

# ARTICLES

## TOWARD AN INTERSPECIES RIGHT TO BREASTFEED

By  
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*Milk is young mammals' primary food. Yet, lactating animals raised for their milk, such as cows and goats, are subject to extreme forms of violence and control preventing them from breastfeeding their own young. Numerous human parents also lack the legal, economic, social, and emotional support they need to nurse their children. At one level, the situation of humans and that of farmed animals is incommensurable in that the latter's reproductive and lactating capacity is typically exploited and rewarded by death when unprofitable. At another level, lactating animals of all species are in a related social status. Lactating parents, typically gendered as female, produce a highly valuable resource in a position of subordination. Meanwhile, many infants are neither breastfed nor fed their species' milk. While breastfeeding law and policy is usually presented as a human public health problem, this Article argues that it is also an interspecies food and environmental justice problem. Both humans and animals are under-protected or unprotected by the law when it comes to lactation. This Article proposes the idea of an interspecies right to breastfeed, that is, a right the central meaning of which would be similar across species, even though its full implementation might require different accommodations, depending on each species. At its core, the right should be understood as relational in that it protects the breastfeeding relation, rather than the breastfeeding parent/caregiver or the breastfed child each taken in isolation.*

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*All mammals nearly always feed their young this way [by breastfeeding], unless humans prevent them from doing so.*

—Michael C. Latham, *Breastfeeding—A Human Rights Issue?*<sup>1</sup>

## I. INTRODUCTION

As I nurse my baby or pump milk for him while reading about lactation and writing this Article, I am repeatedly reminded of my own privilege. As a white, able-bodied, cisgender, middle-class, married woman with a ‘flexible’ job as an academic,<sup>2</sup> I enjoy many advantages enabling me to breastfeed. I received high-quality prenatal, obstetric, and postnatal care, making it physically and emotionally easy to breastfeed. I do not suffer any condition requiring me to take drugs incompatible with breastfeeding. I have neither undergone a mastectomy nor do I have a disability making it difficult, painful, or impossible to breastfeed. There is no recent history of forced nursing in my

<sup>1</sup> Michael C. Latham, *Breastfeeding—A Human Rights Issue?*, 5 INT’L J. CHILD. RTS. 397, 401 (1997).

<sup>2</sup> See Eileen Kane, *Female Academics and the “Flexibility Myth”*, ROLE REBOOT (Mar. 31, 2017), <http://rolereboot.org/culture-and-politics/details/2017-03-female-academics-flexibility-myth/> [https://perma.cc/B7XF-LB6M] (accessed Feb. 5, 2020) (critiquing the commonly held idea according to which academics have flexible jobs).

family that traumatized me. I have the professional and economic freedom to nurse my baby on the breast several times per day and night as well as to express milk whenever I am separated from him. I live and work in mostly affluent communities in which breastfeeding, including in public, is generally valued and supported. As someone with a long commute along the Northeast corridor of the United States, I often resent the lack of publicly accessible lactation rooms. I have taken to pumping in public along the way—on Amtrak, Metro-North, buses, stations, and terminals, among others—without experiencing negative reactions other than puzzled looks.

Breastfeeding not only provides my child with the ideal nourishment, protecting him from illness in the short-, and perhaps even long-term, but breastfeeding also benefits my own health<sup>3</sup> and the environment.<sup>4</sup> I would be remiss if I did not also confess that breastfeeding is an intense source of delight. It feels incredibly good to hold my warm and soft suckling little beast against me, to feel the milk flow into his mouth, and to hear the sound of his swallow. It is a moment of intimate connection, a ‘private conversation,’ as writer Angela Garbes beautifully puts it.<sup>5</sup> When I am away from him, I derive pleasure in pumping—the repetitive motion of the pump’s flange, the slightly nauseating smell of sour milk, the mechanical sound of the pump engine—these stimuli make me feel connected to my baby from afar.

In my breastfeeding journey, perhaps the greatest privilege I experience, however, is that I am a *human* animal. As such, I have a large degree of autonomy over my body, the conduct of my life, and my reproductive and childrearing choices. These opportunities are extremely rare among domesticated nonhuman mammals. To be sure, many humans lack the legal, economic, social, and emotional support they need to be able to nurse their children.<sup>6</sup> But lactating mammals of

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<sup>3</sup> See Adetola Louis-Jacques & Alison Stuebe, *Long-Term Maternal Benefits of Breastfeeding*, 64 CONTEMP. OB/GYN (Jul. 11, 2018), <https://www.contemporaryobgyn.net/breast-health/long-term-maternal-benefits-breastfeeding> [https://perma.cc/PKG9-2D6M] (accessed Feb. 5, 2020) (noting that breastfeeding is associated with improved health outcomes for women such as easier postpartum recovery, delayed fertility return, and cancer prevention).

<sup>4</sup> See generally JAI PRAKASH DADHICH ET AL., REPORT ON CARBON FOOTPRINT DUE TO MILK FORMULA: A STUDY FROM SELECTED COUNTRIES OF THE ASIA-PACIFIC REGION (Arun Gupta ed., 2015), [https://perma.cc/B4GJ-9QUW] (accessed Feb. 5, 2020) (reporting on the carbon footprint of infant formula in the Asia-Pacific region).

<sup>5</sup> Angela Garbes, *The More I Learn About Breast Milk, the More Amazed I Am*, THE STRANGER (Aug. 26, 2015), <https://www.thestranger.com/features/feature/2015/08/26/22755273/the-more-i-learn-about-breast-milk-the-more-amazed-i-am> [https://perma.cc/X66M-D2PC] (accessed Feb. 5, 2020).

<sup>6</sup> Because people of various identities and expression breastfeed, throughout this Article, I strive to use gender neutral characterizations to describe them. I use the words ‘woman’ or ‘female’ when I specifically discuss the gender hierarchies that often underlie breastfeeding practices. See Mathilde Cohen, *The Lactating Man*, in MAKING MILK: THE PAST, PRESENT, AND FUTURE OF OUR PRIMARY FOOD 141 (Mathilde Cohen & Yoriko Otomo eds., 2017) (critiquing the gender normativity of our breastfeeding culture). I also recognize that the word ‘breastfeeding’ and its variations are problematic as

several species, particularly those raised for their flesh, milk, or both, are subject to extreme forms of violence and control preventing them from breastfeeding their own offspring.<sup>7</sup>

A number of ecofeminists, neo-Marxists, and critical animal studies scholars have emphasized the connection between forms of alienation and exploitation across species.<sup>8</sup> They point to similar organizations, ideas, and processes that harm and oppress both animals and specific groups of humans, particularly women, LGBTQIA people, people of color, migrant workers, people with disabilities, and low-income people.<sup>9</sup> At one level, the situation of human parents and farmed animal parents is incommensurable, in that the latter's reproductive and lactating capacity is typically exploited for human interests and sanctioned by death when deemed unprofitable. At another level, lactating animals of different species are often in a comparable social position as they produce a highly valuable resource, in a subordinated status, for the benefit of human babies.<sup>10</sup> In the United States, human breastfeeders generally receive no compensation and little accommodation and recognition for their lactating labor.<sup>11</sup> Lactating

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they can be experienced as cisnormative, especially for lactating people who would rather use 'chestfeeding' or other more gender-neutral terms. I continue to use it here as a concession to mainstream language, but with the intention to include people of various identities and expression who lactate. See *infra* note 57 and accompanying text.

<sup>7</sup> Animals referred to as belonging to the category of 'wild animals' do retain the freedom to reproduce, parent, and breastfeed—though this freedom can be restricted by human interventions such as incarceration, encroachments upon their territory, and environmental degradation.

<sup>8</sup> CAROL J. ADAMS, *THE SEXUAL POLITICS OF MEAT: A FEMINIST-VEGETARIAN CRITICAL THEORY* 28–29 (1990); CAROL J. ADAMS ET AL., *ECOFEMINISM: FEMINIST INTERSECTIONS WITH OTHER ANIMALS AND THE EARTH* 69 (Carol J. Adams & Lori Gruen eds., 2014); GRETA GAARD ET AL., *ECOFEMINISM: WOMEN, ANIMALS, NATURE* 29 (Greta Gaard ed., 1993); LISA KEMMERER, *SISTER SPECIES: WOMEN, ANIMALS, AND SOCIAL JUSTICE* 69 (2011); CLAIRE JEAN KIM, *DANGEROUS CROSSINGS: RACE, SPECIES, AND NATURE IN A MULTICULTURAL AGE* 159 (2015); DAVID A. NIBERT, *ANIMAL OPPRESSION AND HUMAN VIOLENCE: DOMESECRATION, CAPITALISM, AND GLOBAL CONFLICT* 77 (2013); Nik Taylor & Richard Twine, *Introduction: Locating the "Critical" in Critical Animal Studies*, in *THE RISE OF CRITICAL ANIMAL STUDIES: FROM THE MARGINS TO THE CENTRE* 1, 4 (Nik Taylor & Richard Twine, eds., 2014).

<sup>9</sup> See Maneesha Deckha, *Intersectionality and Posthumanist Visions of Equality*, 23 *WIS. J. L. GENDER & SOC'Y* 249, 249 (2008) (adding species to the types of identities usually included in intersectionality).

<sup>10</sup> See Greta Gaard, *Toward a Feminist Postcolonial Milk Studies*, 65 *AM. Q.* 595, 595, 599 (2013) (critiquing exploitative uses of milk across nations, genders, races, species, and environments). See also Yoriko Otomo, *The Gentle Cannibal: The Rise and Fall of Lawful Milk*, 40 *AUS. FEMINIST L. J.* 215 (2014) (comparing regulations seeking to control female human and animal lives through the process of milk production).

<sup>11</sup> See Julie P. Smith, *Markets, Breastfeeding and Trade in Mothers' Milk*, 10 *INT'L BREASTFEEDING J.* 1, 3 (2015) (decrying the fact that the economic worth of breastfeeding, and more generally of human milk, whether delivered from the breast or as donor milk, is rarely measured). Note that some people sell their milk, be it peer-to-peer, or to commercial human milk companies and that some public and private organizations compensate women for expressing their milk. See Mathilde Cohen, *Should Human Milk Be Regulated?*, 9 *U.C. IRVINE L. REV.* 557, 574–82, 618–34 (2019); Illinois Nursing

farmed animals live a life of confinement and forced reproduction and milking.<sup>12</sup> Though the primary food of both groups' children is their species' milk, many are fed the milk of another species.<sup>13</sup> Breastfeeding humans, as well as cows, goats, and other animals raised for milk, have been constructed discursively as potentially unsafe milk producers who must be sanitized and monitored so as to protect human children.<sup>14</sup> Their assigned spaces—be it the barn or the household—have historically functioned as gendered spaces of incarceration, exploitation, and surveillance.<sup>15</sup> Finally, both humans and animals are under-protected or unprotected by the law when it comes to breastfeeding,<sup>16</sup> prompting this Article to examine the conditions of possibility of an interspecies right to breastfeed.

By interspecies right to breastfeed, this Article means a right the core meaning of which would be similar across several species, even though its full implementation might require divergent applications and accommodations depending on the species. This right should be understood as relational, in that it protects the breastfeeding relation, rather than the breastfeeding parent/caregiver or the breastfed child taken in isolation.<sup>17</sup> It is both the right for caregivers to breastfeed and for children to be breastfed, reflecting the bi-directional nature of lactation. Mammals do not lactate in isolation. Milk is typically secreted by one animal—human or nonhuman—for another as part of a

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Mothers in the Workplace Act. 820 ILCS 260/10 (stating that “[a]n employer may not reduce an employee’s compensation for time used for the purpose of expressing milk or nursing a baby”).

<sup>12</sup> See, e.g., Carol Adams, *Pity the Poor Mad Cow: A View from the United States*, 3 *ECOTHEOLOGY* 117, 117 (1997) (depicting the condition of dairy cows and analogizing it to human women’s).

<sup>13</sup> See *Breastfeeding Report Card*, CTR. FOR DISEASE CONTROL (2018), <https://www.cdc.gov/breastfeeding/data/reportcard.htm> [<https://perma.cc/2ZSL-426L>] (accessed Jan. 3, 2020) (suggesting that at 6 months over 40% of infants in the United States were exclusively fed formula rather than human milk); see also Alois F. Kertz & James R. Lofton, *Review: A Historical Perspective of Specific Milk-Replacer Feeding Programs in the United States and Effects on Eventual Performance of Holstein Dairy Calves*, 29 *PROF. ANIMAL SCIENTIST* 321, 321 (2013) (discussing the milk replacers used to feed dairy calves).

<sup>14</sup> See generally Mathilde Cohen, *Regulating Milk: Women and Cows in France and the United States*, 65 *AM. J. COMP. L.* 469 (2017) (comparing the health, safety, and morals discourses around lactating cows and women in France and the United States).

<sup>15</sup> In recent years the privacy of the barn has increased via the enactment of state ‘Ag-Gag’ laws forbidding the undercover filming or photography of activity on farms without the consent of their owners. See Justin F. Marceau, *Ag Gag Past, Present, and Future*, 38 *SEATTLE U. L. REV.* 1317, 1318 (2015) (providing an overview of Ag-Gag legislation); see also Jessica Eisen, *Milk and Meaning: Puzzles in Posthumanist Method*, in *MAKING MILK: THE PAST, PRESENT AND FUTURE OF OUR PRIMARY FOOD* 237, 240 (Mathilde Cohen & Yoriko Otomo, eds., 2017) (discussing the farm as the ‘private sphere’).

<sup>16</sup> See Cohen, *supra* note 14, at 508 (“Qua lactation workers, women and cows are subject to economic regulation, but very few, if any, labor protections.”).

<sup>17</sup> Note that among humans and animals alike, short- or long-term caregiving relationships may develop between adults and children which involve breastfeeding.

caregiving or affective relationship.<sup>18</sup> The administration of hormones or nipple stimulation can trigger lactation in the absence of pregnancy or the stimulus of a suckling baby; but absent external interventions, milk is usually the result of a co-production between a parent/caregiver and a baby.<sup>19</sup> The goal here is not to advance a repronormative agenda and the idea that because someone has reproduced they deserve special status.<sup>20</sup> Rather, the claim is that mammals of all species should have a legally protected right to engage in this type of relationship as a matter of food justice and environmental justice.<sup>21</sup> Milk is all young mammals' primary food and consuming one's own species' milk is also the most sustainable infant feeding practice, calling for an examination of the question from an interspecies perspective.

Why propose a single interspecies right, rather than a *human* right to breastfeed, and separately, an *animal* right to breastfeed? At least three reasons support this choice: interspecies holism, ethics, and strategy. First, humans and animals have overlapping interests. The well-being of humans is directly connected to the well-being of all other species,<sup>22</sup> justifying the recognition of common, or at least interrelated, rights. Second, as a matter of ethics, as Peter Singer contends, “the mere difference of species cannot in itself determine moral status.”<sup>23</sup> If we think human breastfeeders and their children should have the right to engage in this special relationship—be it for nutritional, health, social, or affective reasons—the same justifications apply to other mammals. Third, the similarities in the legal and social meanings of lactation across species warrant a joint legal approach as a matter of advocacy and litigation strategy. By building upon humans' empathy for animals as parents, the identification of interspecies rights presents a promising approach for a broader recognition of animal welfare protections.

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<sup>18</sup> See Mathilde Cohen & Yoriko Otomo, *Introduction*, in *MAKING MILK: THE PAST, PRESENT AND FUTURE OF OUR PRIMARY FOOD* 1, 1 (Mathilde Cohen & Yoriko Otomo, eds., 2017) (“Milk is a relational substance produce by a typically female mammal for consumption by another, typically infant, mammal of the same species.”).

<sup>19</sup> See Cohen, *supra* note 11, at 592–97 (arguing that even among humans who cannot feed their children on the breast—requiring milk expression and bottle-feeding—breastfeeding remains a relationship).

<sup>20</sup> See Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 *COLUM. L. REV.* 101, 181–208 (2001) (critiquing “repronormativity” as a legal and cultural force incentivizing and subsidizing reproduction).

<sup>21</sup> See Andrea Freeman, *First Food Injustice: Racial Disparities in Infant Feeding as Food Oppression*, 83 *FORDHAM L. REV.* 3053, 3066 (2015) (framing human breastfeeding as a food justice issue); see also Erica Morrell, *First Food Justice—Food Justice—Environmental Justice: A Call to Address Infant Feeding Disparities and the First Food System*, 11 *ENVTL. JUST.* 1, 1 (2018) (arguing that human infant foods and feeding affect all humans and the environment and should be on the top of the food and environmental justice agendas).

<sup>22</sup> Janet M. Alger & Steven F. Alger, *Beyond Mead: Symbolic Interaction Between Humans and Felines*, 5 *SOC'Y & ANIMALS* 65, 79–80 (1997).

<sup>23</sup> Peter Singer, *Speciesism and Moral Status*, 40 *METAPHILOSOPHY* 567, 567 (2009).

Note that this Article does not orient the inquiry around the question of what is the source of moral standing for animals to acquire rights, even though it may have bearing upon the ongoing debate on what type of rights animals should have, and the basis upon which they should have rights.<sup>24</sup> Instead it looks at an embodied relationship—breastfeeding—which is common among different species and asks whether there might be benefits, for humans, animals, and the environment, to regulate it along similar lines.

This Article comes in three parts. Part I introduces ‘milk intersectionality,’ i.e., the various forms of oppression effectuated through human attitudes toward and regulation of lactation. Part II presents the current gap in legal protections for breastfeeding among humans and animals. Finally, Part III proposes the idea of an interspecies right to breastfeeding and addresses several objections to the proposal.

## II. MILK INTERSECTIONALITY

Culturally, milk is perceived as the ultimate caring substance—a pure, clean, white liquid, nature’s perfect food, a symbol of life and health.<sup>25</sup> It epitomizes a mother’s selfless devotion to her child. Along with honey, it is the only food produced by an animal specifically to be eaten by another.<sup>26</sup> To produce milk, breastfeeders melt their own body fat, literally liquefying themselves to feed their offspring<sup>27</sup> Yet, milk is often a vector of separation and oppression across species, genders, races, classes, able-bodied people, and differently abled people.<sup>28</sup> I propose the notion of ‘milk intersectionality’ to conceptualize the various ways in which milk crystallizes some of our most profound social anxieties and moral panics across interconnected forms of individual and group identities. This Part focuses in particular on the overlap between species and gender in lactation norms and practices.

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<sup>24</sup> See generally Cass R. Sunstein, *The Rights of Animals*, 70 U. CHI. L. REV. 387 (2003) (presenting the debate and the range of possible positions).

<sup>25</sup> See generally E. MELANIE DUPUIS, *NATURE’S PERFECT FOOD: HOW MILK BECAME AMERICA’S DRINK* (2002) (discussing the “rise” of milk as the ‘perfect food’ and its relationship to conventional notions of perfection).

<sup>26</sup> See ANDREA S. WILEY, *CULTURES OF MILK: THE BIOLOGY AND CULTURE OF DAIRY CONSUMPTION IN INDIA AND THE UNITED STATES* 6 (Harvard Univ. Press 2014) (“[M]ilk [and honey are] the only good[s] that [are] produced in order to be consumed.”).

<sup>27</sup> See Garbes, *supra* note 5 (“[T]o produce breast milk, mothers melt their own body fat . . . [w]e literally dissolve parts of ourselves, starting with gluteal-femoral fat . . . and turn it into liquid to feed for our babies.”).

<sup>28</sup> See Cohen, *supra* note 14, at 473–74, 507–08, 513, 515 (analyzing the ways in which women and animals have been similarly subordinated and oppressed); see also Mathilde Cohen, *Of Milk and the Constitution*, 40 HARV. J.L. & GENDER 115, 149–50 (2017) (focusing on the inequities generated by dairying).

### A. *Milk, Gender, and Species*

We usually think of animal and human milk as distinct substances, yet their histories are deeply interconnected.<sup>29</sup> Americans only began to consume fresh animal milk relatively recently; fluid cow's milk only became a mainstream food product in the nineteenth century, principally as a food for infants who could not be nursed and a drink for weaned children.<sup>30</sup> There are objective similarities between animal and human milk. Milk is a fluid secreted by the females of all mammalian species. It can be so close in composition so as to allow for interspecies cross-nursing, e.g., humans nursing animals and animals nursing humans.<sup>31</sup> In practice, it is humans who have taken advantage of cross-species nursing by breeding and raising animals for their milk on a massive scale. As Barbara Orland has shown, the dairy industry has gone as far as to technologize lactating animals, in particular cows, who in the past century have been reconceived and treated as 'milk machines' or 'turbo-cows.'<sup>32</sup>

The activist and academic ecofeminist movement, developed since the 1980s, posits critical connections between the domination of nature and the exploitation of women.<sup>33</sup> Ecofeminism has exposed how much of the subordination and oppression of animals and women has been facilitated and legitimated by their discursive and material linking.<sup>34</sup> So-called dairy animals are paradigmatic illustrations of this dynamic. Feminized and sexualized through gendered processes involving human control over their fertility, their sexuality, reproduction, and lactation are tightly controlled by humans. Lactating humans and lactating farmed animals are in a related social situation—both have historically been undervalued and deprived of the recognition they deserve for their lactation work, which has largely remained invis-

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<sup>29</sup> See DUPUIS, *supra* note 25, at 5 (describing milk's origins "as an American food in the mid-nineteenth century, primarily as a breast milk substitute for infants and a beverage for weaned children").

<sup>30</sup> *Id.*

<sup>31</sup> Frederick J. Simoons & James A. Baldwin, *Breast-Feeding of Animals by Women: Its Socio-Cultural Context and Geographic*, 77 ANTHROPOS 421, 422 (1982).

<sup>32</sup> See Barbara Orland, *Turbo-Cows: Producing a Competitive Animal in the Nineteenth and Early Twentieth Centuries*, in INDUSTRIALIZING ORGANISMS: INTRODUCING EVOLUTIONARY HISTORY 167, 167, 172 (Susan R. Schrepfer & Philip Scranton eds., 2004) (showing that "the notion of a milk-producing cow as a natural entity" only became a real possibility in the nineteenth century with new feeding techniques and when dairy farming was transplanted from meadows to grain production areas).

<sup>33</sup> See generally Greta Gaard, *Misunderstanding Ecofeminism*, 3 Z PAPERS 20 (1994) (presenting the various branches of ecofeminism and the critiques that have been waged against the movement).

<sup>34</sup> See, e.g., ANIMALS AND WOMEN: FEMINIST THEORETICAL EXPLORATIONS (Carol J. Adams & Josephine Donovan eds., 1995) (exploring the connections between feminism and animal defense through a collection of essays).



ble.<sup>35</sup> In the United States and other regions where intensive dairy farming is the norm, lactating farmed animals typically live under a system of “intensive physical, social, sexual, and reproductive control. Cows are routinely and unrelentingly subject to physical restraint, sexual use, and reproductive control.”<sup>36</sup> Their resulting short life span before being sent to the slaughterhouse is thus spent in a quasi-constant state of pregnancy and lactation. Historically, much of women’s work has been embodied, repetitive, and spatially limited—housework; childcare; caring for the old, the sick, and animals; sexual nurturing; and lactation. Lactation labor was a central and defining aspect of female identity.<sup>37</sup> Until the nineteenth century, before there were safe alternatives to human milk to feed infants, the majority of women lactated between 15 to 20 years because, in most cultures, children were breastfed 2 to 4 years and fertility rates were much higher.<sup>38</sup> According to anthropologist Katherine Dettwyler, the natural age of weaning in modern human populations should range between 2.5 and 7 years of age.<sup>39</sup>

Scholars have analogized the oppression of cows and other lactating farmed animals to that of lactating humans using varying methods and theoretical premises.<sup>40</sup> For example, Diana Stuart, Rebecca Shewe, and Ryan Gunderson have examined the position of these animals within the capitalist system and its implications for their lives, as well as those of the farmers who keep them.<sup>41</sup> They observe that taking their milk and calves, limiting their lives to production, restricting their ability to move around, forage, mate, and rear, as well as reducing their socialization with other animals and humans all match Marx’s description of alienation.<sup>42</sup> Yet, farmed lactating animals’ situation is far more cruel than that of subordinated and impoverished human workers. Dairy products’ ubiquity and constant availability relies on their gendered commodification. To maintain uninterrupted milk production, cows are intensively confined, forced to endure an endless cycle of pregnancy and birth, only to experience their calves

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<sup>35</sup> On the question of whether animals can be said to ‘work,’ see KENDRA COULTER, ANIMALS, WORK, AND THE PROMISE OF INTERSPECIES SOLIDARITY 2 (2015) (taking the view that animals can be said to work).

<sup>36</sup> Jessica Eisen, *Milked: Nature, Necessity, and American Law*, BERKELEY J. GENDER, L. & JUST. 71, 109 (2018).

<sup>37</sup> See generally PATRICIA STUART-MACADAM, BREASTFEEDING: BIOCULTURAL PERSPECTIVES (Patricia Stuart-Macadam & Katherine A. Dettwyler eds., 2017) (analyzing the past and present breastfeeding practices from an evolutionary perspective).

<sup>38</sup> Katherine A. Dettwyler, *A Time to Wean: The Hominid Blueprint for the Natural Age of Weaning in Modern Human Populations*, in BREASTFEEDING: BIOCULTURAL PERSPECTIVES 39, 39 (Patricia Stuart-Macadam & Katherine A. Dettwyler eds., 2017).

<sup>39</sup> *Id.*

<sup>40</sup> For the sake of brevity, throughout this Article, I often speak of cows, even though the argument equally applies to other farmed lactating animals such as does, ewes, buffaloes, camels, mares, and donkeys, among others.

<sup>41</sup> Diana Stuart et al., *Extending Social Theory to Farm Animals: Addressing Alienation in the Dairy Sector*, 53 SOCIOLOGIA RURALIS 201, 210–11 (2013).

<sup>42</sup> *Id.*

immediately taken from them.<sup>43</sup> They are continuously milked and, once they become infertile or substandard milk producers, are sent to the slaughterhouse.<sup>44</sup>

One common organizing frame between human and farmed animal lactation is its underlying gender hierarchy. Breastfeeding is, to some extent, a subordinated (mostly) female task often controlled by males.<sup>45</sup> Milk itself is a highly gendered product.<sup>46</sup> Lactation and breastfeeding are quintessentially mammalian, sex-based, and gendered characteristics.<sup>47</sup> Lactation is one of the few things, along with pregnancy, that only people assigned female at birth are commonly thought capable of doing without medical intervention.<sup>48</sup> Yet, historically, men have dictated who would breastfeed whom and for how long based on their own agendas—in some cultures, they may have discouraged or forbade breastfeeding so their wives could produce more offspring or to maintain sexual access where it was believed that sex and nursing were incompatible.<sup>49</sup> Or they may have encouraged or demanded breastfeeding in virtue of its contraceptive effects.<sup>50</sup> In Renaissance Florence, wet nurse contracts were signed by men—the father, husband, or male relative of a wet nurse would sign the contract with the father of the nursling, leaving the wet nurse and the child's mother unnamed.<sup>51</sup>

To this day, breastfeeding decisions are often determined by male desires, gazes, and the gendered organization of society and space.<sup>52</sup> In parental couples that include self-identified male adults, anthropologist Cecilia Tomori has shown that men's support of breastfeeding, both emotionally and financially, is crucial to whether and how long

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<sup>43</sup> See Lewis Holloway, *Subjecting Cows to Robots: Farming Technologies and the Making of Animal Subjects*, 25 ENV. & PLANNING D: SOC'Y & SPACE 1041, 1041 (2007) (critiquing the idea that cows gain individual freedom with robotic milking technologies).

<sup>44</sup> See, e.g., Fran Howard, *First-Half 2018 Dairy Cow Slaughter Hits Levels Not Seen Since 2013*, FARM JOURNAL'S MILK (July 25, 2018), <https://www.milkbusiness.com/article/first-half-2018-dairy-cow-slaughter-hits-levels-not-seen-since-2013> [https://perma.cc/6ST7-3SYN] (accessed Jan. 3, 2020) (discussing the economic calculus underlying the culling of dairy cows).

<sup>45</sup> See, e.g., Christina M. Miller-Bellor, *Review. Barriers to Breastfeeding in Male Dominated Society*, 2 INT'L J. MED. & MED. SCI. 175, 176–79 (2012) (addressing gender-based attitudes and beliefs that can create barriers to breastfeeding).

<sup>46</sup> See Cohen, *supra* note 6, at 141 (critiquing the gender normativity of our breastfeeding culture).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> See JEAN-LOUIS FLANDRIN, *FAMILIES IN FORMER TIMES* 206 (Richard Southern trans., Cambridge Univ. Press 1979) (describing family relations in early modern France).

<sup>50</sup> *Id.*

<sup>51</sup> See Christine Klapisch-Zuber, *Genitori naturali e genitori di latte nella Firenze del Quattrocento*, 44 QUADERNI STORICI 543, 543 (1980) (describing wet nursing practices in fifteenth century Florence).

<sup>52</sup> See Miller-Bellor, *supra* note 45 (addressing the attitudes and beliefs that create barriers to breastfeeding).

breastfeeding occurs.<sup>53</sup> Spaces considered public, including the workplace, are coded as productive and collective, typically denying the physical needs of bodies coded as female. Despite gaining greater acceptance, people who breastfeed in public may still feel, quite literally, out of place.<sup>54</sup> Expressing milk publicly is still viewed as inappropriate in most settings.<sup>55</sup> At the same time, we continue to speak about breastfeeding as if it were a female-only activity—the very morpheme breast in *breastfeeding*, *breastmilk*, and *breastpump* implies that a woman is lactating. This is why some medical professionals and breastfeeding advocates would rather use the expression ‘chestfeeding.’<sup>56</sup> Similarly, the expressions *mother’s milk* or *mother’s lounges* (for lactation rooms) as well as the female coded visual lexicon sometimes used to depict breastfeeding skips over non-gender-normative forms of breastfeeding.<sup>57</sup>

The gendering of lactation can be observed in animal agriculture too. Kathryn Gillespie has argued dairy farming is characterized by what she calls “gendered commodification and sexualized violence.”<sup>58</sup> Both male and female animals are exploited for their productive and reproductive capacities. Female animals’ value is tied to their function as ‘reproductive machines.’<sup>59</sup> Gillespie illustrates the point using a cow vaccination advertisement campaign depicting a cow accompanied by the following statement, “If she can’t stay pregnant, what else will she do?”<sup>60</sup> Gillespie also notes the dairy industry’s use of images of swollen udders reminiscent of fetishizing large-breasted women.<sup>61</sup> The sexualized violence she describes is more obvious for females, but as she points out, it is also at play with male animals.<sup>62</sup> Male bovine animals

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<sup>53</sup> Cecília Tomori, *Breastfeeding as Men’s “Kin Work,”* in NIGHTTIME BREASTFEEDING: AN AMERICAN CULTURAL DILEMMA 144, 145, 151 (2016).

<sup>54</sup> See Kate Boyer, *Affect, Corporeality and the Limits of Belonging: Breastfeeding in Public in the Contemporary UK*, 18 HEALTH & PLACE 552, 552 (2012) (theorizing the various difficulties women encounter when breastfeeding in public in the UK).

<sup>55</sup> See generally Mathilde Cohen, *The Right to Express Milk* (Nov. 12, 2019) (unpublished manuscript) (on file with author) (describing the various impediments to successful milk expression in American culture and arguing in favor of stronger legal protections in public as well as private spaces).

<sup>56</sup> See generally Trevor McDonald et al., *Transmasculine Individuals’ Experiences with Lactation, Chestfeeding, and Gender Identity: A Qualitative Study*, 16 BMC PREGNANCY & CHILDBIRTH (2016) (examining the “experiences of transmasculine individuals with pregnancy, birthing, and feeding their newborns”).

<sup>57</sup> See generally Alice Farrow, *Commentary. Lactation Support and the LGBTQI Community*, 31 J. HUM. LACTATION 26 (2015) (showing heteronormative and cisnormative assumptions predominant in our current breastfeeding culture represent a barrier to accessing lactation support by LGBTQI parents).

<sup>58</sup> Kathryn Gillespie, *Sexualized Violence and the Gendered Commodification of the Animal Body in Pacific Northwest US Dairy Production*, 21 GENDER, PLACE & CULTURE 1321, 1321 (2014).

<sup>59</sup> *Id.* at 1329–30.

<sup>60</sup> *Id.* at 1329.

<sup>61</sup> *Id.* at 1332.

<sup>62</sup> *Id.* at 1330.

live isolated lives of confinement.<sup>63</sup> They have no functional use to dairy farmers other than being sold for meat or employed for semen extraction and are discursively conceptualized as perpetrators of the violence against females.<sup>64</sup> For instance, semen catalogs market bulls for reproductive prowess; they too are fetishized as sexy icons of virility and masculinity with their large genitalia made visible.<sup>65</sup>

### B. *Obstacles to Breastfeeding*

Numerous barriers to breastfeeding exist both for human and animal parents. On the human side, chief among the obstacles is the lack of legal, economic, social, and emotional support.<sup>66</sup> The United States is one of the few economically advanced countries in the world that does not offer guaranteed paid parental leave.<sup>67</sup> People who breastfeed must do it on their own dime and time, restricting the practice to the most affluent, those who enjoy flexible work conditions, and those whose family and social network support can compensate for the lack of economic resources or flexibility in the workplace. The United States also lacks the social structures necessary to enable most families to breastfeed and to do so for longer than a few weeks, such as high-quality and subsidized pre- and postnatal care for all, including: lactation counseling, paid breastfeeding leaves, paid lactation breaks, and subsidized high-quality childcare, among others.<sup>68</sup>

On the animal side, obstacles to breastfeeding can amount to complete prohibition, particularly for companion and farmed animals.<sup>69</sup> Human interventions begin well before lactation even starts for these groups as their sexuality and reproduction is often controlled by their owners who decide whether, when, and for what purposes they can

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<sup>63</sup> *Id.* at 1327.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 1329.

<sup>66</sup> See Cohen *supra* note 11, at 564–65 (discussing “social, medical, psychological, [and] economic reasons” why parents cannot lactate or lactate sufficiently to meet their babies’ needs).

<sup>67</sup> See Gretchen Livingston, *Among 41 Nations, U.S. is the Outlier When it Comes to Paid Parental Leave*, PEW RES. CTR. (Sept. 26, 2016), <https://www.pewresearch.org/fact-tank/2016/09/26/u-s-lacks-mandated-paid-parental-leave/> [https://perma.cc/FHM3-K9LR] (accessed Feb. 5, 2020) (discussing how the United States is the only country among forty-one nations that does not mandate a national paid leave for new parents and how most other countries fund paid time off).

<sup>68</sup> See Lilian Mongeau, *Why Does America Invest So Little in its Children?*, ATLANTIC (Jul. 12, 2016), <https://www.theatlantic.com/education/archive/2016/07/why-does-america-invest-so-little-in-its-children/490790/> [https://perma.cc/8F9P-5WHG] (accessed Feb. 5, 2020) (discussing the value of the positive impact that prenatal leave can have on all wage earners); see generally ANDREA FREEMAN, *SKIMMED: BREASTFEEDING, RACE, AND INJUSTICE* (2019) (uncovering the multiple legal, political, and societal factors that have denied Black women in particular the ability to choose how to feed their babies).

<sup>69</sup> Laboratory, show, zoo, circus, and other detained animals may also be prevented from breastfeeding.

reproduce.<sup>70</sup> The owners of companion animals, and some commercial breeders generally allow them to nurse their young, but retain control as to how long the breastfeeding relationship will last.<sup>71</sup> Farmed animals raised for their milk are the least likely to be able to breastfeed their own as they are usually separated from them at birth.<sup>72</sup>

Multiple impediments lie in the way of human and farmed animal parents breastfeeding their young. The next Part examines whether the current law offers any protection to the breastfeeding relationship.

### III. THE CURRENT LAW OF BREASTFEEDING

There is currently no stand alone, positive right for human or animal parents to breastfeed under U.S. or international law. At the same time, breastfeeding is not prohibited either. In fact, for humans, an increasing body of legislation aims at encouraging breastfeeding or protecting those who breastfeed.<sup>73</sup> There are also a few instances in which animal breastfeeding is legally protected—typically for wild mammals or companion animals who are not viewed as sources of food.<sup>74</sup> The fundamental difference between humans and animals, however, is that farmed animals, especially those raised for their milk, are ordinarily *de facto* precluded from breastfeeding due to their confinement and forced separation from their children. After presenting the state of animal lactation law, an uncharted territory in the literature, I briefly consider human lactation law, which is becoming a well-patrolled area of legal scholarship.

#### A. *The Regulation of Animal Breastfeeding*

Farmed animals do not have even a minimal right to breastfeed, in the sense of a negative right to be left alone. This is unsurprising given that they generally lack meaningful legal rights under current law as they are considered property.<sup>75</sup> Unlike all other forms of prop-

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<sup>70</sup> See Joanna Swabe, *Human Social Evolution and Animal Exploitation Through Artificial Selection*, 27 AMSTERDAMS SOCIOLOGISCH TIJDSCHRIFT 55, 61, 66–67 (2000) (discussing how humans have exploited animals for their own needs through sophisticated and selective domestication and breeding, maintaining a ‘complete mastery’ over animal breeding).

<sup>71</sup> Literature on how to care for newborn puppies and kittens is replete with information about nursing. See, e.g., LINDA P. CASE, CANINE AND FELINE NUTRITION: A RESOURCE FOR COMPANION ANIMAL PROFESSIONALS 209 (3rd ed. 2010) (“[F]or puppies and kittens, the major proportion of passive immunity is acquired after birth via the colostrum. This emphasizes the importance of immediate nursing . . . to puppies and kittens immediately after birth.”).

<sup>72</sup> See, e.g., Sherry F. Colb, “*Never Having Loved at All*”: An Overlooked Interest that Grounds the Abortion Right, 48 CONN. L. REV. 933, 953 (2016) (describing how, in serving consumer demand, dairy farmers take away calves from nursing mothers).

<sup>73</sup> See generally Meghan Boone, *Lactation Law*, 106 CALIF. L. REV. 1827, 1830–31 (2018) (critically analyzing what she calls ‘lactation law’ around the country).

<sup>74</sup> See *infra* Part II.A.

<sup>75</sup> See GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW 17–18 (1995) (arguing animals are the personal property, or *chattel*, of their owners, even if recognized as a

erty, however, animals are afforded some legal protection by criminal anti-cruelty laws.<sup>76</sup> Farmed animals, however, are generally excluded from anti-cruelty laws—even though some protections apply to them during their transport and slaughter.<sup>77</sup> The U.S. Animal Welfare Act of 1966—the primary federal legislation specifying standards for animal care and use in contexts other than transportation or slaughter—expressly excludes ‘farm animals’ from the definition of the word ‘animal’ as it is employed throughout the entire Act.<sup>78</sup> As discussed above, lactating farmed animals have no right to life, to reproductive autonomy, to the custody of their children, or to other parental rights. While some breastfeeding companion animals and wild animals are legally protected during their lactation, lactating farmed animals rarely benefit from similar safeguards, and when they are, their breastfeeding appears to be protected in an unintended, indirect way.

### 1. *Indirect Protections*

When farmed animals benefit from legal protections qua lactators, it is for the benefit of humans. In some cases, this indirect effect is weak or ambiguous. For instance, federal regulations specify what drugs to give to lactating cows and goats, what indications the drugs should be used for, when not to give them, and how to administer them.<sup>79</sup> The purpose of these rules is strictly to safeguard human consumers on the basis that most drugs are excreted into milk and could be harmful. These regulations may prove advantageous for some animals when they shield them from drugs they do not need or that could harm them. Conversely, in certain circumstances, the regulations may harm animals by depriving them of drugs that may alleviate pain or other conditions. Another example of federal regulation of lactating farmed animals pertains to the post-slaughtering context. Once the animals have been slaughtered, the United States Department of Agriculture prohibits their “lactating mammary glands” from being “saved for edible purposes” although “[n]onlactating mammary glands” can be

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special kind of property. As such, they cannot themselves possess legal rights, because they are the objects of the exercise of someone else’s rights); *see also* STEVEN WISE, *RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS* 4 (2000) (urging the courts to confer legally enforceable rights on animals, beginning with chimpanzees and bonobos).

<sup>76</sup> *See* Maneesha Deckha, *Welfarist and Imperial: The Contributions of Anticruelty Laws to Civilizational Discourse*, 65 *AM. Q.* 515, 515–16 (2013) (offering a critical account of the development and content of anti-cruelty legislation in the United States and Canada which uncovers their colonial, raced, classed, and gender dimensions).

<sup>77</sup> Joseph Vining, *Animal Cruelty Laws and Factory Farming*, 106 *MICH. L. REV. FIRST IMPRESSIONS* 123, 123 (2008) (arguing the laws criminalizing animal abuse should apply to animals raised for food).

<sup>78</sup> Laboratory Animal Welfare Act, § 2(h) (2014) (originally enacted as Act of Aug. 24, 1966, 7 U.S.C. §§ 2132, 80 Stat. 350, 351 (1966)) (specifically excluding horses and farmed animals used for non-research purposes).

<sup>79</sup> *See, e.g.*, Formaldehyde, 21 C.F.R. § 573.460 (2019) (determining which types of food formaldehyde can be used as an additive for lactating dairy cattle).

sold for food.<sup>80</sup> It would be hard to argue this rule benefits the animals, even tangentially, given they are dead. However, the differential treatment between the two types of mammary glands, lactating and nonlactating, presumably motivated by food safety concerns, is noteworthy, as it could also signal a cultural resistance to categorizing the lactating breast as meat for humans.

There are instances in which the regulation of animal lactation, even if prompted by the goal of advancing human interests in food safety, more clearly serves animals' interests. One example of such unintended protection comes from the federal definition of milk, that is, milk's so-called standard of identity. The original 1924 Pasteurized Milk Ordinance, a model regulation in which all states participate to this day,<sup>81</sup> defined milk as follows:

Milk is hereby defined to be the whole, fresh, clean, lacteal secretion obtained by the complete milking of one or more healthy cows, properly fed and kept, excluding that obtained within fifteen days before and five days after calving, or such longer period as may be necessary to render the milk practically colostrum free.<sup>82</sup>

The purpose of the definition was of course to ensure human consumers a safe and nutritious product, not the well-being of cows and their calves. By emphasizing that milk had to be obtained by the 'complete milking' of cows, the definition entrenched the idea milk was for humans only.<sup>83</sup> The rationale for that specification was that complete milking would ensure higher quality, fattier milk because the foremilk first released by milking is lower in fat concentration, while the hindmilk that comes at the end of a milking session has a higher fat content.<sup>84</sup> The new requirement meant that farmers who allowed their cows to reserve some of their milk for their calves could no longer do so. At the same time, health for humans required health for cows, illustrating one element of the connection between human and animal welfare. Malnourished, sick cows produce subpar milk, as several scandals had revealed during the nineteenth century, such as the

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<sup>80</sup> Inspection of Mammary Glands, 9 C.F.R. § 310.17 (2019); see also CALVIN W. SCHWABE, UNMENTIONABLE CUISINE 59 (1979) (reporting the mammary gland, in particular cow's udders were a 'standard peasant fare' in France and offering a recipe for pot-roaster udders). Udders are rarely eaten these days, but see Louisa Chu, *Happy 100th Julia: Udderly Delicious*, WBEZ (Aug. 15, 2012), <https://www.wbez.org/shows/wbez-news/happy-100th-julia-udderly-delicious/ee07de41-68ea-44c4-82e5-e50d33336868> [<https://perma.cc/WFN4-AP55>] (accessed Feb. 5, 2020) (recounting the author's quest for an udder and the cooking and eating process).

<sup>81</sup> NAT'L CONF. OF ST. LEGISLATURES, SUMMARY OF RAW MILK STATUTES AND ADMINISTRATIVE CODES 2 (Scott Hendrick & Doug Farquhar eds., 2012).

<sup>82</sup> Leslie C. Frank, *A State-Wide Milk Sanitation Program*, 39 PUB. HEALTH REP. 2765, 2777 (1924) (emphasis added).

<sup>83</sup> For a discussion of the complete milking requirement, see Kelly Struthers Montford, *Milk in the Anthropocene: Colonialism's Dietary Interventions*, J. FOOD LAW & POL'Y (forthcoming 2020).

<sup>84</sup> *Id.*

‘swill milk’ scandal in New York.<sup>85</sup> By the early 1900s, it became obvious to regulators that “healthy cows, properly fed and kept,” to use the Ordinance’s language, produce cleaner, more nourishing milk.<sup>86</sup> Farmers became obligated to feed and keep them ‘properly’—outlawing some of the most problematic farming practices of the time such as letting cows starve or raising them in urban environments.<sup>87</sup> The new rule also included in the definition of milk the requirement that cows obtain fifteen days of respite from milking before calving and at least five days after<sup>88</sup>—not quite a parental leave, but at least a break from the continuous milking they are otherwise subjected to. Finally, the declaration that milk must be ‘free of colostrum’ to be sold as milk was significant.<sup>89</sup> Like other mammals, after giving birth, cows secrete colostrum, a nutrient-rich fluid loaded with immune factors, rather than milk.<sup>90</sup> Most human consumers find animal colostrum unappetizing,<sup>91</sup>

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<sup>85</sup> See, e.g., *Swill Milk: History of the Agitation of the Subject—The Recent Report of the Committee of the New-York Academy of Medicine*, N.Y. TIMES (Jan. 27, 1860), <http://www.nytimes.com/1860/01/27/news/swill-milk-history-agitation-subject-recent-report-committee-new-york-academy.html> [<https://perma.cc/G2Q7-BL6S>] (accessed Feb. 5, 2020) (denouncing the ‘swill milk scandal,’ which caused a spike in the mortality of New York infants fed with milk from cows that were raised on ‘swill,’ that is residual mash from distilleries and adulterated).

<sup>86</sup> W. Milton Kelly, *Maintaining Healthy and Vigorous Dairy Cows*, PENN. FARMER, Dec. 11, 1915, at 8–432.

<sup>87</sup> See, e.g., the 1887 Minnesota law, HF 320, Chapter 140 § 2 (“No person shall keep cows . . . in a crowded or unhealthy condition, or feed the cows on food that is unhealthy”); 1895 DC law, Chapter 164, 53 Congress, Session 3, An Act: To regulate the sale of milk in the District of Columbia, and for other purposes., 28 Stat. 709 (1895) (requiring “proper water supply, drainage, ventilation, air space, floor space, and cleaning or all dairies and dairy farms”); 1896 San Francisco Ordinance, General orders of the Board of Supervisors: providing regulations for the government of the city and county of San Francisco (to November 10th, 1898), at 369 (prohibiting the sale of “Milk from cows kept in an unhealthy or unsanitary condition, or from cows affected with any form or disease, or from cows which are supplied with water which is impure or unwholesome”), USDA, Fifty Dairy Rules, 1897 (Rule 5 “Stables should be well ventilated, lighted, and drained,” Rule 12 “Have the herd examined at least twice a year by a skilled veterinarian,” Rule 13 “Do not move the cows faster than a comfortable walk while on the way to the place of milking or feeding,” Rule 15 “Never allow the cows to be excited by hard driving, abuse, loud talking, or unnecessary disturbance; do not expose them to cold or storms,” Rule 17 “Feed liberally, and use only fresh, palatable feed stuffs”). See also R. A. PEARSON, U.S. DEP’T OF AGRIC. FARMERS BULLETIN No. 63: CARE OF MILK ON THE FARM (1897) (laying out steps to produce pure milk, including keeping animals healthy, clean, well-fed, and well-cared for, noting at 14 that “bad treatment or neglect quickly results in decreased profits”).

<sup>88</sup> Frank, *supra* note 82, at 2777.

<sup>89</sup> *Id.*

<sup>90</sup> Gaston Mayer & Marc Klein, *History and Cytology of the Mammary Gland*, in MILK: THE MAMMARY GLAND AND ITS SECRETION 47, 73 (S. K. Kon & A. T. Crowie eds., 1961).

<sup>91</sup> Note that some consumers specifically seek animal colostrum in the belief that it will provide them with immunological benefits. See Walter L. Hurley & Peter K. Theil, *Perspectives on Immunoglobulins in Colostrum and Milk*, 3 NUTRIENTS 442, 443 (2011) (examining the use of colostrum as a source of immunoglobulins, whether intended for the neonate of the species producing the secretion or for a different species).



which may explain why the drafters explicitly excluded it from the definition of milk. The flip side of the exclusion is that it allows some breastfeeding time for cows permitted to nurse their calves so long as they produce colostrum.<sup>92</sup>

## 2. Direct Protections

Lactating animals, particularly when they are wild, may enjoy deliberate breastfeeding protections under international, federal, and state law, which are designed to promote animals' welfare, rather than humans'. Here are some examples.

### a. International Law

The 1931 Convention for the Regulation of Whaling prohibits the taking of right whales, calves, immature whales, and lactating whales.<sup>93</sup> This Convention proved largely unsuccessful because a number of major whaling states, such as Australia or Japan, did not sign it and no enforcement mechanisms were put in place.<sup>94</sup> After World War II, however, the 1946 International Convention on the Regulation of Whaling (ICRW) was adopted, and its Schedule adopted elements of the 1931 Convention on the protection of lactating whales.<sup>95</sup> Article 22 of the Schedule states that “[n]o bonus or other remuneration shall be paid to the gunners or crews of whale catchers in respect of the taking of lactating whales.”<sup>96</sup> Article 24 also requires that whale catchers report to their factory ship whether the whales they take are lactating.<sup>97</sup> These provisions are weak and probably rarely enforced, but they at

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<sup>92</sup> Many are not allowed to breastfeed directly, however, as farmers milk them for colostrum and bottle feed it to their calves. *See, e.g.*, Paul Larson, *Colostrum—A Cow's First Milk is Liquid Gold*, LA CROSSE TR. (Dec. 17, 2017), [https://lacrossetribune.com/news/local/paul-larson-colostrum-a-cow-s-first-milk-is-liquid/article\\_094d3b7b-dce6-573c-bb88-fdb253c79ba3.html](https://lacrossetribune.com/news/local/paul-larson-colostrum-a-cow-s-first-milk-is-liquid/article_094d3b7b-dce6-573c-bb88-fdb253c79ba3.html) [<https://perma.cc/P3LR-S5DS>] (accessed Feb. 5, 2020) (noting that the author, a dairy farmer, collects and stores his cows' colostrum to feed calves via a tube in the hope of increasing their antibody protection, stating, “we contribute greatly to excellent calf health”).

<sup>93</sup> Convention for the Regulation of Whaling art. 5, Sept. 24, 1931, 49 Stat. 3079, 155 L.N.T.S. 349 (prohibiting the “[t]aking or killing of calves or suckling whales, immature whales, and female whales which are accompanied by calves (or suckling whales)”).

<sup>94</sup> Natalie Klein, *Whales and Tuna: The Past and Future of Litigation Between Australia and Japan*, 21 GEO. INT'L ENVTL. L. REV. 143, 155 (2009).

<sup>95</sup> International Convention for the Regulation of Whaling schedule, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72, (defining a lactating whale as “(a) with respect to baleen whales, a female which has any milk present in a mammary gland; (b) with respect to sperm whales, a female which has milk present in a mammary gland the maximum thickness (depth) of which is 10cm or more” but clarifying “notwithstanding these criteria, a whale shall not be considered a lactating whale if scientific (histological or other biological) evidence is presented to the appropriate national authority establishing that the whale could not at that point in its physical cycle have had a calf dependent on it for milk”).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

least acknowledge by implication that whales' breastfeeding is something worth safeguarding.

*b. Federal Law*

The Marine Mammal Protection Act (MMPA) and Endangered Species Act were passed in 1972 to prohibit the 'taking' of marine animals without permit.<sup>98</sup> The Act prohibited importing pregnant and nursing marine mammals or animals under eight months into the United States.<sup>99</sup> Rules and regulations were promulgated in 1996 introducing language specifying that 'unweaned' animals and animals "part of a mother-calf/pup pair" could not be imported or taken even by permit holders unless they had special authorization.<sup>100</sup> This language suggests the recognition not only of the value of breastfeeding for marine mammals, but also of its relational quality. In 2015, a Georgia District Court examined whether the National Marine Fisheries Service—the federal agency responsible for the stewardship of national marine resources—had properly interpreted the Act when it required an aquarium to show that beluga whales proposed for import were not nursing at the time of capture.<sup>101</sup> The court rejected the aquarium's claim that the proper standard was whether nursing was obligatory, i.e., necessary for the whale's survival, relying on a D.C. Circuit precedent that had dismissed the distinction between obligatory and convenience nursing.<sup>102</sup> The court thus accepted the National Marine Fisheries Service's reliance "on scientific literature that beluga calves are nursed for two years and may continue to associate with their mothers for a considerable time thereafter"<sup>103</sup> and that belugas "appear to be dependent on their mothers for nursing for the first year, when their teeth appear."<sup>104</sup> This is an instance in which a court accepts that animal breastfeeding is not limited to providing essential

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<sup>98</sup> It is important to note the Endangered Species Act was passed in the same year as the Marine Mammal Protection Act, however, it is not discussed in detail in this Article.

<sup>99</sup> Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, § 102(b)(1)–(2), 86 Stat. 1027, 1032.

<sup>100</sup> Permits to Take, Import and Export Marine Mammals; Update of Office of Management and Budget (OMB) Approval Numbers, 61 Fed. Reg. 21926, 21936 (May 10, 1996). The legislative history reveals that pregnancy was intended for the narrow purposes of prohibiting importation: "It is known that some marine animals are technically pregnant almost year-round, and in the cases of others, it is extremely difficult for even trained observers to detect pregnancy except in the latter stages or in seasons when such animals are known to give birth. It is the intent of the conferees that the term 'pregnant' be interpreted as referring to animals pregnant near term or suspected of being pregnant near term as the case may be." Congressional Report on H.R. 10420, Marine Mammal Protection Act of 1972, Congressional Record—House (Oct. 2, 1972), at 33226.

<sup>101</sup> *Georgia Aquarium, Inc. v. Pritzker*, 135 F. Supp. 3d 1280, 1287–88, 1335, 1339 (N.D. Ga. 2015).

<sup>102</sup> *Id.*; *Animal Welfare Inst. v. Kreps*, 561 F.2d 1002, 1011–12 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978).

<sup>103</sup> *Pritzker*, 135 F. Supp. 3d at 1336.

<sup>104</sup> *Id.*

nutrition, but also involves an affective relationship, which animals have an interest in pursuing beyond the stage when children are reliant on it for their survival.

*c. State Law*

A few states have laws on the books protecting breastfeeding companion animals. A Virginia statute prevents the sale of an “unweaned mammalian companion animal or any dog or cat under the age of seven weeks without its dam or queen.”<sup>105</sup> Similarly, the Nevada animal anti-cruelty statute provides that a “retailer, dealer or operator shall not separate a dog or cat from its mother until it is 8 weeks of age or accustomed to taking food or nourishment other than by nursing, whichever is later.”<sup>106</sup> As for the Illinois Animal Welfare Act, it states that “[n]o dog dealer, dog breeder, or cat breeder shall separate a puppy or kitten from its mother, for the purpose of sale, until such puppy or kitten has attained the age of 8 weeks.”<sup>107</sup> These laws not only directly aim to protect the health and welfare of pups, but also the breastfeeding relationship between animal parents and their offspring via language prohibiting premature separation. State laws may also indirectly protect animal nursing. For instance, states have primary authority over the hunting of wildlife on their territory, including delineating the hunting seasons dates for specific species.<sup>108</sup> Typically, the hunting season avoids peak breeding period, when animals are particularly vulnerable and likely to breastfeed,<sup>109</sup> though some states have been known to allow hunting in the spring when some females are pregnant or lactating.<sup>110</sup>

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<sup>105</sup> Va. Code Ann. § 3.2-6510 (West 2019); see also Rebecca F. Wisch, *Table of State Laws Concerning Minimum Age Sale for Puppies*, MICH. ST. U.: ANIMAL LEGAL & HIST. CTR. (2019), <https://www.animallaw.info/topic/table-state-laws-concerning-minimum-age-sale-puppies> [<https://perma.cc/G9VD-HKBP>] (accessed Feb. 5, 2020) (“Approximately twenty-five states have laws or administrative regulations that state how old a puppy must be before it is offered for sale or adopted out to an owner.”).

<sup>106</sup> The provision at stake is 574.500, titled, “Separating dog or cat from mother.” N. R. S. §§ 574.010–.550.

<sup>107</sup> 225 ILL. COMP. STAT. 605/2.2 (2019).

<sup>108</sup> Note that federal land management agencies have an obligation to manage and conserve fish and wildlife on federal lands but ironically the only mention of lactation I could find relating to the U.S. Fish and Wildlife Service pertained to *human* lactation, as the Minnesota office boasted its lactation-friendly policies for employees. See Katie Steiger-Meister, *U.S. Fish and Wildlife Service First Federal Office in Minnesota Named Breastfeeding Friendly*, U.S. FISH & WILDLIFE SERV.: NEWSROOM (Aug. 5, 2019), <https://www.fws.gov/midwest/news/891.html> [<https://perma.cc/3JQP-QBRG>] (accessed Feb. 5, 2020).

<sup>109</sup> See Karmen L. Campbell et al., *Adjusting for Seasonal Harvest Bias in the Lactation Index for White-Tailed Deer Management*, 40 WILDLIFE SOC’Y BULL. 754 (2016) (suggesting that the lactation status of wild animals is sometimes used as a metric to determine whether hunting should be permitted and how many animals can be killed).

<sup>110</sup> See ANIMAL RIGHTS 100 (Noah Berlatsky, ed., 2015) (noting that a few states allow the hunting of bears in the spring when they emerge from hibernation, lethargic and possibly pregnant or lactating).

*d. Self-Regulation*

In addition to traditional legal ordering, a private form of animal lactation regulation has emerged in the agricultural context at the hand of farmers who aspire to producing and selling ‘humane’ milk, depending on who uses it and in what context.<sup>111</sup> Two European initiatives illustrate this movement. In 2017, German farmer Hans Moeller was featured in the media for giving his cows three months of ‘maternity leave’ to care for their calves<sup>112</sup>—human mothers in Germany receive over a year of paid maternity leave.<sup>113</sup> Moeller calls his system “mother-bonded calf-breeding.”<sup>114</sup> The cows continue to be milked, but only what is left over after their calves’ on-demand nursing.<sup>115</sup> In a similar vein, non-profit British Ahimsa Dairy Foundation released its Ahimsa Manifesto in 2017.<sup>116</sup> One of its principles is that “[c]alves suckling from mothers . . . should always be the first and foremost beneficiaries of their mother’s milk and be allowed to suckle for the first six months of life and never separated from their mothers.”<sup>117</sup> The Foundation goes further than Moeller by guaranteeing “slaughter free milk,” natural insemination every two to four years to allow cows to have long lactation periods, fewer pregnancies, and hand milking.<sup>118</sup>

*B. The Regulation of Human Breastfeeding*

Human parents who breastfeed enjoy considerably more legal protections than animal parents, be it at the international or domestic level, even though these protections do not amount to a stand-alone, positive right to breastfeed. Historically and comparatively, we see a tendency for legal systems to ordain *duties for mothers* to breastfeed

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<sup>111</sup> The term ‘humane’ has variety of meanings. The American non-profit human Farm Animal Care, for example, has developed its own definition, which it uses to certify animal-derived food products under its label. See *Hart Dairy Named as First Pasteurized US Dairy Cow Operation to Earn Certified Humane® Designation*, CERTIFIED HUMANE (Apr. 29, 2019), <https://certifiedhumane.org/hart-dairy-named-as-first-pasteurized-us-dairy-cow-operation-to-earn-certified-humane-designation/> [<https://perma.cc/FF77-K7XD>] (accessed Feb. 5, 2020) (announcing that it awarded its label for the first time to a pasteurized milk dairy).

<sup>112</sup> Wolfgang Runge, *Why A German Farmer Is Giving His Dairy Cows “Maternity Leave,”* DPA INT’L (Mar. 20, 2017), <http://www.dpa-international.com/topic/german-farmer-giving-dairy-cows-maternity-leave-170316-99-686500> [<https://perma.cc/PU9A-YY9F>] (accessed Feb. 5, 2020).

<sup>113</sup> Audrey G. Kingo, *This is What Happened When Germany Paid Women \$25K More During Maternity Leave*, WORKING MOTHER (Sept. 13, 2017), <https://www.workingmother.com/this-is-what-happened-when-germany-paid-women-25k-more-during-maternity-leave> [<https://perma.cc/BW7W-9JE6>] (accessed Feb. 5, 2020).

<sup>114</sup> Runge, *supra* note 112.

<sup>115</sup> *Id.*

<sup>116</sup> *The Ahimsa Manifesto 2017-2030*, AHIMSA DAIRY FOUND., <https://www.ahimsa-milk.org/slaughter-free/the-ahimsa-manifesto-2017-2030/> [<https://perma.cc/37BA-6B9F>] (accessed Feb. 5, 2020).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

or *rights for babies* to be breastfed, rather than a relational right for parents and children to engage in a protected breastfeeding relationship.<sup>119</sup>

The 1794 Prussian Code, which remained in force until 1900, is often presented as a product of the eighteenth-century enlightenment, arising out of Frederick the Great's reformist attempts to comprehensively regulate every possible legal situation.<sup>120</sup> The Code contained a section on the rights and obligations of parents, including Section 67, which provided, "A healthy mother is obliged to breastfeed her child," and Section 68, which stated, "How long she breastfeeds depends on the father's decision, however,"<sup>121</sup> emphasizing the patriarchal organization of infant feeding decisions. Analogously, in 1793, the French National Convention decreed that women ought to breastfeed their children.<sup>122</sup> Both the Prussian and the French dictates were ostensibly motivated by the sharp rise in infant mortality throughout Europe in the eighteenth century, which was in part caused by families' use of animal milk as a substitute for breastfeeding.<sup>123</sup> These commands were also attempts at maintaining women within their subordinated domestic roles as mothers and wives at a time when their position in society was rising, and precursors to feminism as a political ideology were emerging.<sup>124</sup>

When the regulation of breastfeeding is not couched as a mother's duty, it tends to be framed as a *child's* right to be breastfed, raising, as Miriam Labbok puts it, a "potential for conflict between the woman's and the child's rights."<sup>125</sup> For example, the 1990 United Nations Con-

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<sup>119</sup> See Boone, *supra* note 73, at 1850 (writing about the United States, "[m]odern lactation laws are often conceived of and constructed as protective of an infant's right to breast milk, and not necessarily protective of an individual woman's right to lactate or breastfeed").

<sup>120</sup> Gerhard Dilcher, *The City Community as an Instance in the European Process of Individualization*, in *THE INDIVIDUAL IN POLITICAL THEORY AND PRACTICE* 281, 283–88 (Janet Coleman ed., 1996).

<sup>121</sup> *General Law Code for the Prussian States, Part II.2: "Of the Mutual Rights and Obligations of Parents and Children" (1794)*, reprinted in 2 *FROM ABSOLUTISM TO NAPOLEON, 1648-1815*, at 1–2, [http://ghdi.ghi-dc.org/pdf/eng/11\\_FamilyandGender\\_Doc.1\\_ENG.pdf](http://ghdi.ghi-dc.org/pdf/eng/11_FamilyandGender_Doc.1_ENG.pdf) [<https://perma.cc/8LYC-CJRP>] (accessed Feb. 5, 2020).

<sup>122</sup> See Jill Lepore, *Baby Food: If Breast Is Best, Why Are Women Bottling Their Milk?*, *NEW YORKER* (Jan. 19, 2009), <https://www.newyorker.com/magazine/2009/01/19/baby-food> [<https://perma.cc/P3VP-24HK>] (accessed Feb. 5, 2020) ("[T]he French National Convention ruled that women who employed wet nurses could not apply for state aid; not long afterward, Prussia made breast-feeding a legal requirement.").

<sup>123</sup> See Catherine Rollet, *Allaitement, Mise en Nourrice et Mortalité Infantile en France à la Fin du XIXe Siècle*, 33 *POPULATION* 1189, 1189 (1978) (discussing infant feeding choices as the major cause for the French mortality crisis in the eighteenth century).

<sup>124</sup> See, e.g., *WOMEN IN THE EIGHTEENTH CENTURY: CONSTRUCTIONS OF FEMININITY* (Vivien Jones, ed., 2006) (featuring writings by and about eighteenth century British women).

<sup>125</sup> Miriam Labbok, *Breastfeeding: A Woman's Reproductive Right*, 94 *INT'L J. GYNECOLOGY & OBSTETRICS* 277, 278 (2006); see also Penny Van Esterik, *Right to Food; Right to Feed; Right to be Fed. The Intersection of Women's Rights and the Right to Food*, 16

vention on the Rights of the Child does not explicitly recognize children's right to be breastfed, but its Article 24 states,

States Parties shall . . . take appropriate measures: (a) To diminish infant and child mortality . . . (e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents.<sup>126</sup>

Nothing is said about the legal, economic, social, emotional, and material conditions which are necessary for parents to actually breastfeed their children. Of course, the subordination of parents' rights to children's rights, or well-being, is not limited to the lactation context. Historian Linda Gordon has described the ideology of "putting [human] children first," noting that "one of the most transcultural markers of what historians call modernity has been an ethical, or at least discursive, prioritizing of children's welfare."<sup>127</sup> Legal change toward stronger consumer protection has often been the result of mobilization around children's interest. The very regulation of cow's milk in the United States at the end of the nineteenth century and early twentieth century was prompted by pediatricians and public health reformers' concerns about the high rates of infant mortality attributable to adulterated or contaminated milk.<sup>128</sup>

### 1. *International and Foreign Law*

International law does not recognize a positive right to breastfeed on the model of economic, social, and political rights, such as the right to food, healthcare, or housing, but a number of international instruments aim to encourage breastfeeding. In 1981, the World Health Organization (WHO) and the United Nations Children's Fund (UNICEF) developed the International Code of Marketing of Breast-Milk Substitutes as a health policy framework for breastfeeding promotion.<sup>129</sup> Naomi Bromberg Bar-Yam notes the Code's grassroots origins.<sup>130</sup>

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AGRIC. & HUM. VALUES 225, 230 (1999) (discussing breastfeeding as a child's right to be fed).

<sup>126</sup> U.N. General Assembly, *Convention on the Rights of the Child* 24, U.N. Doc A/44/25 (Nov. 20, 1989).

<sup>127</sup> Linda Gordon, *The Perils of Innocence, or What's Wrong with Putting Children First*, 1 J. HIST. CHILDHOOD & YOUTH 331, 331 (2008).

<sup>128</sup> See RICHARD A. MECKEL, *SAVE THE BABIES: AMERICAN PUBLIC HEALTH REFORM AND THE PREVENTION OF INFANT MORTALITY, 1850–1929* 5–6 (1990) (explaining that beginning around 1880, "public health reformers reconceptualized infant mortality and refocused their attention on improving the quality and purity of the urban milk supply and on making clean and wholesome milk available to those infants at highest risk").

<sup>129</sup> WHO, *INTERNATIONAL CODE OF MARKETING OF BREAST-MILK SUBSTITUTES*, 4–7 (1981).

<sup>130</sup> See Bromberg Bar-Yam, *Breastfeeding and Human Rights: Is There a Right to Breastfeed? Is There a Right to be Breastfed?*, 19 J. HUM. LACTATION 357, 360 (2003) (stating the origin of the Code "was motivated by consumer political action, shareholder actions, and a long-term international consumer boycott").

Among its most significant provisions, the Code prohibits free and low-cost supplies of human milk substitutes, bottles, and teats through the health care system.<sup>131</sup> WHO lacks enforcement mechanisms, but the Code's recommendations have been incorporated into many domestic laws.<sup>132</sup> One of its most celebrated achievements has been successfully pressuring leading infant formula manufacturers to change some of their marketing strategies.<sup>133</sup>

The 1990 *Innocenti Declaration* offered targets for global support for breastfeeding, including giving effect to the Code of Marketing of Breast-Milk Substitute and enacting legislation protecting the breastfeeding rights of working women.<sup>134</sup> In 2003, WHO issued breastfeeding recommendations, which are now used by the medical profession worldwide.<sup>135</sup> The Organization advocates for exclusive breastfeeding up to six months of age, and continued breastfeeding, with appropriate complementary foods, up to two years of age or beyond.<sup>136</sup> The International Labour Organization (ILO) includes standards for the workload adjustments needed by women in the workplace, including at least one breastfeeding break per day, or a reduction of working hours to allow for breastfeeding.<sup>137</sup>

## 2. *United States Law*

### a. *Constitutional Protections*

The United States Constitution is famous for being a charter of negative liberties enshrining rights to be protected *from* governmental action (e.g., the right to life, a fair trial, freedom of speech, and religion), rather than positive rights *requiring* governmental action to be fulfilled. Unsurprisingly, it contains no positive right to breastfeed. Admittedly, breastfeeding is not a customarily constitutionally protected right, and as of the time this Article was written, the only known country that explicitly protects breastfeeding in its constitution

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<sup>131</sup> WHO, *supra* note 129, at 11–12.

<sup>132</sup> See generally WHO, UNICEF & IBFAN, *MARKETING OF BREAST-MILK SUBSTITUTES: NATIONAL IMPLEMENTATION OF THE INTERNATIONAL CODE STATUS REPORT 2018* 10, 17, 19, 30 (2018) (providing information on the status of implementing the International Code of Marketing of Breastmilk Substitutes into different countries' legal systems).

<sup>133</sup> See Tehila Sasson, *Milking the Third World? Humanitarianism, Capitalism, and the Moral Economy of the Nestlé Boycott*, 121 AM. HIST. REV. 1196, 1197–98 (2016) (recounting the history of the Nestlé boycott).

<sup>134</sup> See generally *The Innocenti Declaration of the WHO/UNICEF Policymaker's Meeting on "Breastfeeding in the 1990s: A Global Initiative"*, (Aug. 1, 1990) (reflecting the content of the original document for the meeting and the views expressed in response).

<sup>135</sup> WHO & UNICEF, *GLOBAL STRATEGY ON INFANT AND YOUNG CHILD FEEDING* 7–8 (2003).

<sup>136</sup> *Id.* at 8.

<sup>137</sup> International Labour Organization, *Convention Concerning the Revision of the Maternity Protection Convention (Revised)*, 1952 I.L.O.T.S. No. 183 (entered into force Feb. 7, 2002).

is Ecuador.<sup>138</sup> Yet, even in the United States, there have been attempts by the courts to frame breastfeeding in constitutional language. In 1981, the Fifth Circuit issued a decision suggesting that breastfeeding could, in some instances, be constitutionally protected against state infringement.<sup>139</sup> The case involved a Florida kindergarten teacher, Janice Dike, who had challenged her school board's refusal to permit her to breastfeed her child on campus during her lunch break.<sup>140</sup> The argument, based on the right to privacy under the Fourteenth Amendment, was that the Constitution protects from undue state interference with citizens' freedom of personal choice in some areas of marriage and family life.<sup>141</sup> The court wrote,

Breastfeeding is the most elemental form of parental care. It is a communion between mother and child that, like marriage, is "intimate to the degree of being sacred." *Griswold v. Connecticut* . . . . Nourishment is necessary to maintain the child's life, and the parent may choose to believe that breastfeeding will enhance the child's psychological as well as physical health. In light of the spectrum of interests that the Supreme Court has held specially protected, we conclude that the Constitution protects from excessive state interference a woman's decision respecting breastfeeding her child.<sup>142</sup>

Despite this seemingly broad recognition of a right to breastfeed, the court abstained from concluding that the school board's refusal to accommodate Janice Dike and her baby violated the Constitution, finding that the school's interests in avoiding disruption of the educational process, ensuring that teachers perform their duties without distraction, and avoiding potential liability for accidents are legitimate.<sup>143</sup> The court also suggested that, consistent with the state action doctrine, whatever interest in breastfeeding is protected under the right to privacy, it is only safeguarded from *state* interference, not from private employers or owners of private property. Subsequent cases confirmed that the constitutional right, if any, was a minimal, negative one, rather than a positive right triggering specific entitlement. In a 1988 case involving government employee Rona Barrash, who had been fired for not showing up to work so as to breastfeed her baby, a Fourth Circuit panel held,

<sup>138</sup> See República del Ecuador Constitución [Constitution of the Republic of Ecuador] Oct. 20, 2008, art. 43 (Ecuador). ("The State shall guarantee the rights of pregnant and breast-feeding women to: (1) Not be discriminated for their pregnancy in education, social, and labor sectors, (2) Free maternal healthcare services, (3) Priority protection and care of their integral health and life during pregnancy, childbirth and postpartum, (4) The facilities needed for their recovery after pregnancy and during breast-feeding.")

<sup>139</sup> *Dike v. Sch. Bd. of Orange Cty., Fla.*, 650 F.2d 783, 785 (5th Cir. 1981).

<sup>140</sup> *Id.* at 784–85.

<sup>141</sup> *Id.* at 785 (citing *Prince v. Massachusetts*, 321 U.S. 158, 652, 786–87 (1944) for the proposition that "[i]t is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder").

<sup>142</sup> *Id.* at 787 (internal citation omitted).

<sup>143</sup> *Id.*



She may have a constitutional right to nurse her baby for six months, or even longer, that would inhibit intrusive governmental interference with it, but the plaintiff here asserts no right to be let alone while she cares for her baby in the manner she thinks best. Her claim is one of entitlement to the full six months of maternity leave she demanded.<sup>144</sup>

The court found that the denial of Barrash's request for the six-month maternity leave, which had been available under prior policy was an appropriate way for the agency to reduce costs and increase efficiency. In other words, Rona Barrash may have had a right to breastfeed, but on her own time and at her own expense.

*b. Statutory Protections*

Though American law does not recognize a stand-alone right to breastfeed, increasingly, state and federal laws protect breastfeeders, as illustrated in Meghan Boone's review and critique of lactation law.<sup>145</sup> In other words, if parents have the good luck of being physically, socially, economically, and emotionally able to breastfeed, they may become entitled to a bundle of associated rights, such as the right to breastfeed in public, express milk at work, obtain a free breast pump, and some lactation counseling through their insurance, or be free from discrimination for breastfeeding. Three federal statutes are of particular relevance: the Pregnancy Discrimination Act,<sup>146</sup> Affordable Care Act,<sup>147</sup> and Family and Medical Leave Act.<sup>148</sup>

The Pregnancy Discrimination Act (1978) protects women from being discriminated against "because of, or on the basis of, pregnancy, childbirth, or related medical conditions."<sup>149</sup> The controversial and ongoing issue is whether breastfeeding is a 'medical condition' related to pregnancy and childbirth. Courts have been inconsistent in their interpretations.<sup>150</sup> As a result, many breastfeeding employees still find themselves without clear protections against being dismissed, demoted, or harassed due to their lactation status.<sup>151</sup>

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<sup>144</sup> Barrash v. Bowen, 846 F.2d 927, 932 (4th Cir. 1988); see also Southerland v. Thigpen, 784 F.2d 713, 716–17 (5th Cir. 1986) (holding that an incarcerated mother had no fundamental right to breastfeed and distinguishing *Dike* on the ground that prison inmates have more limited privileges and rights).

<sup>145</sup> See Boone, *supra* note 73, at 1836.

<sup>146</sup> Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (1994)).

<sup>147</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 4207, 126 Stat. 577, 577–78 (2010) (codified as amended at 42 U.S.C. § 18031 (2013)).

<sup>148</sup> 29 U.S.C.S. §§ 2601–2654 (LexisNexis 2019).

<sup>149</sup> Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) ("The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions.").

<sup>150</sup> See, e.g., Krishna Jani, *A Return on Investment: How the Breastfeeding Promotion Act Can Change the Make-Up of the Private Workforce*, 23 WM. & MARY J. WOMEN & L. 671, 678 (2017).

<sup>151</sup> See LIZ MORRIS ET AL., CTR. FOR WORKLIFE LAW, EXPOSED: DISCRIMINATION AGAINST BREASTFEEDING WORKERS 13 (2018).

The Affordable Care Act (2010), and its amendment to the Fair Labor Standards Act, guarantee non-exempt employees an unpaid break to express milk at work.<sup>152</sup> The Act requires employers to provide “reasonable break time” for employees and a private place to pump which is not a bathroom.<sup>153</sup> In addition to the shortcoming of the provision itself—such as the lack of compensation for the break—the vagueness of the protection, its exemptions, and weak enforcement mechanism mean that millions of workers are uncovered.<sup>154</sup>

The Family and Medical Leave Act (1993) requires employers to offer leave to new parents, providing them with the most substantial federal support for breastfeeding.<sup>155</sup> The Act permits eligible employees to take twelve weeks of leave during any twelve-month period for “the birth of a son or daughter of the employee and in order to care for such son or daughter.”<sup>156</sup> As such, it facilitates breastfeeding initiation and duration given that longer leaves are associated with longer duration of breastfeeding.<sup>157</sup> As a number of critics have argued, however, the Act falls short in several ways. Many parents are ineligible for leave; even if they get leave, it is unpaid, and leave must be taken in a continuous chunk, rather than broken down, to reduce hours or take breaks for breastfeeding.<sup>158</sup>

### c. State Protections

State constitutional law may show more promise than federal constitutional law in light of a 2017 ruling by a Santa Fe judge who held that all mothers, including those incarcerated in state prisons, have a fundamental right to breastfeed under the state constitution.<sup>159</sup> The rationale was that refusing inmates the option of breastfeeding or expressing milk violates the Equal Rights Amendment to the New Mexico Constitution because it is discrimination based on lactation—a trait construed by the court as sex-based.<sup>160</sup> Given that over twenty states have adopted equal rights amendments to their constitutions, many of which have equal protection provisions that could be interpreted as prohibiting lactation discrimination as a form of sex discrim-

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<sup>152</sup> Patient Protection and Affordable Care Act, 42 U.S.C. § 18031.

<sup>153</sup> 29 U.S.C.S. § 207 (r)(1)(A), (2).

<sup>154</sup> See MORRIS ET AL., *supra* note 151, at 5 (pointing that over 9 million women are not covered by the federal break time provision).

<sup>155</sup> Family Medical Leave Act, 29 U.S.C. § 2612 (a)(1)(A) (2017).

<sup>156</sup> *Id.*

<sup>157</sup> Brian Roe et al., *Is There Competition Between Breast-Feeding and Maternal Employment?*, 36 DEMOGRAPHY 157, 167 (1999).

<sup>158</sup> See, e.g., Lindsey Murtagh & Anthony D. Moulton, *Working Mothers, Breastfeeding, and the Law*, 101 AM. J. PUB. HEALTH 217, 219 (2011).

<sup>159</sup> *Hidalgo v. New Mexico Dept. of Corr.*, No. D-101-CV-2017-01658, slip op. at 21 (N.M. 2017).

<sup>160</sup> *Id.*

ination, it may be that breastfeeding could increasingly be protected as a matter of state constitutional right.<sup>161</sup>

State statutes and regulations also protect breastfeeding in a variety of ways, some of which overlap with federal regulations, such as break times for expressing milk and prohibiting breastfeeding discrimination at work, but often go further, such as legislation offering publicly funded maternity leave,<sup>162</sup> protecting public breastfeeding (which used to be criminalized as indecent exposure),<sup>163</sup> guaranteeing break times to breastfeed one's child at work (rather than just to express milk), providing *paid* break time to express milk,<sup>164</sup> encouraging employers to provide infant-friendly workplaces, or simply affording breastfeeders the protection of tort law.<sup>165</sup> In 1993, Florida was the first state to declare a right to breastfeed in public,<sup>166</sup> soon followed by the other states. The problem remains that breastfeeders often lack a remedy—an enforcement mechanism to prevent others from interfering with their right.<sup>167</sup> New York is an outlier in this respect, as it is a civil rights violation to prevent someone from breastfeeding in public.<sup>168</sup>

<sup>161</sup> Relief could also come at the federal level. See Julie Suk, *An Equal Rights Amendment for the Twenty-First Century: Bringing Global Constitutionalism Home*, 28 YALE J.L. & FEMINISM 381, 444 (2017) (discussing the renewed push to constitutionalize sex equality in the United States via the federal equal rights amendment).

<sup>162</sup> See Jackson Brainerd, *Paid Family Leave in the States*, NCSL (Aug. 2017), <http://www.ncsl.org/research/labor-and-employment/paid-family-leave-in-the-states.aspx> [<https://perma.cc/JP3X-2C56>] (accessed Feb. 5, 2020) (noting that five jurisdictions currently mandate some form of paid family leave: California, New Jersey, New York, Rhode Island, and Washington DC).

<sup>163</sup> Durmeriss Cruver-Smith, *Protecting Public Breast-Feeding in Theory But Not in Practice*, 19 WOMEN'S RTS L. REP. 167, 167–68 (1998).

<sup>164</sup> See, e.g., IND. CODE ANN. § 5-10-6-2, 22-2-14-2 (LexisNexis 2008) (providing that state and political subdivisions must provide for reasonable paid breaks for an employee to express breast milk for her infant). See also Illinois statute, *supra* note 11.

<sup>165</sup> Unlike animals who generally lack private law protections, lactating humans' bodily integrity is protected by tort law. See, e.g., Bruce A. Scruton, *Breastfeeding Mom Told to 'Cover Up' Takes First Step Toward \$1 Million Suit Against Franklin*, N.J. HERALD (Aug. 15, 2018), <https://www.njherald.com/news/20180815/breastfeeding-mom-told-to-cover-up-takes-first-step-toward-1-million-suit-against-franklin> [<https://perma.cc/2UJV-Y4ZL>] (accessed Feb. 5, 2020) (reporting that a mother ordered to cover up by a borough employee while breastfeeding on a beach brought a tort claim against the borough).

<sup>166</sup> See FLA. STAT. ANN. § 383.015 (1993) (setting forth the right of mothers to breastfeed in any location, whether public or private).

<sup>167</sup> See Cruver-Smith, *supra* note 163, at 168 (arguing that the majority of breastfeeding statutes have stopped short of offering a remedy to women who are told to stop breastfeeding in public).

<sup>168</sup> N.Y. CIV. RIGHTS § 79-e (McKinney 1994) (providing that women who have been hassled may bring a claim and receive damages and that legal remedy can be enforced through three different avenues: a woman can file a civil rights suit herself, or the New York Attorney General's office or the Division of Human Rights can file a suit on her behalf).

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In sum, though most human parents lack a broad, positive right to breastfeed, unlike farmed animals they are neither completely unprotected nor precluded from breastfeeding. That being said, there have been cases in which women were ordered by their doctor or the government *not* to breastfeed their children, be it because of drug use<sup>169</sup> or because they tested positive for an infection transmissible through milk, such as HIV.<sup>170</sup> As Khiara Bridges' scholarship shows, low-income women, women of color, or both, are disproportionately the victims of governmental intrusion in their reproductive lives, including in breastfeeding decision.<sup>171</sup> This injustice is another illustration of milk intersectionality—lactation status interconnects with other identity traits in ways that can either support or undermine breastfeeders. After having reviewed the existing lactation law for animals and humans, the next Part argues for stronger breastfeeding rights for both groups.

#### IV. TOWARD AN INTERSPECIES APPROACH TO BREASTFEEDING

This Part sketches the idea of an interspecies right to breastfeed, and explains its appeal, while considering potential objections to it. More analytic and empirical work remains to fully articulate the right, and this Article is just a step in that direction.

##### A. *The Contours of the Right*

###### 1. *Relational Right*

Current advocacy in favor of a legally protected right to breastfeed, be it at the international or domestic level, is typically focused on *human* children's welfare. Generally, breastfeeding is thought of and pushed for as a 'human' right of children. My proposal

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<sup>169</sup> See Kelly S. McGlothen & Lisa M. Cleveland, *The Right to Mother's Milk: A Call for Social Justice That Encourages Breastfeeding for Women Receiving Medication-Assisted Treatment for Opioid Use Disorder*, 34 J. HUM. LACTATION 799, 799–801 (2018) (explaining the barriers opioid-addicted mothers face breastfeeding).

<sup>170</sup> See Leslie E. Wolf et al., *When Parents Reject Interventions to Reduce Postnatal Human Immunodeficiency Virus Transmission*, 155 ARCH. PEDIATRIC ADOLESCENT MED. 927, 927–28 (2001) (discussing an Oregon case in which the state successfully sued for custody of an infant to prevent his HIV-positive mother from breastfeeding him and to administer him antiretroviral prophylaxis). *But see*, *Breast Is Always Best, Even for HIV-Positive Mothers*, 88 BULL. WORLD HEALTH ORG. (2010), <https://www.who.int/bulletin/volumes/88/1/10-030110/en/> [<https://perma.cc/K76D-YKFD>] (accessed Feb. 5, 2020) (recommending that HIV-positive parents breastfeed so long as they take antiretroviral drugs during the period of lactation).

<sup>171</sup> See, e.g., KHIARA M. BRIDGES, *REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION* 52–67 (2011); KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* 9 (2017) (arguing that poor mothers have been disenfranchised of their rights to privacy).

is to shift the focus from human children to animal and human parents and children. The dominant humanist and child-centric paradigm obscures at least three other crucial stakeholders in the breastfeeding relationship: breastfeeders, animals, and the environment.

Breastfeeders themselves may have an interest in breastfeeding independent of that of their children. The health benefits of breastfeeding, for human breastfeeders, are amply supported by the data, from short-term benefits such as returning the uterus to its regular size more quickly, reducing postpartum bleeding, delaying the return of menstrual period, to long-term benefits such as reduced rates of breast and ovarian cancer later in life, and reduced risk of developing a number of diseases such as type 2 diabetes.<sup>172</sup> Mammalian parents may also seek breastfeeding because it can be a pleasurable activity and helps build an emotional bond with their children.<sup>173</sup> However, they can also be harmed by human-led, forced, and close to continuous lactation cycles over their lifetimes.

Human and farmed animal breastfeeding are connected in that greater and longer human breastfeeding rates would reduce the reliance on animal milk, which constitutes the main ingredient of most baby formulas.<sup>174</sup> This could translate into more opportunity for farmed animals to breastfeed their own, or simply for fewer animals to be raised for their milk. There would be significant environmental benefits in increasing human breastfeeding protection considering that formula is typically made of animal milk produced with a large carbon footprint or of commodity crops such as corn or soy which are often grown using large quantities of pesticides and fertilizers.<sup>175</sup> Additionally, formula requires transportation (of the ingredients and of the finished product), storing, and generates considerable waste through packaging.<sup>176</sup>

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<sup>172</sup> Louis-Jacques & Stuebe, *supra* note 3.

<sup>173</sup> See Ruth Feldman et al., *Maternal and Paternal Plasma, Salivary, and Urinary Oxytocin and Parent-Infant Synchrony: Considering Stress and Affiliation Components of Human Bonding*, 14 DEVELOPMENTAL SCI. 752, 752 (2011) (explaining how neuropeptide oxytocin, which plays a key role in the human attachment process, increases immediately prior to breastfeeding).

<sup>174</sup> See Mingruo Guo & Sarfraz Ahmad, *Ingredient Selection for Infant Formula*, in HUMAN MILK BIOCHEMISTRY AND INFANT FORMULA MANUFACTURING TECHNOLOGY 172, 172–73 (Mingruo Guo, ed., 2014) (discussing the various ingredients of baby formula including animal-based ingredients such as dairy, eggs, and honey).

<sup>175</sup> See DADICH ET AL., *supra* note 4, at 13–15, 27 (estimating the carbon emissions associated with formula-milk production).

<sup>176</sup> See Carly Cassella, *No One Is Talking About the Environmental Impacts of the Baby Formula Industry*, SCIENCEALERT (July 17, 2018), <https://www.sciencealert.com/no-one-is-talking-about-the-environmental-impacts-of-the-baby-formula-industry> [<https://perma.cc/F9SZ-K5FW>] (accessed Feb. 5, 2020) (explaining how formula milk production requires farming, storage, pasteurization, drying, cooling, packing, and shipping).

## 2. *A Bundle of Entitlements*

It should become the government, the workplace, and the community's responsibility to recognize and support a right to breastfeed for humans and animals. Governments should bear obligations to support breastfeeding by providing parents with the resources they need to breastfeed beyond a few weeks. On the human side, as discussed above, feeding a child human milk requires considerable legal, financial, social, and emotional resources in a society that lacks broad structural support for young parents. This situation has led anthropologist Penny Van Esterik to ask, "What would happen if human milk were treated like liquid gold?"<sup>177</sup> Why is it that those who breastfeed often do so against all odds? By the same token, why do we not treat lactating farmed animals as producers of an equally valuable liquid, whether we think it should be reserved for their own children or used by our own species too?

Some aspects of the interspecies right to breastfeed should be substantially equivalent for humans and animals, while others will need to vary to account for their different needs and circumstances. In terms of commonalities, lactating parents and children of all species should be provided with sufficient and appropriate food, water, and housing. The core of the right should also be premised on the recognition that "[r]egular and frequent nursing and/or breast milk expression are essential for successful breastfeeding,"<sup>178</sup> requiring breastfeeders and breastfed to have ample opportunity for physical contact. Protecting the right to breastfeed should translate into parental or breastfeeding leaves whereby breastfeeder and breastfed have the freedom to be together for an extended period of exclusive breastfeeding—the duration of which may depend on the species. The idea of a legally mandated 'leave' for animals is not unprecedented. For instance, the city of New York requires furloughs for carriage horses specifying that the animals must "receive no less than five weeks of vacation or furlough every twelve months at a horse stable facility which allows daily access to paddock or pasture turnout."<sup>179</sup>

These minimal prerequisites are particularly needed in contexts where animal and human parents and children are incarcerated—be it on farms, laboratories, zoos, or circuses for animals, or detention centers, jails, and prisons for humans.<sup>180</sup> In practical terms, protecting the right to breastfeed for lactating farmed or otherwise detained animals would imply that they room with their offspring to facilitate

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<sup>177</sup> Penny Van Esterik, *Foreword* to *ETHNOGRAPHIES OF BREASTFEEDING: CULTURAL CONTEXTS AND CONFRONTATIONS* xv, xx (Tanya Cassidy & Abdullahi El Tom eds., 2015).

<sup>178</sup> See Bromberg Bar-Yam, *supra* note 130, at 358 (discussing whether there is a fundamental human right to breastfeed and be breastfed).

<sup>179</sup> N.Y.C., N.Y., ADMIN. CODE § 17-330 (g)(2) (2019).

<sup>180</sup> See generally Karen M. Morin, *Carceral Space: Prisoners and Animals*, 48 *ANTIPODE* 1317, 1318 (2016) (exploring similarities between animal and human carceral geographies).

bonding, care, and on-demand nursing.<sup>181</sup> Similarly, incarcerated humans should have the right to keep their children with them in prison or detention centers for the duration of their lactation.<sup>182</sup> If they prefer for their children to be raised outside the facility, they should have the right to express their milk and have it shipped to their children, in addition to having the opportunity for daily in-person breastfeeding visitations.<sup>183</sup>

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<sup>181</sup> See 21 C.F.R. § 58.90 (2002) (highlighting how current FDA regulations do not seem to address the issue). USDA's regulations of animal welfare seem to be more protective of nursing lab animals with a few provisions here and there suggesting that the breastfeeding relationship is valued and should be protected via transportation or housing accommodations. See 9 C.F.R. § 3.116 (b)(2)-(3) (2001) (specifying care in transit conditions for marine mammals whereby a "dependent unweaned young animal" and a "nursing mother with young" cannot be transported in commerce without it determined to be appropriate by the attending veterinarian); 9 C.F.R. § 3.28 (b)(3)(ii) (2019) (stating that a "nursing female hamster, together with her litter, shall be housed in a primary enclosure, which contains no other hamsters and which provides at least 121 square inches of floor space"); 9 C.F.R. § 3.6 (b)(1)(iv) (2018) (stating that cats "nursing kittens must be provided with an additional amount of floor space, based on her breed and behavioral characteristics"); 9 C.F.R. § 3.6 (c)(1)(ii) (2018) (stating that dogs "nursing puppies must be provided with an additional amount of floor space, based on her breed and behavioral characteristics"); 9 C.F.R. § 3.87 (d)(1)(i) (2012) (noting that for compatibility purposes a nonhuman primate "mother and her nursing infant may be transported together" but neither mandating nor encouraging keeping them together).

<sup>182</sup> See United Nations, 65/229. United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules), Rule 22, 48 (2011) (stating that breastfeeding mothers shall not be punished by close confinement or disciplinary segregation and "not be discouraged from breastfeeding their children"); FEDERAL BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, PROGRAM STATEMENT NO. 5200.02, FEMALE OFFENDER MANUAL at 18, 19 (2016) (outlining special considerations for pregnant and nursing inmates); Hendrik DeBoer, *Prison Nursery Programs in Other States*, CONN. GEN. ASSEMBLY OFFICE OF LEGISLATIVE RESEARCH (Mar. 30, 2012), <https://www.cga.ct.gov/2012/rpt/2012-R-0157.htm> [<https://perma.cc/L9NB-QB6M>] (accessed Feb. 5, 2020) (showing that federal prison policies and a number of states have created prison nursery programs whereby nursing inmates may have the option to serve a portion of their sentence living with and nursing their babies); Naomi Schaefer Riley, *On Prison Nurseries*, 41 NAT'L AFF. 84 (2019) (debating the costs and benefits of existing programs on parents and children). See also U.S. Immigration and Customs Enforcement, Performance-Based National Detention Standards 2011, Part 4.4, available at <https://www.ice.gov/doclib/detention-standards/2011/4-4.pdf> [<https://perma.cc/9VG5-XSYL>] (accessed Feb. 5, 2020) (stating that female detainees shall have access to lactation services and that their initial assessment includes an inquiry into their breastfeeding status, but not providing any information and guidance as to whether breastfeeding detainees can express milk and/or breastfeed their children in person during visitation); Rebecca Klar, *Updated: ICE Rejects Claims It Separated Breastfeeding Mother from Her Child*, THE HILL (Aug. 19, 2019), <https://thehill.com/latino/457915-ice-defends-detaining-breastfeeding-mom> [<https://perma.cc/UDB6-YCZV>] (accessed Feb. 5, 2020) (reporting on the contested case of a breastfeeding migrant woman claiming she was separated from her infant and neither able to direct breastfeed nor express milk); *contra* *Southerland v. Thigpen*, 784 F.2d 713, 717 (5th Cir. 1986) (holding that accommodating breastfeeding "would impair legitimate goals of the penal system . . . [and that] such accommodation would also interfere with the maintenance of internal security").

<sup>183</sup> Note that federal prisons and a growing number of states have adopted policies to allow inmates to express milk under various conditions. See, e.g., Maggie Shepard, *MDC Among First to Have Inmate Breastfeeding Policy*, ALBUQUERQUE J. (May 1, 2018)

When it comes to the species-specific components of the right to breastfeed, further research in ethology and animal studies would help devise guidelines as to what accommodations lactating animals of different species require to be able to breastfeed—in particular, how long the breastfeeding relationship lasts for each species and how frequently does nursing happen absent human interventions. The nature of the right might also differ depending on whether it applies to wild animals—for whom human non-intervention would be sufficient in many instances—or to companion and farmed animals, for whom affirmative human support is necessary so long as they are raised and controlled by humans. Several models could be proposed to operationalize the right to breastfeed on the animal side, such as: (1) unconditional systems, in which lactating farmed animals would be de-domesticated or left to extinction to end their exploitation by humans;<sup>184</sup> (2) systems in which humans continue to raise them, but their milk is categorically reserved for their own species; and (3) hybrid models, in which some of their milk would remain available to humans so long as they have a meaningful opportunity to parent and breastfeed their own.<sup>185</sup> Vegan abolitionists, as well as a number of

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<https://www.abqjournal.com/1165424/mdc-among-first-to-have-inmate-breastfeeding-policy.html> [<https://perma.cc/P3B5-VXQ6>] (accessed Feb. 5, 2020) (noting that New Mexico’s Metropolitan Detention Center now has a policy offering inmates access to a breast pump and support in addition to breastfeeding visitation sessions); Beth Shelburne, *Alabama Women’s Prison Opens First-Of-Its Kind Lactation Room*, WAFF (updated Nov. 17, 2018), <https://www.waff.com/2018/11/16/alabama-womens-prison-opens-first-of-its-kind-lactation-room/> [<https://perma.cc/8FBB-7RV2>] (accessed Feb. 5, 2020) (noting that in Alabama incarcerated women can express milk and have it shipped out to their infants but that they are separated from their baby 24 to 48 hours after giving birth).

<sup>184</sup> See Christian Gamborg et al., *De-Domestication: Ethics at the Intersection of Landscape Restoration and Animal Welfare*, 19 ENVTL. VALUES 57, 57 (2010) (“De-domestication would be the deliberate establishment of a population of domesticated animals or plants in the wild.”); see also Neil Levy, *Could Cows Be Headed for Extinction?*, THE WEEK (Feb. 4, 2018), <https://theweek.com/articles/752603/could-cows-headed-extinction> [<https://perma.cc/6FMN-E4WJ>] (accessed Feb. 5, 2020) (debating the ethics of letting cows go extinct because humans have fully transitioned to a plant-based diet).

<sup>185</sup> The existing animal science literature suggests that some versions of this hybrid system are feasible as they have been embraced by the dairy industry and result in positive outcomes for calves in particular. See, e.g., Barbara Valníčková, et al., *The Effect of Age at Separation from the Dam and Presence of Social Companions on Play Behavior and Weight Gain in Dairy Calves*, 98 J. DAIRY SCI. 5545, 5554 (2015) (finding based on an experiment that even brief maternal rearing for a few days improves different aspects of ‘performance’ and welfare of calves—they grew better and were more playful than calves separated at birth); Julie Føske Johnsen et al., *Is Rearing Calves with the Dam a Feasible Option for Dairy Farms?—Current and Future Research*, 181 APPL. ANIMAL BEHAVIOUR SCI. 1, 2–4 (2016) (comparing four farming systems allowing different degrees of cow-calf interactions: (1) free contact systems where cow and calf have unrestricted access to each other; (2) restricted suckling systems allowing short daily contact only to nurse; (3) half day contact systems where cow and calf are housed together during the day or night; and (4) foster cow systems where one cow nurses 2–4 calves without milking); Cornelia Buchli, et al., *Contact with Cows During the Young Age Increases Social Competence and Lowers the Cardiac Stress Reaction in Dairy*



animal welfare activists, would likely welcome the former approaches, criticizing the latter by pointing out that there is no such thing as ethical or humane animal milk consumption by humans. Even when animals' breastfeeding relationship is protected for a few months, the problem remains that they are still treated as things to be inseminated and milked.<sup>186</sup> As a human and given the huge mammalian diversity, I can only speak in substantial detail about the content of the right to breastfeed for humans, on which the remainder of this Section will focus.

For human parents to be in a position to meet the breastfeeding guidelines promoted by international and national organizations (such as the WHO—exclusive breastfeeding for six months and two years or longer—and the American Academy of Pediatrics (AAP)—exclusive breastfeeding for six months with continuation of breastfeeding for one year or longer), the following list of minimal entitlements should be guaranteed by law:

- All parents, including non-gestational parents, should be entitled to six months fully paid leave after the birth or arrival of their baby. After that, they should have the option of requesting paid, flexible breastfeeding leaves so as to continue to breastfeed.
- Prenatal and post-natal obstetric and pediatric care should include lactation counseling and support at no out-of-pocket cost.
- Insurance plans should cover the full cost of high-quality, electric, double breast pumps as well as accessories (storage bags, extra parts, pumping bras) for every year of lactation.<sup>187</sup>
- All breastfeeding people should be free from discrimination in the workplace and in places of public accommodation.
- All breastfeeding workers, including those who produce milk for children not their own (such as surrogates and bereaved parents), should be guaranteed paid lactation breaks whereby they could express milk or breastfeed their baby at work.
- Because not all workplaces can house adequate lactation rooms (e.g., traveling workers, workers who work outdoors, small businesses, etc.) and because not all breastfeeders work,

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*Calves*, 187 APPL. ANIMAL BEHAVIOUR SCI. 1, 7 (2017) (studying farms that allow calves to be nursed by their dam or foster cows and finding that it leads to more adaptive social behavior in calves); Annabelle Beaver et al., *The Dairy Cattle Housing Dilemma*, 35 VET. CLIN. FOOD ANIMAL 11, 18 (2019) (arguing that cow-calf rearing on dairy farms has short- and long-term positive effects for calves while being compatible with dairying).

<sup>186</sup> See, e.g., Linda McKenzie, "Ahimsa Milk": *There Is No Such Thing and Never Could Be*, ECORAZZI (Oct. 4, 2017), <http://www.ecorazzi.com/2017/10/04/ahimsa-milk-there-is-no-such-thing-and-never-could-be/> [https://perma.cc/X96P-M4S9] (accessed Feb. 5, 2020) (arguing that it is not the way animals are treated but that they are used as resources that is the problem).

<sup>187</sup> This means that the newer, invisible, and silent pumps—which can cost up to \$500—and simple, comparably inexpensive breastbombs for hand expression should be covered.

a public or publicly subsidized network of lactation rooms should be available to all breastfeeding people at all times.

- Federal and state laws should protect the right to breastfeed and *express* milk in public. It should be a civil rights violation to interfere with a breastfeeder's right to breastfeed or express milk in public.
- Breastfeeders should be exempted from jury service for the duration of their lactation or allowed to express milk or nurse their children at the courthouse.

### *B. The Appeal of the Right*

#### *1. Why an Interspecies Right?*

Lactating humans and lactating animals (particularly farmed animals) live under very different circumstances. The former tend to enjoy considerably more agency than the latter, even though both are subject to related forms of subordination in human-dominated environments. Despite their differences, joint advocacy may be mutually beneficial, helping to advance the breastfeeding rights of humans as well as animals, be it as a matter of ethics or of efficient legal strategy.

A number of scholars have proposed a link between peoples' views about human rights and their views about animal rights. Some argue that several of the already recognized human rights should be extended to animals. Peter Singer, as mentioned earlier, famously contends that "the mere difference of species cannot in itself determine moral status," and that the reasons we put forward to explain why humans should have rights should inform our perspective about animal rights too.<sup>188</sup> His argument from marginal cases, or "argument from species overlap," attempts to show that if animals who possess intellectual capacities or have special relationships with others, such as chimps, do not have rights, then similarly situated 'marginal' humans, such as infants or severely mentally disabled adults, must also lack rights. The contention is that since we believe that those humans should have rights, we are unjustified in denying rights to similarly situated animals. Applied to breastfeeding, the reasoning goes as follows: if we think that human breastfeeders and their children should have the right to engage in this special relationship, be it for nutritional, health, social, or affective reasons, then the same justifications apply to other mammals.

Beyond the ethical question, political scientists Yon Soo Park and Benjamin Valentino have found, based on a combination of national public opinion surveys and cross-sectional data on animal rights laws from the fifty U.S. states, a strong connection between the recognition of human rights and animal rights both at the individual attitude level

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<sup>188</sup> Singer, *supra* note 23, at 567.

and the U.S. state policy level.<sup>189</sup> They hypothesize that “attitudes and public policies about animal rights and human rights might be linked to individuals’ underlying orientations to the expansiveness of rights—both in terms of what kinds of creatures deserve rights and what kinds of rights those creatures should enjoy.”<sup>190</sup> They find that support for animal rights strongly links to support for disadvantaged or marginalized human populations, including LGBTQ groups, racial minorities, undocumented immigrants, and the poor.<sup>191</sup> Their research suggests that the people who are likely to support stronger human breastfeeding rights and the protection of animal breastfeeding largely overlap. Thus, it may be more effective to advocate for the two causes jointly.

## 2. *The Psychology of Animal Welfare*

There is a growing literature on the importance of the framing of environmental and other issues to secure citizens’ buy in. Psychologist Per Espen Stoknes studies the defenses we use to avoid thinking about global warming, looking for new ways to talk about it without shutting us down.<sup>192</sup> His main conclusion is that we should step away from doomsday scenarios and learn how to make caring for the earth feel personable, achievable, and empowering.<sup>193</sup> At the same time, climate change and animal welfare are hard to address effectively when considered from the premise that people make decisions based on their self-interest. Is there a way of finding motivation based on positive feelings and empathy so as to avoid what Bruce Robbins would define as a paralysis of non-activism, or “a feeling of the inadequacy of the imagination for presenting the ideas of a whole, wherein [the] imagination reaches its maximum, and, in striving to surpass it, sinks back into itself”?<sup>194</sup>

Milk is a substance in which the intersection between gender, species, and parental status is obvious, and can be mobilized discursively to advance both human and animal welfare rather than pit them against one another. The animal-human milk association is celebrated in some cultures. In the ancient Roman religion, Diva Rumina was the goddess of lactating mothers and suckling offspring, human or

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<sup>189</sup> Yon Soo Park & Benjamin Valentino, *Animals Are People Too: Explaining Variation in Respect for Animal Rights*, 41 HUM. RIGHTS Q. 39, 39–40 (2019).

<sup>190</sup> *Id.* at 42.

<sup>191</sup> *Id.*

<sup>192</sup> See generally Jorgen Randers, *Forward* to PER ESPEN STOKNES, WHAT WE THINK ABOUT WHEN WE TRY NOT TO THINK ABOUT GLOBAL WARMING: TOWARD A NEW PSYCHOLOGY OF CLIMATE ACTION, at xv (2015) (discussing how human reactions to climate change reflects upon human thought and life, as well as how knowledge can help in overcoming psychological barriers).

<sup>193</sup> *Id.* at 67.

<sup>194</sup> Bruce Robbins, *The Sweatshop Sublime*, 117 PMLA 84, 85 (2002) (discussing sublimity in the context of sweatshops); Jedediah Purdy, *Our Place in the World: A New Relationship for Environmental Ethics and Law*, 62 DUKE L.J. 857, 898 (2013).

animal.<sup>195</sup> In Hinduism, “milk and cows are sacred and woman’s association with them provides her with a counterbalancing aura of holiness . . . .”<sup>196</sup> Rather than their shared history of exploitation, perhaps it is the beauty of the connection between human and animal lactating parents and children that should be emphasized in breastfeeding advocacy to positively inspire people.

The advantage of this approach is already manifested in the context of pregnancy. Under international law and in multiple domestic legal systems, pregnant animals receive greater legal protections than non-pregnant animals.<sup>197</sup> This differential treatment is not only—or not *always* only—motivated by the human desire to ensure the survival and reproduction of the protected species, but also by special empathy for animals when they experience a biological and social phenomenon analogous to humans.<sup>198</sup>

For example, gestating sows held in crates have received a unique level of attention from state lawmakers in the past few decades. Since the 1960s, in industrial farming, pregnant pigs are typically held in stalls called by a variety of names such as, “the crate, the stall, the box, a pen, a case, individual accommodation, and—in the ultimate statement of political correctness and consumer cuddling—the individual maternity pen.”<sup>199</sup> The purpose of the crate is to lower the cost of production by using the least amount of space per sow all the while “prevent[ing it] from turning around. The crate or stall requires that the sow faces forward, towards a feeder and watering device.”<sup>200</sup> Sows held in crates require less feed due to movement limitation and temperature control. Katie Smithson and her colleagues write that “pictures of these cages disturb the general public. Capitalizing on this

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<sup>195</sup> See CRISTINA MAZZONI, *SHE-WOLF: THE STORY OF A ROMAN ICON* 93–94 (2010) (examining the evolution of the she-wolf as a symbol in western history, art, and literature).

<sup>196</sup> DAVID D. GILMORE, *MISOGYNY: THE MALE MALADY* 212 (2001).

<sup>197</sup> See World Org. for Animal Health [OIE], *Terrestrial Animal Health Code*, art. 7.5.5 (“Under normal circumstances, pregnant animals that would be in the final 10% of their gestation period at the planned time of unloading at the slaughterhouse/abattoir should be neither transported nor slaughtered. If such an event occurs, an animal handler should ensure that females are handled separately, and the specific procedures [used]. In all cases, the welfare of fetuses and dams during slaughter should be safeguarded.”). Note that Article 7.5.4 states, “Lactating dairy animals should be slaughtered as soon as possible. Dairy animals with obvious udder distension should be milked to minimize udder discomfort.” *Id.*; see also Simon More et al., *Animal Welfare Aspects in Respect of the Slaughter or Killing of Pregnant Livestock Animals (Cattle, Pigs, Sheep, Goats, Horses)*, *EFSA J.* 1, 3 (2017) (discussing European countries’ regulations pertaining to the slaughter of pregnant farmed animals).

<sup>198</sup> See generally Ashley Young et al., *Empathy for Animals: A Review of the Existing Literature*, 61 *MUSEUM J.* 327, 328 (2018) (reviewing the existing literature on the mechanisms underlying empathy between human and nonhuman animals).

<sup>199</sup> John J. McGlone, *Sow Stalls—A Brief History*, *PIG PROGRESS* (updated Apr. 23, 2014), <https://www.pigprogress.net/Home/General/2013/12/Sow-stalls—a-brief-history-1388603W/> [<https://perma.cc/4AD5-EP6W>] (accessed Feb. 5, 2020).

<sup>200</sup> *Id.*

public sentiment, animal advocacy organizations have petitioned for ballot initiatives and lobbied for legislation banning restrictive cages.”<sup>201</sup> Some American states,<sup>202</sup> as well as a few countries,<sup>203</sup> have adopted partial or complete bans on the gestation crate. The official reason for the ban is often couched in terms of general animal cruelty, but the practice is not incomparably crueler than other standard farming practices such as veal crates or battery cage systems, which are less likely to be prohibited.<sup>204</sup> What may be different here, in the eyes of the American public, is the fact of pregnancy. Pregnancy, a state shared by nearly all mammals, may generate feelings of compassion and empathy that other aspects of the farmed animal’s experience do not, or at least not to the same degree.

Just a few months ago, in January of 2019, the case of cow Brianna, who was pregnant and escaped a truck on its way to the slaughter house in New Jersey, made national headlines.<sup>205</sup> Her story prompted the New Jersey legislature to draft a bill banning the slaughter of pregnant cows.<sup>206</sup> The bill would make the transporting of pregnant livestock for slaughter, and the killing of pregnant livestock,

<sup>201</sup> Katie Smithson et al., *Predicting State-Wide Votes on Ballot Initiatives to Ban Battery Cages and Gestation Crates*, 46 J. AGRIC. & APPLIED ECON. 107, 107 (2014).

<sup>202</sup> *Farm Animal Confinement Bans by State*, AM. SOC’Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, <https://www.asPCA.org/animal-protection/public-policy/farm-animal-confinement-bans> [<https://perma.cc/DET7-XT6L>] (accessed Feb. 5, 2020) (listing enacted ballot measures, including by Arizona (2006), California (2008 and 2018), Florida (2002); legislation, including by Colorado (2008), Maine (2009), Michigan (2009), Oregon (2007), Rhode Island (2012); and regulation, including by Ohio (2010)); *see also* Prevention of Farm Animal Cruelty Act, H.R. 4733, 111th Cong. (2010) (unenacted) (“Prohibits a federal agency from purchasing any food product derived from a pig during pregnancy, a calf raised for veal, or an egg-laying hen used or intended for use in food production (covered animal) unless that animal, during the entire period covered by that definition, was provided adequate space to stand up, lie down, turn around freely, and fully extend all limbs.”); S. 161, 111th Leg. (N.J. 2018) (unenacted) (“Establishes animal cruelty of-fense of cruel confinement of a gestating pig.”).

<sup>203</sup> Sow crates are banned in the UK and Sweden during the entire pregnancy of sows. The European Union only allows their use for part of sows’ pregnancies. *See* Council Directive 2008/120, 2008 O.J. (L 47) 5, 6, 7 (EC) (“laying down minimum standards for the protection of pigs”); *Notice of Parliamentary Question to the Commission for Written Answer on the Implementation of Directive 2008/120/EC*, 2013 O.J. (C 346) 523 (Jan. 14, 2013). Note that in a number of countries, the abandonment of crates has been championed by the pork industry itself. *See* CANADIAN PORK COUNCIL & THE NAT’L FARM ANIMAL CARE COUNCIL, CODE OF PRACTICE FOR THE CARE AND HANDLING OF PIGS, 10–12, (2014) (outlining best practices in industrial pork farming).

<sup>204</sup> Note that some states now prohibit all three confinement systems (gestation crates, veal crates, and battery cages), including Massachusetts, Michigan, Ohio, Rhode Island.

<sup>205</sup> Jennifer Jean Miller, *Cow’s I-80 Escape from Slaughterhouse Saved Two Lives*, N.J. HERALD (Jan. 1, 2019), <https://www.njherald.com/20190101/brianna-gives-birth-at-wantage-sanctuary#> [<https://perma.cc/P5QE-NJWV>] (accessed Feb. 5, 2020).

<sup>206</sup> Kaitlyn Kanzler, *Cow that Escaped Slaughter Inspires Legislation*, NORTH JERSEY (Jan. 17, 2019), <https://www.northjersey.com/story/news/passaic/paterson/2019/01/17/brianna-cow-route-80-escaped-slaughter-inspires-legislation/2580758002/> [<https://perma.cc/VYN6-LW49>] (accessed Feb. 5, 2020).

a fourth-degree crime under the state's animal cruelty statutes.<sup>207</sup> This occurrence reflects our current cultural movement that places a very high value on the unborn, sometimes even higher than the value placed on the born, including among animals.<sup>208</sup> But it also brings to light a feeling shared by many—that there is something valuable in the fact of reproduction, from pregnancy to breastfeeding.<sup>209</sup> Again, I am not making a repronormative, pro-natalist argument,<sup>210</sup> but merely highlighting that these experiences resonate across species. The flip side is also true, as Sherry Colb has argued, as the human right to abortion could be reconceptualized based on the plight of dairy cows “not only [as] an interest in bodily separation, but an interest in avoiding loss.”<sup>211</sup>

Some critics may object to this differential consideration of animals depending on whether they are pregnant or not, breastfeeding or not, based on a different set of concerns. The proposal harbors the risk of leading to ‘breastfeeding’ or ‘maternity reductionism’ in a way that parallels what Christine Parker and other scholars have dubbed the ‘housing reductionism’ of farmed animal welfare initiatives by governments and industry groups.<sup>212</sup> The issue is that a reductive focus on one aspect of the farmed animals’ lives, such as confinement in the case of laying hens, does not address other aspects of their health or well-being. Similarly, under an interspecies right to breastfeed regime, lactating farmed animals could enjoy the opportunity to breastfeed, but they could still be confined, artificially inseminated, milked, tail docked, and slaughtered. A truly transformative and emancipatory approach is likely to require more holistic legal and social change rather

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<sup>207</sup> This special legal concern for pregnant farmed animals is not unprecedented, such as the Florida Constitution referring to pregnant pigs. See FLA. CONST. art. 10, § 21 (outlawing confinement of pigs during pregnancy).

<sup>208</sup> See, e.g., Ole Bødtker Nielsen & Percy W. Hawkes, *Fetal Bovine Serum and the Slaughter of Pregnant Cows: Animal Welfare and Ethics*, 18 *BIOPROCESSING J.* 1, 4 (2019) (exhibiting a concern for the possibility of fetal pain during slaughter rather than for the pregnant cow).

<sup>209</sup> See Katherine Harmon, *Birth of a Bond: Illustrating a Year of Mother and Baby Development*, *SCI. AM.* (May 8, 2010), <http://www.scientificamerican.com/article/illustration-pregnancy-bond> [<https://perma.cc/YZD3-ZMSG>] (accessed Feb. 5, 2020) (“After birth, certain biochemical compounds are at work in both mother and child to sustain and accentuate the bond between the two. Hormones, such as oxytocin, surge in mothers after labor and during breast-feeding, promoting social and emotional bonding with the infant. And in babies, just being touched spurs the release of the same compound, helping them, in turn, bond with their moms and other care takers.”).

<sup>210</sup> See Franke, *supra* note 20 and accompanying text (considering infant feeding disparities and the first food system).

<sup>211</sup> See Colb, *supra* note 72, at 933 (framing the abortion right as protecting not only an interest in bodily separation but also an interest in preventing the psychological pain of forced separation from an infant if the parent is not able to raise the child).

<sup>212</sup> See, e.g., Gyorgy Scrinis et al., *The Caged Chicken or the Free-Range Egg? The Regulatory and Market Dynamics of Layer-Hen Welfare in the UK, Australia and the USA*, 30 *J. AGRIC. & ENVTL. ETHICS* 783, 785–86 (2017) (critiquing what they call the ‘animal housing reductionism’ in the context of governments and private organizations’ initiatives on improving housing systems for layer hens).

than small, step-by-step protections of certain species of animals in the narrow circumstances of pregnancy, birth, and lactation.

It is true that there may be moral equivalence in the violent exploitation and slaughtering of pregnant and non-pregnant animals, lactating and non-lactating animals, and nursing and weaned animals. It is also true that for a radical change to occur, humans would need to reconsider the role of animals in their diets.<sup>213</sup> But treating pregnancy and lactation in a special way for the purpose of advancing the cause of animal welfare may still be a promising legal strategy. Capitalizing on the sentiment of interspecies solidarity in those contexts could help obtain broader animal welfare protections. Advocacy for an interspecies right to breastfeed might be the type of reformist, incremental approach likely to yield concrete results in the short- and long-term. Activist movements tend to succeed most when they selectively focus on a narrow issue within a wider campaign, as illustrated with expanding bans of sow stalls as one discrete issue pushed by animal welfare organizations.<sup>214</sup> There may also be a parallel between the idea of an interspecies right to breastfeed and Jedediah Purdy's discussion of climate change. Purdy writes:

Reform efforts may make essential cultural contributions even if they seem futile when we ask simply whether they will likely succeed as lawmaking or regulatory strategies. For instance, municipal efforts to address greenhouse-gas emissions and community-level attempts to define a personal ethics of low-carbon living, although palpably ineffective in one way—they will not directly contribute much to reducing global emissions—may nonetheless turn out to be effective in somewhat the way Sierra Club excursions were: as new ways of experiencing climate change as mattering, and in new shared vocabularies for expressing and elaborating its importance.<sup>215</sup>

Likewise, legally protecting the right of animals to breastfeed may be 'palpably ineffective' in that it "will not directly contribute much to reducing" animal breeding, exploitation, slaughter, and other forms of abuse.<sup>216</sup> But the recognition of an interspecies right to breastfeed "may nonetheless turn out to be effective in somewhat the way" wildlife expedition or visits to animal sanctuaries are in raising awareness to the fact that farmed animals have feelings, bonds, and relationships too, which are worth protecting.<sup>217</sup> Just like Purdy argues that by living low-carbon lives at the local level we will "help to lay the founda-

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<sup>213</sup> See Walter Willett et al., *Food in the Anthropocene: The EAT-Lancet Commission on Healthy Diets from Sustainable Food Systems*, 393 LANCET 446, 459 (2019) (identifying the current dominant human diet as a threat to human health and environmental sustainability, and advocating for the consumption of "protein sources primarily from plants," "fat mostly from . . . plant sources," and "moderate dairy consumption as an option").

<sup>214</sup> See, e.g., AN HSUS REPORT: WELFARE ISSUES WITH GESTATION CRATES FOR PREGNANT SOWS, HUMANE SOC'Y OF THE U.S. 7 (2013).

<sup>215</sup> Purdy, *supra* note at 194, at 925.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

tion” for “a legal regime that effectively addresses climate change,” allowing farmed animals to breastfeed may lay the foundation for “a legal regime that effectively addresses” animal welfare, setting out drastic changes to reduce animal suffering and killing.<sup>218</sup>

## V. CONCLUSION

This Article proposes the recognition of an interspecies right to breastfeed, which would allow both human and animal mammals, in particular farmed animals, to breastfeed their young. Even if the animal component of the right proved utopian, unenforceable, or simply unpersuasive, the implementation of a robust right to breastfeed for humans would go a long way to increase the welfare of animals raised for their milk. If humans had the legal, financial, social, and emotional resources to breastfeed their own children, the need for animal milk in human societies would be considerably reduced. Many more families would be in a position to choose to breastfeed and potentially produce extra human milk available for donation for those who cannot or do not want to. Humans only began to consume animal milk on a wide and global scale when it became a substitute for breastfeeding at the turn of the nineteenth century. The successful implementation of a strong (human) right to breastfeed could reverse engineer this process. In the event that all human infants were breastfed or fed donor human milk, the infant formula market would collapse, and the demand for animal milk would plummet. The financial and scientific resources currently allocated to formula could be redirected to ‘human breast milk dairy,’<sup>219</sup> that is, to supporting human milk banks and the provision of donor milk to all babies who need it.

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<sup>218</sup> *Id.*

<sup>219</sup> I borrow the expression from Henry Dwight Chapin, *The Operation of a Breast Milk Dairy*, 81 J. AM. MED. ASS’N 200, 200 (1923).