

BREASTFEEDING IN CUSTODY PROCEEDINGS: A MODERN-DAY MANIFESTATION OF LIBERAL AND CONSERVATIVE FAMILY TRADITIONS

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In the past decade, popular and medical opinions have coalesced around the conclusion that breastfeeding¹ an infant for at least the first year of life,² preferably to the exclusion of infant formula or

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¹ There appears to be no standardized spelling for the act of breastfeeding, at least in legal opinions. Various court decisions use “breast feeding,” “breastfeeding” or “breast-feeding.” Additionally, medical experts do not seem to differentiate between the giving of breast milk to an infant via the breast or via pumping expressed milk. This Comment will use the term “breastfeeding,” in accordance with the spelling chosen by La Leche League International (“LLLFI”), and uses it to refer to both traditional nursing and the feeding of expressed breast milk. See, e.g. LA LECHE LEAGUE INTERNATIONAL, *All About La Leche League*, <http://www.llli.org/ab.html?m=1> (last updated Apr. 26, 2010). This Comment also uses the terms “nursing” and “breastfeeding” largely interchangeably, though “nursing” seems to be more typically used to describe the act of feeding an infant from the breast itself. For a discussion of the potential inappropriateness of using the terms interchangeably in the legal context, see *infra* note 87 and accompanying text.

² See AM. ACAD. OF PEDIATRICS, *Breastfeeding and the Use of Human Milk*, 115 PEDIATRICS 496,499 (2005), available at <http://aappolicy.aappublications.org/cgi/reprint/full/pediatrics;115/2/496.pdf> (“Breastfeeding should be continued for at least the first year of life and beyond for as long as mutually desired by mother and child.”); see also WORLD HEALTH ORG., A55/15, *Promoting Appropriate Feeding for Infants and Young Children*, GLOBAL STRATEGY FOR INFANT AND YOUNG CHILD FEEDING 5 ¶ 10 (April 16, 2002), available at http://apps.who.int/gb/archive/pdf_files/WHA55/ea5515.pdf (“As a global public health recommendation, infants should be exclusively breastfed for the first six months of life to achieve optimal growth, development and health. Thereafter, to meet their evolving nutritional requirements, infants should receive nutritionally adequate and safe complementary foods while breastfeeding continues for up to two years of age or beyond. Exclusive breastfeeding from birth is possible except for a few medical conditions, and unrestricted exclusive

other breast milk substitutes for at least six months,³ is the normal, optimal infant feeding decision.⁴ Breast milk substitutes expose infants to higher risks of immune deficiency,⁵ disease, and illness.⁶ As the optimal food for infants, breast milk is easier to digest,⁷ adapts to

breastfeeding results in ample milk production.”). The WHO claim is based on both health and sustainable development concerns. *Id.*

³ AM. ACAD. OF PEDIATRICS, *supra* note 2, at 498. (“The AAP Section on Breastfeeding, American College of Obstetricians and Gynecologists, American Academy of Family Physicians, Academy of Breastfeeding Medicine, World Health Organization, United Nations Children’s Fund, and many other health organizations recommend exclusive breastfeeding for the first 6 months of life. Exclusive breastfeeding is defined as an infant’s consumption of human milk with no supplementation of any type (no water, no juice, no nonhuman milk, and no foods) except for vitamins, minerals, and medications. Exclusive breastfeeding has been shown to provide improved protection against many diseases and to increase the likelihood of continued breastfeeding for at least the first year of life.”).

⁴ *Id.*; see also WORLD HEALTH ORG., *Breastfeeding* (2010),

<http://www.who.int/topics/breastfeeding/en/> (“Breastfeeding is the normal way of providing young infants with the nutrients they need for healthy growth and development.”); U.S. BREASTFEEDING COMM., *BREASTFEEDING IN THE UNITED STATES: A NATIONAL AGENDA 7* (2001), available at

<http://www.usbreastfeeding.org/LinkClick.aspx?link=Publications/National-Agenda-2001-USBC.pdf> (“All U.S. mothers should have the opportunity to breastfeed their infants and all infants should have the opportunity to be breastfed. By ensuring access to comprehensive, interdisciplinary, culturally appropriate lactation and breastfeeding care and services from preconception through weaning, all women will be empowered to breastfeed their infants exclusively for about 6 months and continue through the first year of life and beyond while introducing appropriate weaning foods.”).

⁵ U.S. DEP’T OF HEALTH & HUMAN SERVS., OFFICE ON WOMEN’S HEALTH, *WHY BREASTFEEDING IS IMPORTANT* (2010), <http://www.womenshealth.gov/breastfeeding/why-breastfeeding-is-important/> (“The cells, hormones, and antibodies in breast milk protect babies from illness. This protection is unique; formula cannot match the chemical makeup of human breast milk.”).

⁶ U.S. DEP’T OF HEALTH & HUMAN SERVS., OFFICE ON WOMEN’S HEALTH, *NATIONAL BREASTFEEDING CAMPAIGN* (2010), <http://www.womenshealth.gov/breastfeeding/government-programs/national-breastfeeding-campaign/> (“[B]abies who are exclusively breastfed for six months are less likely to develop ear infections, diarrhea, respiratory illnesses, and may be less likely to develop childhood obesity.”).

⁷ U.S. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 5 (“For most babies—especially premature babies—breast milk is easier to digest than formula. The proteins in formula are made from cow’s milk and it takes time for babies’ stomachs to adjust to digesting them.”)

changing nutritional needs,⁸ and is especially important for newborns⁹ and premature babies.¹⁰ Additionally, breastfeeding advocates argue that, for nursing mothers, breastfeeding is easier,¹¹ safer,¹² cheaper,¹³ protects against maternal disease,¹⁴ and aids in infant-mother bonding.¹⁵

⁸ *Id.* (“[B]reast milk changes as your baby grows—Colostrum changes into what is called mature milk. By the third to fifth day after birth, this mature breast milk has just the right amount of fat, sugar, water, and protein to help your baby continue to grow. It is a thinner type of milk than colostrum, but it provides all of the nutrients and antibodies your baby needs.”).

⁹ *Id.* (“[C]olostrum . . . is the thick yellow first breast milk [occurring] during pregnancy and just after birth. This milk is very rich in nutrients and antibodies to protect your baby. Although your baby only gets a small amount of colostrum at each feeding, it matches the amount his or her tiny stomach can hold.”)

¹⁰ *Id.*

¹¹ *Id.* (detailing the lack of need to sterilize bottles, or measure and mix infant formula).

¹² See *Risks of Informal Breastmilk Sharing Versus Formula Feeding*, PHD IN PARENTING (Nov. 28, 2010), <http://www.phdinparenting.com/2010/11/28/risks-of-informal-breastmilk-sharing-versus-formula-feeding/> (outlining the risks of poorly mixed formula, usually as a result of poor water supplies, factory contamination, and formula tampering).

¹³ U.S. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 5 (“Formula and feeding supplies can cost well over \$1,500 each year, depending on how much your baby eats. Breastfed babies are also sick less often, which can lower health care costs.”); See also *id.* (“The nation benefits overall when mothers breastfeed. Recent research shows that if 90 percent of families breastfed exclusively for 6 months, nearly 1,000 deaths among infants could be prevented. The United States would also save \$13 billion per year — medical care costs are lower for fully breastfed infants than never-breastfed infants. Breastfed infants typically need fewer sick care visits, prescriptions, and hospitalizations.”).

¹⁴ CTRS FOR DISEASE CONTROL & PREVENTION, *Does Breastfeeding Reduce the Risk of Pediatric Overweight?* DIV. OF NUTRITION & PHYSICAL ACTIVITY: RESEARCH TO PRACTICE SERIES No. 4,1 (2007)

http://www.cdc.gov/nccdphp/dnpa/nutrition/pdf/breastfeeding_r2p.pdf (“For mothers, benefits of breastfeeding include decreased risk of breast and ovarian cancer, and type 2 diabetes.”); LA LECHE LEAGUE INT’L, *Good for Moms Too*, NEW BEGINNINGS 46, 46 (Nov. 11, 2009) available at <http://www.llli.org/NB/NBMarApr09p46.html> (“Scientists . . . found that women who breastfeed for more than a year are 10% less likely to develop heart conditions than those who do not. Breastfeeding was also found to reduce the risk of high blood pressure by 12% and diabetes and high cholesterol by around 20%.”).

¹⁵ Betsy Liotus, *More than Milk*, NEW BEGINNINGS 36, 36–39 (1996), available at <http://www.llli.org/NB/NBMarApr96p36.html> (“Experts estimate that nearly 90% of the communication that takes place between people is nonverbal. Breastfeeding is an excellent example. The act of breastfeeding ‘speaks’ volumes to a baby in a language he or she most readily understands. The sensory stimulation that’s part of the close, skin-to-skin contact that

Despite these conclusions, American breastfeeding rates remain dismal; while hospitals report that upwards of 70% of women express the intention to breastfeed and attempt to do so in the hospital setting, the rate of exclusive breastfeeding for 6-month-old infants hovers around 18%.¹⁶ Many scholars and experts have investigated the contradictory stances that American doctors and policy-makers seem to take in regards to nursing: explicit—sometimes forceful¹⁷—advocacy in favor of breastfeeding on the one hand, contrasted with meager support for continuation in the face of medical, employment or other obstacles on the other.¹⁸

breastfeeding requires translates into a feeling of acceptance that is a baby's first lesson in self-esteem.”).

¹⁶ AM. ACAD. OF PEDIATRICS, *supra* note 2, at 498 (detailing dismal retention rates for exclusive breastfeeding, despite promotional campaigns).

¹⁷ There is much concern over perceived “pushiness” on the part of breastfeeding advocates. *See, e.g.*, Hanna Rosin, *The Case Against Breastfeeding*, THE ATLANTIC, Apr. 2009, at 64,66 available at <http://www.theatlantic.com/magazine/archive/2009/04/the-case-against-breastfeeding/7311/> (disputing scientific claims about the benefits of breastfeeding and referring to advocates as “breast-feeding fascist[s]” who rely on guilt to pressure time-pressed women into thinking breastfeeding is the only legitimate option in the face of actual and perceived difficulties); *cf. The Case Against Breastfeeding: The Voices*, PHD IN PARENTING (Mar. 18, 2009), <http://www.phdinparenting.com/2009/03/18/the-case-against-breastfeeding-the-voices/> (highlighting a series of responses to the article, disputing both the scientific claims and accusations of “pushy lactivists,” and also discussing hurdles to breastfeeding and inadequate support).

¹⁸ *See, e.g.*, Elita Kalma, *Should Black Women Feel Guilty for Not Breastfeeding?*, BLACKTATING (Dec. 17, 2010, 11:54 AM), <http://www.blacktating.com/2010/12/should-black-women-feel-guilty-for-not.html> (describing obstacles faced by black women as a result of poverty and working conditions that may inhibit breastfeeding); Jake Aryeh Marcus, *Pumping 9 to 5*, MOTHERING (2008), available at <http://www.mothering.com/breastfeeding/pumping-9-to-5> (“No federal law establishes or protects a right to pump breastmilk in the workplace. Although 15 states have statutes concerning the practice . . . , these laws vary widely in what they require employers to do to accommodate employees who express breastmilk, and some don't require employers to do anything at all.”); *Common Breastfeeding Concerns*, KELLYMOM: BREASTFEEDING &

Breastfeeding in custody disputes—whether between divorcing or separating parents or between a state seeking to revoke a biological parent's custody¹⁹—tracks this ambivalence. Since the decline of the tender years doctrine,²⁰ judges espouse the importance of breastfeeding and defer to parental autonomy on one hand while imposing deadlines and invoking personal preferences on the appropriate duration of breastfeeding on the other.²¹ This occurs partially because breastfeeding in custody determinations represents a particular moment at which different infant feeding interests may conflict, allowing historical assumptions about appropriate parenting roles to in-

PARENTING, <http://www.kellymom.com/bf/concerns/index.html> (last visited Nov. 15, 2011) (outlining a variety of medical and other issues that women and babies may encounter during breastfeeding).

¹⁹ It is at least theoretically possible for non-biological parents, both mothers and fathers, to breastfeed. See Jan Barger, *Can Men Breastfeed?*, BABYCENTER, http://www.babycenter.com/404_can-men-breastfeed_8824.bc (last visited Nov. 15, 2011); *Can I Breastfeed My Adopted Baby?*, LA LECHE LEAGUE INT'L, (last modified Jul. 20, 2011, 5:44 PM) <http://www.llli.org/FAQ/adopt.html>. However, I have not come across a case or discussion that explicitly references a breastfeeding relationship established in this manner, except for instances involving lesbian parents who have infants simultaneously and nurse infants birthed by both mothers. See, e.g., Paula Roach, *Parent-Child Relationship Trumps Biology: California's Definition of Parent in the Context of Same-Sex Relationships*, 43 CAL. W. L. REV. 235, 256 (2006) (discussing same-sex relationships involving breastfeeding non-biological children). Thus, when discussing a person engaged in a breastfeeding relationship, this Comment assumes that the typical situation involves a breastfeeding mother nursing a biological child unless stated otherwise.

²⁰ Alexandra Selfridge, *Equal Protections and Gender Preference in Divorce Contests over Custody*, 16 J. CONTEMP. LEGAL ISSUES 165, 166–67 (2007); see also John G. Taussig Jr. & John T. Carpenter IV, *Joint Custody*, 56 N.D.L. REV. 223, 225–27 (1980).

²¹ See Elizabeth N. Baldwin, *Extended Breastfeeding and the Law*, 20 BREASTFEEDING ABSTRACTS 19, 19–20 (2001) <http://www.lalecheleague.org/ba/feb01.html>; Elizabeth N. Baldwin, *Breastfeeding and Divorce*, LA LECHE LEAGUE INT'L (Aug. 2, 2006, 11:38 pm), <http://www.lalecheleague.org/law/lawdivorce.html>; Melissa R. Vance, *Breastfeeding Legislation in the United States: A General Overview and Implications for Helping Mothers*, 41 LEAVEN 51, 51–54 (2005), <http://www.llli.org/llleaderweb/lv/lvjunjul05p51.html>.

fuse hard choices. When two parents with theoretically equal claims to parent are in conflict, the time investment involved in breastfeeding, especially exclusively, may undermine the presumption of joint custody.²² The idea that breastfeeding is best collides with assumptions about appropriate behavior while nursing.²³ The primacy of parental autonomy in feeding decisions clashes with state intervention into the lives of “failed” families, and allows judicial discretion about the “best interest of the child” when both parents have an equal claim.²⁴

This Comment contends that cultural and legal representations of breastfeeding in custody determinations highlight contradictory notions of motherhood and family that mirror liberal and conservative family traditions thought to be long dead. Judicial determinations involving a breastfeeding relationship often reinforce narratives of marriage, parenthood, and their respective roles for women in a way that comports with the gender-specific “tender

²² See Ramsay Laing Klaff, *The Tender Years Doctrine: A Defense*, 70 CALIF. L. REV. 335, 360–64 (1982).

²³ See *infra* Part III.

²⁴ Cf. MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 248 (1985) (“Courts applied judicially created standards of child welfare and parental fitness in order to take the ultimate decision of child placement out of the hands of both parents.”); Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299, 300 (2002) (describing a second legal tradition marked by massive legal intervention into the parental relation despite an extreme deference to parental prerogatives and a reluctance to intervene).

years” doctrine²⁵ and the notion of parental autonomy as a way of privatizing dependency. In the case of custody disputes involving two parents, breastfeeding may act a tiebreaker in favor of complete maternal custody; it may also be disregarded as evidence of inappropriate maternal behavior. Both of these determinations can be read as consistent with the tender years doctrine rather than its repudiation.²⁶ In cases where the state seeks to revoke custody based in part on maternal behavior while breastfeeding, such as alcohol or drug use, or failure to supplement with infant formula, such custody determinations mirror efforts to privatize dependency and then punish women who fail to meet the imposed standards.²⁷

Common law coverture and the tender years doctrine have both been widely discredited as violating the Equal Protection Clause of the Fourteenth Amendment and advancing archaic notions of the proper role of women in family and public life.²⁸ This Comment shows that the treatment of breastfeeding in custody disputes demonstrates that such pronouncements may be premature. Furthermore, it

²⁵ Cf. GROSSBERG, *supra* note 24, at 248 (“The ‘tender years’ rule is an apt. illustration of the growing body of rules devised by the courts to enhance their new powers. It decreed that infants . . . should be placed in a mother’s care unless she was proven unworthy of the responsibility.”).

²⁶ See *infra* Part II.

²⁷ See *infra* Part III.

²⁸ See *infra* Part I.

explores the contradictory ways in which the history of family law in the conservative and liberal traditions continues to influence the outcome of cases. Scientific proof of the benefits of breastfeeding may be largely indisputable, especially in situations where the mother wishes to do so.²⁹ This Comment argues that courts should follow a doctrine that is based on the presumption of the benefits of breastfeeding when desired by the mother, and seeks to accommodate such desires without resort to stereotyping and judgment. Part I surveys common law coverture, conservative and liberal family traditions, the tender years doctrine, parental autonomy and the privatization of dependency, and the relation to modern custody disputes involving breastfeeding. Part II examines the effect of the tender years doctrine on custody disputes involving breastfeeding when parents have valid claims to custody under a “best interest of the child” standard and argues that seemingly contradictory determinations in fact both reinforce appropriate gender roles for women-as-mothers under the tender years doctrine. Part III investigates the relationship between

²⁹ No arguments have been made in favor of compelled breastfeeding, which is beyond the scope of this Comment. In addition, it is clear that the choice to breastfeed resides with the mother, insofar as no court would enforce a contractual agreement between spouses wherein the husband agreed to pay the mother to breastfeed for a specified duration. See Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204, 231 (1983) (“[C]ourts have refused to enforce such agreements between spouses as: payment by one spouse to another for domestic, child care, or other services in the home.”).

parental autonomy, the privatization of dependency, and judicially determined inappropriate maternal breastfeeding relationships, and argues the juxtaposition between normally deferential court standards of parental autonomy and intervention into the lives of women more subject to state intervention highlights the contradictory nature of family law. Part IV proposes that courts acknowledge breastfeeding as the normal and optimal feeding decision for infants and support that choice without relying on common law coverture, state intervention, or tender years justifications. The Comment concludes that it may not be possible to sever historical justifications for custody disputes involving the family and the role of women, but attempting to do so would be preferable than continuing down the path set by current legal standards.

I. COMMON LAW COVERTURE, CONSERVATIVE AND LIBERAL FAMILY TRADITIONS, THE TENDER YEARS DOCTRINE, PARENTAL AUTONOMY AND THE PRIVATIZATION OF DEPENDENCY, AND MODERN CUSTODY DISPUTES

Modern family law arises out of a conservative and liberal family tradition premised upon hierarchical family relationships between husbands, wives, and children.³⁰ This Part outlines three dif-

³⁰ See MARY BETH NORTON, *FOUNDING MOTHERS AND FATHERS: GENDERED POWER AND THE FORMING OF AMERICAN SOCIETY* 57 (1996).

ferent aspects of historical family law: the conservative tradition of hierarchical family as manifested in common law coverture and the liberal tradition's modification of separate spheres, the assumption of parental autonomy as a mechanism for privatizing dependency, and the tender years doctrine as modification of both.

A. Common Law Coverture and Conservative and Liberal Family Traditions

The conservative family tradition considers the nuclear family as a microcosm of the state, with its hierarchy positioning the Husband at the top.³¹ As Locke noted, “the Husband and Wife, though they have but one common Concern, yet having different understanding, will unavoidably sometimes have different wills too; it therefore being necessary, that the last Determination, *i.e.* the Rule, should be placed somewhere, it naturally falls to the Man's share, as the abler and the stronger.”³² In the conservative tradition, women belong in the private sphere of the home while men belong in the public sphere

³¹ See *id.* at 58–59 (“Whether they focused primarily on politics or chiefly on the family, early modern Anglo-American theorists concurred on three key points: hierarchy was necessary to the operations of the household; the proper director of the family's activities was its husband/father/master; and the subordination of wife to husband was the foundation of the family unit and thus of society itself.”).

³² JOHN LOCKE, *Essay Concerning the Original, Extent, and End of Civil Government*, in TWO TREATISES OF GOVERNMENT 226 (1698).

of everywhere else.³³ This is coextensive with the common law doctrine of coverture.³⁴ According to Blackstone: “By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs every thing.”³⁵

The rise of the Liberal tradition continued the hierarchical division of labor, albeit in a somewhat modified fashion:

The liberal tradition, despite its supposed foundation of individual rights and human equality, is more Aristotelian in this respect than is generally acknowledged. In one way or another, almost all liberal theorists have assumed that the ‘individual’ who is the basic subject of the theories is the male head of a patriarchal household.³⁶

Additionally, the liberal tradition reinforces the public/private divide discussed above via invocation of the “cult of domesticity” present in Nineteenth century America, which associated women with the do-

³³ MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 240 (1983) (“The real domination of women has less to do with their familial place than with their exclusion from all other places. They have been denied the freedom of the city, cut off from distributive processes and social goods outside the sphere of kinship and love.”).

³⁴ See *infra* notes 35 and 37, and accompanying text.

³⁵ 1 WILLIAM BLACKSTONE, COMMENTARIES *421, 422; See also Marylynn Salmon, *Equality or Submersion?: Feme Covert Status in Early Pennsylvania*, in WOMEN OF AMERICA: A HISTORY 92, 94 (Carol Berkin & Mary Beth Norton eds., 1979).

³⁶ SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 14 (1989).

mestic both because of their proper place and because of a natural inclination towards nurturing.³⁷

B. Parental Autonomy and the Privatization of Dependency

If liberal and conservative traditions define a proper family as one predicated on hierarchy, one reason for such hierarchy is the state's preference for the privatization of dependency.³⁸ Children be-

³⁷ See GROSSBERG, *supra* note 24, at 209 (discussing the ways in which the “cult of domesticity in nineteenth century America “thoroughly and single-mindedly linked women with domesticity” and “confused womanhood with motherhood”).

³⁸ For an explanation of this term, see Brenda Crossman, *Contesting Conservatism, Family Feuds and the Privatization of Dependency*, 13 AM. U. J. GENDER SOC. POL'Y & L. 415, 416 n. 1 (2005) (“This process of restructuring and retracting the Keynesian welfare state has been extensively documented, although variously labeled within the literature. Compare PAUL PIERSON, *DISMANTLING THE WELFARE STATE?: REAGAN, THATCHER, AND THE POLITICS OF RETRENCHMENT* 17 (1994) (describing restructuring as the politics of retrenchment, which the author defines as “policy changes that either cut social expenditure, restructure welfare state programs to conform more closely to the residual welfare state model, or alter the political environment in ways that enhance the probability of such outcomes in the future”) with NEIL GILBERT, *TRANSFORMATION OF THE WELFARE STATE: THE SILENT SURRENDER OF PUBLIC RESPONSIBILITY* 45 (2002) (describing a similar restructuring process as a shift from a largely social democratic state to a more market oriented body, which the author calls “the enabling state”). He describes the enabling state as involving an increased emphasis on the private delivery of public goods and “less emphasis on providing income support to people out of work than does the welfare state and more weight on fostering social inclusion, mainly through active participation in the labor force.” *Id.* Others have described this process of restructuring as privatization. See, e.g., STEVEN RATHGEB SMITH AND MICHAEL LIPSKY, *NONPROFITS FOR HIRE: THE WELFARE SYSTEM IN THE AGE OF CONTRACTING* 188 (1993) (describing privatization as “a broad policy impulse which seeks to change the balance between public and private responsibility in public policy”); PRIVATIZATION, LAW, AND THE CHALLENGE TO FEMINISM 4 (Brenda Cossman & Judy Fudge eds., 2002) (describing privatization as capturing “the process of transition from welfare state to neo-liberal state as the material base

long (as property) to the father, who has the right and obligation to raise and train them for future citizenship, at least (originally) with respect to legitimate children.³⁹ Under this vision, “the interests of children were [presumed] best protected by making the father the natural guardian and by using a property-based standard of parental fitness.”⁴⁰

Parental autonomy is the rule, and a parent (read: father) has the duty and obligation to raise children with almost no intervention from outside state forces:

In Blackstone’s apt phrase, children lived in “the empire of the father” until they reached twenty-one. A father enjoyed virtually unlimited control over the custody of his minor legitimate children and was also free to determine who would serve as his children’s guardian in the case of his death, unconstrained by any obligation to select the children’s mother, for instance, or another relative. Blackstone’s description of the right of correction, operating on similar principles, noted that a father had to act “in a reasonable manner,” but left the exact location of this limit unclear. Blackstone endorsed correction for the purpose of securing obedience; the only behavior he actually declared unreasonable was intentionally killing a child for insubordination.⁴¹

This rule, however, is accompanied by a converse willingness to intervene in the lives of “failed” families, “often evincing a radical suspicion of parental autonomy and an eager willingness to reshape fam-

upon which the Keynesian compromise rested has been undermined and its mode of governance transformed”).”)

³⁹ GROSSBERG, *supra* note 24, at 235.

⁴⁰ *Id.*

⁴¹ Hasday, *supra* note 24, at 90 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *434, 440–41 (1698)).

ily relations.”⁴² One primary manifestation of the state inclination to “routinely scrutinize the familial relations of [welfare] recipients, doubt parental judgment, and undercut familial autonomy” when a family requires assistance from the state or is otherwise considered failed.⁴³ However, this interference also extends to the creation of “suitable home rules” that may influence the government’s ability to rescind custody from poor mothers in situations where interference would not occur but for dependence on public resources.⁴⁴

C. The Emergence and Decline of the Tender Years Doctrine

As a result of the rise of the liberal idea of separate spheres, a preference for maternal care in children emerged, first for illegitimate children but then as part of a larger move towards a “nurture-based definition of child welfare.”⁴⁵ This rise modified the assumption of patriarchal control of children as described previously, at least for infants and young children.⁴⁶ Playing off of English common law’s “ambiguous status” surrounding the custody of illegitimate children, state courts in Massachusetts and then New York began awarding

⁴² Hasday, *supra* note 24, at 300.

⁴³ *Id.* at 300–301.

⁴⁴ *Id.* at 362–63.

⁴⁵ GROSSBERG, *supra* note 24, at 234.

⁴⁶ *Id.* at 238.

custody of such children to mothers, justified both on lineage and welfare grounds.⁴⁷ The New York court's determination "cemented an identification of maternal legal rights with child welfare and judicial discretion that remained intact for much of the rest of the century" and was largely adopted by state courts throughout the United States.⁴⁸

What started as a custody award in cases of illegitimate children,⁴⁹ however, portended a larger shift in the role of parenting, children, and appropriate roles. The tender years doctrine, then, arose out of "Victorian gender commitments" and dictated that "infants, children below puberty, and youngsters afflicted with serious ailments should be placed in a mother's care unless she was proven unworthy of the responsibility."⁵⁰ Under such a rule, women had a presumptive right "to the custody of children in need of maternal nurture."⁵¹ This rule was a "double-edged sword for women," however, since children in need of a "masculine" home environment, such as older boys, could and were placed with their fathers instead.⁵² This presumptive

⁴⁷ *Id.* at 207–08.

⁴⁸ GROSSBERG, *supra* note 24, at 208–209.

⁴⁹ *Id.* at 207–09.

⁵⁰ *Id.* at 248.

⁵¹ *Id.* at 249.

⁵² *Id.*

rule largely controlled family law custody disputes for more than a century.⁵³ The doctrine also contains two relevant assumptions: first, the presumption of fitness on the part of the mother, largely assumed in a legal framework of strong parental rights (which would be most relevant in a situation where a parent is in conflict with the state over custody); and second, the presumption of fitness on the part of the mother in relation to the father, assumed under the doctrine of tender years and Victorian notions of appropriate gender divisions (which would be relevant in a situation where two parents are in conflict with each other over custody and each otherwise has a strong presumption of custody against the state).⁵⁴

Under modern family law doctrine, the tender years doctrine is largely considered to be abolished, “denounced as antiquated, wrongheaded, and dysfunctional in our enlightened new age of gender equality.”⁵⁵ Courts and legislatures across the United States “have eliminated gender-preference provisions from their divorce-custody

⁵³ Klaff, *supra* note 22, at 335.

⁵⁴ *Id.*; see GROSSBERG, *supra* note 24, at 249; see Michael Grossberg, *Who Gets the Child? Custody, Guardianship, and the Rise of a Judicial Patriarchy in Nineteenth-Century America*, 9 FEMINIST STUDIES 235, 235 (1983).

⁵⁵ Selfridge, *supra* note 20, at 167 (describing contemporary attitudes); *Reed v. Reed*, 404 U.S. 71, 76–77 (1971) (deciding custody on the basis of sex is a violation of the Fourteenth Amendment’s Equal Protection Clause); *cf. Orr v. Orr*, 440 U.S. 268, 283 (1979) (denouncing the gender bias of unconstitutional alimony statutes as perpetuating gender stereotypes).

statutes.”⁵⁶ The tender years doctrine has been replaced in all jurisdictions by a “best interest of the child” standard that places children in the place most likely to facilitate their welfare, untethered from the traditional assumption that such a place is necessarily with a child’s mother.⁵⁷ However, commentators have noted that, despite statutory prohibitions and frequent claims to implement gender-neutral standards,⁵⁸ “the application of the ‘best interests’ standard is very likely to be biased in the mother’s favor. Thus, the general ‘best interests’ standard in operation may not truly be gender neutral.”⁵⁹ The next Part will discuss the way that traces of the tender years doctrine and its ties to liberal and conservative notions of appropriately gendered parenting influence outcomes in custody disputes involving a breastfeeding mother.

⁵⁶ Selfridge, *supra* note 20, at 169, 169 n. 15.

⁵⁷ *Id.* at 169–70; *see* UNIF. MARRIAGE & DIVORCE ACT § 402 (amended 1971 and 1973), 9A U.L.S. 282 (1998).

⁵⁸ *See* UNIF. MARRIAGE & DIVORCE ACT § 402 (amended 1971 and 1973), 9A U.L.S. 282 (1998); *see, e.g.* Mich. Comp. Laws. Serv. §722.23 (LexisNexis 2011) (espousing in the spirit of the UMDA, a 12-factor list to be “considered, evaluated, and determined by the court” in making custody decisions).

⁵⁹ Selfridge, *supra* note 20, at 171–72.

II. BREASTFEEDING AS CONFLICT IN CUSTODY DISPUTES BETWEEN EQUALLY SITUATED PARENTS: “THE BEST INTEREST OF THE CHILD” AS TENDER YEARS IN DISGUISE

Breastfeeding is one factor that may play into the “best interest of the child” at stake in a custody dispute, and one that has arisen only recently.⁶⁰ The rise of such a factor in custody disputes is largely attributable to two phenomena.⁶¹ First, previous regimes of divorce laws and the tender years doctrine rendered breastfeeding irrelevant.⁶² In relation to divorce laws, “[p]rior to the advent of no-fault divorce in the 1970s, breastfeeding was not a relevant consideration in most child custody disputes,” which instead analyzed fault.⁶³ The tender years doctrine’s presumption of female custody also made investigation into the breastfeeding relationship unnecessary.⁶⁴ Second, breastfeeding simply was not popular: “[w]arned of the dire consequences of contaminants in breast milk if they did not wean right away, an entire generation of mothers stopped breastfeeding

⁶⁰ Mark Momjian, *Winning the Weaning War: Breastfeeding as a Factor in Child Custody Litigation*, 8 AM. J. FAM. LAW 135, 135–36 (1994).

⁶¹ See *id.* at 135; Kristen D. Hofheimer, *Breastfeeding as a Factor in Child Custody and Visitation Decisions*, 5 VA. J. SOC. POL’Y & L. 433, 433 (1998).

⁶² Momjian, *supra* note 60, at 135.

⁶³ *Id.*; Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1470–71 (1992) (explaining American jurisprudence prior to the 1970s that required the spouse filing for divorce to show his or her partner was guilty of marital fault).

⁶⁴ Kristen D. Hofheimer, *supra* note 61, at 433 (“Over the past decade, breastfeeding has surfaced as an increasingly common issue in child custody and visitation litigation. This development is partially due to the abolition of the tender years doctrine, under which judges always awarded custody of a breastfeeding child to the mother unless she were shown to be unfit.”).

their children during the baby boom era.”⁶⁵ In the 1990s, however, campaigns to increase breastfeeding rates and increased scientific understanding of breast milk as optimal human infant nutrition meant that “trial courts [were] increasingly being asked to determine whether an infant’s breastfeeding schedule affect[ed] custody or visitation rights.”⁶⁶ Thus, breastfeeding is an instance where a previously irrelevant factor entered judicial decision-making after the supposed end to the tender years doctrine and after the rise of sex-neutral parenting determinations.⁶⁷ As such, it represents a mechanism through which to analyze the prevalence of such argumentation.

This Part proceeds by first discussing the way that courts have dealt with breastfeeding in the context of custody disputes centered on joint custody and shared parenting. It argues that judicial decision-making in this arena reinforces assumptions of the tender years doctrine in two separate ways. First, it reinforces the notion that women are the appropriate caregivers for infants and children who are nursing and ties that appropriate caregiving relationship to biology and maternal instinct. Second, it notes that even cases that deny

⁶⁵ Momjian, *supra* note 60, at 135.

⁶⁶ *Id.* at 135–36.

⁶⁷ *Id.* at 138.

deference to a nursing mother do so based on justifications of proper maternal conduct consistent with the tender years tradition.

A. Custody Decisions Granting Sole Breastfeeding Determinations to the Mother

Many recent cases use breastfeeding as justification to grant sole custody to a mother nursing an infant.⁶⁸ The most famous early case in this genre is *Norton v. Norton*, in which the Colorado Court of Appeals upheld a grant of custody to the mother on the grounds that the mother was breastfeeding her child.⁶⁹ The court noted that the custody order could be modified as the child grew older, and deemed the father's sex discrimination claim frivolous for even suggesting that granting custody based on breastfeeding was a sex-linked decision.⁷⁰ Cases that grant custody largely follow this pattern: judges grant exclusive or near-exclusive custody to the mother, and then qualify the grant with a time period after which the decision may be

⁶⁸ *Ford v. Ford*, 700 P.2d 65, 66 (Idaho 1982) (originally holding that custody of the child should go to the breastfeeding mother as the continuation of breastfeeding would be in the child's best interest); *In re the Marriage of Love*, 511 N.W.2d 648, 648–49 (Iowa Ct. App. 1993) (finding, at the district court level, that father should receive custody, but that transfer of custody of his breastfeeding daughter would be postponed until she was weaned); *Friendshuh v. Headlough*, 504 N.W.2d 104, 106 (S.D. 1993) (awarding custody to the mother until age two, after expressing concern about the mother's interest in breastfeeding indefinitely); see Momjian, *supra* note 60, at 136–38 (discussing the implications of these cases in the breastfeeding context).

⁶⁹ *In re the Marriage of Norton*, 640 P.2d 254, 254–55 (Colo. App. 1982).

⁷⁰ *Id.*; see Momjian, *supra* note 60, at 136 (describing popular backlash to the opinion on the national level).

reconsidered.⁷¹ These recent cases seem to consider a breastfeeding relationship as relevant to the awarding or rescinding of custody or visitation schedules in two ways: one, as evidence of an ongoing attachment or relationship investment that one parent has put into maintaining contact with an infant,⁷² and two, as a parental (read: maternal) decision that deserves deference, at least until a certain age.⁷³

Thus, one plausible reading of these cases is as a limited revitalization of the tender years doctrine for breastfeeding mothers.⁷⁴ Instead of the historical version of tender years, which limited the doctrine's application generally to those "children in need of maternal nurture,"⁷⁵ courts may define maternal nurture specifically as breastfeeding itself and the doctrine becomes limited by the end of that relationship, i.e., weaning.⁷⁶ Thus, breastfeeding redefines what

⁷¹ See, e.g., *Bell v. Bell*, 2008 WL 2152277, at *1, *4 (Ky. Ct. App. May 23, 2008).

⁷² See, e.g., *Buccini v. Sonara*, 989 So.2d 1288, 1289–91 (Fla. Dist. Ct. App. 2008) (holding that despite father's concern that mother will breastfeed indefinitely to deny father unsupervised visits, father will not have unsupervised custody until the doctor determines the child can safely take a bottle).

⁷³ See, e.g., *Widdel v. Kannegieter*, 779 N.W.2d 79, 2009 WL 5124774, at *4 (Iowa Ct. App. Dec. 30, 2009).

⁷⁴ It is possible that the doctrine was dead but has now been revitalized. See Hofheimer, *supra* note 61, at 459 (detailing cases from the early 1990s that allow lengthy visitation despite the presence of a breastfeeding relationship in young infants). These cases may limit the revitalized doctrine of tender years not only in length (as discussed) but also in scope, but do not undermine the central thesis of this Comment.

⁷⁵ See GROSSBERG, *supra* note 24, at 249.

⁷⁶ See, e.g., *Widdel v. Kannegieter*, 2009 WL 5125774, at *4 (determining that two

constitutes a tender year as including those behaviors which can only be performed by mothers, but does not challenge that the breastfeeding relationship itself is controlled by mothers and is an area in which the court should defer to the mother's judgment.⁷⁷

It is not surprising, then, that a large portion of the dispute in the case law concerns the proper age at which a court should no longer defer to a breastfeeding mother as the proper arbiter of the appropriate age for weaning.⁷⁸ In *S.G. v. A.G.*, the Family Court of Delaware juxtaposed these different interests in relation to a sibling set of

and half month old who was no longer breastfed justified termination of deference to mother's determination of appropriate time length of visitation); *Bowen v. Thomas*, 656 N.E.2d 1328, 1330 (Ohio Ct. App. 1995) (overturning a trial court order for the mother to stop breastfeeding twins in order to facilitate workforce reentry and eliminate need for spousal support and instead condition the end of such support on weaning); *Ford v. Ford*, 700 P.2d 65, 67 (Idaho 1985) ("In its initial custody award, the magistrate specifically underscored its temporary nature by providing that the mother have custody 'for the present' because the child was breast-feeding. The clear implication was that when the breast-feeding period terminated, the award would be subject to modification."). *But see* *H.O. v. G.T.*, No. CN08-04254, 2010 WL 1199810, at *6 (Del. Fam. Ct. Jan. 13, 2010) ("[T]he Court does not find persuasive Mother's argument that she is still breast-feeding . . . Mother works twelve-hour shifts on the weekends. No testimony was presented to this Court by a nutritional expert or physician to indicate that L needs to be breast-fed. Moreover, Mother has the ability to express her milk if she deems that nutritionally important for L.").

⁷⁷ Since all custody disputes that involve breastfeeding (at least the ones surveyed) involve a father who would like more visitation, or a mother who was denied exclusive custody despite breastfeeding, the decision to award custody to the mother by definition defers to her judgment. At least some courts, however, do so in passing, seemingly assuming without question that this is the proper way to assign parenting duties. *See, e.g.*, *Bell v. Bell*, No. 2007-CA-001368-MR, 2008 WL 2152277, at *4 (Ky. Ct. App. 2008).

⁷⁸ *See, e.g.*, *Widdel v. Kanegieter*, 779 N.W.2d 79, 2009 WL 5125774, at *4 (Iowa App. 2009); *Ford v. Ford*, 700 P.2d 65, 67 (Idaho 1985).

two children, aged three and seven months.⁷⁹ B, the infant, was both nursing and had a medical condition affecting digestion, so the court held that “the need to breastfeed weighs heavily in favor of Mother retaining custody,” but noted doctor testimony that the medical condition would subside at twelve to fifteen months of age cautioning a different result at such time.⁸⁰ However, the three-year-old, A, “[was] healthy,” and not nursing.⁸¹ Thus, the court granted visitation for A immediately, and B the “first weekend after he turns one year old.”⁸² The general court consensus is that a court may decide not to take breastfeeding into account at one year,⁸³ conforming with the American Association of Pediatrics recommendation,⁸⁴ though no court has specifically cited to such a requirement or authority. Other courts have set different standards, such as two years,⁸⁵ or three

⁷⁹ S.G. v. A.G., 2008 WL 5588866, at *1–2 (Del. Fam. Ct. Oct. 28, 2008).

⁸⁰ *Id.* at *3.

⁸¹ *Id.* at *1. *3.

⁸² *Id.* at *5.

⁸³ *See, e.g.*, Beebe v. Elmenhorst, 2010 WL 3488832, *2 (Kan. Ct. App. Aug. 27, 2010) (affirming district court decision to allow overnight visitation after one year in relation to Kansas statute requiring support for nursing mothers, given ability to pump breastmilk and “tapering off” of nursing); *In re Love*, 511 N.W.2d 648, 648–49 (Iowa Ct. App. 1993) (ordering reconsideration of custody at 11 months).

⁸⁴ *See* AM. ACAD. OF PEDIATRICS, *supra* note 2 and accompanying text; WORLD HEALTH ORG., *supra* note 2 and accompanying text.

⁸⁵ Policard v. Policard, No. FA084010559, 2010 WL 797173, at *1 (Conn. Super. Feb. 5, 2010).

years.⁸⁶ At least one treatise has acknowledged that court-led weaning decisions based on legal factors may not be consistent with scientific evidence about weaning or attachment, since forced weaning may be more detrimental than any perceived harm from extended nursing, and that attempts to equate nursing from the breast and via expressed milk are often false and damaging.⁸⁷ The inconsistency of these determinations may also evidence judge intuition or gut feelings about the “proper” age for weaning rather than any scientific evidence.⁸⁸

The tender years doctrine does not explain all of the motivations for using breastfeeding as a factor in custody disputes, even when custody is ultimately granted to the mother.⁸⁹ The cases that

⁸⁶ *Holtzleiter v. Holtzleiter*, No. 48A02-0810-CV-921, 2009 WL 1749773, at *7 (Ind. Ct. App. June 22, 2009).

⁸⁷ ANN M. HARALAMBIE, 1 *HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES* 461 (3d. ed. 2009) (“Weaning may become an important issue in determining visitation, with some courts creating schedules which interfere with breast-feeding and others ordering mother’s [sic] to wean their children to facilitate expanded visitation. Most knowledgeable experts believe that children should be weaned on their own schedule, if at all possible. Forced weaning (sometimes called ‘traumatic weaning’) may be counterproductive, making the child who feels deprived for excessively long periods of time even more insistent on nursing and more difficult to wean. Another consideration is the mother’s physical comfort. Even if the baby is satisfied with a bottle during visitation, the mother’s breasts may become painfully engorged if milk is not expressed by timely nursing. Breast pumps are not always effective and may be uncomfortable or even painful to use.”).

⁸⁸ See Elizabeth N. Baldwin, *Extended Breastfeeding and the Law*, 20 *BREASTFEEDING ABSTRACTS* 19 (2007) available at <http://www.llli.org/ba/Feb01.html> (explaining factors that may cause judges and other professionals to impose personal views on appropriate breastfeeding in custody disputes).

⁸⁹ See e.g., HARALAMBIE, *supra* note 87, at 461 (explaining the effect of weaning which could influence motivation for using breastfeeding as a factor in custody disputes).

allow custody most categorically, for example, often involve a medical need to breastfeed and the testimony of experts.⁹⁰ However, the use of maternal choice to breastfeed to inform a decision to allow exclusive custody until weaning is clearly in line with liberal notions of the family that position women as the keeper of the home and the best influence for children in need of a type of care that only a mother can provide.⁹¹

B. Qualifications on Deference to Maternal Choice in Breastfeeding:
Specters of the Proper Role of Parenting

If granting custody to a breastfeeding mother evinces the ongoing influence of the tender years doctrine into modern family law, limitations on that right may do so as well, albeit in a more complicated fashion. At least two types of denials of custody for breastfeeding mothers may be predicated on notions of fit maternal parenthood in the tradition of the tender years doctrine: the policing of women

⁹⁰ See *Policard*, 2010 WL 797173, at *1 (“There was a great deal of testimony over the issue of physical custody of the youngest child. The wife, and mother of the child, is still breastfeeding the child at one and a half years of age. Due to the breast feeding, she seeks to prevent the husband from having shared physical custody at this time. The husband asserts that the child should be able to stay with him at this time. The court was provided with post-trial memoranda which dealt with the issue of breastfeeding. After reading the memoranda and hearing the testimony at the trial, the court has determined that the husband may have joint physical custody of the minor child at such time as the child stops breastfeeding, or at the child's second birthday whichever is sooner.”); *S.G. v. A.G.*, 2008 WL 5588866, at *3 (Del. Fam. Ct. Oct. 28, 2008) (invoking the medical testimony of experts as evidence for a need to breastfeed and adopting the youngest available age for reevaluation of custody).

⁹¹ See GROSSBERG, *supra* note 24.

who breastfeed too long as “unfit mothers” and the invocation of the stereotype of the mother who deliberately prolongs breastfeeding in order to prevent joint custody.⁹²

First, courts sometimes invoke the notion of the vindictive breastfeeding mother who unnecessarily prolongs the nursing relationship to justify sole custody, who denies visitation to the willing father, or who lies about doing so.⁹³ In *Buccini v. Sonara*, for example, a Florida Court of Appeals expressed skepticism that breastfeeding was the actual motivation for the mother’s desire to limit visitation.⁹⁴ The trial court had dismissed the father’s claim that “he has no way of knowing when or if the child is weaned because the mother withholds information from him and it is unlikely she will affirmatively contact him,” which the father claimed meant the mother could “breastfeed until the child is a toddler which is well beyond the normal accepted breastfeeding period . . . denying access to the father.” The court of appeals found the failure to account for such claims an

⁹² See, e.g., *Buccini v. Sonara*, 989 So.2d 1288, 1290 (Fla. Dist. Ct. App. 2008); Baldwin, *supra* note 88, at 1.

⁹³ See, e.g., *Buccini*, 989 So.2d at 1290; Jeanne Sager, *Mom Uses Breastfeeding as Weapon in Custody Battle*, STROLLERDERBY (Apr. 28, 2009, 12:01 PM), available at <http://www.babble.com/CS/blogs/strollerderby/archive/2009/04/28/mom-uses-breastfeeding-as-weapon-in-custody-battle.aspx> (describing a court’s order of forced weaning for a two-year-old because the mother refused visitation of breastfeeding grounds).

⁹⁴ *Buccini*, 989 So.2d at 1289 (stating that the father of a year-old child “has asked many times for unsupervised visits” which were denied and that “[t]he only reason [the mother] ever gave was that she is breastfeeding their son”).

abuse of discretion.⁹⁵ The court also noted that “[t]he father should also be allowed to question the child’s pediatrician to learn from him/her whether the child is still breastfeeding or is able to take a bottle so that he will know when to ask for mediation to adjust visitation to include overnight visits.”⁹⁶ The language used by this court expresses a strong distrust of the breastfeeding mother’s motivations, and a desire that some objective force (i.e., a doctor) be available to ensure the proper decision-making.⁹⁷

Second, and similarly, breastfeeding advocacy groups often accuse family law courts of policing benign breastfeeding relationships, seeking to destroy mutually beneficial relationships and the best interest of the child because of fears of improper sexualization of infants by mothers or a general discomfort with extended nursing.⁹⁸ This concern is largely based on two highly publicized cases in which courts determined that extended breastfeeding constituted improper

⁹⁵ *Id.* at 1290–91.

⁹⁶ *Id.* at 1290.

⁹⁷ *Id.*

⁹⁸ See Baldwin, *supra* note 88, at 1. (“Misinformation about breastfeeding affects everyone in our society, including lawyers, judges, psychologists, and social workers. While there is no harm in breastfeeding past infancy and allowing a child to wean naturally, many professionals in social service agencies and family law courts are quite shocked to learn just how long a child may breastfeed. Lacking accurate information, these officials may overreact and conclude that breastfeeding a child of two, three, or four is somehow improper.”). Typically, extended nursing is thought to include breastfeeding beyond the age of two, though some courts have expressed frustration with mothers who attempt to do so beyond a year. *Id.*

child sexualization or “troubling” attachment by the mother towards her child.⁹⁹ Scientific evidence does not support either of these conclusions, since the global age for weaning is between 4–5 and almost all scientific evidence supports such a conclusion.¹⁰⁰

These two tropes, at first glance, seem to fly in the face of the tender years doctrine, focusing instead on competent fatherhood, equally divided parenthood, and a willingness to indict improper parenting by all parties.¹⁰¹ A closer look, however, indicates a consistency with liberal and conservative notions of the family generally, and tender years specifically. The tender years doctrine, after all, concerned not merely the notion of woman as appropriate caregiver; it also contemplated the necessity of “maternal instincts” for young children.¹⁰² In situations where the mother was not an appropriate maternal influence, either because of unfitness or because of the need for a masculine influence, courts did not hesitate to transfer proper custody back to the father as head of household and purveyor of mas-

⁹⁹ Momjian, *supra* note 60, at 138. (citing *Shunk v. Walker*, 589 A.2d 1303 (Md. Ct. App. 1991) and *Friendshuh v. Headlough*, 504 N.W.2d 104 (S.D. 1993).

¹⁰⁰ Baldwin, *supra* note 88, at 2.

¹⁰¹ *Buccini v. Sonara*, 989 So.2d 1288, 1291 (Fla. Dist. Ct. App. 2008); Baldwin, *supra* note 88, at 1.

¹⁰² *See GROSSBERG, supra* note 24, at 249.

culinity.¹⁰³ Court standards for fitness also “indicated a wariness about maternal fitness that accompanied all legal extensions of married women’s sphere.”¹⁰⁴ In that sense, judicial standards of the “reasonable woman” are in line with policing motherhood to only include appropriately maternal actions.¹⁰⁵ Inappropriately maternal actions, such as breastfeeding as related to sexuality or using a child for one’s own gain, abrogate the availability of the tender years doctrine.¹⁰⁶ These standards not only coincide with a court’s desire to find the “best interest of the child” in any given case, but also may be read as reinforcing acceptable standards for maternal parenting and relation between mother and child, especially given the misalignment between scientific fact and court inquiry.¹⁰⁷

III. BREASTFEEDING AS JUSTIFICATION FOR REVOCATION OF PARENTAL RIGHTS: IMPROPER MATERNAL RELATIONSHIPS AND THE DISPROPORTIONATE REACH OF FAMILY LAW

Part II discussed the ways in which breastfeeding determinations in custody disputes inform and reinforce the tender years doctrine. This Part investigates a slightly different application: the ways

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 248.

¹⁰⁷ See GROSSBERG, *supra* note 24, at 249.

in which breastfeeding serves as evidence for and a marker of improper parental relationships indicating a failure of the privatization of dependency. It argues that attempts to revoke custody based on breastfeeding failures may fit the concept of the privatization of dependency and the failure of some families to meet societal standards under the liberal and conservative definition of family. In some others, evidence of breastfeeding while intoxicated or while on drugs serves as prima facie evidence of parental incompetence worthy of state intervention or termination of parental rights.¹⁰⁸ In others, the failure to supplement with infant formula or successfully breastfeed manifests as parental incompetence that can amount to criminal behavior.¹⁰⁹ In both scenarios, however, scrutiny falls disproportionately on poor women or fails to invoke evidence that the conduct alleged is harmful for breastfeeding infants.

Parental autonomy in the context of raising an infant includes the right to breastfeed.¹¹⁰ This deferential standard, however, does not extend to mothers who use drugs or alcohol while breastfeed-

¹⁰⁸ In re P.B., No. B224012, 2010 WL 361083, at *2 (Cal. Ct. App. Sept. 20, 2010); In re Oscar S. v. Maria G., No. D039212, 2002 WL 1420424, at *1 (Cal. Ct. App. July 1, 2002).

¹⁰⁹ In re S.L.A., 223 S.W.3d 295, 300 (Tenn. Ct. App. 2007).

¹¹⁰ Suzanne D'Amico, *'Inherently' Female Cases of Child Abuse and Neglect: A Gender-Neutral Analysis*, 28 FORDHAM URB. L.J. 855, 860 (2001) ("Thus, under the Dike court's reasoning, the mother has a constitutional right to breastfeed free from undue state interference; however, this unique right imposes unique duties. Generally, the breastfeeding mother is the exclusive provider of nourishment to her child.").

ing—drug or alcohol use while breastfeeding is often taken as unquestionable evidence of parenting worthy of state intervention, without discussion of the effects of such behavior.¹¹¹ In addition, the decision to exclusively breastfeed is often subject to medical oversight and intervention.¹¹² In one famous New York case, for example, a nineteen-year-old welfare recipient named Tabitha Walrond was charged with reckless homicide for failure to feed her son adequately and causing his death through malnutrition.¹¹³

To be sure, these cases provide a more complicated picture of the privatization of dependency than routine home searches for social welfare recipients¹¹⁴ or even of drug-addicted pregnant women.¹¹⁵

For one thing, there may be other issues at play. In *In re S.L.A.*, for

¹¹¹ *In re P.B.*, 2010 WL at *1 (“Mother admitted to regularly using marijuana, including while she was breastfeeding P., but she said she had a prescription for it”); *In the Matter of S.L.A.*, 223 S.W.3d at 300 (revoking custody because the mother, among other things, stored breast milk in a trailer that was also used as a methamphetamine lab and admitted to drug use during pregnancy and while nursing).

¹¹² See generally ELLEN CHETWYND, JUDITH L. GUTOWSKI, & MARSHA WALKER, UNITED STATES LACTATION CONSULTANT ASSOCIATION, CONTAINING HEALTH CARE COSTS HELP IN PLAIN SIGHT. INTERNATIONAL BOARD CERTIFIED LACTATION CONSULTANTS: ALLIED HEALTHCARE PROVIDERS CONTRIBUTE TO THE SOLUTION 1–20 (2010) available at http://www.uslca.org/documents/White%20Paper/Reimbursement_White_Paper.pdf.

¹¹³ Mary Romero, *The Foundational Myths of Reproductive Labor Under Capitalism: A Call for Brave New Families or Brave New Villages?*, 8 AM. U. J. GENDER SOC. POL’Y & L. 177, 177 (1999) (describing the situation).

¹¹⁴ See Hasday, *supra* note 24, at 301.

¹¹⁵ Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1421 (1991).

example, the mother was running a methamphetamine lab out of her trailer and had been incarcerated continuously.¹¹⁶ In *In re P.B.*, the mother had delusions and hospital records that would seem to interfere with her ability to care for a child.¹¹⁷ This scrutiny may indicate that more parental decision-making ought to be subject to state intervention, rather than less.

However, such cases also highlight the relationship between the state, assumptions of proper motherhood, and the gap between surveillance by the state on one hand and the provision of adequate services on the other. For drug addicted mothers, little investigation into the legal status of their drug use or its effects on development is even mentioned.¹¹⁸ In the case of Tabitha Walrond,

The district attorney's charges are based on the assumptions surrounding the naturalness of motherhood—namely, breast-feeding and caring for babies. Because she had breast reduction surgery, Walrond was biologically unable to

¹¹⁶ 223 S.W.3d at 297–98.

¹¹⁷ 2010 WL 3621083 at *2–*3.

¹¹⁸ See *id.* at *6–7 (discussing advocacy of drug legalization as evidence of drug addiction, and discounting allegations that the marijuana used was done so legally); see also Kelly Bonyata, *Breastfeeding and Marijuana*, KELLYMOM, <http://kellymom.com/health/lifestyle/marijuana.html> (last modified May 18, 2010) (stating “[t]he effect of marijuana use on infants via breastfeeding has not been extensively studied. Some negative effects, such as sleepiness, slow weight gain, higher SIDS rates, and second-hand smoke risks, have been reported, though “no significant differences were found in terms of age at weaning, growth, and mental or motor development.” In the case of methamphetamines, little study has been done on actual effects, though methamphetamines do excrete into the milk supply and are contraindicated. See *Meth Use Can Affect Mother's Breast Milk*, MT. DEP'T OF PUB. HEALTH & HUM. SERVS., available at <http://www.dphhs.mt.gov/newsevents/newsreleases2004/september/methuseandbreastmilk.shtml> (Sept. 29, 2004) (noting that meth may be cut with other drugs, causing damage, and that breastfeeding should not occur for 24 hours after ingestion of methamphetamines).

successfully breast-feed her baby. She lacked the assumed “natural” knowledge of assessing the baby’s health, and no public support was provided to assist her. Medical experts agree that routine pediatric checkups would have identified the problem, but Medicare declined to enroll Tyler despite Walrond’s numerous attempts, delaying his enrollment until months after his death. In addition, no one ever informed Walrond that her breast reduction surgery greatly increased her risk for difficulties in breast-feeding. Even though Walrond received inadequate prenatal and postpartum health care, as well as being denied public access to health care for her baby, the state charged her as being responsible for the baby’s death.¹¹⁹

Breastfeeding custody disputes in the case of failed breastfeeding and infant safety may thus invoke both the tender years doctrine and notions of parental autonomy.¹²⁰ Increased scrutiny is combined with a lack of real support services and a focus on punishment for women when maternal decisions go awry.

IV. REJECTING COMMON LAW COVERTURE, THE TENDER YEARS DOCTRINE, AND DISPROPORTIONATE INTRUSION INTO THE LIVES OF POOR WOMEN IN THE CASE OF BREASTFEEDING MOTHERS

Current family law’s continued reliance on the tender years doctrine and liberal and conservative notions of maternal behavior described in Parts II and III should be cause for alarm. After all, these doctrines have been discredited as violating equal protection, based on inaccurate stereotypes of the proper role of women, and unnecessarily intrusive into the lives of poor women.¹²¹ The elimina-

¹¹⁹ Romero, *supra* note 113, at 177–78.

¹²⁰ Moran v. Moran, 612 A.2d 1075, 1076 (1992).

¹²¹ See Selfridge, *supra* note 61, at 166–68.

tion of such justifications from legal decision-making may be thus desirable.

However, this desire collides with scientific evidence of the superiority of exclusive breastfeeding as the normal and optimal food for infants for at least six months, and AAP recommendations that weaning should be natural, child-led, and not attempted until desired by both mother and child.¹²² What does this mean for the rule in custody disputes involving breastfeeding? The assumption of breastfeeding as the norm for human infants may support a number of conclusions. It counsels that judges should be apprised of current research and findings into the benefits of facilitating breastfeeding by mothers who wish to do so. It means that more research should be done into the adequacy of expressed milk as an adequate substitute for direct feeding. Invocation of stereotypes about vindictive women and inappropriate relationships should be interrogated as based on outdated caricatures of female behavior.

A number of family law scholars, including those at the American Law Institute, advocate the use of a “primary caretaker presumption” in custody disputes, which would allocate “custodial

¹²² See generally Introduction; see also HARALAMBIE, *supra* note 87, at 664; *supra* note 5 (describing public health savings and benefits).

responsibility in rough proportion to the share of responsibility the parent assumed before the divorce or the circumstances giving rise to the custody action.”¹²³ In the case of breastfeeding, this type of rule might better approximate the time spent nursing as an approximation for determining custody in a way that does not require a reliance on tender years or feminine domesticity. However, in applying such a rule courts would need to address time allocation concerns: even if a breastfeeding mother receives 80% of custody time to allocate for the time spent breastfeeding, nursing on-demand may require that the 20% allocated to the other parent not take place continuously, or overnight, or far from the nursing mother during lunch time.

Some critics argue that deferring to women as primary custodians of children because of their biological ability to breastfeed may compound the gendering of the family tradition.¹²⁴ If custody for breastfeeding mothers is not accompanied by adequate child support, equal pay, and lactation support, challenges to liberal and conservative conceptualizations of family and the notion of separate spheres

¹²³ Rachel M. Colancecco, *A Flexible Solution to a Knotty Problem: The Best Interests of the Child Standard in Relocation Disputes*, 1 DREXEL L. REV. 573, 597 (2009); see also Elizabeth Barker Brandt, *Concerns at the Margins of Supervised Access to Children*, 9 J.L. & FAM. STUD. 201, 214 (2007) (describing the standard and its failure to be adopted by any state legislature).

¹²⁴ See *supra* Part II.

may be exacerbated rather than eliminated.¹²⁵ Some scholars go so far as to claim that any preference for breastfeeding relationships is sex-biased and ignores that any nurture benefits can be gained by either parent through mechanisms other than breastfeeding.¹²⁶ These criticisms are reasonable, and caution against a robust presumption of women-as-breastfeeders. However, the benefits of breastfeeding, and the need to support it on a public health level mean that there is value in attempting to split these types of custody disputes from their doctrinal roots, even if such a split can only be done imperfectly. A presumption of primary custody rule may be one way to do so, and should be considered.

¹²⁵ OKIN, *supra* note 36, at 17 (discussing how increased single parenting as a result of divorce and subsequent impoverishment cuts against advancements for women in the public sphere and how increases in equality for women may simultaneously help outcomes for children).

¹²⁶ Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and its Aftermath*, 56 U. CIN. L. REV. 1, 84 (1987) (“[B]reast-feeding is no longer universal in human society, and even one of the most ardent advocates of the child’s right to the continuous care of an adult during its early years recognizes that the essential bond of intimacy can be created by the ‘wisdom’ of mothers in the absence of breast-feeding. If that is so, then “wise” fathers, as well, can and do form intimate bonds with infants growing out of a repeated pattern of daily interaction and care. A strategy for childrearing that will bind both fathers and mothers to the nurturance of the child seems better suited to its growth and development under modern conditions in which the child’s natal family is less frequently the unit in which it reaches maturity.”). *But cf.* GROSSBERG, *supra* note 24, at 254 (discussing rejection of such equal protection claims by men).