</sup> See, e.g., *Morales-Santana*, 137 S. Ct. at 1700-01 (invalidating a sex-based rule for determining citizenship); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 152 (1980) (invalidating a law affording workers’ compensation benefits automatically to widows but not to widowers); *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (invalidating a law that granted benefits to children of unemployed fathers but not unemployed mothers); *Caban v. Mohammed*, 441 U.S. 380, 394 (1979) (invalidating a law that permitted unwed mothers but not unwed fathers to block the adoption of a child by denying consent); *Orr v. Orr*, 440 U.S. 268, 283 (1979) (invalidating a law that granted alimony to women only); *Califano v. Goldfarb*, 430 U.S. 199, 216-17 (1977) (invalidating a law that afforded Social Security benefits to widows automatically but required widowers to show dependence); *Stanton v. Stanton*, 421 U.S. 7, 15-17 (1975) (invalidating a law affording boys more years of parental support on the assumption that girls would marry); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 642-45, 653 (1975) (invalidating a law granting Social Security survivors’ benefits to widows, but not widowers, with minor children); *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (invalidating a legal presumption that unwed fathers would be unfit parents); *Frontiero v. Richardson*, 411 U.S. 677, 688-91 (1973) (invalidating a law granting benefits automatically to wives, but not husbands, of servicemembers).

<sup>106</sup> See sources cited *supra* note 105.

<sup>107</sup> 518 U.S. at 522 (internal quotation marks omitted).

policy. The Court recognized that physical sex differences could in theory justify excluding women,<sup>108</sup> but would not do so unless no women could meet VMI's admissions criteria. Because some women could pass this bar, eight justices deemed the all-male policy unconstitutional.<sup>109</sup>

Critically, the Court then extended *Virginia's* careful scrutiny of sex-based laws to unsex parenting, even in the presence of physical sex differences related to reproduction.<sup>110</sup> In *Nevada Department of Human Resources v. Hibbs*, a decision authored by Chief Justice Rehnquist—no great advocate of sex equality<sup>111</sup>—the Court recognized that fathers and mothers might be differently situated with regard to “the period of physical disability due to pregnancy and childbirth.”<sup>112</sup> But greater post-birth leave granted to mothers and not fathers that is “not attributable to any differential physical needs of men and women” would be constitutionally verboten as premised in and furthering the “pervasive sex-role stereotype that caring for family members is women’s work.”<sup>113</sup> So in the face of the physical difference of childbirth, equal protection requires unsexing any carework unrelated to this difference.<sup>114</sup>

More recently, the Court expanded the bounds of unsexing parenting with its recognition of the right to same-sex marriage.<sup>115</sup> At the same time that the Constitution policed laws enforcing sex roles in the family, sex-based parenting roles continued to serve as a reason for denying same-sex marriage.<sup>116</sup> Recognizing the right to same-sex marriage meant renouncing the idea that having parents of different sexes was necessary (or even necessarily beneficial).<sup>117</sup> If, as a matter of federal constitutional law, two men or two women can be just as good parents as a man and a woman, the separation of sex from parenting is well-nigh complete.

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<sup>108</sup> See *id.* at 533 (“Physical differences between men and women . . . are enduring . . .”).

<sup>109</sup> See *id.* at 566-67 (Scalia, J., dissenting).

<sup>110</sup> See *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 730-31 (2003) (crediting Congress’s finding that the “pervasive sex-role stereotype that caring for family members is women’s work” enforced the gendered breadwinner-homemaker dichotomy). *Hibbs* addressed whether the FMLA abrogated state sovereign immunity under Section 5 of the Fourteenth Amendment such that a state employee could sue her state employer under the statute. See *id.* at 726. This required the Court to evaluate the reach of the Amendment’s first Section, as Congress’s enforcement power under Section 5 extends only to laws remedying or deterring conduct that violates Section 1. See *id.* at 727-30 (“[T]he persistence of . . . unconstitutional discrimination by the States justifies Congress’ passage of prophylactic § 5 legislation.”).

<sup>111</sup> See Reva B. Siegel, *You’ve Come a Long Way, Baby: Rehnquist’s New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871, 1872 (2006) (indicating that Rehnquist was “a vocal critic of the Court’s sex discrimination jurisprudence” and an opponent of the ERA).

<sup>112</sup> *Hibbs*, 538 U.S. at 731 & n.4 (citing evidence that the average physical recovery period after childbirth is four to eight weeks).

<sup>113</sup> *Id.* at 731.

<sup>114</sup> For more on this jurisprudence focusing on recent case law, see Cary Franklin, *Biological Warfare: Constitutional Conflict Over “Inherent Differences” Between The Sexes*, 2017 S. CT. REV. 169.

<sup>115</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604-05 (2015).

<sup>116</sup> See Case, *supra* note 97, at 1488 (“[P]rohibitions on homosexuality rely on stereotypes in the sense that they are based on ‘fixed notions concerning the roles and abilities of men and women.’”) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)).

<sup>117</sup> See *Obergefell*, 135 S. Ct. at 2600 (recognizing that “gays and lesbians can create loving, supportive families”).

Beyond equal protection doctrine, statutes that operate at the “faultline between work and family” seek to unsex parenting as well.<sup>118</sup> Title VII’s<sup>119</sup> ban on workplace sex discrimination prohibits employers from acting on the basis of sex stereotypes about caregiving responsibilities, either assuming that women are less competent workers because of their family responsibilities, or that men are less competent caregivers because of their work responsibilities.<sup>120</sup> And when the guarantee of formal equality under the Constitution and statutes like Title VII fell short in unsexing parenting, Congress responded by enacting the FMLA.<sup>121</sup> As the Supreme Court made clear, “[b]y setting a minimum standard of family leave for *all* eligible employees, irrespective of gender,” the FMLA “attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers’ incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes.”<sup>122</sup> While the goal of unsexing parenting may not yet be fulfilled, it has been the aim of sex equality law for decades.

## II. SEXING BREASTFEEDING

Despite the constitutional mandate to unsex the carework of parenting, courts and commentators have overlooked the carework associated with breastfeeding that can and thus must be unsexed. Cases view breastfeeding as a biological event only, or a social event derivative of that biological event, and scholars mostly concur.<sup>123</sup> Coupled with public health efforts to promote breastfeeding, the result is a burgeoning area of facially sex-discriminatory breastfeeding laws that cover both lactation *and* carework. Even though these sexed regulations exist at “the faultline between work and family,”<sup>124</sup> neither judges nor scholars have noted the tension with the doctrine set forth in Part I that mandates unsexing carework.

This Part first explains why we sex breastfeeding, setting forth the sex equality jurisprudence of breastfeeding, and how it exists in tension with the sex equality jurisprudence of parenting. This law of breastfeeding does not recognize the carework that is part of breastfeeding.<sup>125</sup> Even when it is noticed, the carework of breastfeeding is seen as inevitably bundled with sex, and thus breastfeeding inevitably reinforces women’s role as caregivers.<sup>126</sup> This Part then explains how we sex breastfeeding,

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<sup>118</sup> *Hibbs*, 538 U.S. at 738.

<sup>119</sup> See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a).

<sup>120</sup> See U.S. Equal Emp’t Opportunity Comm’n, Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities, 2 EEOC Compl. Man. § 615 (2007), <https://www.eeoc.gov/policy/docs/caregiving.html> (indicating that Title VII outlaws “sex-based disparate treatment of female caregivers, focusing on sex-based stereotypes,” and “sex-based disparate treatment of male caregivers, such as the denial of childcare leave that is available to female workers”).

<sup>121</sup> See *Hibbs*, 538 U.S. at 737-38 (discussing how the FMLA was needed to remedy the sex unequal distribution of home and market work because formal-equality statutes like Title VII did not).

<sup>122</sup> *Id.* at 737.

<sup>123</sup> See *infra* Part II.A.2.

<sup>124</sup> *Hibbs*, 538 U.S. at 738.

<sup>125</sup> See *infra* notes 183-95 and accompanying text.

<sup>126</sup> See *infra* notes 196-97 and accompanying text.



cataloguing the rules of breastfeeding that rely on sex classifications, and showing how the same rules are sex neutral with regard to other aspects of carework. Rather than exhausting the realm of sexed breastfeeding laws, this catalogue highlights key examples of the most important rules that make up the sexed law of breastfeeding.<sup>127</sup>

### A. Why We Sex Breastfeeding

The constitutional mandate to unsex parenting stems from the idea that a host of “family duties” need not be and thus should not be assigned on the basis of sex.<sup>128</sup> This reasoning should extend to many facets of breastfeeding, notwithstanding the physical fact of lactation that typically divides mothers and fathers. These substantial “family duties”<sup>129</sup> can be performed regardless of whether a parent is lactating and thus can be disaggregated from sex. Yet the law has failed to notice this breastfeeding carework. This Section first offers a typology of the substantial nonbiological carework that breastfeeding entails, and that is the kind of carework that equal protection has required to be unsexed. It then shows how law renders breastfeeding carework invisible by treating breastfeeding as a biological event exclusive to women.

#### 1. Breastfeeding as Carework in Life

Breastfeeding is typically thought of as a simple matter of lactation. But sources from economists<sup>130</sup> to parenting blogs<sup>131</sup> recognize that breastfeeding is not a natural and costless phenomenon. Rather, successful breastfeeding depends on substantial investments in capital and expenditures of labor that are separate and apart from lactation.<sup>132</sup> With the exception of lactation, acquiring breastfeeding capital and performing breastfeeding labor can be done by either sex.<sup>133</sup>

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<sup>127</sup> A more complete though still not exhaustive list of sexed breastfeeding laws can be found in the appendices to this Article.

<sup>128</sup> *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 730 (2003).

<sup>129</sup> *Id.*

<sup>130</sup> See Pinka Chatterji & Kevin D. Frick, *Does Returning to Work After Childbirth Affect Breastfeeding Practices?*, 3 REV. ECON. HOUSEHOLD 315 (2005).

<sup>131</sup> See, e.g., Ross Hunt, *5 Ways Dads Can Help with Breastfeeding*, TODAY’S PARENT (Aug. 3, 2018), <https://www.todaysparent.com/family/parenting/ways-dads-can-help-with-breastfeeding/>; *The Fatherly Guide*, *supra* note 29.

<sup>132</sup> See *infra* notes 133-176 and accompanying text.

<sup>133</sup> There is a burgeoning academic literature on father involvement in breastfeeding. See, e.g., Sihota, et al., *supra* note 12, at 1 (noting and reviewing this “growing” literature). Some studies focus on how father involvement in breastfeeding increases breastfeeding rates. See, e.g., Jennifer Abbass-Dick, et al., *Perinatal Breastfeeding Interventions Including Fathers/Partners: A Systematic Review of the Literature*, 75 MIDWIFERY 41 (2019) (reviewing research finding that prenatal breastfeeding education for fathers increases breastfeeding in partners); Alfredo Pisacane, et al., *A Controlled Trial Of The Father’s Role In Breastfeeding Promotion*, 4 PEDIATRICS 494, 494 (2005) (finding that father breastfeeding education substantially increased the rate at which fathers provided support (91% v. 34%)). Other studies focus on the various ways fathers can be involved in breastfeeding. See, e.g., Nigel Sherriff, et al., *Engaging and Supporting Fathers to Promote Breastfeeding: A Concept Analysis*, 30 MIDWIFERY 667 (2014) (providing the following typology of father breastfeeding support: (1) knowledge about breast feeding; (2) positive attitude to breast feeding; (3) involvement in the decision-making process; (4) practical support; and (5)

Parents can acquire breastfeeding capital, which can be physical, human, or social capital. As for physical capital, breastfeeding often entails acquiring goods such as a nursing pillow, nursing bras, nipple cream, and more.<sup>134</sup> A breastpump and associated accessories<sup>135</sup> will be important not only for those who at least sometimes expect to be apart from their breastfeeding baby, but also for babies who won't latch to the breast.<sup>136</sup> Parents can research and acquire this physical capital,<sup>137</sup> and can do the associated administrative work, like determining insurance coverage for these products.<sup>138</sup>

Some of these breastfeeding products will be used exclusively by the lactating parent (for example, a nursing bra).<sup>139</sup> Other products can be used by either parent (for example, a breastfeeding book).<sup>140</sup> Even products that seem inherently sexed may not be. For example, a breastfeeding pillow can be used not only by the lactating parent while breastfeeding, but by either parent when giving the baby a bottle.<sup>141</sup> Regardless of which parent will use these products, either parent can research the products and acquire them.

As for human capital, all parents can learn skills for performing breastfeeding carework.<sup>142</sup> As the volumes of breastfeeding books can attest to,<sup>143</sup> there is a lot to learn

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emotional support); Lynn A. Rempel & John K. Rempel, *The Breastfeeding Team: Involved Fathers' Role in the Breastfeeding Family*, 27 J. HUM. LACT. 115 (2011) (cataloguing ways fathers can be involved in breastfeeding).

<sup>134</sup> See, e.g., Haley Jena, *Breastfeeding Products for New Moms*, WHAT TO EXPECT <https://www.whattoexpect.com/baby-products/nursing-feeding/breastfeeding-essentials-new-moms/> (last updated July 6, 2020) (cataloguing breastfeeding supplies).

<sup>135</sup> See, e.g., *Breast Milk Storage and Feeding*, MEDELA, <https://www.medela.us/breastfeeding/products/breastmilk-storage-and-feeding> (last visited Jan. 15, 2022).

<sup>136</sup> See KAREN WAMBACH & BECKY SPENCER, *BREASTFEEDING AND HUMAN LACTATION* 249, 253 (6th ed. 2021). Pumping can also be a way to maintain or increase milk supply. See *id.* at 365.

<sup>137</sup> The transaction costs can run high given the array of products on the market. See, e.g., *Breast Pump Buying Guide*, CONSUMER REPORTS, <https://www.consumerreports.org/cro/breast-pumps/buying-guide/index.htm> (last updated May 24, 2016); *Nursing Bra Buying Guide*, CONSUMER REPORTS, <https://www.consumerreports.org/cro/nursing-bras/buying-guide/index.htm> (last updated May 24, 2016).

<sup>138</sup> See *id.* The Affordable Care Act requires insurers to cover the cost of only certain types of breastpumps. See *Breastfeeding Benefits*, HEALTHCARE, <https://www.healthcare.gov/coverage/breast-feeding-benefits/> (last visited Jan. 15, 2022) (indicating variation on “manual or electric, the length of the rental, and when you’ll receive it (before or after birth)”). On the gendered distribution of this type of administrative work, see Emens, *supra* note 67, at 1409.

<sup>139</sup> See *Nursing Bra Buying Guide*, *supra* note 137. The law sexes breastfeeding, but this Article does not. Transgender men and nonbinary persons can lactate. The non-lactating parent can be a mother. Therefore, rather than assuming that mothers lactate and fathers do not, this Article uses gender-neutral terms where appropriate.

<sup>140</sup> See, e.g., KATHLEEN HUGGINS, *THE NURSING MOTHER'S COMPANION* (2015); LA LECHE LEAGUE, *THE WOMANLY ART OF BREASTFEEDING* (8th ed. 2010). While this Article focuses on law, these titles make clear that it is not law alone that sexes (or, with terms like “womanly,” genders) breastfeeding.

<sup>141</sup> See *How to Use a Breastfeeding Pillow*, WIKIHOW, <https://www.wikihow.com/Use-a-Breast-Feeding-Pillow> (last updated Feb. 22, 2020). Federal law assumes that only breastfeeding women use nursing pillows. See 16 C.F.R. § 1500.86 (exempting from classification as a banned toy “nursing pillows that are designed to be used only as a nursing aide for breastfeeding mothers”).

<sup>142</sup> The difference between a supportive partner and an unsupportive partner turns precisely on whether the partner has the knowledge and skills required to provide breastfeeding assistance. See, e.g., Pisacane, et al.,

about breastfeeding. Parents can learn about breastfeeding generally, such as how often babies need to eat, what it looks like when a baby is swallowing, the role of the baby in milk letdown, and so on.<sup>144</sup> Parents can learn how to use the physical capital associated with breastfeeding, like how to set up the breastpump and how to store breastmilk.<sup>145</sup> Parents can learn the mechanics of breastfeeding,<sup>146</sup> like different positions<sup>147</sup> and proper latch.<sup>148</sup> Parents can attend breastfeeding classes,<sup>149</sup> and there are breastfeeding classes aimed specifically at non-lactating parents, which I refer to as partners,<sup>150</sup> in recognition of their role.<sup>151</sup>

Parents can also invest in social capital related to breastfeeding, regardless of sex. Through the course of breastfeeding, parents develop relationships with professionals who support breastfeeding, such as the obstetrician, midwife, doula, pediatrician, and lactation consultant.<sup>152</sup> Parents also find it useful to develop relationships with others who are going through the experience of breastfeeding.<sup>153</sup> Even when it comes to relationships that are thought to run primarily to the lactating person—such as the obstetrician, midwife, or lactation consultant—any parent can play a role in forming,

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*supra* note 133, at 494 (finding that teaching fathers how to prevent and manage lactation difficulties substantially increased the rate at which fathers provided support).

<sup>143</sup> See, e.g., *Best Sellers in Breastfeeding*, AMAZON, <https://www.amazon.com/gp/bestsellers/digital-text/157607011> (last visited Jan. 15, 2022) (listing one hundred bestselling breastfeeding books).

<sup>144</sup> See Hunt, *supra* note 131 (reporting that he “learned all about cluster feeding, the baby’s role in letdown and the importance of nipple cream”); 8 *Ways*, *supra* note 168 (suggesting that dads learn “how breastfeeding works—what it looks like when a baby is swallowing, rather than just resting at the breast”).

<sup>145</sup> See *The Fatherly Guide*, *supra* note 29 (citing “breastfeeding aids mom uses, like pumps or nipple shields and breastmilk storage guidelines”).

<sup>146</sup> On the unique contributions non-lactating parents can make here, see *infra* notes 168-70 and accompanying text.

<sup>147</sup> See WAMBACH & SPENCER, *supra* note 136, at 224 (indicating five most common positions as “cradle hold, cross-cradle hold, football hold, side-lying, and prone position”).

<sup>148</sup> *Id.* (“Latch-on refers to the ability of the newborn to grasp the nipple, flange the upper and lower lips outward against the breast areola, and remain firmly on the breast between bursts of suckling.”); *id.* at 251 (noting that “[a] deep latch ensures full draining of the milk stored in the breast,” whereas an improper latch can result in “nipple pain and damage” and reduced milk flow).

<sup>149</sup> See Mayo Clinic Staff, *Breast-Feeding Support: How A Partner Can Help*, MAYO CLINIC (Nov. 19, 2020), <https://www.mayoclinic.org/healthy-lifestyle/labor-and-delivery/in-depth/breastfeeding-support/art-20043871> (recommending fathers attend classes to learn “the positions and techniques involved,” so “you might be better able to help your partner”; to “understand the impact that the use of bottles, pacifiers and supplemental feedings can have on the breast-feeding process”; and to “spur you and your partner to make decisions together. . .”).

<sup>150</sup> Regardless of whether the lactating and non-lactating parents are romantic partners, they are breastfeeding partners.

<sup>151</sup> See *Prenatal: Supporting the Breastfeeding Parent*, THE BREASTFEEDING CENTER OF GREATER WASHINGTON, <https://app.acuityscheduling.com/schedule.php?appointmentType=12923202&owner=18081780> (last visited Jan. 15, 2022) (“This class is intended for fathers, partners, co-parents and others who are supporting the breastfeeding parent.”).

<sup>152</sup> See Amy Brown & Ruth Davies, *Fathers’ Experiences of Supporting Breastfeeding*, 10 *MATERNAL & CHILD NUTRITION* 510, 510-11 (2014) (collecting research); LA LECHE LEAGUE, *supra* note 140, at 25-26.

<sup>153</sup> See Office of the Surgeon General, *supra* note 34, at 20 (collecting studies finding that peer support improves breastfeeding practices).

maintaining, and deepening these relationships.<sup>154</sup> Finding the right relationships is especially important because not all doctors or hospitals are equally supportive of breastfeeding.<sup>155</sup>

In addition to investing in breastfeeding capital, parents can also engage in breastfeeding labor, regardless of sex. Partners can perform various forms of breastfeeding labor that do not turn on the capacity to lactate. Partners can identify and resolve breastfeeding problems.<sup>156</sup> Partners can connect lactating parents to persons who can help, such as lactation consultants.<sup>157</sup> Partners can attend appointments with these professionals<sup>158</sup> to serve as an advocate<sup>159</sup> and a consistent source of advice.<sup>160</sup>

Partners can feed babies expressed milk.<sup>161</sup> The feeding of expressed breastmilk occurs not only when the lactating parent is away from the baby, but also when babies

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<sup>154</sup> See LA LECHE LEAGUE, *supra* note 140, at 31 (suggesting that a key role fathers play is connecting mothers to needed support persons); Amy Bassett, *Open Letter to Breastfeeding Dads*, LACTATION CONSULTANTS OF CENTRAL FLA. <https://lactationconsultantsofcentralfl.com/breastfeeding-tips/open-letter-to-breastfeeding-dads/> (last visited Jan. 15, 2022) (indicating that “the majority of people who contact [her lactation consultant office] are fathers”).

<sup>155</sup> See Jennifer Bernstein & Lainie Rutkow, *Hospital Breastfeeding Laws in the U.S.: Paternalism or Empowerment?*, 44 U. BALT. L. REV. 163, 174-75 (2015) (explaining certification for hospitals and birthing centers that have adopted best practices for promoting breastfeeding).

<sup>156</sup> See Sherriff, *supra* note 133, at 675 (recounting one mother’s experience: “[I]f you’re freaking out about the baby. . . they’re there” and can suggest “let’s just Google that—it might just be something really simple.”).

<sup>157</sup> See *supra* notes 152-54 and accompanying text.

<sup>158</sup> See Erin Stieglitz, *Should I Bring My Husband To My Lactation Consultations?*, LEADING LADY (May 2, 2018), <https://www.leadinglady.com/blogs/archive/lactation-consultant-should-i-bring-my-husband-to-my-lactation-consultations> (noting that during these appointments “the lactation consultant may give [fathers] tasks to help with feedings”).

<sup>159</sup> See Sherriff, *supra* note 133, at 675.

<sup>160</sup> See *id.* at 671 (noting substantial “inconsistency of information and advice given to parents from health professionals regarding breast feeding,” and that “[f]athers may therefore have an important part to play in ensuring continuity of advice”).

<sup>161</sup> Once breastfeeding is established, on average at four weeks, breastmilk can be expressed and fed to the baby. See *Introducing a Bottle to a Breastfed Baby*, LA LECHE LEAGUE INTERNATIONAL, <https://www.llli.org/breastfeeding-info/introducing-a-bottle-to-a-breastfed-baby/> (last visited Jan. 15, 2022). Research is just beginning on the question of whether and to what extent the benefits of breastfeeding are from nursing directly at the breast or also from consuming expressed breastmilk. See Meghan B. Azad, et al., *Infant Feeding and Weight Gain: Separating Breast Milk From Breastfeeding and Formula From Food*, 142 PEDIATRICS 1092 (2018) (finding that nursing was superior to consuming expressed breastmilk in reducing obesity).

Partner support with expressed breastmilk becomes even more essential when a baby has difficulty breastfeeding. See Linda Sweet & Philip Darbyshire, *Fathers and Breastfeeding Very-Low-Birthweight Preterm Babies*, 25 MIDWIFERY 540 (2009) (documenting this with interviews). Consider this scenario described by a father of a premature baby:

Sara would nurse Elliott as long as she could. . . . When she was done, she’d continue pumping as much as she could. Meanwhile, . . . holding Elliott, I’d slowly feed him [with a tube connected to a breastmilk-filled syringe] by putting the tubed finger in his mouth—giving him something to suck on—while pressing down on the syringe. . . . Someone would clean up the pumping supplies and the syringe to be ready for the next feeding, while the other would change him. . . . We were supposed to feed him upward of

cannot latch to the breast,<sup>162</sup> when lactating parents don't feel comfortable breastfeeding in public,<sup>163</sup> and when gay couples rely on donor breastmilk.<sup>164</sup> Any parent can do the labor adjacent to expressing breastmilk, like cleaning the pump and bottles, storing extra milk, preparing frozen breastmilk for use, and transporting a pump or parts.<sup>165</sup> And when the lactating parent and baby are apart, during the workday, for example, the partner can transport the baby to the lactating parent to be breastfed,<sup>166</sup> a strategy that may be necessary when the lactating parent cannot effectively express breastmilk, or when the baby refuses a bottle.<sup>167</sup>

Sometimes non-lactating partners are uniquely situated to contribute to breastfeeding in ways that lactating persons cannot. Because they are not breastfeeding the baby, non-lactating partners are better positioned, literally, to see how the baby is positioned and adjust the positioning accordingly.<sup>168</sup> Having the partner burp the baby and hold the baby during the course of feeding brings particular benefits, including allowing the baby to eat more,<sup>169</sup> and learn important hunger cues.<sup>170</sup>

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12 times a day. So about 45 minutes out of every two hours was taken up with nothing but the feeding process.

*The Truth About Breastfeeding That New Dads Need To Know*, INSTAFATHER (Mar. 22, 2015), <https://www.instafather.com/dad-blog/2015/3/21/my-new-dad-story-why-breastfeeding-was-the-hardest-the-best-newborn-experience>.

<sup>162</sup> See WAMBACH & SPENCER, *supra* note 136, at 365.

<sup>163</sup> See Office of the Surgeon General, *supra* note 27, at 13 (collecting studies documenting this phenomenon).

<sup>164</sup> See WAMBACH & SPENCER, *supra* note 136, at 365. Partners can feed their infant expressed breastmilk with a supplemental nursing system, which mimics breastfeeding by allowing for skin-to-skin contact and for the baby to learn or retain the skill of suckling. See *Supplemental Nursing System*, MEDELA, <https://www.medela.com/breastfeeding-professionals/products/feeding/supplemental-nursing-system> (last visited Jan. 15, 2022) (describing a reservoir filled with expressed breastmilk or formula that is placed on the chest with tubes fixed alongside the nipples that release milk as the baby feeds, and explaining that it “[t]rains the baby to suck properly by creating a vacuum at the breast”); *Men Can Breastfeed Too!*, COLORADO SURROGACY (July 30, 2019), <https://www.coloradosurro.com/blog/inducing-lactation-men-can-breastfeed> (explaining that a supplemental nursing system “is a way men and women can ‘breastfeed’ without producing milk” and that “[i]t’s a great bonding tool”).

<sup>165</sup> See *The Fatherly Guide*, *supra* note 29; Hunt, *supra* note 131.

<sup>166</sup> See, e.g., *Dike v. Sch. Bd. of Orange Cty.*, 650 F.2d 783, 785 (5th Cir. 1981) (recounting how father regularly brought baby to mother’s workplace to be breastfed).

<sup>167</sup> See WAMBACH & SPENCER, *supra* note 136, at 379-81 (discussing pumping problems).

<sup>168</sup> See Lucas Godinez, *Fathers, Breastfeeding, and Bonding*, INT’L LACTATION CONSULTANT ASSN. BLOG (Aug. 17, 2013), <https://lactationmatters.org/category/fathers-2/> (advising that fathers “can make sure the infant is latching appropriately” and “can help position the baby”); *8 Ways Dad can Support a Nursing Mom*, BRAVADO DESIGNS, <https://bravadodesigns.com/blogs/the-thread/144995143-8-ways-dad-can-support-a-nursing-mom> (last visited Jan. 15, 2022) [hereinafter *8 Ways*] (quoting lactation consultant stating that she “just changed [her] workshops to include dads more” because “dads can see” better “the overall baby and mom position”).

<sup>169</sup> See Godinez, *supra* note 168 (explaining advantage of “hav[ing] dad burp the baby in between breasts,” because “[b]abies get very warm and snuggly next to mom’s warm breasts and fall asleep easily” before they are done eating, so “[i]f dad takes baby after eating” the baby is more likely to stay awake and “[y]ou might get a burp out and be ready to nurse some more”).

<sup>170</sup> See Diane Erdmann, *The Role of Dad in Breastfeeding*, BREASTFEEDING SUPPORT OF OMAHA, <https://omahabreastfeeding.com/newsletter-archive/the-role-of-dad-in-breastfeeding/> (last visited Jan. 15, 2022) (explaining that “[b]oth parents need to share the role of holding baby as often times when babies are

Non-lactating partners can also perform breastfeeding labor by supporting the lactating parent. Partners can physically support the lactating parent with massages,<sup>171</sup> or by preparing food or drinks for them.<sup>172</sup> Because of the biological features of lactation, feeding the lactating parent is a component of feeding the breastfed child.<sup>173</sup> Partners can also provide emotional support to the lactating parent, by giving encouragement or simply by being present during breastfeeding,<sup>174</sup> especially in public.<sup>175</sup> As one site aimed at encouraging father involvement in breastfeeding recognized: “For moms who have been shamed while breastfeeding in public, and unfortunately there are many, the support of a partner or bystander can make all the difference in giving her the courage to continue feeding her baby whenever and wherever baby is hungry.”<sup>176</sup>

Although cisgender men are limited to performing breastfeeding carework,<sup>177</sup> transgender men and nonbinary persons can lactate.<sup>178</sup> In many states, a lactating

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fussing and mom is holding them, they think, ‘Hey, mom is holding me and I can smell food nearby so I guess I should be eating while I’m here,’” whereas “[i]f dad holds baby after eating, [babies] should realize they don’t need more, they are just ready for someone else to hold and cuddle them”).

<sup>171</sup> See Hunt, *supra* note 29 (recounting how his “wife didn’t want to move once the baby had latched,” so she “often . . . found herself in a rather uncomfortable position,” and he would give her a massage, which allowed him to “feel like [he] was a part of the whole feeding process”).

<sup>172</sup> See Godinez, *supra* note 168; see also Wallwork, *supra* note 15.

<sup>173</sup> See WAMBACH & SPENCER, *supra* note 136, at 479 (stating that “energy requirements for lactation are approximately 500 kcal per day over the recommended caloric intake”). More broadly, because the breastfed child is dependent on the biological production of the lactating parent, any labor that supports the lactating parent’s milk production also supports the breastfed child, rendering all such labor a form of breastfeeding carework. See Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 YALE J.L. & FEMINISM 51, 54–55 (1997) (discussing the Marxist concept of production, which includes “the reproduction of the tools and labor power required for production”).

<sup>174</sup> See Sheriff, *supra* note 133, at 675.

<sup>175</sup> See *id.* at 674 (quoting one father reporting: “If we have to stop somewhere to breast feed, I’ll find somewhere . . . help cover her up, make sure she has water”). Partners can also serve as a visual shield, see *The Fatherly Guide*, *supra* note 29 (“Subtly use your body to block gawkers if she is breastfeeding in public.”), or as an advocate if anyone complains about public breastfeeding, see Sheriff, *supra* note 133, at 675.

<sup>176</sup> Beth Leyba, *If I Could, I Would: Men Offer Breastfeeding Support*, THE GOOD MEN PROJECT (Mar. 12, 2014), <https://goodmenproject.com/featured-content/kt-men-offer-breastfeeding-support>.

<sup>177</sup> This may soon change. See Cederstrom, *supra* note 28 (discussing peer-reviewed case report confirming that a person assigned male at birth was able to breastfeed for six weeks following a hormone regimen); Mathilde Cohen, *The Lactating Man*, in MAKING MILK. THE PAST, PRESENT AND FUTURE OF OUR PRIMARY FOOD 141, 141–43 (Mathilde Cohen & Yoriko Otomo, eds. 2017) (describing how cisgender men have been known to lactate with sufficient mechanical or hormonal stimulation).

<sup>178</sup> See MacDonald, et al., *supra* note 23, at 106 (“Transmasculine individuals also lactate and chestfeed babies they have birthed.”). The academic literature on chestfeeding is growing, see, e.g., Trevor MacDonald, *Lactation Care for Transgender and Non-Binary Patients: Empowering Clients and Avoiding Aversives*, 35 J. HUM. LACT. 223 (2019); J.E. Dodgson, *Non-conforming: Aren’t We All in One Way or Another?* 35 J. HUM. LACT. 212 (2019); Robyn Lee, *Queering Lactation: Contributions of Queer Theory to Lactation Support for LGBTQIA2S+ Individuals and Families*, 35 J. HUM. LACT. 233 (2019), and chestfeeding is no longer arcane, see Britni De La Cretaz, *What It’s Like to Chestfeed*, THE ATLANTIC (Aug. 23, 2016), <https://www.theatlantic.com/health/archive/2016/08/chestfeeding/497015/>.

transgender man is deemed legally male, at least by some markers.<sup>179</sup> When transgender men directly feed babies with their human milk, it is often referred to as “chestfeeding.”<sup>180</sup> Some transgender men can lactate even if they have had their breasts surgically removed.<sup>181</sup>

## 2. Breastfeeding as Biology in Law

The presence of breastfeeding carework has escaped notice because sex equality law has either ignored breastfeeding altogether or viewed it as a biological event only.<sup>182</sup> If breastfeeding is solely a matter of lactation, then there is no breastfeeding carework to be unsexed.

There are no precedents explicitly addressing the constitutionality of a sex classification regulating breastfeeding. Yet the Supreme Court has ignored breastfeeding even when it is relevant, and thus has missed the opportunity to identify breastfeeding carework that must be unsexed. For example, the Court’s 2003 decision in *Nevada Department of Human Resources v. Hibbs* addressed the constitutionality of state parental leave policies that afforded women more leave than men.<sup>183</sup> As for the “period of physical disability due to pregnancy and childbirth,” the Court acknowledged that there is a real physical difference between men and women, but that any post-birth leave afforded on the basis of sex must be carefully scrutinized to ensure that it is “attributable to . . . differential physical needs of men and women.”<sup>184</sup>

When it came to one physical difference following childbirth that might be relevant to sex-differentiated leave policies—physical recovery from childbirth—the Court discussed in detail how this biological sex difference should be treated for purposes of unsexing. But when it came to another physical difference following childbirth that might be relevant to sex-differentiated leave policies—breastfeeding—the Court was silent as to how this biological sex difference should be treated for purposes of unsexing. The Court thus missed an opportunity to explain that sexed breastfeeding regulations must also be carefully scrutinized to ensure that they are not premised in the “pervasive sex-role stereotype that caring for family members is women’s work.”<sup>185</sup> So rather than

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<sup>179</sup> See *Changing Birth Certificate Sex Designations: State-by-State Guidelines*, LAMBDA LEGAL, <https://www.lambdalegal.org/know-your-rights/article/trans-changing-birth-certificate-sex-designations> (last updated Sept. 17, 2018); Clarke, *supra* note 42, at 896-97 (discussing legal status of nonbinary identity).

<sup>180</sup> See MacDonald, et al., *supra* note 23, at 107 (“*Chestfeeding* is used to refer to transmasculine or gender non-conforming individuals and the act of feeding a baby or child at the chest”).

<sup>181</sup> See *id.*

<sup>182</sup> For more on the judicial tendency to view reproductive biology solely in terms of its physiological facts rather than its social features, see Fontana & Schoenbaum, *supra* note 14, at 330-31; Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 267-77 (1992).

<sup>183</sup> 538 U.S. 721 (2003).

<sup>184</sup> *Id.* at 731.

<sup>185</sup> *Id.*

explaining how men can perform breastfeeding carework, the Court said nothing about breastfeeding at all.

Breastfeeding has been raised more squarely in the lower courts. In *Knussman v. Maryland*, the Fourth Circuit confronted the permissibility of sex discrimination based on breastfeeding, but there too the court remained silent on men’s role in breastfeeding.<sup>186</sup> That case involved an equal protection challenge raised by a male employee of the state of Maryland who claimed that the state’s leave policy that afforded more leave to “primary caregivers” than “secondary caregivers” was applied on the basis of sex.<sup>187</sup> When the employee contacted his employer about whether he would qualify as the primary caregiver for his newborn child, he was told, in a comment prefiguring Tucker Carlson’s reaction to Pete Buttigieg,<sup>188</sup> that “fathers would only be permitted to take leave as secondary care givers since they ‘couldn’t breast feed a baby.’”<sup>189</sup>

The court held the sex discriminatory application of the policy to be unconstitutional because it amounted to “‘dissimilar treatment for men and women who are . . . similarly situated.’”<sup>190</sup> In stating that mothers and fathers are “similarly situated” despite the employer’s reliance on a way in which they are not—the capacity for breastfeeding—the Fourth Circuit reached the right result with the wrong reasoning. Rather than explaining how the physical difference of lactation alone would not justify a sex-based rule regarding leave to care for an infant, the Fourth Circuit, like the Court in *Hibbs*, ignored breastfeeding. And like the Court in *Hibbs*, it missed the chance to explain how, despite the physical sex difference of lactation, sex-based breastfeeding rules may be premised in impermissible stereotypes, because mothers and fathers are “similarly situated” when it comes to performing breastfeeding carework.

Because courts have ignored breastfeeding as a matter of constitutional sex equality jurisprudence, they have ignored the breastfeeding carework that parents of either sex can perform. Without any guidance from constitutional law about how breastfeeding can and should be unsexed, when courts address breastfeeding in other areas—most notably in the context of statutory sex discrimination law—they view breastfeeding as the physical fact of lactation only and thus as a phenomenon “unique to women.”<sup>191</sup>

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<sup>186</sup> 272 F.3d 625, 638 (4th Cir. 2001).

<sup>187</sup> *Id.* at 629 (recounting the plaintiff’s allegation that “only birth mothers could qualify as primary care givers” under the state’s policy).

<sup>188</sup> See *supra* notes 1-4 and accompanying text.

<sup>189</sup> 272 F.3d at 629.

<sup>190</sup> *Id.* at 635.

<sup>191</sup> *Martinez v. N.B.C., Inc.*, 49 F. Supp. 2d 305, 310–11 (S.D.N.Y. 1999) (explaining that “breast feeding . . . is unique to women”); accord *Derungs v. Wal-Mart Stores, Inc.*, 141 F. Supp. 2d 884, 889, 893 (S.D. Ohio 2000) (assuming that “breast-feeding . . . is unique to women”); *Wallace v. Pyro Min. Co.*, 789 F. Supp. 867, 869 (W.D. Ky. 1990), *aff’d*, 951 F.2d 351 (6th Cir. 1991) (accepting that “breast-feeding, like pregnancy, is a uniquely female attribute”); U.S. Equal Emp’t Opportunity Comm’n, *Enforcement Guidance on Pregnancy Discrimination and Related Issues* (June 25, 2015), at I.A.4.b, <https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related->



Courts evaluating claims of sex discrimination in employment based on breastfeeding have considered whether a breastfeeding woman has any similarly situated male comparators.<sup>192</sup> Courts have answered in the negative.<sup>193</sup> They have treated the notion that breastfeeding would impact men at work as “impossible,”<sup>194</sup> reasoning that an employer’s adverse action motivated by breastfeeding “clearly imposes upon women a burden that male employees need not—indeed, could not—suffer.”<sup>195</sup> Remarkably, one court proclaimed breastfeeding to entail only “a communion between mother and child” in a case where the father performed substantial breastfeeding carework by regularly transporting his child to be breastfed at the mother’s workplace.<sup>196</sup> On this view, courts have held that there is no reason that “male workers” would have any “child-care concerns” that would require accommodation of the sort that “breast-feeding female workers” have.<sup>197</sup> In so doing, courts overlook the breastfeeding “child-care concerns,” like attending a breastfeeding class, visiting a lactation consultant, or transporting a baby to be breastfed, that men and women workers alike can share.

Scholars too have failed to account for breastfeeding carework that can be performed by either sex. Early scholarship mapping out the evolving jurisprudence on unsexing had to confront how the doctrine should address pregnancy and breastfeeding, the two aspects of parenting that involve physical sex differences. When it came to pregnancy, scholars often took the case head on, urging the law to rely on male comparators with other physical disabilities to form the basis for sex discrimination claims.<sup>198</sup> Yet these same scholars downplayed breastfeeding,<sup>199</sup> suggesting that breastfeeding could not support sex-based regulations because of all the *other* parenting

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[issues#\\_ftnref55](#) (“[B]ecause only women lactate, a practice that singles out lactation or breastfeeding for less favorable treatment affects only women.”).

<sup>192</sup> See Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 750 (2011) (documenting how courts view comparators as the “defining element” of a discrimination claim).

<sup>193</sup> Courts have agreed on this conclusion, but have reached different results about whether this means that breastfeeding discrimination amounts to sex discrimination. Compare, e.g., *E.E.O.C. v. Houston Funding II*, 717 F.3d 425, 428 (5th Cir. 2013) (concluding that, because lactation affects only women, discriminating on this basis is discriminating on the basis of sex), with *Derungs*, 141 F. Supp. 2d at 891 (concluding that, because lactation affects only women, and thus there can be no male comparators, that discriminating on this basis is *not* discriminating on the basis of sex).

<sup>194</sup> *Martinez*, 49 F. Supp. 2d at 309 (discussing “the drawing of distinctions among persons of one gender [women] on the basis of criteria that are immaterial to the other [men]”).

<sup>195</sup> *Houston Funding II*, 717 F.3d at 428; accord *Martinez*, 49 F. Supp. 2d at 310 (same).

<sup>196</sup> *Dike v. Sch. Bd. of Orange Cty.*, 650 F.2d 783, 787 (5th Cir. 1981).

<sup>197</sup> *Wallace v. Pyro Min. Co.*, 789 F. Supp. 867, 869-70 (W.D. Ky. 1990), *aff’d*, 951 F.2d 351 (6th Cir. 1991).

<sup>198</sup> See, e.g., Wendy W. Williams, *Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 327-28 (1984-85) (explaining how nonpregnant but similarly disabled men can serve as comparators for sex discrimination claims based in pregnancy).

<sup>199</sup> See *id.* at 360 n.135 (in a footnote, responding to another scholar who “would add breastfeeding to pregnancy as a difference between the sexes which must be fully taken into account”: “I confess ambivalence on that point”).

work unrelated to breastfeeding that men can do.<sup>200</sup> In so doing, they viewed breastfeeding as simply a matter of lactation, and almost entirely overlooked breastfeeding carework that can be unsexed.<sup>201</sup> With one important exception not focused on law,<sup>202</sup> contemporary legal scholarship continues to overlook how men can be involved in breastfeeding.<sup>203</sup>

## B. How We Sex Breastfeeding

Despite breastfeeding carework that can be performed by parents of either sex, the law of breastfeeding excludes men from its benefits and protections. The law treats breastfeeding as a physical experience based in the biological sex difference of lactation, leaving the legal realm of breastfeeding almost exclusively to women. While not exhaustive, this Part surveys the most significant areas of sexed breastfeeding law. It first discusses how each of these areas of law are sexed in the context of the traditional heterosexual family, as that is the structure that typifies the gender dynamics that have animated the law of sex equality.<sup>204</sup> It then highlights how these areas of law are sexed by excluding transgender, nonbinary, gay, and lesbian parents.

### 1. Health Law

The Patient Protection and Affordable Care Act (ACA) generally requires health plans to offer benefits to mothers and fathers equally,<sup>205</sup> but not when it comes to breastfeeding. While the specific required benefits were to be determined later by an expert panel,<sup>206</sup> the ACA included a mandate for covered employers to offer insurance

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<sup>200</sup> See Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1029 (1984) (deeming a law that would provide parental leave only to breastfeeding women unconstitutional because “[e]ither parent, or a stranger, is biologically capable of caring for a child”).

<sup>201</sup> At best, these scholars recognized that men could feed infants expressed breast milk. See Williams, *supra* note 198, at 360 n.135 (“Bottled milk, human or not, need not be fed to the infant by the mother.”). Even when social features of breastfeeding were recognized, they were limited to women. See Siegel, *supra* note 182, at 375 n.448 (treating “breast-feeding” as a “fundamentally social” practice, but still one that affects only women because “[w]omen are alone physiologically capable of engaging in the work [of breastfeeding]”).

<sup>202</sup> Mathilde Cohen’s work traces the ways that men can be involved in breastfeeding, and this Article owes a debt to the groundwork laid therein. See Cohen, *supra* note 177, at 157-58 (explaining that “[m]en do not need to literally lactate . . . to participate in breastfeeding,” as “[m]en (just like everyone else regardless of sex and gender) can support breastfeeders” and listing “a variety of [such] behaviors”). Cohen’s project is sociological rather than legal: she addresses how breastfeeding can be unsexed, but not the role the law plays in sexing or unsexing breastfeeding.

<sup>203</sup> Cf. Darren Rosenblum, et al., *Pregnant Man?: A Conversation*, 22 YALE J. L. & FEM. 207, 276 (2010) (attributing to Professor Elizabeth Emens the recognition that a gay couple feeding their baby donor breastmilk is “‘kind of’” breastfeeding).

<sup>204</sup> See *supra* notes 79-93 and accompanying text.

<sup>205</sup> See Danielle Garrett, et al., *Turning to Fairness: Insurance Discrimination Against Women Today and the Affordable Care Act* 4 (2012), [https://nwlc.org/wp-content/uploads/2015/08/nwlc\\_2012\\_turningtofairness\\_report.pdf](https://nwlc.org/wp-content/uploads/2015/08/nwlc_2012_turningtofairness_report.pdf) (noting the ACA’s prohibition on sex discrimination in insurance company-provided health plans).

<sup>206</sup> See *id.* (requiring that additional care for women be “provided for in comprehensive guidelines supported by the Health Resources and Services Administration”).

plans that provided certain benefits without cost sharing only “to women.”<sup>207</sup> The resulting regulations included “comprehensive lactation support services,” such as the provision of “breastfeeding equipment and supplies” (e.g., breast pumps) and breastfeeding “counseling” and “education” (e.g., lactation consultant appointments and breastfeeding classes),<sup>208</sup> but only “with regard to women.”<sup>209</sup>

The ACA did not mandate comparable coverage for fathers, even when such coverage could benefit them. This means that a father is not guaranteed insurance coverage for “education” like a breastfeeding class,<sup>210</sup> despite the critical role such human capital plays in determining whether the father is involved in performing key forms of care for a breastfed baby.<sup>211</sup> Nor is the father guaranteed insurance coverage for “counseling” from a lactation consultant,<sup>212</sup> even though such social capital can be crucial to a father learning how to feed his infant a bottle of breastmilk.<sup>213</sup> And if a mother is uninsured, a father cannot use his health insurance to cover the cost of “breastfeeding equipment,” like a breastpump, to benefit his child.<sup>214</sup> Several states sex breastfeeding support further, by requiring that medical personnel provide breastfeeding education and counseling, but, again, only to women.<sup>215</sup>

Other federal laws like the Child Nutrition Act require the provision of “breastfeeding promotion and support activities” and “the distribution of breastfeeding equipment” to promote breastfeeding among low-income populations.<sup>216</sup> But they do so

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<sup>207</sup> 42 U.S.C. § 300gg-13(4) (requiring insurance coverage “with respect to women” for “such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph”).

<sup>208</sup> Health Res. & Servs. Admin., *Women’s Preventive Services Guidelines*, <https://www.hrsa.gov/womens-guidelines-2019> (last reviewed Oct. 2020) (“The Women’s Preventive Services Initiative recommends comprehensive lactation support services (including counseling, education, and breastfeeding equipment and supplies) during the antenatal, perinatal, and the postpartum period to ensure the successful initiation and maintenance of breastfeeding.”).

<sup>209</sup> 42 U.S.C. § 300gg-13(4).

<sup>210</sup> Health Res. & Servs. Admin., *supra* note 208.

<sup>211</sup> *See supra* note 142.

<sup>212</sup> Health Res. & Servs. Admin., *supra* note 208.

<sup>213</sup> *See* Video Interview with Isabela Lessa, International Board Certified Lactation Consultant, Breastfeeding Center for Greater Washington (Oct. 12, 2020) (notes on file with author) [hereinafter Lessa Interview] (indicating that fathers make appointments without the mother if they are learning how to bottle feed, and that this is especially true of gay men using donor breastmilk).

<sup>214</sup> Health Res. & Servs. Admin., *supra* note 208.

<sup>215</sup> *See, e.g.*, Ill. Rev. Stat. ch. 410 § 50/3.4(a)(16) (granting “every woman . . . [t]he right to receive information about breastfeeding”); Mo. Rev. Stat. § 191.915 (requiring hospitals to provide “information on breast-feeding,” “information on local breast-feeding support groups,” and “breast-feeding consultations,” but only to “mothers”). For a list of sexed state healthcare laws regulating breastfeeding, see Appendix B.

<sup>216</sup> 42 U.S.C. § 1790 (“The Secretary . . . shall establish a breastfeeding promotion program to promote breastfeeding as the best method of infant nutrition, foster wider public acceptance of breastfeeding in the United States, and assist in the distribution of breastfeeding equipment to breastfeeding women.”); 7 C.F.R. § 246.11(c)(7)(iv) (requiring “[a] plan to ensure that women have access to breastfeeding promotion and support activities during the prenatal and postpartum periods”). Not all federal law misses the role of fathers in breastfeeding. *See* 45 C.F.R. § 1302.81 (requiring that Headstart program “provide enrolled

only for “women,”<sup>217</sup> and thus deny to men benefits like breastfeeding education and counseling that can be used by fathers in parenting their children. By contrast, efforts to unsex carework generally by providing other “nutrition education” to all “parents” are present in this very same law.<sup>218</sup> By excluding low-income fathers from breastfeeding benefits, the law of breastfeeding is not only sexed but raced. The racial impact of sexed breastfeeding law is taken up later.<sup>219</sup> Here, the goal is to highlight the outlier status of breastfeeding when it comes to unsexing key forms of parenting carework.

The law regulating healthcare-related tax deductions likewise sexes breastfeeding. The Medicare Prescription Drug, Improvement and Modernization Act (also called the Medicare Modernization Act) created the modern version of medical flexible spending accounts (FSAs).<sup>220</sup> FSAs allow many employees to set aside pretax wages in a separate account created by their employer to pay for eligible healthcare expenses.<sup>221</sup> What healthcare expenses qualify for this special treatment is a matter of federal law.<sup>222</sup> Federal law generally permits mothers and fathers to use FSAs on equal terms for parenting expenses.<sup>223</sup> When it comes to the physical fact of lactation, FSAs do well in covering the expenses related to breastfeeding, such as nursing bras.<sup>224</sup> But when it comes to expenses related to breastfeeding carework that can be done by either parent, like attending a breastfeeding class, they are covered for the mother only,<sup>225</sup> again excluding fathers from learning the skills needed to make them effective parents.

## 2. Workplace Law

The Fair Labor Standards Act (as amended by the ACA) and many state laws require employers to provide eligible employees with reasonable break time to express

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pregnant women, fathers, and partners or other relevant family members the prenatal and postpartum information, education and services that address, as appropriate, . . . the benefits of breastfeeding”).

<sup>217</sup> See sources cited *supra* note 216.

<sup>218</sup> See 7 C.F.R. § 246.11(c)(4) (requiring that “nutrition education [be] offered . . . to parents and guardians”).

<sup>219</sup> See sources cited *supra* note 378-81.

<sup>220</sup> See Alyssa A. DiRusso, *Charity at Work: Proposing a Charitable Flexible Spending Account*, 2014 UTAH L. REV. 281, 307-14.

<sup>221</sup> See *id.* at 309.

<sup>222</sup> For various terms, see I.R.C. §§ 67(b)(5), 68(c)(1), 213(a) (2012); Treas. Reg. § 1.213-1(a), (e)(1) (as amended in 1979).

<sup>223</sup> See DiRusso, *supra* note 220, at 312-13 (noting the Code’s provision of dependent-care assistance, which provides care benefits to children).

<sup>224</sup> See, e.g., *Which Expenses Are Eligible for HSA, FSA and HR Reimbursement?*, CIGNA, <http://www.cigna.com/qualified-health-care-expenses> (last visited Jan. 15, 2022) [hereinafter *Which Expenses*] (“Breast feeding—Pump, Shields, Gel Pads, Nursing Bras, and lactation supplies are reimbursable.”).

<sup>225</sup> *FSA Eligible Expenses*, WAGeworks, <https://www.wageworks.com/employees/support-center/healthcare-fsa-eligible-expenses-table/> (last visited Jan. 15, 2022) (indicating that for “childbirth classes,” including breastfeeding instruction, “charges for mother only” are covered); *Which Expenses*, *supra* note 217 (indicating that expenses for “[c]hildbirth classes” including the subject of “nursing” are covered, “but are limited to expenses incurred by the mother-to-be,” specifically indicating that “[e]xpenses incurred by a ‘coach’—even if that is the father-to-be—are not reimbursable”).

breastmilk.<sup>226</sup> By accommodating lactation but not related breastfeeding carework that can be performed by either sex, the statute ignores the ways that fathers can be involved in breastfeeding even during the workday, albeit far less often than mothers. Fathers could be granted reasonable break time to transport a breastpump or parts when they have been forgotten or have broken, or to transport expressed milk directly to the baby if there is no extra milk supply, or to another location if the milk storage conditions at the workplace are inadequate. These forms of breastfeeding carework may seem trivial, but they can make a real difference when time is of the essence,<sup>227</sup> and when mothers are already spending substantial amounts of time expressing milk.<sup>228</sup>

Several states allow employees to use break time not only for expressing milk, but also for nursing babies at the breast,<sup>229</sup> which public health officials have touted as “the most effective strategy” for making breastfeeding compatible with employment.<sup>230</sup> In these jurisdictions, fathers could be more involved, regularly transporting the baby to and from the mother’s workplace.<sup>231</sup> But no “reasonable break time” is afforded for this purpose. So even when the law tries to accommodate breastfeeding more substantially, it falls short by focusing on lactation and failing to recognize the accompanying breastfeeding carework that can be performed by any parent, regardless of sex.

The FMLA also sexes breastfeeding in the workplace. The FMLA grants a mother workplace leave to visit a doctor, midwife, or lactation consultant to address sufficiently serious breastfeeding-related medical problems, such as a clogged milk duct, mastitis, or breast abscess.<sup>232</sup> Because such problems may require different feeding techniques, such as different positioning of the baby or feeding the baby expressed breastmilk, such an appointment may include advice and education about breastfeeding the child.<sup>233</sup> Yet the law only grants the father leave to attend such appointments under limited circumstances. The father may take leave only if he is “needed to care for [the mother].”<sup>234</sup> By conditioning the father’s right to leave on the mother’s rather than the

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<sup>226</sup> See 29 U.S.C. § 207(r) (“(1) An employer shall provide—(A) a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child’s birth each time such employee has need to express the milk. . . .”). For a list of state workplace breastfeeding accommodation laws, see Appendix C.

<sup>227</sup> Expressing breastmilk is time sensitive; skipping or delaying an expression can lead to breast engorgement for the mother and insufficient milk for the child. See WAMBACH & SPENCER, *supra* note 136, at 256-60.

<sup>228</sup> See Wendelin Slusser, et al., *Breast Milk Expression in the Workplace: A Look at Frequency and Time*, 20 J. HUM. LACT. 164, 167 (2004) (finding that breastfeeding workers express milk on average twice per day, with more frequent expression for younger infants).

<sup>229</sup> See, e.g., Conn. Gen. Stat. § 31-40w (2001) (granting right to “express breast milk or breastfeed” at the workplace during break); 23 R.I. Gen. Laws Ann. § 23-13.2-1 (2008) (providing break time “to breastfeed or express breast milk” if it does not impose an “undue hardship” on the employer); Appendix C.

<sup>230</sup> See Office of the Surgeon General, *supra* note 34, at 52.

<sup>231</sup> See *supra* notes 166-67 and accompanying text.

<sup>232</sup> See 29 U.S.C. § 2612(a)(1)(D) (providing leave “[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee”); WAMBACH & SPENCER, *supra* note 136, at 283-306 (discussing serious breastfeeding-related medical problems).

<sup>233</sup> See WAMBACH & SPENCER, *supra* note 136, at 283-306.

<sup>234</sup> 29 C.F.R. § 825.120(a)(5) (“A spouse is entitled to FMLA leave . . . if needed to care for her following the birth of a child if she has a serious health condition”).

child's needs, the law fails to recognize the father as a parent who can provide valuable breastfeeding-related care to the child. Still further, the FMLA limits this benefit to fathers who are the "spouse" of the breastfeeding mother.<sup>235</sup> When the father of the child is not married to the mother—as in upwards of forty percent of births<sup>236</sup>—he is not entitled to leave. The FMLA thus fails to acknowledge the father as an important part of breastfeeding in his own right, regardless of his relationship with the mother or the mother's need.

Fathers can even be terminated from employment for performing breastfeeding carework. The Pregnancy Discrimination Act (PDA) amending Title VII to protect against employment discrimination on the basis of "pregnancy" and "related medical conditions"<sup>237</sup> has sometimes been held to protect against discrimination on the basis of breastfeeding,<sup>238</sup> but by its own terms covers only "women."<sup>239</sup> This assumes that only women face adverse consequences at work due to breastfeeding, and excludes fathers from protection.<sup>240</sup> A woman who leaves work to attend a lactation appointment is within the PDA's protection.<sup>241</sup> A man who leaves work to attend the same appointment and is fired for being seen as more committed to family than work has no cause of action,<sup>242</sup> even though such a termination is premised on the very type of sex stereotype that Title VII was meant to eradicate.<sup>243</sup>

### 3. Public Accommodations

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<sup>235</sup> *Id.*

<sup>236</sup> See *Unmarried Childbearing*, CDC, <http://www.cdc.gov/nchs/fastats/unmarried-childbearing.htm> (last updated Dec. 9, 2019).

<sup>237</sup> 42 U.S.C. § 2000e(k).

<sup>238</sup> See, e.g., *E.E.O.C. v. Houston Funding II*, 717 F.3d 425 (5th Cir. 2013) (holding that "lactation is a related medical condition of pregnancy for purposes of the PDA"); Deborah A. Widiss, *The Interaction of the Pregnancy Discrimination Act and the Americans with Disabilities Act After Young v. UPS*, 50 U.C. DAVIS L. REV. 1423, 1448 (2017) (noting "a growing recognition in the courts that discrimination related to breastfeeding or lactation violates the PDA").

<sup>239</sup> 42 U.S.C. § 2000e(k) ("The terms 'because of sex' or 'on the basis of sex' include . . . because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy . . . shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . .").

<sup>240</sup> See *supra* notes 156-60, 165-70, 174-76 and accompanying text (discussing breastfeeding carework that fathers might need to perform during the workday).

<sup>241</sup> See sources cited *supra* note 238.

<sup>242</sup> See, e.g., *Johnson v. Univ. of Iowa*, 431 F.3d 325, 332 (8th Cir. 2005) (addressing these protections as applied to men under the PDA); *EEOC v. Commonwealth Edison Co.*, No. 85 C 5637, 1985 WL 352, at \*2 (N.D. Ill. June 27, 1985) (same).

<sup>243</sup> If an employer allowed women but not men to attend lactation consultant appointments, a man would have a claim for sex discrimination under Title VII. But the right that the PDA grants—to be treated the same as other nonbreastfeeding but similarly situated employees—would not protect him. So if a father but not a mother who leaves work to transport a breastpump is fired, he may bring a claim for sex discrimination. But if a father and mother are both fired for transporting the breastpump, and another employee who leaves work for a comparable non-breastfeeding reason is not, the mother would have a claim of discrimination under the PDA, but the father would not.

Federal law<sup>244</sup> and the law of all fifty states<sup>245</sup> protect the right to breastfeed in public.<sup>246</sup> But these laws grant this right only to mothers who are breastfeeding and not to fathers simultaneously performing associated breastfeeding carework.<sup>247</sup> This means that a mother who is breastfeeding cannot be kicked out of a place she otherwise has a right to be, but a father who is there to support her can be.<sup>248</sup> The exclusion of fathers from these laws not only fails to protect fathers' role in breastfeeding, but also fails to protect breastfeeding women themselves. While these laws grant women the right to breastfeed in public, the anxiety and public shaming that some women experience when doing so means that for the right to be meaningful, the law needs to provide a right to support as well.<sup>249</sup>

Other federal and state laws require certain locations to include a private space to breastfeed or express breastmilk.<sup>250</sup> The Friendly Airports for Mothers Act, for example, requires airports to “provide[] a location for members of the public to express breast milk.”<sup>251</sup> The law sexes breastfeeding by dividing persons into two types: those who “express breast milk,” who may use the space, and all others, who “intrud[e]” on those expressing breast milk, and must be excluded.<sup>252</sup> The terms of the statute exclude fathers who might support breastfeeding from these spaces. Laws like this one sex breastfeeding by assuming that breastfeeding entails only the matter of lactation while ignoring and

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<sup>244</sup> See, e.g., Consolidated Appropriations Act, Pub. L. No. 108-199, § 629, 118 Stat. 3, 357 (2004) (“[A] woman may breastfeed her child at any location in a Federal building or on Federal property, if the woman and her child are otherwise authorized to be present at the location.”).

<sup>245</sup> See *Breastfeeding State Laws*, NAT’L CONF. STATE LEGISLATURES (July 9, 2020), <https://www.ncsl.org/research/health/breastfeeding-state-laws.aspx>.

<sup>246</sup> For a compelling argument that this right should be extended to expressing breastmilk, see Mathilde Cohen, *The Right to Express Milk*, 33 YALE J.L. & FEM. 47 (2021).

<sup>247</sup> See, e.g., Colo. Rev. Stat. § 25-6-302 (“A mother may breast-feed in any place she has a right to be.”); Appendix E. Some states also prohibit the denial of public services on the basis of breastfeeding, but only “to a woman because she is breastfeeding her child.” See, e.g., Mich. Comp. Laws § 37.231. One state bars harassment for public breastfeeding, but only for “a mother who is breastfeeding a child.” Mass. Gen. Laws Ann. ch. 111 § 221 (2003). One state also protects the right to bottle feed in public, but only for mothers. See 23 R.I. Gen. Laws § 23-13.5-1 (2008) (“A woman may feed her child by bottle or breast in any place open to the public.”). Sexing this type of care unrelated to any biological sex difference easily violates equal protection. See *supra* Part I.B.

<sup>248</sup> See, e.g., Office of the Surgeon General, *supra* note 34, at 13 (citing studies finding that “when they have breastfed in public places, many mothers have been asked to stop breastfeeding or to leave”); *Breastfeeding Mother Kicked out of Florida Restaurant*, FOX NEWS (Jun. 28, 2017), <https://www.foxnews.com/food-drink/breastfeeding-mother-kicked-out-of-florida-restaurant> (in an article reporting on a couple kicked out of a restaurant because the mother was breastfeeding, stating that “[t]he couple . . . took to social media to express how *they* felt about the way *they* were treated,” and relaying couple’s post that “*we* had never had a word said to *us* about breastfeeding until today”) (emphases added).

<sup>249</sup> See *supra* notes 174-76 and accompanying text (discussing the role of partner support in public breastfeeding, including by alleviating anxiety, acting as a visual shield, and serving as an advocate).

<sup>250</sup> See Appendices A, E.

<sup>251</sup> 49 U.S.C. § 47107(w)(3)(A)(i); see also Fairness for Breastfeeding Mothers Act of 2019, 40 U.S.C. § 3318 (requiring that a covered public building “contain[] a lactation room that is made available for use by members of the public to express breast milk”).

<sup>252</sup> 49 U.S.C. § 47107(w)(3)(A)(i) (requiring “a location for members of the public to express breast milk that is shielded from view and free from intrusion from the public”).

inhibiting the valuable forms of breastfeeding carework that parents of either sex can perform.

Fathers' exclusion from such spaces means that they are denied the ability not only to support the breastfeeding mother, but also to perform the types of infant care, like changing a diaper, that arise during the course of breastfeeding—precisely the type of care that the Court has long recognized must be unsexed.<sup>253</sup> Notably, the sexed approach to breastfeeding here is in stark contrast to affirmative efforts to unsex this type of infant care through the thoughtful design of infrastructure in this very same law. The Friendly Airports for Mothers Act requires infant changing tables in men's restrooms to encourage men to be involved in all forms of infant care.<sup>254</sup> Yet this law denies fathers access to breastfeeding spaces, resulting in their exclusion from these very same forms of care.

#### 4. Civil Rights Law

Many states consider breastfeeding as a factor in the duty to serve on a jury, but they all do so on the basis of sex. Almost twenty states provide automatic exemptions to jury service to “mothers” or “women” who are breastfeeding.<sup>255</sup> A number of these states provide blanket exemptions for breastfeeding but no exemptions for childcare.<sup>256</sup> In these states, the breastfeeding mother gets an exemption from jury service, but a father never will, regardless of his role in supporting breastfeeding. Other states that provide an automatic exemption for breastfeeding women sometimes provide exemptions for childcare, but these exemptions are so limited that fathers performing breastfeeding carework will rarely be eligible.<sup>257</sup>

The fungibility of childcare as compared with the nonfungibility of lactation might seem to justify the distinct treatment of breastfeeding.<sup>258</sup> But compare the mother

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<sup>253</sup> See *supra* Part I.A.

<sup>254</sup> *Id.* § (w)(1)(B) (requiring “a baby changing table in one men’s and one women’s restroom in each passenger terminal building of the airport”). See generally Holning Lau, *Shaping Expectations about Dads as Caregivers: Toward an Ecological Approach*, 45 HOFSTRA L. REV. 181 (2016) (discussing the importance of infrastructure like changing tables in men’s bathrooms in shaping men’s role in caregiving).

<sup>255</sup> See, e.g., Cal. AB § 1814 (providing that “a mother of a breast-fed child can postpone jury duty for up to one year” or longer by request); Iowa Code § 607A.5 (1994) (allowing “a woman to be excused from jury service” if “she is the mother of a breastfed child”); Appendix G.

<sup>256</sup> See, e.g., Cal. AB § 1814; Iowa Code § 607A.5.

<sup>257</sup> See, e.g., Mo. Rev. Stat § 494.430 (providing automatic exemption for “nursing mother,” but to care for a child only to avoid “extreme hardship”); Okla. Stat. tit. 38, § 28 (providing automatic exemption to a “mother who is breast-feeding a baby,” but to care for a child only to avoid “undue or extreme physical or financial hardship”).

<sup>258</sup> See Katharine Silbaugh, *Commodification and Women’s Household Labor*, 9 YALE J. L. & FEM. 81, 93 (1997) (defining “[f]ungible things” as those that “can be replaced by something else that falls in the same place on the metric, such as similar services by a different person,” and discussing whether carework qualifies). Breastfeeding has been and sometimes continues to be fungible, at least to some extent. See Roberts, *supra* note 173, at 56 (discussing slaves serving as wet nurses); Mathilde Cohen, *Should Human Milk Be Regulated?*, 9 U.C. IRVINE L. REV. 557 (2019) (discussing markets for breastmilk).



who only nurses her child at bedtime<sup>259</sup> to the father of a premature baby performing breastfeeding labor around the clock.<sup>260</sup> She does not need an accommodation for breastfeeding to perform jury service, and he very well may. Yet in some states, she is granted an automatic exemption from jury service, and he is not eligible for one at all. Once these facts are recognized, it is apparent that laws regulating jury service and breastfeeding on the basis of sex rely on and reinforce stereotypes about the proper roles of women and men in caring for young children, just as laws limiting women's role on juries have long done.<sup>261</sup>

## 5. Hortatory Policies

Almost twenty states have hortatory policies promoting breastfeeding enshrined in their law.<sup>262</sup> All of these laws are sexed.<sup>263</sup> Some of these laws use language that might be concerning from the perspective of the law's mandate to unsex parenting. For example, it is "the public policy of Kansas that a mother's choice to breastfeed should be supported and encouraged to the greatest extent possible . . . to improve maternal . . . bonding."<sup>264</sup> This language itself might raise a red flag for what it expresses that is in tension with the mandate to unsex parenting: that bonding between infants and mothers is more important than bonding between infants and fathers, and that men are irrelevant to parenting when it comes to a key aspect of the care of many infants: breastfeeding.<sup>265</sup>

Still further, these hortatory provisions are concerning for how they could be applied in cases where the mother's bonding with the child through breastfeeding is in tension with the father's bonding with the child. Consider, for example, a disputed custody case where the mother claims that breastfeeding entitles her to more physical

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<sup>259</sup> See Kelly Bonyata, et al., *Weaning Techniques*, KELLY MOM, <https://kellymom.com/ages/weaning/wean-how/weaning-techniques/> (last visited Jan. 15, 2022) (explaining that as part of the weaning process "[i]t is very normal for a baby to drop all but one feeding").

<sup>260</sup> See *supra* note 161.

<sup>261</sup> See, e.g., *Hoyt v. Florida*, 368 U.S. 57, 58-62 (1961) (allowing a state law that made women's jury service voluntary over an equal protection challenge because women's place was at "the center of home and family life"); *Br. for Billy Duren, Pet'r*, at 8, *Duren v. State of Missouri*, 439 U.S. 357 (1979) (No. 77-6067), 1977 WL 189874 (in a brief written by Ruth Bader Ginsburg, arguing against a law exempting women from jury duty upon their request, explaining that "states justified women's exemptions by assuming that most women would be too busy with home and children to serve on juries, and that it would be more convenient to exempt all women than to determine which are actually unable to serve").

<sup>262</sup> See, e.g., Kan. Stat. Ann. § 65-1,248(a); Nev. Rev. Stat. § 201.232. For a list of sexed state hortatory breastfeeding laws, see Appendix H.

<sup>263</sup> See *infra* note 264 and accompanying text; Appendix H.

<sup>264</sup> Kan. Stat. Ann. § 65-1,248(a); *accord*, e.g., Nev. Rev. Stat. § 201.232 (exhorting "acceptance of this most basic act of nurture between a mother and her baby" to "improv[e] bonding between mothers and their babies"); see also Appendix H.

<sup>265</sup> See Anne Schneider & Helen Ingram, *Behavioral Assumptions of Policy Tools*, 52 J. POL. 510, 519-21 (2000) (explaining how hortatory laws can affect behavior); Mary Anne Case, *Reflections on Constitutionalizing Women's Equality*, 90 CAL. L. REV. 765, 785-86 (2002) (suggesting in the context of sex discrimination that "mere government pronouncements of principle unmoored from direct, binding connection to policy" can still bring "serious constitutional problems" by the messages they express).

custody than she would otherwise be allotted.<sup>266</sup> Two states expressly include breastfeeding among the factors courts should consider in determining custody,<sup>267</sup> and in other states, breastfeeding would presumably be a factor in such determinations.<sup>268</sup> Breastfeeding mothers could rely on these hortatory policies to argue for custody that might be in tension with the dictates of equal protection.<sup>269</sup>

Consider the Pennsylvania case of *Stephon v. Malmad*,<sup>270</sup> where the court addressed a custody dispute that turned on the mother's right to breastfeed—one of the few cases to do so and consider sex equality concerns.<sup>271</sup> There, the mother sought to limit the father's custody and visitation to “segments of four hours under conditions and circumstances that would allow her to breastfeed.”<sup>272</sup> The father did not object to breastfeeding, but sought “extensive unsupervised contact” with his infant daughter.<sup>273</sup> The court acknowledged that sex equality law abrogated the tender years doctrine, which treated mothers as the presumptive custodians of young children,<sup>274</sup> and that “a child of tender years or months needs to bond with a father as well as with its mother.”<sup>275</sup> The court ruled for the father because “no authority” supported the idea that the mother's interest in breastfeeding trumped the father's interest in his relationship with the child as an exception to sex discrimination law.<sup>276</sup>

But this framing of the issue—the mother's right to breastfeed versus the father's right to custody—downplays how unsexing breastfeeding can allow courts to move past a zero-sum approach. In this case, and in many others, breastfeeding and father custody are not at odds because of the breastfeeding carework that fathers can perform.<sup>277</sup> Yet when it comes to fathers' role in breastfeeding, courts in these cases have remained silent,

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<sup>266</sup> Most states favor joint physical custody. See J. Herbie DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy*, 52 FAM. CT. REV. 213, 213 (2014).

<sup>267</sup> See Mich. Comp. Laws Ann. § 722.27a(7)(b); Utah Code Ann. § 30-3-34.

<sup>268</sup> Custody determinations are generally grounded in the best interests of the child, considering all of the relevant circumstances. See DiFonzo, *supra* note 266, at 214.

<sup>269</sup> See, e.g., *Watts v. Watts*, 350 N.Y.S.2d 285 (Fam. Ct. 1973) (holding that any presumptive preference in favor of maternal custody violated the father's right to equal protection).

<sup>270</sup> 30 Pa. D. & C. 4th 510 (1996).

<sup>271</sup> See *id.*; see also *In re the Marriage of Norton*, 640 P.2d 254, 254-55 (Colo. App. 1982) (rejecting a father's sex equality challenge to a custody denial due to breastfeeding).

<sup>272</sup> 30 Pa. D. & C. 4th at 512. Presumably, this meant that the visits would occur at the mother's home, and the mother “would intercede instantly if the infant began to cry or sought her mother's attention.” *Id.* at 513.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 519.

<sup>275</sup> *Id.* at 518 (“Indeed, our whole jurisprudential philosophy of shared legal and physical custody emanates from a belief in the benefit to the child from frequent contact from both parents.”).

<sup>276</sup> *Id.* (“Our request for legal authority from counsel that unlimited breast-feeding to the exclusion of father's reasonable visitation was permitted as an exception to the Equal Rights Amendment produced no such authority, nor are we aware of, nor have we heard of any such authority.”); cf. *Dike v. Sch. Bd. of Orange Cty.*, 650 F.2d 783, 787 (5th Cir. 1981) (recognizing a liberty interest in breastfeeding, but one “subject to some limitation . . . where other interests become dominant”).

<sup>277</sup> 30 Pa. D. & C. 4th at 517 (noting that “there was no tangible evidence that appellant would not be able to continue with breast-feeding due to the modes and periods of time we allowed for father's partial custody”).

at best noting that the mother can express breastmilk,<sup>278</sup> but failing to recognize the ways that a father can support breastfeeding by feeding his child expressed breastmilk, transporting his child to the mother for feedings, transporting expressed breastmilk to his child, or visiting his child with the mother present to allow and support breastfeeding. Once fathers' role in breastfeeding carework is acknowledged, breastfeeding can be made compatible with father custody in many circumstances.<sup>279</sup>

Recall, however, that *Stephon v. Malmad* granted the father visitation because there was no legal authority to support the position “that unlimited breast-feeding to the exclusion of father’s reasonable visitation was permitted as an exception to the Equal Rights Amendment.”<sup>280</sup> Other courts faced with the same question in the presence of a state law exhorting that “a mother’s choice to breastfeed should be supported and encouraged to the greatest extent possible”<sup>281</sup> might reach a different conclusion, especially as men’s role in breastfeeding carework continues to go largely unseen.

## 6. Excluding LGBTQ Parents

The discussion above has focused on how the law sexes breastfeeding by remaining blind to breastfeeding carework that any parent can perform, regardless of sex. These laws may problematically exclude not only cisgender men in opposite-sex couples, but also cisgender men in same-sex couples, who may benefit from some of these supports, for example, breastfeeding education.<sup>282</sup> And when these laws limit their reach to those who are lactating, as some do,<sup>283</sup> these laws also exclude mothers in same-sex couples who are not breastfeeding but who can perform breastfeeding carework.

The sexed law of breastfeeding also excludes transgender fathers and nonbinary parents from its protections, and in a still broader way. These parents can, like all parents, perform breastfeeding carework. But they may also lactate.<sup>284</sup> This means that each and every breastfeeding law, including ones that relate only to lactation, could apply

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<sup>278</sup> See *H.O. v. G.T.*, No. CN08-04254, 2010 WL 1199810, at \*6 (Fam. Ct. Del. Jan. 13, 2010) (“Mother has the ability to express her milk if she deems that nutritionally important for [the child].”); *Beebe v. Elmenhorst*, No. 103,658, 2010 WL 3488832, at \*2 (Kan. Ct. App. Aug. 27, 2010) (noting that the mother “admitted that it was possible for her to pump breast milk”).

<sup>279</sup> Recognizing breastfeeding carework that can be performed regardless of sex reduces the tension between a mother’s desire to breastfeed and a father’s time with a child, but does not eliminate it. Some circumstances render a father’s involvement in breastfeeding more difficult, for example, when the parents live a great distance apart, when the mother cannot express breastmilk, or when the child cannot be fed with expressed milk. See, e.g., *Bell v. Bell*, No. 2007-CA-001368-MR, 2008 WL 2152277 (Ky. Ct. App. May 23, 2008) (denying father visitation to a breastfed child who lived in another state); *supra* note 270 (citing cases discussing the mother’s ability to express milk). There is no single solution to these cases. Courts must consider the best interests of the child, but should do so while attending to the constitutional concerns of unsexing parenting, acknowledging the role that fathers can play in breastfeeding.

<sup>280</sup> 30 Pa. D. & C. 4th at 518.

<sup>281</sup> Kan. Stat. Ann. § 65-1,248(a).

<sup>282</sup> See *supra* notes 212-13 and accompanying text.

<sup>283</sup> See, e.g., Conn. Gen. Stat. Ann. § 38a-503f(a)(1)(R) (requiring insurers to cover “[b]reastfeeding support and counseling for any pregnant or breastfeeding woman”).

<sup>284</sup> See *supra* notes 178-81 and accompanying text.

equally to transgender fathers and nonbinary parents. Yet under a law that regulates breastfeeding on the basis of sex, people who lactate but do not identify as women are put to a cruel choice of denying their identity or being denied critical breastfeeding protections and benefits.

A few examples illustrate this. Take laws that criminalize public indecency. Many states exempt breastfeeding from these laws,<sup>285</sup> but only for women.<sup>286</sup> While cisgender men would not need these protections, transgender men and nonbinary persons who breastfeed or chestfeed may, but they are nonetheless excluded.<sup>287</sup> Or consider workplace accommodation laws. While cisgender fathers do not need “reasonable break time . . . to express breast milk,”<sup>288</sup> transgender fathers and nonbinary parents may. Yet a law that limits this accommodation to women denies them this protection.<sup>289</sup> This Article later discusses how excluding LGBTQ parents from breastfeeding reinforces the type of sex stereotypes that equal protection has long sought to undo. Here the point is that the sexed law of breastfeeding excludes lactating parents who are situated precisely as lactating mothers are, only on the basis of sex.

### III. SEXING PARENTING BY SEXING BREASTFEEDING

The unsexed law of parenting and the sexed law of breastfeeding represent a deep divide in the law of sex equality. While some aspects of breastfeeding turn on lactation, other aspects of breastfeeding turn on carework that can be separated from sex. This Part makes the case that breastfeeding carework is comparable to other forms of carework and thus should be treated consistently. It starts by explaining how the two circumstances are comparable because they both shape a common core concern of sex-equality law: the distribution of family work and market work. Breastfeeding and its associated carework are part of the foundational period after birth that shapes investments that parents make at home and in the market, as well as employers’ expectations of these investments. The failure to unsex breastfeeding thus undercuts the law’s efforts to unsex parenting. This Part then addresses two concerns unique to the caregiving context of breastfeeding—autonomy and privacy—and explains why these concerns do not undermine the comparison between breastfeeding carework and other forms of carework. Finally, this Part explains how the sexed law of breastfeeding violates the law’s dictate to unsex

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<sup>285</sup> See *Breastfeeding State Laws*, *supra* note 245 (citing thirty-one states).

<sup>286</sup> See, e.g., Ariz. Rev. Stat. Ann. § 13-1402(B) (“Indecent exposure does not include an act of breastfeeding by a mother”); Appendix D.

<sup>287</sup> In many states, transgender persons can change their legal sex without any anatomical or hormonal changes, so that a person with breasts could be legally male. See *supra* note 179 and accompanying text.

<sup>288</sup> 29 U.S.C. § 207(r).

<sup>289</sup> The text of the federal provision refers to “an employee,” but a number of factors suggest an application to women only. First, this provision uses the female pronoun. See *id.* (“her nursing child”). Because the remainder of the FLSA uses the term “employee” in conjunction with the male pronoun “his” to refer to employees in a sex-neutral way, e.g., 29 U.S.C. § 213, the use of “her” indicates a sex-specific meaning. Second, the title of the relevant provision—“[r]easonable break time for nursing mothers”—refers only to women. 9 U.S.C. § 207(r). Some analogous state laws are clearly sexed. See, e.g., Vt. Stat. Ann. tit. 21, § 305(a) (“For an employee who is a nursing mother, the employer shall . . . [p]rovide reasonable time . . . to express breast milk”).

parenting not only by its impact on cisgender heterosexual couples, but on other parents and parenting configurations.

### A. Breastfeeding as Parenting

Sexed breastfeeding law is comparable to sexed parenting law in terms of its harmful consequences for sex equality. The period immediately after a child is born operates at the “faultline between work and family.”<sup>290</sup> Laws regulating infant care—including laws regulating breastfeeding—that presume that the “mother is the center of home and family life”<sup>291</sup> start in motion “a . . . cycle of discrimination that force[s] women to continue to assume the role of primary family caregiver, and foster[s] employers’ stereotypical views about women’s commitment to work and their value as employees.”<sup>292</sup>

Before going further, it must be emphasized that the comparison between the law of breastfeeding and the law of parenting is not perfect. The law need not treat “the allocation of family duties”<sup>293</sup> exactly the same for men and women when these duties entail a physical sex difference.<sup>294</sup> The physical fact of lactation may thus be relevant to determining whether sex-based laws regulating breastfeeding are justified.<sup>295</sup> And many aspects of breastfeeding turn on lactation. Only the lactating person can nurse the baby or express breastmilk. Only she has to risk exposing her breasts when feeding in public. Only she has to endure the pain, discomfort, and medical complications that breastfeeding sometimes brings.<sup>296</sup> Only her health conditions<sup>297</sup> and what she consumes<sup>298</sup> will affect the milk she produces and her ability to breastfeed.

Nonetheless, biological sex does not render these areas of law fully distinct. The aim of sex-equality law is to eradicate “the pervasive sex-role stereotype that caring for family members is women’s work.”<sup>299</sup> The sexed law of breastfeeding encourages women to invest in caregiving and discourages men from doing so. The sexed law of breastfeeding also leads employers to stereotype women as committed to care and men as committed to career. In *Hibbs*, the Court recognized the crucial role of the period

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<sup>290</sup> Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 738 (2003).

<sup>291</sup> Califano v. Westcott, 443 U.S. 76, 89 (1979) (internal quotation marks omitted).

<sup>292</sup> *Hibbs*, 538 U.S. at 736.

<sup>293</sup> *Id.* at 730.

<sup>294</sup> United States v. Virginia, 518 U.S. 515, 533 (1996) (indicating that “[p]hysical differences between men and women” can justify sex-based classifications); *Hibbs*, 538 U.S. at 731 (suggesting that the “differential physical needs of men and women” can legitimate different treatment).

<sup>295</sup> This Article argues that given that some transgender men and non-binary persons lactate, even breastfeeding laws related only to lactation should not regulate on the basis of sex. See *infra* notes 406-07 and accompanying text.

<sup>296</sup> See WAMBACH & SPENCER, *supra* note 136, at 281-313 (cataloguing pain and medical problems associated with breastfeeding).

<sup>297</sup> See *id.* at 159-75, 481-49 (discussing how maternal health affects breastfeeding).

<sup>298</sup> See *id.* at 127-59, 471-81 (discussing how maternal drug therapy and nutrition affect breastfeeding).

<sup>299</sup> *Hibbs*, 538 U.S. at 731.

immediately after birth for developing caregiving identities and attachments.<sup>300</sup> Excepting breastfeeding from the law's efforts to unsex parenting in this critical period not only runs headlong with sex equality in law but also with its achievement in life.

The period immediately following the birth of a child is so critical because of the role it plays in generating (or not generating) attachments between parent and child that are enduring. Performing infant care, including breastfeeding carework, generates attachment between parent and child, in two ways. It does so directly, as the act of providing care bonds caregiver to child and child to caregiver.<sup>301</sup> It also does so indirectly, by changing the parent's self-concept.<sup>302</sup> The more that a new parent embraces her new identity, the more attached to and involved with the infant that parent will be.<sup>303</sup> Early patterns of attachment are sticky and predictive of later patterns of care.<sup>304</sup>

Engaging in breastfeeding carework is especially important for fathers precisely because they generally do not lactate. Fathers then typically do not enjoy the attachment or change in self-concept that breastfeeding brings to lactating parents.<sup>305</sup> It is all the more crucial then that fathers be involved with breastfeeding carework so they too can develop their parental identities and attachments with their breastfed children.

To play this out,<sup>306</sup> the father of a breastfed infant may assume that his crying baby is hungry and that only the mother can provide the needed comfort, making many men feel inadequate.<sup>307</sup> This can establish a dynamic that has a profound and lasting impact on gendered caregiving. Breastfeeding dictates so much of the time and schedule of an infant.<sup>308</sup> If men aren't involved in this process, they will be uninvolved not only

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<sup>300</sup> See *id.* at 736 (“These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers’ stereotypical views about women’s commitment to work and their value as employees.”).

<sup>301</sup> See Tiffany Field, *Attachment and Separation in Young Children*, 47 ANN. REV. PSYCH. 541 (1996) (reviewing attachment theory literature); Jennifer Abbass-Dick, et al., *Breastfeeding As Family Teamwork: A Research To Practice Briefing (International)*, FAMILY INCLUDED (Aug. 31, 2018), <https://familyincluded.com/breastfeeding-family-teamwork/> (reviewing research on breastfeeding and attachment).

<sup>302</sup> See ERIK ERIKSON, *IDENTITY AND THE LIFE CYCLE* 131-42 (1959) (setting forth theory that a new parent’s self-concept changes from a recipient to a provider of care); Maria P. Fracasso, *The Concurrent Paths of Parental Identity and Child Development*, in *IDENTITY FLEXIBILITY DURING ADULTHOOD* 151, 151 (Jan Sinnott, ed. 2017) (explaining that parental identity develops through the process of parenting).

<sup>303</sup> See ELLEN GALINSKY, *THE SIX STAGES OF PARENTHOOD* 74-79 (discussing relationship between parent-infant attachment and parental identity change).

<sup>304</sup> Hormonal changes brought on by providing infant care generate neurobiological changes in the father, affecting care of his children for the rest of his life. See Ilanit Gordon, et al., *Oxytocin and the Development of Parenting in Humans*, 68 BIO. PSYCH. 377 (2010). Generally, fathers who attach early to children are more attentive to their care later on. See Abbass-Dick, et al., *supra* note 301.

<sup>305</sup> See, e.g., Sheriff, *supra* note 133, at 674 (reporting that fathers sometimes felt “left out” of breastfeeding and “concerned over a perceived lack of bonding opportunity with the infant”).

<sup>306</sup> I am indebted to Clare Huntington for playing it out this way for me.

<sup>307</sup> See Sheriff, *supra* note 133, at 674 (reporting such feelings of helplessness but also a desire for involvement with adequate knowledge).

<sup>308</sup> See WAMBACH & SPENCER, *supra* note 136, at 248 (noting that newborns nurse frequently and “virtually every time they wake up, day and night, for many months”).

with a major aspect of the infant's life, but with a huge part of their days (and nights). The breastfeeding mother will become the primary parent by default. And if women take charge of feeding from the start without partner involvement, they are far more likely to take charge of key moments of feeding as the child grows, such as transitioning the child to solid food.<sup>309</sup> This puts different-sex couples down the path to a gendered division of labor that, once set in motion, is difficult to disrupt.<sup>310</sup>

Sexing breastfeeding also makes it far more likely that childcare adjacent to breastfeeding will likewise be sexed. This is because breastfeeding turns not only on the physiology and behavior of the mother, but on the physiology and behavior of the baby.<sup>311</sup> If a lactation consultant diagnoses an issue with the baby that makes breastfeeding difficult, this might require visits to the pediatrician and surgery.<sup>312</sup> Although this is clearly care for the baby, if the father is not present at the lactation consultant appointment, the mother will likely be the one to do the childcare stemming from this as well. So while a law like the FMLA grants fathers leave to take care of a child with a "serious health condition" in an effort to unsex parenting,<sup>313</sup> the sexed law of breastfeeding makes it less likely that he will do so.

Cases like *Hibbs* identify the importance of unsexing carework, yet the sexed law of breastfeeding seriously undermines these efforts to unsex parenting. The sexed law of breastfeeding affects men's and women's caregiving behavior by changing the costs of this behavior through the provision of benefits and protections. Laws reduce the cost of breastfeeding education and support to mothers but not fathers.<sup>314</sup> Laws protect mothers but not fathers from risking their job for tending to breastfeeding matters.<sup>315</sup> Laws protect mothers who breastfeed in public but not partners who provide them with support.<sup>316</sup> Many states have enshrined as their policy the goal of promoting breastfeeding to support maternal-infant bonding, while ignoring how breastfeeding could support paternal-infant bonding as well.<sup>317</sup>

Women tend to have the experiences and expectations to be primary caregivers,<sup>318</sup> so sexed laws encouraging women to do breastfeeding carework only compound these

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<sup>309</sup> See Abbass-Dick, et al., *supra* note 301.

<sup>310</sup> See *id.*

<sup>311</sup> WAMBACH & SPENCER, *supra* note 136, at 215 ("Breastfeeding is dependent not only on the mother, but also on the behaviors of the newborn."); *id.* at 249 (recognizing the host of infant-based factors that affect breastfeeding, such as illness, injury, and physical anomalies).

<sup>312</sup> *Id.* at 255 (discussing medical treatment for tongue-tie, a condition that makes it difficult to breastfeed).

<sup>313</sup> See 29 U.S.C. § 2612(a)(1)(D).

<sup>314</sup> See *supra* Part II.B.1.

<sup>315</sup> See *supra* Part II.B.2.

<sup>316</sup> See *supra* Part II.B.2.

<sup>317</sup> See *supra* Part II.B.5.

<sup>318</sup> See, e.g., Alyssa Croft, et al., *An Underexamined Inequality: Cultural and Psychological Barriers to Men's Engagement With Communal Roles*, 19 PERSON. & SOC. PSYCH. REV. 343, 344 (2015) (citing research that women make up the overwhelming majority of front-line workers in many caring professions).

tendencies. Men do not have these same experiences and expectations,<sup>319</sup> and thus they need more support to spur greater involvement in caregiving.<sup>320</sup> Men want to be involved in breastfeeding, but they often feel helpless.<sup>321</sup> It turns out that men who receive help with the right forms of support are far more likely to be involved in breastfeeding than those who do not.<sup>322</sup> But instead of encouraging men’s participation in breastfeeding with these types of support, the sexed law of breastfeeding does the opposite, denying a host of resources to men that it affords to women.

In addition to its impact on the relative cost of breastfeeding for men and women, the sexed law of breastfeeding can also affect behavior by the messages it sends.<sup>323</sup> Fathers get the message—loud and clear—that they are not proper participants in the breastfeeding process.<sup>324</sup> Mothers get this message, too, which is equally important, as mothers’ beliefs about fathers’ appropriate role is a key predictor of fathers’ involvement with their children.<sup>325</sup> Employers receive harmful messages, too. Laws such as the FLSA that mandate workplace breastfeeding accommodations to women but not men make women on average more expensive to employ than men—exactly the opposite of sex equality law’s goal.<sup>326</sup> Other sexed laws contribute to the belief that breastfeeding carework—for example, attending breastfeeding classes and visiting lactation consultants—is the responsibility of the mother alone, and thus perpetuate the stereotype that women will invest more at home and less at work than their male colleagues.<sup>327</sup>

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<sup>319</sup> See Sheriff, *supra* note 133, at 674 (discussing research finding that men are less knowledgeable about breastfeeding than women).

<sup>320</sup> See *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 728 n.2 (2003) (explaining that the FMLA provided parental leave to fathers to change the reality that “the primary responsibility for family caretaking often falls on women”) (quoting 29 U.S.C. § 2601(a)(5)).

<sup>321</sup> See, e.g., Brown & Davies, *supra* 152, at 510 (citing research that fathers want to support their partner with breastfeeding but they feel left out and helpless to support their partner); Sherriff, *supra* note 133, at 674 (reporting that fathers want to know the best ways to help their breastfeeding partners, but they feel helpless).

<sup>322</sup> See Pisacane et al., *supra* note 133, at 494 (finding that teaching fathers how to prevent and manage the most common lactation difficulties substantially increased the rate at which fathers provided breastfeeding support).

<sup>323</sup> See, e.g., Cass Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024 (1996) (arguing that law’s expressive function is in changing norms in a way that can ultimately change behavior).

<sup>324</sup> See Brown & Davies, *supra* note 152, at 510 (finding that men reported being excluded from prenatal breastfeeding education and being marginalized in postnatal breastfeeding support); Rempel & Rempel, *supra* note 133, at 115 (finding that fathers’ perceptions of their role in breastfeeding is important to their influence on mothers’ breastfeeding decisions and experiences).

<sup>325</sup> See Brent A. McBride, et al., *Paternal Identity, Maternal Gatekeeping, and Father Involvement*, 54 FAMILY RELS. 360, 360 (2005) (discussing this finding as part of the phenomenon of “maternal gatekeeping,” essentially mothers’ control over fathers’ carework); Naomi Cahn, *The Power of Caretaking*, 12 YALE J.L. & FEMINISM 177, 206 (2000) (citing research finding that “[w]omen are often reluctant to trust their husbands with the responsibility of providing adequate care”).

<sup>326</sup> See Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 232 (2000) (observing that workplace accommodations that go to identifiable groups increase the cost of employing those groups); 29 U.S.C. § 2601(a)(6) (stating that the gender-neutral FMLA was meant to avoid the “serious potential for encouraging employers to discriminate against [women] employees and applicants” generated by women-only leave policies).

<sup>327</sup> Consider a Texas statute that allows employers who provide certain breastfeeding accommodations to be designated “mother-friendly.” Tex. Health & Safety Code Ann. § 165.003. This law and its associated



On the flip side, employers believe that breastfeeding has no impact on fathers' work. Fathers enjoy a wage boost upon the birth of a child—the so-called “fatherhood premium.”<sup>328</sup> Indeed, employers may prefer fathers as compared to childless men because they presume that fathers will intensify their breadwinning efforts<sup>329</sup>—but only if fathers conform to this expected sex role. If the father performs too much carework, he is likely to face a “flexibility stigma.”<sup>330</sup> Fathers cite this employer backlash as one reason they are discouraged from doing more carework.<sup>331</sup> The sexed law of breastfeeding plays a key role in this. The father who seeks an accommodation granted to mothers (e.g., leave to accompany the mother to an appointment for a breastfeeding problem) is asking for something excessive under current law.

These mechanisms of sex inequality have a real economic impact. While breastmilk itself may be free, breastfeeding is far from costless. The most substantial cost of breastfeeding is its opportunity cost,<sup>332</sup> in terms of the time it takes to nurse a baby or express breastmilk, *and* the time it takes to develop breastfeeding capital and perform breastfeeding labor.<sup>333</sup> Women investing more in breastfeeding carework than their male partners means they will invest less in market work during this time.<sup>334</sup> In heterosexual

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website ensure that, in the minds of employers, breastfeeding is solely a mother's burden. *See* Tex. Dep't of State Health Servs., *Mother Friendly Worksite*, TEXAS MOTHER FRIENDLY (last visited Jan. 15, 2022), <http://texasmotherfriendly.org>.

<sup>328</sup> *See* Jane Waldfogel, *Understanding the “Family Gap” in Pay for Women with Children*, 12 J. ECON. PERSP. 137, 143 (1998) (explaining that while mothers earn less than childless women, “[t]here is no such family penalty for men,” and “married men, most of whom have children, earn more than other men”); Shelly Lundberg & Elaina Rose, *Parenthood and the Earnings of Married Men and Women*, 7 LAB. ECON. 689, 705–06 (2000) (“Fatherhood leads to a 9% increase in wages . . .”).

<sup>329</sup> *See* Jeffrey Gage & Ray Kirk, *First-Time Fathers: Perceptions of Preparedness for Fatherhood*, 34 CAN. J. NURS. RES. 15, 19–21 (2002) (discussing that when women plan to breastfeed, their male partners plan to intensify their work efforts).

<sup>330</sup> Joan C. Williams et al., *Cultural Schemas, Social Class, and the Flexibility Stigma*, 69 J. SOC. ISSUES 209, 220–21 (2013) (discussing employer stigma men face when they are involved in caregiving).

<sup>331</sup> *See* Magnus Bygren & Ann-Zofie Duvander, *Parents' Workplace Situation and Fathers' Parental Leave Use*, 68 J. MARRIAGE & FAM. 363, 365 (2006) (reporting that features of a father's workplace may affect the length of his parental leave).

<sup>332</sup> There are other substantial costs as well. *See* Anna Momigliano, *Breast-feeding Isn't Free. This Is How Much It Really Costs*, WASH. POST (May 21, 2019), <https://www.washingtonpost.com/lifestyle/2019/05/28/breast-feeding-isnt-free-this-is-how-much-it-really-costs/> (estimating these costs, such as a breastpump, nursing bra, and lactation consultant appointment, to total nearly \$700).

<sup>333</sup> Economists attend to the opportunity cost of lactation, but not the opportunity cost of breastfeeding carework. *See* Emilia Del Bono & Chiara Pronzato, *Does Breastfeeding Support at Work Help Mothers and Employers at the Same Time?*, at 3 (2012), <https://www.iza.org/publications/dp/6619/does-breastfeeding-support-at-work-help-mothers-and-employers-at-the-same-time> (“[B]reastfeeding is an activity which is intensive in maternal time and therefore in direct competition with other uses of it, including market work.”).

<sup>334</sup> *See id.* (citing a negative relationship between breastfeeding duration and maternal employment); Phyllis L. F. Rippey & Mary Noonan, *Is Breastfeeding Truly Cost Free? Income Consequences of Breastfeeding for Women*, 77 AM. SOCIOL. REV. 244, 260 (2012) (finding that long-duration breastfeeding mothers have lower incomes upon returning to work than formula-feeding mothers and short-duration breastfeeding mothers).

couples, the initial hit to the mother's wage after a child is born (and the corresponding bump to the father's wage)<sup>335</sup> means that fathers engaging in carework have more to lose in wages than mothers. The gender wage gap that follows the birth of a child is even more pronounced when women breastfeed, and when they do so for longer periods.<sup>336</sup> This creates a self-fulfilling cycle that continues to render mothers the cheaper caretakers, and thus continues to encourage ever more gendered divisions of family and market work.<sup>337</sup>

Unsexing breastfeeding can narrow the gender gap that results from breastfeeding, both by reducing breastfeeding carework for women and thus reducing the impact of breastfeeding on women's market work, and by increasing breastfeeding carework for men and thus increasing the impact of breastfeeding on men's market work. Still, it must be acknowledged that the bulk of the time required to breastfeed comes down to lactation, which largely cannot be unsexed. The more important impact of unsexing breastfeeding is its effect on the gendered distribution of carework going forward, after breastfeeding.<sup>338</sup> To the extent that unsexing breastfeeding helps to avoid sticky caregiving dynamics that cement mothers as the primary parent for feeding, nurturing, and comforting,<sup>339</sup> unsexing breastfeeding can have a big impact on the gendered division of labor in the home, and in turn a big impact on relative investments in men's and women's market work.

### *B. Breastfeeding and the Body*

This Article has focused on showing that many components of breastfeeding are appropriately considered carework under the law of unsexing parenting. These components of breastfeeding can be separated from the physical fact of lactation and thus can and should be separated from sex. This Part addresses two features of breastfeeding that arguably render it distinct from other aspects of parenting because it involves a lactating person's body: that a partner's involvement in breastfeeding may infringe on bodily autonomy, and that male involvement in breastfeeding generally may infringe on women's privacy. This Part addresses these arguments in turn, explaining why neither the autonomy nor the privacy concerns render breastfeeding sufficiently distinct from other aspects of parenting for purposes of unsexing.

#### 1. Autonomy

Breastfeeding can be distinguished from other forms of carework because of how it entails the body. For breastfeeding tasks that turn on lactation, only the lactating person can accomplish these tasks, and they necessarily involve her body. This arguably distinguishes breastfeeding from other forms of parenting, because partner involvement

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<sup>335</sup> See *supra* note 328 and accompanying text.

<sup>336</sup> Rippey & Noonan, *supra* note 334, at 260.

<sup>337</sup> See Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1, 21 (2005) (citing studies showing this dynamic).

<sup>338</sup> See *supra* notes 300-10 and accompanying text.

<sup>339</sup> See *supra* notes 300-10 and accompanying text.

in breastfeeding could infringe on the autonomy that lactating persons (mostly women) should be able to exercise over their bodies.<sup>340</sup>

There are circumstances when partner involvement in breastfeeding might raise autonomy concerns of a constitutional dimension. In the context of pregnancy, the Supreme Court has recognized that a woman has a right to make decisions without the father.<sup>341</sup> The Court invalidated a spousal notification requirement for abortion that gave the husband an “enforceable right to require a wife to advise him before she exercises her personal choices” because of “the urgent claim[] . . . to retain control over . . . her body.”<sup>342</sup> By contrast, the Court indicated that with “a living child, . . . the father’s interest in the welfare of the child and the mother’s interest are equal.”<sup>343</sup> The Court seems not to have contemplated the circumstance of breastfeeding, which involves both a “living child” and “[the woman’s] body.”<sup>344</sup>

To the extent that the same rights recognized in the context of pregnancy extend to breastfeeding,<sup>345</sup> the autonomy concerns that arise in the context of breastfeeding are ameliorated by the same fact that allows for unsexing breastfeeding in the first place: much breastfeeding carework can be performed without involving the lactating parent’s body at all. Partners can, for example, acquire a breastpump, attend a breastfeeding class, or feed a baby expressed breastmilk. When partner involvement in breastfeeding does not involve the body, autonomy concerns dissipate.<sup>346</sup>

Autonomy concerns do arise when partner involvement in breastfeeding implicates the lactating parent’s body. For example, a breastfeeding mother may not want the father present at a lactation consultant appointment.<sup>347</sup> To address this concern, partner involvement in circumstances that involve the lactating parent’s body should turn

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<sup>340</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 869 (recognizing “the urgent claims of the woman to retain the ultimate control over her destiny and her body, claims implicit in the meaning of liberty”).

<sup>341</sup> See, e.g., *id.* at 896–98.

<sup>342</sup> *Id.*

<sup>343</sup> *Id.* at 895–96 (“If these cases concerned a State’s ability to require the mother to notify the father before taking some action with respect to a living child . . . , it would be reasonable to conclude . . . that the father’s interest in the welfare of the child and the mother’s interest are equal.”).

<sup>344</sup> *Id.* at 869 (recognizing in the context of pregnancy “the urgent claims of the woman to retain the ultimate control over . . . her body”).

<sup>345</sup> See *Dike v. Sch. Bd. of Orange Cty.*, 650 F.2d 783, 787 (5th Cir. 1981) (recognizing a qualified liberty interest in breastfeeding, but one “subject to some limitation at some point where other interests become dominant”).

<sup>346</sup> See *Casey*, 505 U.S. at 898 (focusing on the problematic aspect of male “authority” over his pregnant partner and “control over . . . her body”).

<sup>347</sup> Tension between bodily autonomy and the partner’s interest in the child can arise when a partner seeks custody of a breastfed child. Recognizing the breastfeeding carework that the partner can do without involving the body of the lactating parent alleviates but does not eliminate the autonomy concern. See *supra* Part II.B.5.

on that person's consent.<sup>348</sup> With such a limit in place, unsexing breastfeeding does not infringe on autonomy.<sup>349</sup>

Applying this limit may require drawing some fine lines. Returning to the lactation consultant, the appointment often entails examining the lactating parent and asking about her health and examining the baby and asking about the baby's health.<sup>350</sup> Unsexing breastfeeding means including partners in the care of the child<sup>351</sup> while respecting bodily autonomy. This analysis suggests a dividing line: partners can be excluded to the extent that breastfeeding entails the lactating parent's body (e.g., when the lactation consultant is addressing that parent's circumstances), but partners should be included to the extent that breastfeeding entails childcare (e.g., when the lactation consultant is addressing the child's circumstances).<sup>352</sup>

Simply because unsexing breastfeeding might play into a lactating parent's decisions about breastfeeding should not be seen as autonomy reducing. To the extent that unsexing breastfeeding increases breastfeeding rates by increasing support for breastfeeding, this might be viewed as autonomy enhancing. As feminist legal theorists have recognized, those with caregiving responsibilities—disproportionately women—are less free when they are left alone, and more free when they are supported.<sup>353</sup> Rather than necessarily interfering with autonomy, partner participation in breastfeeding to assist with the carework that lactating persons typically shoulder alone can be liberating.

## 2. Privacy

Breastfeeding can also be distinguished from other forms of carework because it may entail exposure of what are often considered intimate body parts: the breast generally, and the nipple specifically.<sup>354</sup> When it comes to unsexing breastfeeding, a

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<sup>348</sup> See Fontana & Schoenbaum, *supra* note 14, at 364 (to address autonomy concerns, proposing a need for the mother's consent when father involvement in the pregnancy entails the woman's body); *Casey*, 505 U.S. at 896–98 (invalidating spousal notification law for abortion because it *mandated* the father's involvement in the pregnancy).

<sup>349</sup> Such a limit is especially needed in circumstances of abuse. See *Casey*, 505 U.S. at 893 (explaining how the spousal notification requirement would be a “substantial obstacle” to abortion in abusive marriages).

<sup>350</sup> See WAMBACH & SPENCER, *supra* note 136, at 215 (“[A] complete newborn assessment is critical to breastfeeding.”).

<sup>351</sup> *Id.* (indicating that “[p]arental participation during the [newborn] assessment promotes discussion about normal newborn characteristics and any variations” and “is also helpful for obtaining additional questions about history or other information that may arise during the examination”).

<sup>352</sup> This might suggest two appointments, one with the mother and one with the father, making it all the more important for men to have their own insurance coverage for this breastfeeding support. See *supra* notes 205–15 and accompanying text.

<sup>353</sup> See MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004).

<sup>354</sup> See Elizabeth Sepper & Deborah Dinner, *Sex in Public*, 129 *YALE L. J.* 78, 144–45 (2019) (discussing how the lack of public acceptance of breastfeeding is based in the sex stereotype that breasts are “primarily for sex”). A movement aimed at undoing the special legal status of the nipple has had mixed results. Compare *Free the Nipple v. City of Fort Collins*, 916 F.3d 792 (10th Cir. 2019) (affirming grant of preliminary injunction based on equal protection challenge to law barring only females from publicly

concern might arise that involving men in breastfeeding violates an interest in bodily privacy. To understand this concern, it is helpful to divide the law's approach to accommodating breastfeeding in public places into two categories: the public approach and the private approach. In the public approach are those laws that treat breastfeeding as a public act of carework akin to any other carework done in public, such as feeding or entertaining a child. The law has done so by removing legal barriers to breastfeeding in public.<sup>355</sup> The privacy concern arises under those laws that treat breastfeeding as a private act involving intimate bodily exposure by creating spaces exclusively for breastfeeding.<sup>356</sup> The privacy concern would run that allowing men into such spaces would infringe on the bodily privacy interests of breastfeeding mothers.<sup>357</sup>

Any claim to same-sex privacy as a matter of constitutional mandate is weak.<sup>358</sup> That doesn't mean that the privacy concern—which some women may genuinely experience—is without remedy. When it comes to breastfeeding, we are in a time of legal and social transition. Sex-based privacy interests have shown themselves to be malleable and subject to legal pressures.<sup>359</sup> As the law presses towards greater public acceptance of breastfeeding,<sup>360</sup> the idea that breastfeeding is an intimate act will diminish. If the law presses towards unsexing breastfeeding, the idea that breastfeeding is for women only will diminish, too. While we are in social transition, those with privacy concerns can be accommodated with freestanding lactation units that can fit a breastfeeding parent, her partner, and a child or children, without exposing her to others.<sup>361</sup>

### C. Breastfeeding Across Families

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exposing their breasts except for breastfeeding), *with* *Free the Nipple v. City of Springfield*, 923 F.3d 508 (8th Cir. 2019) (upholding similar law).

<sup>355</sup> See *supra* notes 244-47 and accompanying text.

<sup>356</sup> See *supra* notes 250-52 and accompanying text.

<sup>357</sup> An interest in same-sex bodily privacy has been recognized as an exception to statutory sex discrimination law, but has been the subject of heavy criticism. See, e.g., Amy Capczynski, *Same-Sex Privacy and the Limits of Anti-discrimination Law*, 112 YALE L.J. 1257, 1259 (2003).

<sup>358</sup> See *id.* at 1257 (discussing and rejecting possible bases for a constitutional right to same-sex bodily privacy, including either “a penumbral right to same-sex privacy” or a right “drawn . . . from the decisional privacy doctrine”). Nor would there be any associational right in a shared breastfeeding space free from male intrusion. See *Roberts v. United States Jaycees*, 468 U.S. 609, 619-20 (1984) (holding that the right of intimate association did not trump the interest in preventing sex discrimination where relationships are not close and where the space was otherwise open to all comers).

<sup>359</sup> See Naomi Schoenbaum, *The Law of Intimate Work*, 90 WASH. L. REV. 1167, 1192 (2015) (discussing how women's preference for female gynecologists shifted over time as a response to their availability brought on by legal changes).

<sup>360</sup> See *supra* Part II.B.3.

<sup>361</sup> See Mamava, *Our Birth Story*, <https://www.mamava.com/our-story> (last visited Jan. 15, 2022) (“We believe that all mamas deserve a private, clean, and comfortable place to use a breast pump or breastfeed.”). These units should be provided in addition to rather than instead of communal breastfeeding spaces. Aside from undermining the press towards public acceptance of breastfeeding, family-only units separate lactating persons and their partners from other lactating persons and their partners. While connections in these spaces are fleeting, they can nonetheless provide support. Cf. Office of the Surgeon General, *supra* note 34, at 20 (discussing the importance of mother-to-mother breastfeeding support).

The sexed law of breastfeeding undermines the law's efforts to unsex parenting, not only by its effects on heterosexual couples, but also by its effects on gay, lesbian, transgender, and nonbinary parents.<sup>362</sup> The sexed law of breastfeeding also has important implications for equality by its effects on families of color. This Section takes up these issues in turn.

As for transgender and nonbinary parents, a law of breastfeeding that makes women its exclusive beneficiaries is infirm because it excludes lactating transgender men, who in many states can be deemed male,<sup>363</sup> and lactating nonbinary persons, who in some states can be deemed not female.<sup>364</sup> By denying its protections to transgender men and nonbinary persons, the sexed law of breastfeeding puts such persons in the unfortunate position of choosing between the valuable benefits that breastfeeding regulations provide or their identity. The exclusion of even lactating transgender men from breastfeeding benefits and protections shows just how deeply the law rejects the idea of men as caregivers, even when they are situated in precisely the same circumstance as women.<sup>365</sup> The sexed law of breastfeeding also reinforces the use of gendered language with regard to breastfeeding, which can be harmful to transgender men.<sup>366</sup>

Sexing breastfeeding harms transgender men not only by excluding them from legal protections, but by typing breastfeeding as for women only.<sup>367</sup> In one study of lactating transgender men, several men who initiated chestfeeding reported having to stop as a result of “overwhelming gender dysphoria.”<sup>368</sup> A transgender man who nurses a child experiences gender dysphoria because breastfeeding (and its associated carework) have been deemed an exclusively female activity. While the sexed law of breastfeeding is surely not the only reason for this, it plays a key role in legitimating and maintaining the notion that breastfeeding is for women only.

As for gay and lesbian parents, *Obergefell v. Hodges* held that it was unconstitutional to discriminate against same-sex couples when it comes to many of the

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<sup>362</sup> The sexing of breastfeeding law is one of a number of ways that this area of law excludes LGBTQ families. See Boone, *supra* note 32, at 1870 (showing how breastfeeding law excludes these families by limiting its protections to women who lactate for their biological children, thereby excluding women who donate breastmilk to gay couples).

<sup>363</sup> See *supra* note 172 and accompanying text.

<sup>364</sup> See Clarke, *supra* note 42, at 896-97.

<sup>365</sup> See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) (noting that equal protection requires “that all persons similarly situated should be treated alike”).

<sup>366</sup> See MacDonald, *supra* note 23, at 107 (finding that “participants expressed the importance of words related to gender,” explaining that “[b]eing described with words such as *she*, *her*, *mom*, *mum*, *mother*, *breasts*, or *breastfeeding* could be distressing for a parent who self-identifies differently” and could “intensify feeling gender dysphoria”); Dodgson, *supra* note 178, at 212 (addressing how gendered language conveys messages about whether health care providers will be affirming to transgender and nonbinary persons).

<sup>367</sup> For an example from life, in 2012, La Leche League initially denied a transgender man a role as a leader of a breastfeeding support group because it afforded those roles to women only. See Lee, *supra* note 178, at 236. After some protest, La Leche League relented and adopted a functional rather than sex-based rule, allowing anyone with nine months of breastfeeding experience to serve as group leader. See *id.*

<sup>368</sup> MacDonald, *supra* note 23, at 112 (quoting one such participant: “I was producing a ton of milk,” but “I didn’t have anything ready socially,” for example, “I had no appropriate . . . male clothes for nursing.”).

most important facets of parenting.<sup>369</sup> There, the Supreme Court required that “aspects of marital status,” like “birth . . . certificates[] . . . and child custody, support, and visitation,” needed to be open equally to different- and same-sex parents.<sup>370</sup> This constitutional dictate to treat different- and same-sex parents equally presumably applies to breastfeeding. The focus of the sexed law of breastfeeding on the lactating mother as the exclusive holder of benefits and protections violates this rule.

Sexed breastfeeding regulations exclude all gay men because of their sex. Whereas the sexed law of breastfeeding grants benefits and protections to one parent in heterosexual couples, it affords these same privileges to no one in male couples. This is so even though gay men may feed their children donor breastmilk from a surrogate,<sup>371</sup> and thus they may benefit from some of the supports that the sexed law of breastfeeding provides to women only, such as breastfeeding education (e.g., how to store breastmilk) or counseling (e.g., how to bottle feed).<sup>372</sup> Under this law, gay men are treated as substandard parents, not only because of their sexual orientation, but also because their families lack an appropriate caregiver—a woman. This law thus rests on and reinforces both the constitutionally infirm stereotype that caring is women’s work and the constitutionally infirm second-class status of same-sex families.<sup>373</sup>

As for lesbian women, some sexed breastfeeding laws apply only to “breastfeeding women” and not to women more generally,<sup>374</sup> thus excluding nonlactating mothers just as they exclude fathers. Other laws by their terms apply to “women” generally,<sup>375</sup> and thus could be read to cover nonlactating women, including lesbian partners of breastfeeding women. To the extent that breastfeeding protections apply to nonbreastfeeding mothers but not fathers, they treat similarly situated persons

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<sup>369</sup> 135 S. Ct. 2584, 2600-01 (2015); *see also* Pavan v. Smith, 137 S. Ct. 2075, 2077-79 (2017) (invalidating a state law treating birth certificates differently for different-sex as compared with same-sex married couples).

<sup>370</sup> *Obergefell*, 135 S. Ct. at 2601; *see also* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 504 (N.Y. 2016) (Pigott, J., concurring) (“Same-sex couples are now afforded the same legal rights as heterosexual couples and are no longer barred from establishing the types of legal parent–child relationships that the law had previously disallowed.”).

<sup>371</sup> *See* Rosenblum, et al., *supra* note 203, at 276 (describing experience of gay couple who fed their baby donor breastmilk).

<sup>372</sup> *See* Lessa Interview, *supra* note 213 (describing how gay men may benefit from these breastfeeding supports and relaying example of a gay couple who wanted to learn from a lactation consultant how to feed their infant breastmilk with a supplemental nursing system); *cf. Supplemental Nursing System*, *supra* note 164.

<sup>373</sup> *See* United States v. Windsor, 133 S. Ct. 2675, 2694 (2013) (highlighting the importance of recognition for same-sex parents because their families must “understand the integrity and closeness of their own family and its concord with other families in their community”).

<sup>374</sup> *See, e.g.*, Conn. Gen. Stat. Ann. § 38a-503f(a)(1)(R) (requiring insurers to provide coverage of “[b]reastfeeding support and counseling for any pregnant or breastfeeding woman”).

<sup>375</sup> *See, e.g.*, 7 C.F.R. § 246.11(c)(7)(iv) (requiring “that women have access to breastfeeding promotion and support activities”).

differently—a violation of equal protection<sup>376</sup>—and they do so on the basis of sex, reinforcing the idea that care is the realm of women.<sup>377</sup>

The sexed law of breastfeeding has racial dimensions, too.<sup>378</sup> Breastfeeding rates are higher among white families.<sup>379</sup> This means that families of color need more, rather than fewer, resources to promote breastfeeding. Although federal law aims to increase breastfeeding rates for low-income families—disproportionately families of color<sup>380</sup>—with a variety of means-tested breastfeeding benefits, it provides these benefits to women only.<sup>381</sup> By excluding fathers, these laws undermine their own goal of promoting breastfeeding among the groups that most need this support.<sup>382</sup> And by disproportionately excluding black fathers, these laws reinforce the “racialized trope” of the “Deadbeat Dad,”<sup>383</sup> and continue the law’s failure to support black fatherhood.<sup>384</sup>

#### IV. UNSEXING BREASTFEEDING

This Article has focused on a key mismatch in the law of sex equality. Courts and commentators have recognized the importance of unsexing parenting when no physical sex difference justifies a sexed approach. The law of breastfeeding stands as the near singular exception.<sup>385</sup> This is so even though many aspects of breastfeeding carework are not tied to the biological sex difference of lactation and thus can and should be unsexed. This Part considers what a jurisprudence correcting the outlier status of breastfeeding law would look like, such that the law of breastfeeding and the law of parenting would present a coherent picture within sex equality law.

This Part addresses how sex equality law can extend the heightened scrutiny that it typically applies to sex-based regulations to the context of breastfeeding. It explains

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<sup>376</sup> See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985).

<sup>377</sup> Note that women can induce lactation with hormones, even without having been pregnant. See WAMBACH & SPENCER, *supra* note 136, at 769-70 (discussing induced lactation). So a child may have two breastfeeding mothers. See Lance Wahlert & Autumn Fiester, *Induced Lactation for the Nongestating Mother in a Lesbian Couple*, 15 AM. MED. ASSN. J. ETHICS 753 (2013). Equal treatment for these families would mean providing breastfeeding benefits for both breastfeeding parents, for example, in a family with two breastfeeding mothers, two breastpumps instead of one. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015).

<sup>378</sup> For more on the racial dimensions of the law regulating breastfeeding, see the work of Andrea Freeman, for example, *First Food Justice: Racial Disparities in Infant Feeding as Food Oppression*, 83 FORDHAM L. REV. 3053 (2015).

<sup>379</sup> See Summer Sherburne Hawkins, et al., *Breastfeeding and the Affordable Care Act*, 62 PEDIATR. CLIN. N. AM. 1071, 1072-73 (2015).

<sup>380</sup> See John Creamer, *Poverty Rates for Blacks and Hispanics Reach Historic Lows in 2019*, CENSUS (Sept. 15, 2020), <https://www.census.gov/library/stories/2020/09/poverty-rates-for-blacks-and-hispanics-reached-historic-lows-in-2019.html>.

<sup>381</sup> See *supra* notes 216-19 and accompanying text.

<sup>382</sup> See sources cited *supra* note 133 (finding that father involvement increases rates of breastfeeding).

<sup>383</sup> Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law*, 34 B.C. J.L. & SOC. JUST. 233, 238 (2014).

<sup>384</sup> See, e.g., Omarr Rambert, *The Absent Black Father: Race, The Welfare-Child Support System, and the Cyclical Nature of Fatherlessness*, 68 UCLA L. REV. 324 (2021).

<sup>385</sup> Pregnancy is the other exception. See generally Fontana & Schoenbaum, *supra* note 14, at 309.



how the jurisprudential moves to unsex breastfeeding are already present in the equal protection doctrine that applies to sex. In other contexts, courts have applied exacting scrutiny to sex-based regulations that relate to physical sex differences. This Part begins by explaining how this doctrine can be extended to unsex breastfeeding, and then details how heightened scrutiny would apply to sexed breastfeeding law across a number of examples. In so doing, the Article provides a typology that classifies sexed breastfeeding regulations by the equal protection treatment they merit depending on the degree to which the sexed breastfeeding regulation relates to the physical sex difference of lactation—fully, partially, or not at all.

### A. Constructing Scrutiny

This Article has identified a key outlier in the law of sex equality. Sexed breastfeeding laws have not been subject to the same scrutiny that has been applied to sexed parenting regulations. But just as sex equality law has scrutinized and invalidated sexed parenting laws that are based in “invidious” sex stereotypes in cases like *Weinberger v. Wiesenfeld*,<sup>386</sup> sex equality law could likewise scrutinize and invalidate sexed breastfeeding regulations that are based in similar “invidious” sex stereotypes. Such an application to breastfeeding would accomplish the aim of unsex parenting: to free women and men from the “very stereotype the law condemns.”<sup>387</sup>

Extending scrutiny to the context of breastfeeding would require courts to distinguish between sex classifications that constitutionally regulate on the basis of physical sex differences and sex classifications that unconstitutionally regulate on the basis of sex stereotypes. This would require considering whether men and women are similarly situated for purposes of the law in question in light of the law’s goals, notwithstanding the physical difference of the capacity to lactate.<sup>388</sup> To survive such scrutiny, the law’s reliance on sex would have to be “substantially related” to the physical difference.<sup>389</sup> If the sex-based classification goes beyond what is necessary to account for the physical difference, the classification would be based in an impermissible stereotype.<sup>390</sup>

This type of scrutiny can be applied to unsex laws even in areas like breastfeeding that relate to a physical difference. The Court has done so before. In *United States v. Virginia*, the Court first recognized that the Constitution proscribes reliance on sex even

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<sup>386</sup> See 420 U.S. 636, 651-53 (1975) (invalidating a provision of the Social Security Act allowing widows but not widowers to collect benefits).

<sup>387</sup> *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 138 (1991) (internal quotation marks omitted).

<sup>388</sup> See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) (explaining that the Equal Protection Clause “is essentially a direction that all persons similarly situated should be treated alike”).

<sup>389</sup> *United States v. Virginia*, 518 U.S. 515, 524 (1996) (stating that sex classifications must “serve[] important governmental objectives” and “the discriminatory means employed [must be] substantially related to the achievement of those objectives”) (internal quotation marks omitted).

<sup>390</sup> See, e.g., *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 731 (2003) (distinguishing between sex classifications justified by “differential physical needs of men and women,” and those premised in “sex-role stereotype[s]”).

when the state is regulating in the context of physical sex differences.<sup>391</sup> Before *Virginia*, basing a law in a physical sex difference was the end of the equal protection inquiry. If the law regulated in the context of a physical difference, this would justify reliance on sex; there was no need to turn to a stereotyping analysis.<sup>392</sup> In *Virginia*, however, even though physical differences between the sexes were relevant to Virginia Military Institute's physical training program, this did not end the inquiry. Rather, the Court evaluated whether the law's reliance on sex was based in an "overbroad generalization[]." <sup>393</sup> *Virginia* was thus a turning point in sex equality law: whereas "real' differences [once] served as a check on the reach of anti-stereotyping doctrine," after the decision, "anti-stereotyping doctrine serves as a check on the state's regulation of 'real' differences."<sup>394</sup>

*Hibbs* brought this doctrinal revolution to the context of parenting, and, in so doing, shows us the way to unsexing breastfeeding.<sup>395</sup> Even though the ability to bear a child and the physical recovery period it entails differ by sex, the Court closely scrutinized parental leave policies following the birth of a child to ensure that any sex classification was fully supported by this difference and not sex stereotypes.<sup>396</sup> The Court made clear that the physical sex difference of recovery from childbirth could justify a sex-based difference in leave policies, but only for this period of physical recovery and no longer.<sup>397</sup>

Unsexing breastfeeding would require extending this equal protection analysis to the context of breastfeeding. Given that both recovery from childbirth and breastfeeding relate to a physical sex difference that accompanies bearing a child, applying *Hibbs* to unsex breastfeeding is no great stretch. Under this approach, even though a breastfeeding law might relate to the physical sex difference of lactation, the law could only regulate on the basis of sex to the extent that the difference of lactation justified reliance on sex and no more.

### B. Deploying Scrutiny

Applying the type of heightened scrutiny just discussed to breastfeeding would allow courts to classify breastfeeding regulations into one of three types: (1) those regulations that do not implicate physical sex differences, (2) those regulations that implicate physical sex differences and are justified by them, and (3) those regulations that

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<sup>391</sup> See Franklin, *supra* note 15, at 145-46 (explaining that "the [*Virginia*] Court's treatment of the issue of 'real' differences marked a new departure for constitutional sex discrimination doctrine").

<sup>392</sup> *Id.*

<sup>393</sup> *Virginia*, 518 U.S. at 533.

<sup>394</sup> Franklin, *supra* note 15, at 145-46.

<sup>395</sup> See *id.* at 149-54.

<sup>396</sup> See *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 731 (2003) (explaining impermissibility of "differential leave policies . . . not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women's work").

<sup>397</sup> See *id.* at 731 & n.4 (indicating that any sex-based leave beyond the "four to eight weeks" of "medical recovery period for a normal childbirth" would be impermissible).

implicate physical sex differences but are not justified by them. The remainder of this subsection discusses these three types of breastfeeding regulations, and then highlights how this way of unsexing breastfeeding could enhance equality between men and women, and for lesbian, gay, transgender, and nonbinary parents.

Regulations of the first type—those not based in any physical differences—would not survive scrutiny. For example, laws that mandate that insurers cover the cost of breastfeeding classes for women but not men when such classes focus on the components of feeding infants expressed breastmilk would be suspect.<sup>398</sup> Unsexing breastfeeding requires an approach that views with skepticism laws based in the assumption that fathers will not invest in breastfeeding capital and will not engage in breastfeeding labor.<sup>399</sup>

The second and third classes of cases—those based in physical differences—are harder to separate. Following the teachings of *Virginia* and *Hibbs*, a physical sex difference would not on its own determine the constitutionality of a sex-based breastfeeding regulation.<sup>400</sup> Instead, courts would have to evaluate whether women and men are “similarly situated” with regard to the regulation, notwithstanding any physical sex difference.<sup>401</sup> In so doing, courts would need to look to the purpose of the sex classification (whether it is sufficiently “important”) and whether the sex classification in fact furthers that purpose (whether it is “substantially related” to achieving the purpose).<sup>402</sup> Laws can only rely on sex when it is a perfect proxy for the law’s objective.<sup>403</sup> In other words, any reliance on sex must extend no further than necessary to accomplish the law’s goal to avoid the stricture against “overbroad generalization[s]” premised on sex stereotypes.<sup>404</sup>

Applying this type of heightened scrutiny to breastfeeding might leave some sex-based breastfeeding regulations in place. There are some benefits that could be provided only to breastfeeding persons without raising constitutional concerns. A nursing bra is

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<sup>398</sup> See, e.g., *Pumping and Storing Breastmilk*, LACTATION LINK, <https://lactationlink.com/pumping-storing-breastmilk/> (Jan. 15, 2022) (describing class focused on “[h]ow to get your free breastpump through your insurance,” “[p]ump parts,” “[i]ntroducing a bottle,” and “[s]afe handling, storage, and warming guidelines for breastmilk”); Section II.B.1 (discussing how the law sexes access to breastfeeding education).

<sup>399</sup> See, e.g., *Hibbs*, 538 U.S. at 736 (“Stereotypes about women’s domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men.”); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 652 (1975) (“It is no less important for a child to be cared for by its . . . parent when that parent is male rather than female.”).

<sup>400</sup> See *supra* notes 391-97 and accompanying text.

<sup>401</sup> See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) (explaining that the Equal Protection Clause “is essentially a direction that all persons similarly situated should be treated alike”); *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (explaining that heightened scrutiny of sex classifications is meant to ensure that “similarly situated” men and women are treated the same) (internal quotation marks omitted).

<sup>402</sup> *United States v. Virginia*, 518 U.S. 515, 524 (1996) (stating that the sex “classification [must] serve[] important governmental objectives and that the discriminatory means employed [must be] substantially related to the achievement of those objectives”) (internal quotation marks omitted).

<sup>403</sup> See *supra* notes 97-100 and accompanying text.

<sup>404</sup> *Virginia*, 518 U.S. at 533-34.

one example,<sup>405</sup> as the benefits come solely from the physical difference of lactation. Even in these instances, the law should classify on the basis of lactation rather than on the basis of sex, to account for lactating transgender men and nonbinary persons.<sup>406</sup> So a regulation granting support that would benefit only those who are lactating should confer such support in a sex-neutral way, to the “lactating person,” not to “women” or “mothers,” as current law does.<sup>407</sup>

Even when breastfeeding laws regulate on the basis of sex in the context of physical differences, these physical differences may not be sufficiently related to the purpose of the law to legitimate a sex-based regulation. Consider a law that seeks to promote breastfeeding by mandating insurance coverage for breastfeeding classes that cover topics related to the physical difference of lactation, like proper latches and breastfeeding positions—but only for women.<sup>408</sup> As an initial matter, such a law is infirm for excluding lactating transgender men and nonbinary persons. But this type of law also falls short by excluding non-lactating fathers. Non-lactating fathers (and mothers) can use the knowledge imparted by such a class to provide breastfeeding support and guidance, and are sometimes *better* positioned to do so because they are not breastfeeding.<sup>409</sup> And if the goal of these laws is to promote breastfeeding, the exclusion of men is difficult to justify, as research shows that providing this type of education to fathers substantially increases breastfeeding.<sup>410</sup>

Or consider laws that grant women the right to breastfeed wherever they are otherwise allowed to be.<sup>411</sup> Again, these laws are problematic for excluding lactating transgender men and nonbinary persons. But they are also problematic for excluding non-lactating fathers and mothers. While of course only the lactating parent is required to breastfeed the child, the non-lactating parent’s presence can be quite valuable, particularly in promoting breastfeeding—the goal of many of these laws.<sup>412</sup> For those who are not comfortable breastfeeding in public without partner support, the partner’s presence is a practical necessity.<sup>413</sup> And the partner’s presence is also critical for performing forms of infant care, like changing a diaper, that arise during the process of

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<sup>405</sup> See *supra* note 139 and accompanying text.

<sup>406</sup> See *supra* notes 178-81 and accompanying text.

<sup>407</sup> See *supra* Part II.B. Language matters. The term “breastfeeding” refers to a traditionally female activity, but replacing it with “chestfeeding” may be provocative. See *Brighton NHS Trust Introduces New Trans-Friendly Terms*, BBC (Feb. 10, 2021), <https://www.bbc.com/news/uk-england-sussex-56007728> (reporting on such a change in British health service and objection that this “entirely replac[es] any language related to womanhood”); cf. Chase Strangio, *Can Reproductive Trans Bodies Exist?*, 19 CUNY L. REV. 223, 229-30 (2016) (discussing objection to transgender inclusion in reproductive rights for severing its connection to womanhood). Policymakers might refer to “lactation” where possible, and to add the term “chestfeeding” to “breastfeeding” rather than replace it. See Bartick, et al., *supra* note 27, at 1 (“[t]o be inclusive of all people in our written materials,” adopting “desexed or gender-inclusive language (e.g., using ‘lactating person’ instead of ‘mother’)”).

<sup>408</sup> See *supra* Part II.B.1; Appendix B.

<sup>409</sup> See *supra* notes 142-51, 168-70 and accompanying text.

<sup>410</sup> See sources cited *supra* note 133.

<sup>411</sup> See *supra* Part II.B.3; Appendix E.

<sup>412</sup> See *supra* notes 174-76 and accompanying text.

<sup>413</sup> See *supra* notes 174-76 and accompanying text.

breastfeeding. Given the key role that partners play in supporting breastfeeding and providing infant care, the limitation of legal protection to the breastfeeding woman should be viewed skeptically.

Finally, consider a law that provides breastfeeding women an accommodation in the form of break time from work with the dual goals of promoting breastfeeding *and* women's labor market outcomes.<sup>414</sup> Such a law would be infirm to the extent it excludes lactating transgender men and nonbinary persons.<sup>415</sup> Still further, the law should be suspect for excluding non-lactating fathers and mothers. Only the lactating parent will require break time from work to express milk. But non-lactating parents can engage in carework that is necessary for successful breastfeeding and that can only be done with break time from work. When a mother forgets a breastpump accessory or a breastpump breaks, a father can bring these items to her. By reducing (slightly) the work-related costs of lactation for women and increasing (slightly) the work-related costs of lactation for men, extending workplace breastfeeding accommodations in this way helps to advance women's role at work and men's role at home.<sup>416</sup> Notwithstanding the relevance of the physical difference of lactation, a sex-based law would be questionable, because the sex classification undermines the objectives of the law.

To be sure, the fact that laws in this third category could better achieve their aims by including men is not by itself fatal. "The Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all."<sup>417</sup> In such cases, legislative intent matters. For such laws to survive, the lesser role of paternal support in promoting breastfeeding—and not stereotypical views of the relative importance of mothers and fathers to caregiving—must have been the actual reason for the law's reliance on sex.<sup>418</sup> This might save laws whose goal is to promote breastfeeding, but will do less to save breastfeeding-related provisions in laws like the FMLA, which are aimed at achieving sex equality.<sup>419</sup>

If sex classifications in breastfeeding regulations are deemed unconstitutional, courts must determine the appropriate remedy. When a statute that "benefits one class . . . and excludes another from the benefit" violates equal protection, "[a] court may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include

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<sup>414</sup> See *supra* Part II.B.2; Appendix C.

<sup>415</sup> See *supra* notes 284-89 and accompanying text.

<sup>416</sup> See *supra* notes 121-22, 327 and accompanying text (discussing this rationale in the context of the FMLA).

<sup>417</sup> *Dandridge v. Williams*, 397 U.S. 471, 486-87 (1970).

<sup>418</sup> See *United States v. Virginia*, 518 U.S. 515, 533 (1996) (instructing that "[t]he justification must be genuine, not hypothesized or invented *post hoc* in response to litigation[,] [a]nd it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females").

<sup>419</sup> See, e.g., 29 U.S.C. §§ 2601(a)(2), (b)(3), (b)(5) (including among its purposes "that fathers and mothers be able to participate in early childrearing" and "to promote the goal of equal employment opportunity for women and men").

those who are aggrieved by exclusion.”<sup>420</sup> The first approach is known as “leveling down,” and the second approach “leveling up.”<sup>421</sup> Legislative intent guides the choice between these alternatives.<sup>422</sup> Typically, “extension, rather than nullification, is the proper course” both generally<sup>423</sup> and specifically in the context of sex discrimination.<sup>424</sup>

Despite sometimes<sup>425</sup> imposing additional costs, leveling up is critical to moving towards a more equal distribution of carework across the sexes. This is because, as the Supreme Court has explained, a simple rule of equality is not enough to unsex parenting in light of the gendered distribution of carework that already exists.<sup>426</sup> A rule that grants no breastfeeding benefits at all might satisfy the dictates of formal equality,<sup>427</sup> but would have a serious disparate impact in a world where women already do far more carework related to breastfeeding. In light of this, a formally equal rule that affords no caregiving benefits to anyone “would exclude far more women than men from the workplace” and would “continue to reinforce the stereotype of women as caregivers.”<sup>428</sup>

By encouraging men to do more caregiving, affirmative caregiving benefits afforded to men and women equally have the potential to disrupt both the reality of the gendered distribution of carework, and “the stereotype that only women are responsible for family caregiving.”<sup>429</sup> In turn, such benefits can ensure that caregiving accommodations “w[ill] no longer be stigmatized as an inordinate drain on the workplace

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<sup>420</sup> *Morales-Santana*, 137 S. Ct. at 1698 (internal quotation marks omitted).

<sup>421</sup> Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law*, 46 WM. & MARY L. REV. 513, 515 (2004).

<sup>422</sup> See *Morales-Santana*, 137 S. Ct. at 1699 (“The choice between these outcomes is governed by the legislature’s intent, as revealed by the statute at hand.”).

<sup>423</sup> *Id.* (internal quotation marks omitted).

<sup>424</sup> See *id.* at 1699-1700 (recognizing this principle and citing many examples, but explaining that “[a]lthough extension of benefits is customary in federal benefit cases . . . all indicators in this case point in the opposite direction”).

<sup>425</sup> I say “sometimes” because leveling up some of the breastfeeding regulations under study here, such as extending public accommodation rights to partners, would not impose any financial cost.

<sup>426</sup> *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 738 (2003).

<sup>427</sup> I say “might” because eliminating certain breastfeeding protections for women might be sex discriminatory, on the ground that they affect women alone. See *supra* notes 185, 229-31 and accompanying text (discussing case law holding that breastfeeding discrimination is sex discrimination for this reason); cf. *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 323 n.20, 327 (1993) (Stevens, J., dissenting) (“As the capacity to become pregnant is a characteristic necessarily associated with one sex, a classification based on the capacity to become pregnant is a classification based on sex.”). Unsexing breastfeeding need put an end to such protections. Acknowledging that biological features once thought to be exclusive to women can also affect men (either transgender or cisgender) does not mean that discrimination on the basis of these features is not discrimination on the basis of sex, but to recognize it as such might require turning to a theory of sex stereotyping or disparate impact. See *Clarke*, *supra* note 42, at 956 (explaining “that in practice, discrimination based on pregnancy drives women’s inequality, that it is based on the assumption that all workers meet a traditionally male norm, or that it is a thinly veiled attempt to exclude women from the workplace”).

<sup>428</sup> *Hibbs*, 538 U.S. at 738.

<sup>429</sup> *Id.*; see also 29 U.S.C. § 2601(b)(4) (explaining that an affirmative caregiving benefit as provided by the FMLA “minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis”).

caused by female employees,” and that “employers c[an]not evade [such] obligations simply by hiring men.”<sup>430</sup>

Critics might favor leveling down on the ground of sex equality. Some feminist thinkers might argue that to the extent the law seeks to promote breastfeeding, it inevitably sexes parenting.<sup>431</sup> But such an argument ignores the role that men can play in breastfeeding. This Article has shown how unsexing breastfeeding can help to relieve the tension between the state’s twin goals of promoting breastfeeding and unsexing parenting. Because some aspects of breastfeeding can be performed by any parent, regardless of sex, the state can simultaneously promote breastfeeding *and* unsex parenting.<sup>432</sup>

While leveling up is the preferred remedy for breastfeeding laws that impermissibly rely on sex, this doesn’t mean that the same exact benefits currently granted to women must be extended to cisgender men. The physical difference of lactation may still be relevant. For example, when it comes to laws that provide workplace accommodations for women to express breastmilk during the workday,<sup>433</sup> cisgender men obviously do not need regular break time to express breastmilk. Rather, they can be made equal with break time likewise necessary for expressing milk during the day, such as bringing a forgotten breastpump to the mother’s workplace.<sup>434</sup>

Just because leveling up to spur father involvement in caregiving is the remedy most consistent with sex equality law doesn’t mean that father involvement in breastfeeding will always be easy for women. At the individual level, it may be difficult for women to create space for men in a domain that has typically been for mothers only, especially because breastfeeding has so often been viewed as a source of maternal-child bonding.<sup>435</sup> At the group level, it may be difficult for women to create space for men in places like breastfeeding rooms and support groups, which may require overcoming discomfort with men in these intimate spaces.<sup>436</sup> Looking abroad to programs aimed at

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<sup>430</sup> *Id.* at 737.

<sup>431</sup> *See* Cohen, *supra* note 177, at 159 (indicating that from one “feminist perspective . . . [i]n as much as breastfeeding is seen as an aspect of maternal experience that is not shareable with men, it is repudiated as an ideological practice that maintains women’s subordination”).

<sup>432</sup> These same feminist critics might respond that notwithstanding the ability to unsex some aspects of breastfeeding, that lactation—the most time-consuming aspect of breastfeeding—cannot be unsexed, and thus promoting breastfeeding continues to sex parenting. The Article targets the constitutionally problematic dimensions of the sexed law of breastfeeding. It takes as given the policy choice of promoting breastfeeding and does not address whether the state would better promote sex equality by adopting a different stance towards breastfeeding.

<sup>433</sup> *See supra* notes 226-31 and accompanying text.

<sup>434</sup> One approach would extend breastfeeding accommodations to caregiving responsibilities generally, whether related to breastfeeding or not.

<sup>435</sup> *See* Cahn, *supra* note 325, at 536-41 (discussing how gendered norms may lead mothers to engage in “gatekeeping” vis-à-vis fathers to retain the primary maternal role).

<sup>436</sup> *See supra* Part III.B.2.

encouraging father involvement in breastfeeding in a number of countries shows that these challenges are manageable.<sup>437</sup>

## CONCLUSION

This Article has made visible the sexed law of breastfeeding, surfaced its tension with pervasive efforts to unsex parenting in the rest of sex equality law, and begun the project of resolving this tension. With many sexed breastfeeding laws already on the books, and new sexed breastfeeding laws on the horizon,<sup>438</sup> the time to take up this project is now. Mounting evidence<sup>439</sup> that motherhood rather than sex per se is the most significant contributor to gender inequality in the workplace makes the stakes clear: sex equality in private and public life. We will never unsex parenting as much as we want until we unsex breastfeeding as much as we should.

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<sup>437</sup> See, e.g., *Parent Infant Feeding Initiative*, <http://pifistudy.net.au/> (last visited Jan. 15, 2022) (discussing breastfeeding initiative in Australia with interventions channeled through the father); Oxford Health NHS Foundation Trust, *Dads and Breastfeeding*, <https://www.oxfordhealth.nhs.uk/wp-content/uploads/2017/03/CY-173.16-Dads-and-breastfeeding.pdf> (last visited Jan. 15, 2022) (subdivision of British National Health Service providing comprehensive advice to fathers on how to support breastfeeding).

<sup>438</sup> See, e.g., PUMP for Nursing Mothers Act, S. 1658, 117th Cong. (2021), <https://www.govtrack.us/congress/bills/117/s1658/text> (proposing to extend the FLSA provision on “reasonable break time for nursing mothers” to other classes of employees).

<sup>439</sup> See, e.g., Henrik Kleven, et al., *Children and Gender Inequality: Evidence from Denmark*, 11 AM. ECON. J.: APPLIED ECON. 181 (2019) (attributing 80% of the gender wage gap to motherhood); Claire Cain Miller, *The Gender Pay Gap Is Largely Because of Motherhood*, N.Y. TIMES (May 13, 2017), <https://www.nytimes.com/2017/05/13/upshot/the-gender-pay-gap-is-largely-because-of-motherhood.html> (collecting studies).



APPENDIX A: FEDERAL BREASTFEEDING LAWS<sup>440</sup>

**“Breastfeeding promotion program”**: [42 U.S.C. § 1790](#): “The Secretary . . . shall establish a breastfeeding promotion program to promote breastfeeding as the best method of infant nutrition, foster wider public acceptance of breastfeeding in the United States, and assist in the distribution of breastfeeding equipment to breastfeeding women.”

- **“Nutrition education”**: [7 C.F.R. § 246.11\(c\)\(7\)](#): “Establish standards for breastfeeding promotion and support which include, at a minimum, the following . . . (iv) A plan to ensure that women have access to breastfeeding promotion and support activities during the prenatal and postpartum periods.”

**“Child nutrition”**: [45 C.F.R. § 1302.44\(a\)\(2\)\(viii\)](#): “Promote breastfeeding, including providing facilities to properly store and handle breast milk and make accommodations, as necessary, for mothers who wish to breastfeed during [Headstart] program hours, and if necessary, provide referrals to lactation consultants or counselors.”

**“Consolidated Appropriations Act, 2004”**: [Pub. L. No. 108-199, 118 Stat. 357 § 629](#): “Notwithstanding any other provision of law, a woman may breastfeed her child at any location in a Federal building or on Federal property, if the woman and her child are otherwise authorized to be present at the location.”

**“Coverage of preventive health services”**: [42 U.S.C. § 300gg-13\(4\)](#): “A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for . . . with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.”

- **“Women’s Preventive Services Guidelines”**: [HRSA Health Resources & Service Administration](#): “Breastfeeding Services and Supplies—The Women’s Preventive Services Initiative recommends comprehensive lactation support services (including counseling, education, and breastfeeding equipment and supplies) during the antenatal, perinatal, and the postpartum period to ensure the successful initiation and maintenance of breastfeeding.”

**“Establishment of Breastfeeding Policy for the Department of the Army”**: [10 U.S.C. § 733](#): “The Secretary of the Army shall develop a comprehensive policy regarding breastfeeding by female members of the Army who are breastfeeding.”

- **“Procedures”**: [32 C.F.R. § 79.6](#): “The facility [a military-operated child daycare center] has a designated place set aside for breastfeeding mothers who want to come during work to breastfeed, as well as a private area with an outlet (not a bathroom) for mothers to pump their breast milk.”

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<sup>440</sup> This Appendix lists only those federal laws that expressly reference “breastfeeding,” “nursing,” or “lactation.” Other federal laws that sex breastfeeding without referencing these terms, such as the Family and Medical Leave Act and Pregnancy Discrimination Act, are discussed in Part II.B, *supra*.

**“Exemptions from classification as a banned toy or other banned article for use by children”:** [16 C.F.R. § 1500.86\(a\)\(9\)](#): “Boston Billow Nursing Pillow and substantially similar nursing pillows that are designed to be used only as a nursing aide for breastfeeding mothers. For example, are tubular in form, C- or crescent-shaped to fit around a nursing mother’s waist, round in circumference and filled with granular material.”

**“Lactation room in public buildings”:** [40 U.S.C. § 3318](#): “Except as provided in subsection (c), the appropriate authority of a covered public building shall ensure that the building contains a lactation room that is made available for use by members of the public to express breast milk.”

**“McGovern-Dole International Food for Education and Child Nutrition Program”:** [7 U.S.C. § 1736o-01](#): “[T]he Secretary may establish a program, to be known as ‘McGovernDole International Food for Education and Child Nutrition Program’, requiring the procurement of agricultural commodities and the provision of financial and technical assistance to carry out . . . (2) maternal, infant, and child nutrition programs for pregnant women, nursing mothers, infants, and children who are 5 years of age or younger.”

**“Mothers’ Rooms”:** [49 U.S.C. § 47107\(w\)\(3\)\(A\)\(i\)](#): “The Secretary of Transportation may approve an application under this subchapter for an airport development project grant only if the Secretary receives written assurances that the airport owner or operator will maintain (A) a lactation area in the sterile area of each passenger terminal building of the airport; . . . (A) ‘lactation area’ means a room or similar accommodation that- (i) provides a location for members of the public to express breast milk that is shielded from view and free from intrusion from the public.”

**“Nursing mothers”:** [21 C.F.R. § 201.80\(i\)](#): “If a drug is absorbed systemically, this subsection of the labeling shall contain, if known, information about excretion of the drug in human milk and effects on the nursing infant. . . . ‘Caution should be exercised when (name of drug) is administered to a nursing woman.’”

**“Reasonable break time for nursing mothers”:** [29 U.S.C. § 207\(r\)](#): “An employer shall provide—(A) a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk; and (B) a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.”

## APPENDIX B: STATE HEALTHCARE BREASTFEEDING LAWS

**Alaska:** [H. Con. Res. 18, 28th Leg. \(Alaska 2014\)](#): “WHEREAS the immediate skin-to-skin contact in breastfeeding enhances the emotional connection between the mother and infant . . . be it FURTHER RESOLVED that the Alaska State Legislature strongly encourages hospitals and birthing facilities in the state to receive the baby-friendly designation by implementing the Ten Steps to Successful Breastfeeding program.”

**California:** [Cal. Health and Safety Code § 123360 \(2008\)\(a\)](#): “The State Department of Public Health shall include in its public service campaign the promotion of mothers breast-feeding their infants.”

**Connecticut:** [Conn. Gen. Stat. Ann. § 38a-503f \(2020\)\(a\)\(1\)](#): “[E]ach [covered] individual health insurance policy . . . shall provide coverage for the following benefits and services: . . . (R) Breastfeeding support and counseling for any pregnant or breastfeeding woman; (S) Breastfeeding supplies, including, but not limited to, a breast pump for any breastfeeding woman.”

**Hawaii:** [H. Con. Res. 158, 25<sup>th</sup> Leg. \(Haw. 2010\)](#): “BE IT RESOLVED by the House of Representatives of the Twenty-fifth Legislature of the State of Hawaii, Regular Session of 2010, the Senate concurring, that the Department of Human Services, in consultation with the Department of Health, is urged to develop a program to encourage breastfeeding among mothers who receive medical assistance from Medicaid.”

### **Illinois:**

- [410 Ill. Comp. Stat. 50/3.4 \(2020\)\(a\)](#): “In addition to any other right provided under this Act, every woman has the following rights with regard to pregnancy and childbirth: . . . (16) The right to receive information about breastfeeding.”
- [210 Ill. Comp. Stat. 81/10 \(2013\)](#): “Every hospital that provides birthing services must adopt an infant feeding policy that promotes breastfeeding. . . . An infant feeding policy adopted under this Section shall include guidance on the use of formula (i) for medically necessary supplementation, (ii) if preferred by the mother, or (iii) when exclusively breastfeeding is contraindicated for the mother or for the infant.”

**Minnesota:** [Minn. Stat. § 145.894 \(1997\)](#): “The commissioner of health shall: (1) develop a comprehensive state plan for the delivery of nutritional supplements to pregnant and lactating women, infants, and children. . . .”

**Mississippi:** [Miss. Code Ann. § 41-135-5 \(2016\)\(1\)](#): “Hospitals that provide birth services may adopt an infant feeding policy that promotes and supports breast-feeding. Any infant feeding policies adopted under this section shall include guidance on the use of formula (a) for medically necessary supplementation; (b) if preferred by the mother; or (c) when exclusive breast-feeding is not advised for the mother and/or infant.

**Missouri:** [Mo. Rev. Stat. § 191.915 \(1999\)](#): “Every hospital, as defined in section [197.020](#), and ambulatory surgical center, as defined in section [197.200](#), that provides obstetrical care shall: (1) Provide new mothers, where appropriate as determined by the attending physician, with information on breast-feeding and the benefits to the child; and (2) Provide new mothers, where appropriate as determined by the attending physician, with information on local breast-feeding support groups; or (3) Offer breast-feeding consultations to new mothers, where appropriate as determined by the attending physician.”

**Washington:** [Wash. Rev. Code § 74.09.475 \(2017\)\(1\)](#): “[T]he authority shall require that all health care facilities that provide newborn delivery services to medical assistance clients establish policies and procedures to provide: (a) Skin-to-skin placement of the newborn on the mother’s chest immediately following birth to promote the initiation of breastfeeding, except as otherwise indicated by authority guidelines; and (b) Room-in practices in which a newborn and a mother share the same room for the duration of their postdelivery stay at the facility, except as otherwise indicated by authority guidelines.”

## APPENDIX C: STATE WORKPLACE BREASTFEEDING LAWS

**Arkansas:** [Ark. Code Ann. § 11-5-116 \(2009\)](#): “Break time for expressing breast milk”: “(a) (1) An employer shall provide reasonable unpaid break time each day to an employee who needs to express breast milk for her child in order to maintain milk supply and comfort.”

**California:** [Cal. Lab. Code § 1030 et seq. \(2019\)](#): “Lactation Accommodation”: “Every employer, including the state and any political subdivision, shall provide a reasonable amount of break time to accommodate an employee desiring to express breast milk for the employee’s infant child each time the employee has need to express milk.”

**Colorado:** [Colo. Rev. Stat § 8-13.5-104\(1\) \(2008\)](#): “Workplace Accommodations for Nursing Mothers”: “An employer shall provide reasonable unpaid break time or permit an employee to use paid break time, meal time, or both, each day to allow the employee to express breast milk for her nursing child for up to two years after the child’s birth.”

**Connecticut:** [Conn. Gen. Stat. § 31-40w \(2001\)](#): “Breastfeeding in the workplace”: “(a) Any employee may, at her discretion, express breast milk or breastfeed on site at her workplace during her meal or break period. . . . (c) An employer shall not discriminate against, discipline or take any adverse employment action against any employee because such employee has elected to exercise her rights under subsection (a) of this section.”

**Georgia:** [Ga. Code Ann. § 34-1-6 \(2010\)](#): “Employer obligation to provide time for women to express breast milk for infant child”: “an employer may provide reasonable unpaid break time each day to an employee who needs to express breast milk for her infant child.”

### Hawaii

- [Haw. Rev. Stat. § 378-2 \(2020\)](#): “Discriminatory practices made unlawful; offenses defined”: “(a) It shall be an unlawful discriminatory practice: . . . (7) For any employer or labor organization to refuse to hire or employ, bar or discharge from employment, withhold pay from, demote, or penalize a lactating employee because the employee breastfeeds or expresses milk at the workplace. For purposes of this paragraph, the term ‘breastfeeds’ means the feeding of a child directly from the breast.”
- [2013 Haw. Sess. Laws Act. 249](#): “Relating to Breastfeeding in the Workplace”: “An employer shall provide (1) reasonable break time for an employee’s nursing child for one year after the child’s birth each time the employee has a need to express breast milk.”

### Illinois

- [820 Ill. Comp. Stat. 260/10 \(2018\)](#): “Break time for nursing mothers”: “An employer shall provide reasonable break time to an employee who needs to express breast milk for her nursing infant child each time the employee has the need to express milk for

one year after the child's birth. . . . An employer may not reduce an employee's compensation for time used for the purpose of expressing milk or nursing a baby."

**Indiana:** [Ind. Code § 5-10-6-2 \(2008\)](#): "Paid breaks for expressing breast milk": "(a) The state and political subdivisions of the state shall provide reasonable paid break time each day to an employee who needs to express breast milk for the employee's infant child."

**Kentucky:** [Ky. Rev. Stat. Ann. § 344.040 \(2019\)](#): "Unlawful discrimination by employers": "It is an unlawful practice for an employer: (c) To fail to make reasonable accommodations for any employee with limitations related to pregnancy, childbirth, or a related medical condition who requests an accommodation, including but not limited to the need to express breast milk, unless the employer can demonstrate the accommodation would impose an undue hardship on the employer's program, enterprise, or business."

**Maine:** [Me. Rev. Stat. Ann. tit. 26, § 604 \(2009\)](#): "Nursing mothers in the workplace": "An employer . . . shall provide adequate unpaid break time or permit an employee to use paid break time or meal time each day to express breast milk for her nursing child for up to 3 years following childbirth. . . . An employer may not discriminate in any way against an employee who chooses to express breast milk in the workplace."

**Maryland:** [Md. Code Ann. State Pers. & Pens. § 2-310 \(2018\)](#): "Break time for nursing mothers employed by the State": "(a) The State, through its appropriate officers and employees, shall provide: (1) a reasonable break time for an employee to express breast milk for her nursing child after the child's birth each time the employee needs to express the milk. . . ."

**Minnesota:** [Minn. Stat. § 181.939 \(2014\)](#): "Nursing Mothers: "(a) An employer must provide reasonable unpaid break time each day to an employee who needs to express breast milk for her infant child."

**Mississippi:** [Miss. Code Ann. § 71-1-55 \(2006\)](#): "Discrimination against breast-feeding mother who uses lawful break time to express milk prohibited": "[N]o employer shall prohibit an employee from expressing breast milk during any meal period or other break period provided by the employer."

**Montana:** [Mont. Code Ann. § 39-2-215 \(2007\)](#): "Public Employer Policy On Support Of Women And Breastfeeding--Unlawful Discrimination": "(1) All state and county governments, municipalities, and school districts and the university system must have a written policy supporting women who want to continue breastfeeding after returning from maternity leave."

**New Mexico:** [N.M. Stat. Ann. § 28-20-2 \(2000\)](#): "Nursing Mothers: Use of a breast pump in the workplace": "A. In order to foster the ability of a nursing mother who is an employee to use a breast pump in the workplace, an employer, including the state and its political subdivisions, shall provide . . . flexible break times."

**New York:** [N.Y. Lab. Law § 206-C \(2007\)](#): “Right of nursing mothers to express breast milk”: “An employer shall provide reasonable unpaid break time or permit an employee to use paid break time or meal time each day to allow an employee to express breast milk for her nursing child for up to three years following child birth. . . . No employer shall discriminate in any way against an employee who chooses to express breast milk in the work place.”

**North Dakota:** [N.D. Cent. Code § 23-12-17 \(2009\)](#): “Workplace breastfeeding policies-Infant friendly designation”: “1. An employer may use the designation “infant friendly” on its promotional materials if the employer adopts a workplace breastfeeding policy that includes the following: a. Flexible work scheduling, including scheduling breaks and permitting work patterns that provide time for expression of breast milk.”

**Oklahoma:** [Okla. Stat. tit. 40, § 435 \(2020\)](#): “Break Periods to Breast-Feed—Private Room—Reports”: “A. 1. An employer other than a state agency may provide reasonable unpaid break time each day to an employee who needs to breast-feed or express breast milk for her child to maintain milk supply and comfort. . . . C. The Department of Health shall issue periodic reports on breast-feeding rates, complaints received, and benefits reported by both working breast-feeding mothers and employers.”

**Oregon:** [Or. Rev. Stat. § 653.077 \(2019\)](#): “Expressing milk in workplace”: “(2)(a) An employer shall provide reasonable unpaid rest periods to accommodate an employee who needs to express milk for the employee’s child. . . . (6) An employer may allow an employee to temporarily change job duties if the employee’s regular job duties do not allow the employee to express milk.”

**Rhode Island:** [23 R.I. Gen. Laws Ann. § 23-13.2-1 \(2008\)](#): “Workplace policies protecting a woman’s choice to breastfeed”: “An employer may provide reasonable unpaid break time each day to an employee who needs to breastfeed or express breast milk for her infant child to maintain milk supply and comfort. . . . (c) The department of health shall issue periodic reports on breastfeeding rates, complaints received and benefits reported by both working breastfeeding mothers and employers.”

**South Carolina:** [S.C. Code Ann. §41-1-130 \(2020\)](#): “Break time or meal time for employees to express breast milk; definitions; remedies”: “An employer shall provide an employee with reasonable unpaid break time or shall permit an employee to use paid break time or meal time each day to express breast milk. . . . An employer may not discriminate against an employee for choosing to express breast milk in the workplace in compliance with the provisions of this section.”

**Tennessee:** [Tenn. Code Ann. § 50-1-305 \(1999\)](#): “Breast milk expressing by employees—Break time and place”: “(b) An employer shall provide reasonable unpaid break time each day to an employee who needs to express breast milk for that employee’s infant child.”

## Texas

- [Tex. Health & Safety Code Ann. § 165.003 \(1995\)](#): “Business Designation As ‘Mother-Friendly’”: “(a) A business may use the designation ‘mother-friendly’ in its promotional materials if the business develops a policy supporting the practice of worksite breast-feeding that addresses the following: (1) work schedule flexibility, including scheduling breaks and work patterns to provide time for expression of milk; . . . (4) access to hygienic storage alternatives in the workplace for the mother’s breast milk.”
- [Tex. Health & Safety Code Ann. § 165.032 \(1995\)](#): “Demonstration Project”: “(a) The department shall establish a demonstration project in Travis County to provide access to worksite breast-feeding for department employees who are mothers with infants.”

## Utah

- [Utah Code Ann. § 34-49-202 \(2015\)](#): “Nursing Mothers in the Workplace”: “(a) A public employer shall: (i) provide for at least one year after the birth of a public employee’s child reasonable breaks for each time the public employee needs to breast feed or express milk. . . .”
- [Utah Code Ann. § 34-49-204 \(2015\)](#): “Nursing Mothers in the Workplace”: “A public employer may not refuse to hire, promote, discharge, demote, or terminate a person, or may not retaliate against, harass, or discriminate in matters of compensation or in terms, privileges, and conditions of employment against a person otherwise qualified because the person breastfeeds or expresses milk in the workplace.”

**Vermont:** [Vt. Stat. Ann. tit. 21, § 305 \(2017\)](#): “Nursing mothers in the workplace”: “(a) For an employee who is a nursing mother, the employer shall for three years after the birth of a child: (1) Provide reasonable time, either compensated or uncompensated, throughout the day to express breast milk for her nursing child.”

**Virginia:** [Va. Code Ann. § 2.2-1201 \(2020\)](#): “Duties of Department; Director”: “Develop state personnel policies that provide break time for nursing mothers to express breast milk. Such policies shall require an agency to provide (i) a reasonable break time for an employee to express breast milk for her nursing child after the child’s birth each time such employee has need to express the breast milk.”

**Washington:** [Wash. Rev. Code 43.10.005 \(2020\)](#): “Workplace pregnancy accommodations—Unfair practices—Definitions”: “(b) ‘Pregnancy’ includes the employee’s pregnancy and pregnancy-related health conditions, including the need to express breast milk. (c) “Reasonable accommodation” means: . . . (viii) Providing reasonable break time for an employee to express breast milk for two years after the child’s birth each time the employee has need to express the milk.”

**Wyoming:** [H.J.R. 1, 57 Leg., Gen. Sess. \(Wyo. 2003\)](#): “Now, Therefore, Be It Resolved By The Members of the Legislature of the State of Wyoming: . . . (2) That the Legislature encourages breastfeeding and commends employers, both in the public and the private sector, who make accommodations for breastfeeding mothers whenever feasible.”



## APPENDIX D: STATE PUBLIC INDECENCY BREASTFEEDING LAWS

**Alaska:** [Alaska Stat. § 01.10.060\(b\) \(2019\)](#): “In the laws of the state, ‘lewd conduct,’ ‘lewd touching,’ ‘immoral conduct,’ ‘indecent conduct,’ and similar terms do not include the act of a woman breast-feeding a child in a public or private location where the woman and child are otherwise authorized to be.”

**Arizona:** [Ariz. Rev. Stat. Ann. § 13-1402\(B\) \(2010\)](#): “Indecent exposure does not include an act of breast-feeding by a mother.”

**Arkansas:** [Ark. Code. Ann. § 5-14-112\(c\) \(2007\)](#): “A woman is not in violation of this section [criminalizing indecent exposure] for breastfeeding a child in a public place or any place where other individuals are present.”

**District of Columbia:** [D.C. Code Ann. § 2-1402.82 \(2007\)](#): “Notwithstanding any other provision of District of Columbia law governing indecent exposure or the definition of the private or intimate parts of a female person, including that portion of the breast that is below the top of the areola, a woman shall have the right to breastfeed in accordance with this section.”

**Florida:** [Fla. Stat. § 800.02 \(1993\)](#): “A person who commits any unnatural and lascivious act with another person commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083. A mother’s breastfeeding of her baby does not under any circumstance violate this section.”

**Louisiana:** [La. Rev. Stat. Ann. § 51.2247.1](#): “Breastfeeding not a violation of law. A mother breastfeeding her baby in any location, public or private, where the mother is otherwise authorized to be, shall not be deemed to be in violation of R.S. 14:106 (obscenity) or of any other provision of law.”

**Massachusetts:** [Mass. Gen. Laws ch. 111 § 221 \(2009\)](#): “Notwithstanding any general or special law to the contrary, the act of a mother breastfeeding her child, and any exposure of a breast incidental thereto that is solely for the purpose of nursing such child, shall not be considered lewd, indecent, immoral, or unlawful conduct.”

**Michigan:** [Mich. Comp. Laws. § 41.181\(4\) \(2018\)](#): “Public nudity does not include any of the following: (a) A woman’s breastfeeding of a baby whether or not the nipple or areola is exposed during or incidental to the feeding.”

**Minnesota:** [Minn. Stat. Ann. § 617.23 \(1998\)](#): “Indecent Exposure; Penalties: . . . It is not a violation of this section for a woman to breastfeed.”

**Mississippi:** [Miss. Code Ann. § 97-29-31 \(2012\)](#): “A person who willfully and lewdly exposes his person, or private parts thereof, in any public place, or in any place where others are present, or procures another to so expose himself, is guilty of a misdemeanor. . . It is not a violation of this statute for a woman to breast-feed.”

**Missouri:** [Mo. Rev. Stat. § 191.918 \(2014\)](#): “The act of a mother breast-feeding a child or expressing breast milk in a public or private location where the mother and child are otherwise authorized to be shall not: (2) Be considered an act of public indecency, indecent exposure, sexual conduct, lewd touching, or obscenity or any other similar term for purposes of state or municipal law.”

**Nevada:** [Nev. Rev. Stat. § 201.210\(2\) \(2017\)](#): “For the purposes of this section, the breast feeding of a child by the mother of the child does not constitute an act of open or gross lewdness.”

**New Hampshire:** [N.H. Rev. Stat. Ann. § 132:10-d \(1999\)](#): “Breast-feeding a child does not constitute an act of indecent exposure and to restrict or limit the right of a mother to breast-feed her child is discriminatory.”

**North Carolina:** [N.C. Gen. Stat. § 14-190.9\(b\) \(2015\)](#): “Notwithstanding any other provision of law, a woman may breast feed in any public or private location where she is otherwise authorized to be, irrespective of whether the nipple of the mother’s breast is uncovered during or incidental to the breast feeding.”

**North Dakota:** [N.D. Cent. Code § 12.1-20-12.1\(4\) \(2017\)](#): “Indecent Exposure . . . The act of a woman discreetly breastfeeding her child is not a violation of this section.”

**South Carolina:** [S.C. Code Ann. § 63-5-40\(B\) \(2008\)](#): “Breastfeeding a child in a location where the mother is authorized to be is not considered indecent exposure.”

**South Dakota:** [S.D. Codified Laws § 22-24A-2 \(2006\)\(10\)](#): “This term [obscene] does not include a mother’s breast-feeding of her baby.”

**Tennessee:** [Tenn. Code Ann. § 39-13-511\(d\) \(2010\)](#): “Indecent exposure . . . This section does not apply to a mother who is breastfeeding her child who is twelve (12) months of age or younger in any location, public or private.”

**Utah:** [Utah Code Ann. § 76-9-702 \(2018\)](#): “A woman’s breast feeding, including breast feeding in any location where the woman otherwise may rightfully be, does not under any circumstance constitute a lewd act, irrespective of whether or not the breast is covered during or incidental to feeding.”

**West Virginia:** [W. Va. Code § 61-8-9\(a\) \(2007\)](#): “Provided, That it is not considered indecent exposure for a mother to breast feed a child in any location, public or private.”

**Wisconsin:** [Wis. Stat. § 944.20 \(1995\)](#): “(1) Whoever does any of the following is guilty of a Class A misdemeanor: (a) Commits an indecent act of sexual gratification with another with knowledge that they are in the presence of others; or (b) Publicly and indecently exposes genitals or pubic area. (2) Subsection (1) does not apply to a mother’s breast-feeding of her child.”

**Wyoming:** [Wyo. Stat. § 6-4-201 \(2007\)](#): “The act of breastfeeding an infant child, including breastfeeding in any place where the woman may legally be, does not constitute public indecency.”

APPENDIX E: STATE PUBLIC ACCOMMODATIONS BREASTFEEDING LAWS

**Alabama:** [Ala. Code § 22-1-13 \(2006\)](#): “A mother may breastfeed her child in any location, public or private, where the mother is otherwise authorized to be present.”

**Alaska:** [Alaska Stat. § 29.25.080 \(2019\)](#): “A municipality may not enact an ordinance that prohibits or restricts a woman breast-feeding a child in a public or private location where the woman and child are otherwise authorized to be.”

**Arizona:** [Ariz. Rev. Stat. Ann. § 41-1443 \(2006\)](#): “A mother is entitled to breast-feed in any area of a public place or a place of public accommodation where the mother is otherwise lawfully present.”

**Arkansas:** [Ark. Code Ann. § 20-27-2001 \(2007\)](#): “A woman may breastfeed a child in a public place or any place where other individuals are present.”

**California:** [Cal. Civil Code § 43.3 \(1998\)](#): “Notwithstanding any other provision of law, a mother may breastfeed her child in any location, public or private, except the private home or residence of another, where the mother and the child are otherwise authorized to be present.”

**Colorado:** [Colo. Rev. Stat. § 25-6-302 \(2016\)](#): “A mother may breast-feed in any place she has a right to be.”

**Connecticut:** [Conn. Gen. Stat. Ann. § 53-34b \(1997\)](#): “No person may restrict or limit the right of a mother to breast-feed her child.”

**Delaware:** [Del. Code Ann. tit. 31, § 310 \(1997\)](#): “Notwithstanding any provisions of law to the contrary, a mother shall be entitled to breast-feed her child in any location of a place of public accommodation wherein the mother is otherwise permitted.”

**District of Columbia:** [D.C. Code Ann. § 2-1402.82\(c\)\(1\) \(2007\)](#): “A woman shall have the right to breastfeed her child in any location, public or private, where she has the right to be with her child, without respect to whether the mother’s breast or any part of it is uncovered during or incidental to the breastfeeding of her child.”

**Florida:** [Fla. Stat. § 383.015 \(1994\)](#): “A mother may breastfeed her baby in any location, public or private, where the mother is otherwise authorized to be, irrespective of whether the nipple of the mother’s breast is uncovered during or incidental to the breastfeeding.”

**Georgia:** [Ga. Code Ann. § 31-1-9 \(2010\)](#): “A mother may breast-feed her baby in any location where the mother and baby are otherwise authorized to be.”

**Hawaii:** [Haw. Rev. Stat. § 489.21 \(2000\)](#): “It is a discriminatory practice to deny, or attempt to deny, the full and equal enjoyment of the goods, services, facilities, privileges,

advantages, and accommodations of a place of public accommodations to a woman because she is breastfeeding a child.”

**Illinois:**

- [740 Ill. Comp. Stat. 137/10 \(2004\)](#): “A mother may breastfeed her baby in any location, public or private, where the mother is otherwise authorized to be, irrespective of whether the nipple of the mother’s breast is uncovered during or incidental to the breastfeeding. . . .”
- [740 Ill. Comp. Stat. 137/15 \(2004\)](#): “A woman who has been denied the right to breastfeed by the owner or manager of a public or private location, other than a private residence or place of worship, may bring an action to enjoin future denials of the right to breastfeed. If the woman prevails in her suit, she shall be awarded reasonable attorney’s fees and reasonable expenses of litigation.”

**Indiana:** [Ind. Code § 16-35-6-1 \(2003\)](#): “Notwithstanding any other law, a woman may breastfeed her child anywhere the woman has a right to be.”

**Iowa:** [Iowa Code § 135.30A \(2000\)](#): “Notwithstanding any other provision of law to the contrary, a woman may breast-feed the woman’s own child in any public place where the woman’s presence is otherwise authorized.”

**Kansas:** [Kan. Stat. Ann. § 65-1,248\(b\) \(2006\)](#): “A mother may breastfeed in any place she has a right to be.”

**Kentucky:** [Ky. Rev. Stat. § 211-755 \(2006\)](#): “(1) Notwithstanding any other provision of the law, a mother may breast-feed her baby or express breast milk in any location, public or private, where the mother is otherwise authorized to be. . . . (3) No person shall interfere with a mother breast-feeding her child in any location, public or private, where the mother is otherwise authorized to be.”

**Louisiana:** [La. Stat. Ann. § 51:2247.1\(B\) \(2001\)](#): “Notwithstanding any other provision of law to the contrary, a mother may breastfeed her baby in any place of public accommodation, resort, or amusement.”

**Maine:** [Me. Rev. Stat. Ann. tit. 5, § 4634 \(2001\)](#): “Notwithstanding any other provision of law, a mother may breast-feed her baby in any location, public or private, where the mother is otherwise authorized to be.”

**Maryland:** [Md. Code Ann., Health-Gen. § 20-801 \(2003\)](#): “(a) A mother may breast-feed her child in any public or private location in which the mother and child are authorized to be. (b) A person may not restrict or limit the right of a mother to breast-feed her child.”

**Massachusetts:** [Mass. Gen. Laws Ann. ch. 111 § 221 \(2003\)](#): “(a) A mother may breastfeed her child in any public place or establishment or place which is open to and accepts or solicits the patronage of the general public and where the mother and her child

may otherwise lawfully be present. . . . (c) No person or entity, including a governmental entity, shall, with the intent to violate a mother's right under subsection (a), restrict, harass or penalize a mother who is breastfeeding her child."

**Michigan:** [Mich. Comp. Laws § 37.232 \(2014\)](#): "Except where expressly permitted by state or federal statute or a regulation promulgated thereunder, a person with control over a public accommodation or public service shall not do any of the following: (a) Deny the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service to a woman because she is breastfeeding a child."

**Minnesota:** [Minn. Stat. § 145.905 \(1998\)](#): "A mother may breastfeed in any location, public or private, where the mother and child are otherwise authorized to be, irrespective of whether the nipple of the mother's breast is uncovered during or incidental to the breastfeeding."

**Mississippi:** [Miss. Code Ann. § 17-25-9 \(2006\)](#): "A mother may breast-feed her child in any location, public or private, where the mother is otherwise authorized to be, without respect to whether the mother's breast or any part of it is covered during or incidental to the breast-feeding."

**Missouri:** [Mo. Rev. Stat. § 191.918 \(2014\)](#): "1. Notwithstanding any other provision of law to the contrary, a mother may, with discretion, breast-feed her child or express breast milk in any public or private location where the mother is otherwise authorized to be."

**Montana:** [Mont. Code Ann. § 50-19-501 \(2007\)](#): "(1) A mother has a right to breastfeed the mother's child in any location, public or private, where the mother and child are otherwise authorized to be present, irrespective of whether or not the mother's breast is covered during or incidental to the breastfeeding."

**Nebraska:** [Neb. Rev. Stat. § 20-170 \(2017\)](#): "Notwithstanding any other provision of law, a mother may breast-feed her child in any public or private location where the mother is otherwise authorized to be. . . ."

**Nevada:** [Nev. Rev. Stat. § 201.232\(2\) \(2017\)](#): "Notwithstanding any other provision of law, a mother may breast feed her child in any public or private location where the mother is otherwise authorized to be, irrespective of whether the nipple of the mother's breast is uncovered during or incidental to the breast feeding."

**New Hampshire:** [N.H. Rev. Stat. Ann. § 132:10-d \(1999\)](#): "Breast-feeding a child does not constitute an act of indecent exposure and to restrict or limit the right of a mother to breast-feed her child is discriminatory."

**New Jersey:** [N.J. Rev. Stat. § 26:4B-4\(2\) \(1997\)](#): "Notwithstanding any provision of law to the contrary, a mother shall be entitled to breast feed her baby in any location of a

place of public accommodation, resort or amusement wherein the mother is otherwise permitted.”

**New Mexico:** [N.M. Stat. Ann. § 28-20-1 \(2009\)](#): “A mother may breastfeed her child in any location, public or private, where the mother is otherwise authorized to be present.”

**New York:** [N.Y. Civ. Rights Law § 79-E \(1994\)](#): “Notwithstanding any other provision of law, a mother may breast feed her baby in any location, public or private, where the mother is otherwise authorized to be, irrespective of whether or not the nipple of the mother’s breast is covered during or incidental to the breast feeding.”

**North Carolina:** [N.C. Gen. Stat. § 14-190.9\(b\) \(2015\)](#): “Notwithstanding any other provision of law, a woman may breast feed in any public or private location where she is otherwise authorized to be, irrespective of whether the nipple of the mother’s breast is uncovered during or incidental to the breast feeding.”

**North Dakota:** [N.D. Cent. Code § 23-12-16 \(2009\)](#): “If the woman acts in a discreet and modest manner, a woman may breastfeed her child in any location, public or private, where the woman and child are otherwise authorized to be.”

**Ohio:** [Ohio Rev. Code Ann. § 3781.55 \(2005\)](#): “A mother is entitled to breast-feed her baby in any location of a place of public accommodation wherein the mother otherwise is permitted.”

**Oklahoma:** [Okla. Stat. tit. 63, § 1-234 \(2004\)](#): “[A] mother may breast-feed her baby in any location where the mother is otherwise authorized to be.”

**Oregon:** [Or. Rev. Stat. § 109.001 \(1999\)](#): “A woman may breast-feed her child in a public place.”

**Pennsylvania:** [35 Pa. Stat. Ann. § 636.3 \(2007\)](#): “A mother shall be permitted to breastfeed her child in any location, public or private, where the mother and child are otherwise authorized to be present, irrespective of whether or not the mother’s breast is covered during or incidental to the breastfeeding.”

**Rhode Island:** [23 R.I. Gen. Laws § 23-13.5-1 \(2008\)](#): “A woman may feed her child by bottle or breast in any place open to the public.”

**South Carolina:** [S.C. Code Ann. § 63-5-40\(A\) \(2008\)](#): “A woman may breastfeed her child in any location where the mother and her child are authorized to be.”

**South Dakota:** [S.D. Codified Laws § 25-5-35 \(2015\)](#): “A mother may breastfeed her child in any location, public or private, where the mother and child are otherwise authorized to be present as long as the mother is in compliance with all other state and municipal laws.”

**Tennessee:** [Tenn. Code Ann. § 68-58-101 \(2006\)](#): “A mother has a right to breastfeed her child in any location, public or private, where the mother and child are otherwise authorized to be present.”

**Texas:** [Tex. Health Code Ann. § 165.002 \(2019\)](#): “A mother is entitled to breast-feed her baby or express breast milk in any location in which the mother’s presence is otherwise authorized.”

**Utah:** [Utah Code Ann. § 17-15-25 \(1995\)](#): “The county legislative body may not prohibit a woman’s breast feeding in any location where she otherwise may rightfully be, irrespective of whether the breast is uncovered during or incidental to the breast feeding.”

**Vermont:** [Vt. Stat. Ann. tit. 9, § 4502\(j\) \(2015\)](#): “Notwithstanding any other provision of law, a mother may breastfeed her child in any place of public accommodation in which the mother and child would otherwise have a legal right to be.”

**Virginia:** [Va. Code Ann. § 32.1-370 \(2015\)](#): “A mother may breastfeed in any place where the mother is lawfully present. . . .”

**Washington:** [Wash. Rev. Code § 49.60.030\(1\) \(2009\)](#): “The right to be free from discrimination . . . shall include, but not be limited to: (g) The right of a mother to breastfeed her child in any place of public resort, accommodation, assemblage, or amusement.”

**West Virginia:** [W. Va. Code § 16-1-19\(b\) \(2014\)](#): “Notwithstanding any provision of this code to the contrary, a mother may breast feed a child in any location open to the public.”

**Wisconsin:** [Wis. Stat. § 253.165 \(2009\)](#): “A mother may breast-feed her child in any public or private location where the mother and child are otherwise authorized to be. In such a location, no person may prohibit a mother from breast-feeding her child, direct a mother to move to a different location to breast-feed her child, direct a mother to cover her child or breast while breast-feeding, or otherwise restrict a mother from breast-feeding her child as provided in this section.”



## APPENDIX F: STATE LACTATION ROOM LAWS

**Illinois:** [410 Ill. Comp. Stat. 140/5 \(2016\)\(a\)](#): “On or before January 1, 2017, the airport manager of an airport operated by a city, county, city and county, or airport district that conducts commercial operations and that has more than 1,000,000 enplanements a year shall provide a room or other location at each airport terminal behind the airport security screening area for members of the public to express breast milk in private. . . .”

**Louisiana:** [La. Stat. Ann. § 49:148.4.1 \(2014\)\(B\)](#): “The state buildings provided for in Subsection C of this Section shall provide suitable accommodation in the form of a room, other than a toilet stall, for the exclusive use of women to breastfeed a child or express breast milk.”

**Mississippi:** [Miss. Code Ann. § 43-20-31 \(2006\)](#): “The Department of Health shall promulgate regulations to ensure that licensed child care facilities shall be required to comply with the following: (a) Breast-feeding mothers, including employees, shall be provided a sanitary place that is not a toilet stall to breast-feed their children or express milk.”

**New York:** [N.Y. Pub. Bldgs. Law § 144\(2\) \(2019\)](#): “A covered public building shall contain a lactation room that is made available for use by a member of the public to breastfeed or express breast milk.”

## APPENDIX G: STATE JURY SERVICE BREASTFEEDING LAWS

**California:** [AB § 1814 \(2000\)](#): “[A] mother of a breast-fed child can postpone jury duty for up to one year, and after that one year, jury duty may be further postponed upon written request by the mother.”

**Connecticut:** [State of Connecticut Judicial Branch](#): “If you are breastfeeding and choose to serve you can request a private accommodation such as a private room to express milk. The option to postpone jury service is also provided.”

**Idaho:** [Idaho Code § 2-212 \(2002\)](#): “A person who is not disqualified for jury service under section 2-209, Idaho Code, may have jury service postponed by the court or the jury commissioner only upon a showing of undue hardship, extreme inconvenience, or public necessity, or upon a showing that the juror is a mother breastfeeding her child.”

**Illinois:** [705 Ill. Comp. Stat. 305/10.3 \(2006\)](#) “Any mother nursing her child shall, upon request, be excused from jury service.”

**Iowa:** [Iowa Code § 607A.5 \(1996\)](#) “A person shall be excused from jury service if the person submits written documentation verifying, to the court’s satisfaction . . . that the person is the mother of a breastfed child and is responsible for the daily care of the child. However, if the person is regularly employed at a location other than the person’s household, the person shall not be excused under this section.”

**Kansas:** [Kan. Stat. Ann. § 43-158 \(2006\)](#): “The following persons shall be excused from jury service: . . . (e) a mother breastfeeding her child. Jury service shall be postponed until such mother is no longer breastfeeding the child.”

**Kentucky:** [Ky. Rev. Stat. Ann. § 29A.100\(4\) \(2007\)](#): “The judge shall excuse a mother who is breastfeeding a child or expressing breastmilk from jury service until such time as the child is old enough that the mother is no longer breastfeeding the child.”

**Michigan:** [Mich. Comp. Laws § 600.1307a\(3\) \(2012\)](#): “A nursing mother may claim exemption from jury service for the period during which she is nursing her child and shall be exempt upon making the request if she provides a letter from a physician, a lactation consultant, or a certified nurse midwife verifying that she is a nursing mother.”

**Mississippi:** [Miss. Code Ann. § 13-5-23 \(2006\)](#): “All qualified persons shall be liable to serve as jurors, unless excused by the court for one (1) of the following causes: . . . When the juror’s attendance would cause undue or extreme physical or financial hardship to the prospective juror or a person under his or her care or supervision; or (c) When the potential juror is a breast-feeding mother.”

**Missouri:** [Mo. Rev. Stat § 494.430 \(2014\)](#): “Upon timely application to the court, the following persons shall be excused from service as a petit or grand juror: . . . (2) Any

nursing mother, upon her request, and with a completed written statement from her physician to the court certifying she is a nursing mother.”

**Montana:** [Mont. Code Ann. § 3-15-313 \(2009\)\(1\)](#): “An excuse may be granted if the prospective juror is a breastfeeding mother or otherwise has a personal obligation to provide actual and necessary care to another, including a sick, aged, or special needs dependent who requires the prospective juror’s personal care and attention, and comparable substitute care is either unavailable or impractical without imposing an undue economic hardship on the prospective juror or dependent person.”

**Nebraska:** [Neb. Rev. Stat. § 25-1650 \(2021\)](#): “A nursing mother who requests to be excused shall be excused from jury service until she is no longer nursing her child, but the mother shall be required to submit a physician’s certificate in support of her request.”

**New York:** [N.Y. Jud. Law § 517\(a\)\(1\) \(2019\)](#): “Except as otherwise provided in paragraph two of this subdivision, the commissioner of jurors may, in his or her discretion, on the application of a prospective juror who has been summoned to attend, excuse such prospective juror from a part or the whole of the time of jury service or may postpone the time of jury service to a later day during the same or any subsequent term of the court, provided that if the prospective juror is a breastfeeding mother and submits with her application a note from a physician indicating that the prospective juror is breastfeeding, the commissioner shall excuse the prospective juror or postpone the time of jury service.”

**Oklahoma:** [Okla. Stat. tit. 38, § 28\(E\) \(2004\)](#): “Upon his or her request, a person shall be exempt from service as a juror if the person is: . . . 2. A mother who is breast-feeding a baby.”

**Oregon:** [Or. Rev. Stat. § 10.050\(4\) \(1999\)](#): “A judge of the court or clerk of court shall excuse a woman from acting as a juror upon the request of the woman if the woman is breast-feeding a child.”

**Pennsylvania:** [42 Pa. Cons. Stat. § 4503 \(2015\)](#): “No person shall be exempt or excused from jury duty except the following: . . . (8) Breastfeeding women who request to be excused.”

**South Dakota:** [S.D. Codified Laws § 16-13-10.4 \(2012\)](#): “The parent of a child expected to be born during, or immediately prior to, the scheduled jury duty or a mother breastfeeding a baby younger than one year may submit a written request for an exemption from jury duty to the clerk of court within ten days of receiving the summons for jury duty. A parent who gives written notice shall be exempt from jury duty if the baby is less than six weeks old. A mother shall be exempt from jury duty if she is breastfeeding a baby younger than one year.”

**Utah:** [Utah Code Ann. § 78B-1-109 \(2015\)\(1\)](#): “A court may excuse an individual from jury service: (a) upon a showing . . . (iii) that the individual is a mother who is breastfeeding a child.”

**Virginia:** [Va. Code Ann. § 8.01-341.1 \(2005\)](#): “Any of the following persons may serve on juries in civil and criminal cases but shall be exempt from jury service upon his request: . . . 8. A person who has legal custody of and is necessarily and personally responsible for a child or children 16 years of age or younger requiring continuous care by him during normal court hours, or any mother who is breast-feeding a child.”

## APPENDIX H: STATE HORTATORY BREASTFEEDING POLICIES

**Alaska:** [H. Con. Res. 18, 28th Leg., \(Alaska 2014\)](#): “BE IT RESOLVED that the Alaska State Legislature recognizes the unique physical, mental health, economic, and societal benefits that breastfeeding provides to babies, mothers, families, and communities. . . .”

### **Colorado:**

- [Colo. Rev. Stat. § 25-6-301 \(2004\)](#): “(1) The general assembly hereby finds and declares that: . . . (i) Breast-feeding is a basic and important act of nurturing that should be encouraged in the interests of maternal and infant health.”
- [Colo. Rev. Stat. § 8-13.5-102 \(2016\)](#): “(2) The general assembly further declares that the purpose of this article is for the state of Colorado to become involved in the national movement to recognize the medical importance of breastfeeding, within the scope of complete pediatric care, and to encourage removal of boundaries placed on nursing mothers in the workplace.”

**District of Columbia:** [D.C. Code Ann. § 2-1402.81 \(2004\)\(a\)](#): “The Council finds that: (1) The encouragement of a public acceptance of breastfeeding is consistent with the promotion of family values between a mother and her child and no mother should be made to feel incriminated or socially ostracized for breastfeeding her child. (2) Breastfeeding a baby constitutes a basic act of nurturing to which every mother and child has a right and which should be encouraged in the interests of maternal and child health.”

**Florida:** [Fla. Stat. Ann. § 383.015 \(1993\)](#): “The breastfeeding of a baby is an important and basic act of nurture which must be encouraged in the interests of maternal and child health and family values. . . .”

**Georgia:** [Ga. Code Ann. § 31-1-9 \(2018\)](#): “The breast-feeding of a baby is an important and basic act of nurture which should be encouraged in the interests of maternal and child health.”

**Hawaii:** [2013 Haw. Sess. Laws Act. 249](#): “The legislature finds that breastfeeding provides important health benefits to both mother and child.”

**Illinois:** [740 Ill. Comp. Stat. 137/5 \(2004\)](#): “The General Assembly finds that breast milk offers better nutrition, immunity, and digestion, and may raise a baby’s IQ, and that breastfeeding offers other benefits such as improved mother-baby bonding, and its encouragement has been established as a major goal of this decade by the World Health Organization and the United Nations Children’s Fund. . . .”

**Kansas:** [Kan. Stat. Ann. § 65-1,248 \(2006\)](#): “Breast milk is widely acknowledged to be the most complete form of nutrition for infants, with a range of benefits for infant’s health, growth, immunity and development and has also been shown to improve maternal health and bonding in addition to contributing to society at large through economic and

environmental gains, it is therefore the public policy of Kansas that a mother's choice to breastfeed should be supported and encouraged to the greatest extent possible."

**Louisiana:** [La. Stat. Ann. § 51.2247.1 \(2001\)\(3\)](#): "The legislature does hereby declare that the promotion of family values and infant health demands that our society put an end to the vicious cycle of embarrassment and ignorance that constricts women and men alike on the subject of breastfeeding, and that in a genuine effort to promote family values, our society should encourage public acceptance of this most basic act of nurture between mother and baby and should take appropriate steps to ensure that no mother is made to feel incriminated or socially ostracized for breastfeeding her baby."

**Montana:** [Mont. Code Ann. § 50-19-501 \(2007\)](#): "Nursing mother and infant protection.": "The Montana legislature finds that breastfeeding a baby is an important and basic act of nurturing that must be protected in the interests of maternal and child health and family values."

**Nevada:** [Nev. Rev. Stat. § 201.232 \(2017\)\(h\)](#): "Any genuine promotion of family values should encourage public acceptance of this most basic act of nurture between a mother and her baby, and no mother should be made to feel incriminated or socially ostracized for breast feeding her child."

**New Hampshire:** [N.H. Rev. Stat. Ann. § 275-77 \(2018\)](#): "The advisory council shall: (a) Examine best practices on behalf of pregnant women and lactating mothers in New Hampshire."

**Oklahoma:** [Okla. Stat. tit. 63, § 1-234 \(2004\)](#): "The Legislature hereby declares that breast-feeding a baby constitutes a basic act of nurturing to which every baby has a right and which should be encouraged in the interests of maternal and child health."

**Pennsylvania:** [35 Pa. Cons. Stat. § 636.2 \(2007\)](#): "The General Assembly finds that breastfeeding a baby is an important and basic act of nurturing that must be protected in the interests of maternal and child health and family values."

**Texas:** [Tex. Health & Safety Code Ann. § 165.001 \(1995\)](#): "The legislature finds that breast-feeding a baby is an important and basic act of nurture that must be encouraged in the interests of maternal and child health and family values."

**Virginia:** [S.J.R. 298, 2019 \(Va. 2019\)](#): "WHEREAS, breastfeeding provides unique health, economic, and societal benefits to babies, mothers, families, and the community as a whole; . . . RESOLVED by the Senate, the House of Delegates concurring, That the General Assembly designate August, in 2019 and in each succeeding year, as Breastfeeding Awareness Month in Virginia."

**West Virginia:** [W. Va. Code § 16-1-19 \(2014\)](#): "The Legislature finds that breast feeding is an important, basic act of nurturing that is protected in the interests of maternal and child health."