

## Are Breastfeeding Protections Anti-Feminist?

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Meghan Boone, *Lactation Law*, \_\_ **Calif. L. Rev.** \_\_ (forthcoming 2018), available at [SSRN](#).

If one reason that women have been held back in the workforce is difficulty reconciling caregiving responsibilities and work-related duties, then one obvious method of reform should be to require employers to accommodate caregiving, particularly those forms of caregiving that are disproportionately or exclusively fulfilled by women. For example, because a typical full-time work schedule is not conducive to a new mother's schedule of breastfeeding or pumping breast milk, many women are forced to prioritize work over breastfeeding. In response, both state and federal laws require employers of a certain size to accommodate new mothers returning from maternity leave by providing them with breaks and a suitably private area in the workplace to pump breast milk, allowing them to return to work *and* continue to feed their babies breast milk. Surely a win for feminism and facilitating women's employment choices, right?

In her forthcoming article *Lactation Law*, Meghan Boone answers no, at least as such statutes are currently written. From the opening paragraphs, she poses a startlingly counterintuitive example of a Maine teacher whose child was stillborn. In the following days, she began lactating, an understandably traumatic process for someone mourning a stillbirth. As she grieved, she learned of nonprofit organizations that collected donated breast milk and distributed it to babies who would otherwise not be fed breast milk and decided to participate. The school where she worked, however, refused to accommodate her pumping breast milk because the Maine statute that required employers to accommodate lactation only applied to mothers nursing or pumping milk for *their own children*. Because the teacher's breast milk would be donated to other babies, the school was not required to accommodate her desire to pump breast milk while she was at work.

From this difficult puzzle, Boone identifies a troubling feature of statutes protecting the right to pump breast milk at work or breastfeed in public: such laws do not protect women *qua* women. They protect infants, justified by the current medical opinion that infants fed breast milk enjoy health advantages that are not available to formula-fed infants. The significance of breastfeeding and pumping breast milk, in other words, has little to do with the lactating woman. Rather, lactation is a service that a mother provides to her child.

This may seem like a distinction without a difference, but Boone persuasively outlines how legal protections for lactation reject decisions that characterize breastfeeding as an autonomy interest that shapes women's decisions about how to mother, and instead underscore societal perceptions of what mothers should be. Employers need only accommodate women who wish to pump breast milk for the benefit of their own infant children, ignoring a small but conceptually significant group of women who want to donate breast milk, hope to pump breast milk for the benefit of an adopted child, or want to feed their child breast milk beyond infancy.

Similarly, statutes protecting the right of mothers to breastfeed in public often specify that the woman must be breastfeeding her own infant. Even further, the laws that supposedly support breastfeeding contain implicit judgment of *how* women breastfeed in public, noting that the act of breastfeeding must be undertaken "with discretion." Fifteen states attempt to accommodate lactating mothers by

exempting them from jury duty rather than actually facilitating lactating mothers serving this critical role within American civic life. (And even when such accommodations are available, they are often stronger in theory than in practice. Earlier this year, Professor Judith Miller [sued Chicago's Daley Center](#) for telling her to use the men's restroom to pump breast milk when she appeared for jury service.)

Boone argues that these regulations make the benefits of breastfeeding accommodations contingent on compliance with cultural and societal expectations of motherhood: a new mother who hopes to discreetly breastfeed or pump breast milk for the benefit of her own infant child might be accommodated, but other women with other needs will be unprotected. Society will accept only a narrow conception of breastfeeding, and only for the benefit of a biologically-related infant child. It is not the woman's choices that are accommodated, but the perceived interests of the infant. Boone's point was starkly illustrated when I saw her present an earlier draft of the paper at a legal conference. After her presentation, a series of male professors argued that if lactation laws were more protective of female employees wishing to lactate, women would use such laws as an excuse to shirk work duties for extended periods of time, or when they were not actually new mothers. In this view, lactation laws must be narrowly proscribed for only the most compelling benefits to infants, lest female employees throughout the workforce take advantage of a special right to get extra breaks at work.

On this reading, Boone argues, the current state of lactation law further entrenches gendered expectations, which, at least in some respects, is worse than having no lactation law at all. Existing statutes reinforce the idea of breastfeeding as something that women should do if they are the right kind of mother, but not for too long, and not in ways that fall outside of the norm. Boone proposes fundamental changes to lactation law: focusing on the physiological experience of lactation rather than a maternal relationship, removing the justification tied to an infant biologically related to the lactating woman, and recognizing that promoting women's health is also a public goal supported by lactation law. Her reforms are a thoughtful and comprehensive solution to the deep-rooted issues with current flawed protections of lactating women. My only quandary is that Boone's demonstration of the gender and maternal stereotypes embodied in lactation law is so thoroughly persuasive that it makes the prospect of reform seem very unlikely.

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