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## A Permission Slip to Breastfeed: Legislating a Mother's Choice in Pennsylvania

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## A PERMISSION SLIP TO BREASTFEED: LEGISLATING A MOTHER'S CHOICE IN PENNSYLVANIA

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### INTRODUCTION

"In a society where people can dine at a restaurant named 'Hooters,' I am disturbed that a woman breastfeeding her child in a mall is so offensive that a law to protect her right to do so had to be established."<sup>1</sup> Yet such a law was in fact created. In an effort to protect the choices of mothers across the Commonwealth, Pennsylvania enacted the Freedom to Breastfeed Act in July 2007.<sup>2</sup> Breastfeeding one's own child is a natural human instinct,<sup>3</sup> yet it is currently one which, in the United States, seems to be unsupported and neglected by mothers, families, and the public. In fact, "only [fifty-six] percent

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1. Amy Williams Strasburg, Letter to the Editor, *Pa. Breastfeeding Law Exposes Double Standard*, LANCASTER NEW ERA (Lancaster, Pa.), July 16, 2007, at A8.

2. Kim Lyons, *Rendell Signs Bill to Allow Breast-feeding in Public*, PITTSBURGH TRIB.-REV., July 10, 2007, [http://www.pittsburghlive.com/x/pittsburghtrib/news/rss/s\\_516583.html](http://www.pittsburghlive.com/x/pittsburghtrib/news/rss/s_516583.html); see also 35 PA. STAT. ANN. §§ 636.1-4 (West 2009) (allowing a woman to breastfeed in public).

3. Cf. SHERRY F. COLB, WHEN SEX COUNTS: MAKING BABIES AND MAKING LAW 73 (2007) ("In addition, [breastfeeding] does a lot to facilitate bonding between mother and child."); Edward Baer & Leah Marguiles, *Infant and Young Child Feeding: An Analysis of the WHO/UNICEF Meeting*, STUD. IN FAM. PLAN., Feb. 1980, at 72, 72 ("Hundreds of scientific studies confirm the superiority of breastfeeding for nutritional, immunological, economic, psychological, and contraceptive reasons."); Sijke Selinda Barkhuis, Note, *Breast-feeding and the Law*, 3 TEX. J. WOMEN & L. 417, 423 (1994) ("[B]reast-feeding remains essential for the survival, proper psychological development, and health of individual infants.").

of new mothers in this country breastfeed.”<sup>4</sup> Many women have chosen, whether for personal preference or medical necessity, to feed their new children infant formula, rather than the natural and instinctive choice their own bodies may provide. While formula may not be a significant public health threat in the United States, breast milk offers a significant number of benefits that a mass-produced formula cannot provide.<sup>5</sup> Statistically, breast milk offers superior nourishment to a growing infant<sup>6</sup> “for nutritional, immunological, economic, psychological, and contraceptive reasons.”<sup>7</sup> Studies have also suggested that an infant fed a predominantly formula-based diet is “more susceptible to a wide range of infectious diseases and allergies than the breastfed child.”<sup>8</sup>

Governments all over the world have concluded that the breast is in fact the best option when it comes to feeding a very young infant and have instituted numerous programs to encourage breastfeeding.<sup>9</sup> David Satcher, the United States Surgeon General under President Clinton, urged mothers to breastfeed and the United States government to initiate “national, culturally appropriate strategies to promote breastfeeding.”<sup>10</sup> Satcher also called breastfeeding “one of the most important contributors to infant health” and classified the United States’ low breastfeeding rates as a “public health challenge.”<sup>11</sup> In order to meet this public health challenge head-on and increase the breastfeeding rate in America, the government and the community must work together to accommodate mothers and infants

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4. Charity R. Clark & Elizabeth R. Wohl, *Breastfeeding Laws in Vermont: A Primer*, VT. B.J., Spring 2008, at 1.

5. George Kent, *Child Feeding and Human Rights*, INT’L BREASTFEEDING J., Dec. 18, 2006, available at <http://www.internationalbreastfeedingjournal.com/content/1/1/27> (“Even when it is produced and prepared properly, infant formula leads to inferior health outcomes because it lacks some of the key elements in breast milk, especially the factors that strengthen the infant’s immune system.”).

6. COLB, *supra* note 3, at 73.

7. Baer & Marguiles, *supra* note 3, at 72.

8. *Id.* (referencing a series of studies, carried out in “modern middle-class US and European communities,” comparing the developments of breastfed children with children who were fed primarily formula). See also COLB, *supra* note 3, at 73 (“Nursing provides a baby with her mother’s immunity to pathogens, along with exactly the right mix of nutrients needed for her to thrive. Breastfeeding also significantly reduces an infant’s inevitable ingestion of air while she drinks and the consequent distress that bottle-feeding frequently entails.”).

9. Danielle M. Shelton, *When Private Goes Public: Legal Protection for Women Who Breastfeed in Public and at Work*, 14 LAW AND INEQ. 179, 185 (1995).

10. Jacqueline H. Wolf, *What Feminists Can Do for Breastfeeding and What Breastfeeding Can Do for Feminists*, 31 SIGNS: J. WOMEN IN CULTURE & SOC’Y 397, 410 (2006) (quoting DEP’T OF HEALTH & HUMAN SERVS. OFFICE ON WOMEN’S HEALTH, HHS BLUEPRINT FOR ACTION ON BREASTFEEDING 3 (2000), available at <http://www.womenshealth.gov/archive/breastfeeding/programs/blueprints/bluprntbk2.pdf> [hereinafter HHS BLUEPRINT]).

11. *Id.* (quoting HHS BLUEPRINT, *supra* note 10).

and support mothers' efforts to breastfeed,<sup>12</sup> especially since a successful breastfeeding relationship relies on exclusive breastfeeding.<sup>13</sup>

A society that preaches "breast is best" and hails the benefits of breastfeeding, yet does little to support breastfeeding mothers in public places, will fail in its efforts to increase the breastfeeding rate. By limiting via social stigma, rather than law, the *accepted* nursing areas to private homes, mothers are forced either to become reclusive members of society for as long as they breastfeed in order to maintain that exclusivity,<sup>14</sup> or to supplement their children's diets with formula in an attempt to become *socially acceptable* and remain contributing members of the public sphere.<sup>15</sup> Many states have attempted to overcome this inhibiting social stigma by enacting legislation to clarify a mother's right to breastfeed her child in public, but each piece of legislation varies with regard to its language, enforcement, and provided remedies.<sup>16</sup>

Pennsylvania passed its Freedom to Breastfeed Act in July 2007;<sup>17</sup> the Act explicitly states the legislature's recognition of the importance of breastfeeding to family life.<sup>18</sup> While Pennsylvania's new law may on its face appear to be a step in the right direction, it is only an empty statement. The Pennsylvania legislature managed to imply public support for a mother's choice to breastfeed, while, in reality, it created a toothless law. The Freedom to Breastfeed Act lacks creation of a right to breastfeed, contains confusing language, lacks remedies a mother can use to protect her personal choice, and stands only as an empty attempt to placate a vocal portion of the constituency.

This Note argues that the Pennsylvania legislature's ultimate word choice and statutory construction greatly diminish the Act's protection of nursing mothers who wish to simultaneously do two

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12. Barkhuis, *supra* note 3, at 423 ("Successful breast-feeding depends in large part on social encouragement and accommodation. Since American culture fails to provide much of either one, it is not surprising that breast-feeding rates in this country are low.").

13. *Id.* at 436 ("Because successful lactation requires frequent and exclusive breastfeeding on demand, prohibiting women from breast-feeding in certain places undermines their ability to breast-feed successfully and, thus, would burden their right to breast-feed.").

14. COLB, *supra* note 3, at 74. Colb further suggests that the forced choice between reclusion or formula-feeding "has far greater implications — for women and for their children — than does the decision about whether to expose one's nipples for entertainment value." *Id.*

15. *See* Barkhuis, *supra* note 3, at 419 ("Faced with widespread intolerance of breastfeeding, and vulnerable to the ignorance that such intolerance reflects, many new mothers might be disinclined to initiate or continue breast-feeding.").

16. *See* Nat'l Conference of State Legislatures, Breastfeeding Laws, <http://www.ncsl.org/default.aspx?tabid=14389> (last visited Mar. 30, 2010) (providing an index of the various state laws concerning public breastfeeding).

17. Lyons, *supra* note 2.

18. Freedom to Breastfeed Act, 35 PA. STAT. ANN. § 636.2 (West 2009).

legal things: make the choice to breastfeed their children and remain contributing members of the public sphere. Part I reviews the various rationales underlying the creation of breastfeeding protection legislation in the United States. Part II highlights Pennsylvania's attempt to create breastfeeding protection legislation and discuss its immediate implications. Part III presents suggested changes for the Freedom to Breastfeed Act, using other states' legislative choices as models and examples. Finally, Part IV proposes that Pennsylvania adopt a remedy clause in order to give the legislation more force.

### I. A MOTHER'S CHOICE: BREASTFEEDING V. BOTTLE-FEEDING

According to the Centers for Disease Control and Prevention (CDC), seventy-four percent of children born in 2006 were initially breastfed.<sup>19</sup> By six months of age, only forty-three percent of children were being breastfed at all, and only fourteen percent were exclusively breastfed,<sup>20</sup> though the CDC asserts that breastfeeding is "[i]deal for [i]nfants" and that "[b]oth babies and mothers gain many benefits from breastfeeding."<sup>21</sup> There are a number of medical and personal reasons why a mother would choose formula over her own breast milk. Ultimately, however, societal pressures and personal beliefs tend to play a significant role in mothers' choices regarding breastfeeding.

Mothers may find themselves mixing formula rather than breastfeeding their child and bonding in a more elemental way<sup>22</sup> because of hurdles like misinformation propagated by the infant formula industry, a denial of adequate maternity leave by her employer, and insufficient support from her own doctor.<sup>23</sup> Some feel a certain sense of culturally encouraged modesty due to worries about a perceived lack of decorum surrounding breastfeeding or indelible links to the sexuality of the breast that lead them to decline to breastfeed.<sup>24</sup> "Other women may choose not to breastfeed because of embedded cultural assumptions about the propriety of breastfeeding, the sexual

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19. Centers for Disease Control and Prevention, Breastfeeding Among U.S. Children Born 1999-2006, CDC National Immunization Survey, [http://www.cdc.gov/breastfeeding/data/NIS\\_data/index.htm](http://www.cdc.gov/breastfeeding/data/NIS_data/index.htm) (last visited Mar. 29, 2010).

20. *Id.*

21. Centers for Disease Control and Prevention, Breastfeeding, <http://www.cdc.gov/breastfeeding/index.htm> (last visited Mar. 29, 2010).

22. COLB, *supra* note 3, at 73.

23. Isabelle Schallreuter Olson, Comment, *Out of the Mouths of Babes: No Mother's Milk for U.S. Children — The Law and Breastfeeding*, 19 HAMLINE L. REV. 269, 299 (1995); see also KAREN M. KEDROWSKI & MICHAEL E. LIPSCOMB, BREASTFEEDING RIGHTS IN THE UNITED STATES 33 (2008) ("Some women are less likely to breastfeed because of operative assumptions and biases within the medical community that continues, for the most part, to play a supervisory role over the delivery and care of infants.").

24. KEDROWSKI & LIPSCOMB, *supra* note 23, at 33.

nature of the breast, and about norms of what constitutes the proper space and body required for feeding one's child."<sup>25</sup> An even more frequently encountered and disturbing barrier to the natural choice of breastfeeding is the social stigma and denial of public support many mothers face. One author describes her experiences breastfeeding her third child: "[b]eing stuck at home breast-feeding as he [the author's husband] walked out the door for work just made me unreasonably furious, at him and everyone else."<sup>26</sup> Why should a woman be "stuck at home," cut off from the community, just because she has made the choice to breastfeed? A woman's choice to breastfeed or to formula-feed should be supported; that support requires a public sphere accepting of both choices outside the home.

Stories abound of breastfeeding mothers being relegated to public restrooms with their infants,<sup>27</sup> or even being removed from public areas because of their choice to breastfeed, an act which must often occur outside the home due to its very nature.<sup>28</sup> Breastfeeding women are often met with outright hostility from the very society that should be supporting their choice to breastfeed.<sup>29</sup>

Society's opinions regarding breastfeeding seem almost contradictory. Women are strongly encouraged to breastfeed by the scientific community<sup>30</sup> and local, national, and international organizations,<sup>31</sup> yet, at the same time, society may reject a woman attempting to provide what she thinks is the best nutrition for her child because she happens to be out in public while doing it. Much of this hostile rejection of a natural, extraordinarily nutritious act appears to stem

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25. *Id.*

26. Hanna Rosin, *The Case Against Breast-Feeding*, ATLANTIC MONTHLY, Apr. 2009, <http://www.theatlantic.com/magazine/archive/2009/04/the-case-against-breastfeeding/7311>.

27. Virginia L. Marchant, *Are Your Breasts Bound by Law?*, MOTHERING, Jan. 2005, at 62, 64.

28. See Durmeriss Cruver-Smith, Note, *Protecting Public Breast-Feeding in Theory But Not in Practice*, 19 WOMEN'S RTS. L. REP. 167, 172 (1998) ("Infants do not have time clocks, making it impossible for mothers to arrange in advance to nurse their children in private accommodations. . . . [U]nless mother and child are to be imprisoned in the home for the three to twelve months during which nursing i[s] desirable, it is likely that the mother will be forced either to endure the hunger shrieks of her infant or more properly to feed it wherever she is." (quoting Arthur D. Silk, *Breast-Feeding Should be Encouraged, Not Outlawed*, L.A. TIMES, May 17, 1995, at B11)).

29. See COLB, *supra* note 3, at 73 ("In the United States and elsewhere, women who breastfeed outside the house must often be prepared to face hostility."); Shelton, *supra* note 9, at 181 ("It seems no breastfeeding woman is immune from potential attacks by employers, police officers, quasi-public property owners, other citizens, and security guards.").

30. Cruver-Smith, *supra* note 28, at 171 (discussing the results of scientific studies analyzing the benefits of breastfeeding).

31. See, e.g., La Leche League International, <http://www.llli.org> (last visited Mar. 29, 2010) (a national and international breastfeeding support coalition).

from the perception of a woman's breast as a sexual object, though it serves an entirely different purpose while she is nursing.<sup>32</sup> Others have suggested that hostility to public breastfeeding stems from a perception that it is unprofessional for a woman, especially an employed woman, to breastfeed her child and continue to maintain a professional presence.<sup>33</sup> Some contend that breastfeeding is "trivial and mundane,"<sup>34</sup> perhaps because infant formula is so easily available and relatively safe,<sup>35</sup> or that a breastfeeding woman is merely seeking attention or participating in a "form of exhibitionism," because breastfeeding is thought of as an "embarrassing, unnecessary, [and] disgusting" act.<sup>36</sup> A quarter of mothers responding to a survey shared that they chose to bottle-feed their children because they felt breastfeeding to be "embarrassing."<sup>37</sup> Some low-income women, responding to the same survey, reported that they chose not to breastfeed because they "perceived a negative reaction from those who witnessed" breastfeeding in public.<sup>38</sup> Some teenage mothers said their concern for their own body image led them to choose to bottle-feed their children.<sup>39</sup> Similar surveys link an attitude against public breastfeeding to "breasts' sexual connotation in American society, including their use for male sexual pleasure or fantasy."<sup>40</sup> One woman has even reported that, though she was physically able to breastfeed and had no employment obligations to stand in her way, she chose not to breastfeed because it "would set up an unequal dynamic in her marriage — one in which the mother, who was responsible for the very sustenance of the infant, would naturally become responsible for everything else as well."<sup>41</sup> All of these factors may have played

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32. Olson, *supra* note 23, at 275; *see also* COLB, *supra* note 3, at 74 ("Society today views women's breasts as presumptively sexual and accordingly dirty and taboo").

33. Shelton, *supra* note 9, at 186.

34. *Id.* at 184.

35. *See* Barkhuis, *supra* note 3, at 419 ("Although the recent introduction of artificial infant food may now ensure the survival of the human species without breast-feeding, breast-feeding remains essential for the survival, proper physiological development, and health of individual infants.").

36. Shelton, *supra* note 9, at 183-84 (quoting Peter Pallot, *Breastfeeding Women Are Told to Leave*, DAILY TELEGRAPH (London), Nov. 6, 1993, at 6). A recent survey suggests that while many report that "they are not offended by public breastfeeding," these same people insist that the sight of a breastfeeding mother is only disagreeable when that mother is feeding her infant immodestly. As many mothers know, however, "modesty is sometimes difficult to maintain," especially with an older baby. KEDROWSKI & LIPSCOMB, *supra* note 23, at 45.

37. KEDROWSKI & LIPSCOMB, *supra* note 23, at 37.

38. *Id.*

39. *Id.*

40. *Id.* at 36; *see also* Shelton, *supra* note 9, at 179 ("Breastfeeding is perceived by many as dirty, sexual, embarrassing, and generally something that should be kept behind closed doors.").

41. Rosin, *supra* note 26.

a part in the recently reported experiences of two women, both of whom made the dual decisions to breastfeed their infants and maintain a social presence as they continued to patronize stores and travel within society while they made sure their children's nutritional needs were met in a manner of their own choosing.

In July 2004, a Starbucks Coffee employee asked Lorig Charkoudian, a Maryland mother, to relocate to the coffee shop's restroom or stop breastfeeding her daughter while uncovered in the store's seating area.<sup>42</sup> Upon Charkoudian's inquiry, Starbucks confirmed that though the company had no official policy regarding breastfeeding, "breastfeeding fell into the category of behaviors that might create complaints, and therefore employees could approach nursing mothers and ask them to stop breastfeeding or leave the main area of the store."<sup>43</sup> Similarly, Maggie Buckwalter was chastised in February 2007 for attempting to discreetly breastfeed her infant son in the hallway of her daughters' elementary school, where she was volunteering.<sup>44</sup> Buckwalter reported that a school administrator told her "it was inappropriate to breast-feed her baby in public at the school."<sup>45</sup> Both of these situations reflect the antagonism breastfeeding mothers face when they choose to do what they feel is best, and what has been demonstrated as the superior option for their children, while simultaneously trying to maintain a public presence. "Given that breastfeeding is widely acknowledged as beneficial for both babies and their mothers, it is disturbing that the facilitation of this important process meets so much misunderstanding and resistance."<sup>46</sup> Fortunately, states have begun making significant efforts to protect a woman's choice to breastfeed and her ability to do so while maintaining a public presence.

#### A. Breastfeeding and State Legislation

Many states have recently attempted to protect the breastfeeding mother from the discrimination she may face when she chooses to breastfeed her child in a public space. Though public breastfeeding is not forbidden outright in any state,<sup>47</sup> many state legislatures have

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42. Marchant, *supra* note 27, at 67.

43. *Id.*

44. Margie Peterson, *Moms Can Nurse Babies in Public—If Nobody Minds*, MORNING CALL (Allentown, Pa.), July 5, 2007, at B1.

45. *Id.* (Buckwalter stated that she "left school that day feeling like I'd been showing pornography to kids.'").

46. Shelton, *supra* note 9, at 201.

47. Jake Aryeh Marcus, *Lactation and the Law*, MOTHERING, July-Aug. 2007, at 48, 50. Though no state completely bans breastfeeding in public, Illinois limits a woman's

taken up the cause of protecting breastfeeding mothers from outside intrusion.<sup>48</sup> State legislatures have demonstrated, through the passage of these breastfeeding protection laws, that they recognize the growing collection of scientific evidence that “establish[es] the significant medical benefits of breastfeeding.”<sup>49</sup>

Simultaneously, these legislatures have also rejected an idea which a significant amount of their constituents embrace, the concept of a woman’s breast as a solely sexual object, and have thus also rejected a “societal attitude keeping many women from breastfeeding their children, especially in public.”<sup>50</sup> The states passing these laws have the power to minimize the impact of that rather sexist concept and promote the resurgence of a natural, instinctive act that can improve the health of infants,<sup>51</sup> and potentially save money in the long-term by “reducing the need for publicly provided formula supplements, health care, and child protective intervention.”<sup>52</sup> The very idea of saving public dollars by encouraging a choice that has so many other benefits alone should spur other states to pass such protective legislation and support their mothers and children. The language of breastfeeding protection legislation varies widely from state to state,<sup>53</sup> and while several issues remain unresolved, the varied language can still provide instruction for future legislative enactments and amendments.

One of the many cloudy issues roiling within the public breastfeeding debate is whether women have a right to breastfeed their children. A United States Fifth Circuit Court of Appeals case, *Dike v. School Board of Orange County*, held that a woman “enjoys a constitutionally protected interest in breastfeeding her child.”<sup>54</sup>

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ability to breastfeed in a place of worship and Missouri requires that mothers breastfeed in public use “as much discretion as possible.” 740 ILL. COMP. STAT. ANN. 137/10 (West 2009); MO. ANN. STAT. § 191.918 (West 2009).

48. Though many states have breastfeeding protection laws,

Dr. Kathleen Marinelli . . . says that legislation doesn’t give a woman the right to breastfeed but rather protects her from discrimination and the potential of prosecution for exercising her *given* right to breastfeed her child. “It’s important to realize and to acknowledge that women have a right to breastfeed their children, whether that means breastfeeding in public or expressing their milk in the workplace, whether a law exists or not.”

Marchant, *supra* note 27, at 66.

49. Olson, *supra* note 23, at 299.

50. *Id.*

51. Barkhuis, *supra* note 3, at 443.

52. *Id.*

53. See *infra* Part III (discussing various states’ legislation-construction choices).

54. Olson, *supra* note 23, at 289; see *Dike v. School Bd. of Orange County*, Fla., 650 F.2d 783, 787 (5th Cir. 1981) (“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.”).

Advocates generally assume that such a right is still not established,<sup>55</sup> so they promote and support the passage of state and federal legislation that provides women the right to breastfeed their children.<sup>56</sup> Since no state completely bans public breastfeeding,<sup>57</sup> the states that have passed breastfeeding legislation essentially enacted clarification statutes, making it clear to others in the community that women can breastfeed their children in public spaces, with varying restrictions on those mothers and the public that may or may not have been intended by the authors of the legislation.<sup>58</sup>

Laws protecting public breastfeeding appear in a few basic formats, ranging from criminal exemption language to statutes that create a new civil right to breastfeed.<sup>59</sup> The most basic statutes “specifically exempt breastfeeding from public nudity and other criminal statutes,”<sup>60</sup> thus protecting a mother breastfeeding her child in public from those police officers, security guards, and others that threaten her with citation or arrest for feeding her child in an otherwise legal manner of her choosing.<sup>61</sup> Other statutes specifically “provide mothers with the *right* to breastfeed wherever mothers and babies are otherwise authorized to be.”<sup>62</sup> Most of these statutes granting a right to breastfeed also state that if a mother and her child are authorized to be in any one location, public or private, the mother may breastfeed her child in that location.<sup>63</sup> A law like this generally protects mothers seeking to maintain a presence in the public sphere and still feed their children as they choose. Under such a law, a woman should be able to breastfeed her child in a store or a park, as long as she and her child are both authorized to be there. She can breastfeed her child even in places that are not government-owned, as a public

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55. Marcus, *supra* note 47, at 50.

56. *Id.*

57. *Id.*

58. See Olson, *supra* note 23, at 283 (“These new laws protecting a woman’s right to breastfeed vary greatly in scope and level of effectiveness and range from protecting a breastfeeding woman from prosecution for indecent exposure, to protecting a woman’s right to breastfeed as a civil right, and excusing a breastfeeding mother from jury service.”).

59. Shelton, *supra* note 9, at 186-87.

60. *Id.* at 186.

61. See *id.* at 181 (regarding police officers and security guards). Leigh Bellini, a mother from Pennsylvania, was nursing her child in a shopping mall when “security guards . . . offered her a free new blanket to ‘cover up’ while breast-feeding her son in the mall’s food court after one customer lodged a complaint.” When she refused their offer and continued breastfeeding, “security guards threatened to call police if she didn’t move to a restroom,” though “Bellini said her breast was never exposed.” Susan E. Lindt, *Breast-Feeding Law Points to Rifts*, INTELLIGENCER J. (Lancaster, Pa.), July 18, 2007, at A1.

62. Shelton, *supra* note 9, at 186-87 (emphasis added).

63. Kent, *supra* note 5.

place in this setting “is understood to include restaurants, stores, shopping malls, and sports stadiums, and other places frequented by the general public, even if they are privately owned.”<sup>64</sup> A problem may arise, however, when a mother attempts to exercise her right to breastfeed while at work, since a child would generally not be permitted to be present at the workplace. Protecting breastfeeding in the workplace is not, however, the subject of this Note. The third and most protective type of legislation is that utilized by the State of New York. It explicitly creates and protects a woman’s civil right to breastfeed and imposes remedies she may use to enforce her right.<sup>65</sup> These remedies are perhaps one of the most important pieces of breastfeeding protection legislation; however, many states refrain from providing remedies to breastfeeding mothers who, while technically protected under the law,<sup>66</sup> may still find themselves harassed or excluded from public places because of their choice to breastfeed.<sup>67</sup> Pennsylvania is one of these states.

Shortly after Pennsylvania’s Freedom to Breastfeed Act was enacted, the *Lancaster New Era*, a local newspaper in Lancaster, Pennsylvania, published an article requesting that breastfeeding mothers have “a little decorum, please.”<sup>68</sup> The article’s authors conducted an informal survey, collecting reactions to the law such as, “[d]on’t hang your boob out. Be discreet,” and, “[e]ven though you have a right to do it, there’s a time and place to do it appropriately.”<sup>69</sup> Though other respondents thought the law was unnecessary, the suggestion (or even demand) that nursing mothers “cover it up” suggests that women breastfeeding in public may continue to run into resistance until the community perception of a woman’s breast as a sexual object changes.<sup>70</sup>

### *B. Debating Breastfeeding Protection Legislation*

Though breastfeeding is a completely natural and instinctual act,<sup>71</sup> it has a varying history of public acceptance. Women have at

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64. *Id.*

65. Shelton, *supra* note 9, at 189.

66. Marcus, *supra* note 47, at 52.

67. Mothers may find legally instituted remedies especially important as it has been reported that “state courts have generally not supported a woman’s right to breastfeed.” Olson, *supra* note 23, at 294. Without support from the courts, mothers are left only with legislation for protection.

68. Cindy Stauffer & Jenna Spinelle, *A Little Decorum, Please*, LANCASTER NEW ERA (Lancaster, Pa.), July 14, 2007, at A1.

69. *Id.*

70. *Id.*

71. *See supra* note 3 and accompanying text (discussing the biological benefits of breastfeeding).

certain times in the historical record felt free to breastfeed their infants at home, but then have been chastised for doing the same thing while out and about in their communities.<sup>72</sup> A significant number of states have taken steps to protect breastfeeding women from others who seek to control their choices regarding child-rearing outside of the home.<sup>73</sup> Breastfeeding protection legislation protects a woman's choice as to whether to breastfeed or bottle-feed and publicizes the state's stance on the matter. Overall, this legislation represents a victory for women's and children's rights in the greater society. The patchwork of legislation, however, filled with holes and confusing language, may serve only to confuse the situation.

Breastfeeding protection legislation is usually presented as legislation intended to protect a mother's choice regarding how and what to feed her baby. Legislators, or at least those who successfully lobby those legislators, are concerned about potential harassment of women who do in fact choose to breastfeed their children in a public place.<sup>74</sup> Delegates to the United Nations Conference on Women expressed similar concerns when they said, "restrictive work arrangements, social stigma and false information are denying [women] a choice in how to feed their babies."<sup>75</sup> This legislation is intended to protect a woman's choice to feed her baby in a traditional and natural manner by protecting her from societal harassment and by serving as the state's acknowledgment that it believes breastfeeding is the best option for mothers and children and that breastfeeding should be supported outside of the home.<sup>76</sup>

Besides supporting a woman's right to choose to feed her infant in a natural and legal manner, breastfeeding protection legislation can also do its part to "chang[e] society's attitudes about breastfeeding" and can be "a critical factor in a woman's decision to breastfeed."<sup>77</sup>

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72. See *supra* notes 28-46 and accompanying text (detailing stories of women who have experienced disapproval of breastfeeding in public).

73. See *supra* Part I.A (outlining the various types of breastfeeding protection legislation states have enacted).

74. Shelton, *supra* note 9, at 180.

75. *Id.* (quoting Marcus Eliason, *Rain Muddies Women's Gathering*, MONTGOMERY ADVERTISER, Sept. 2, 1995, at 11A).

76. Freedom to Breastfeed Act, 35 PA. STAT. ANN. § 636.2 (West 2009). Pennsylvania's Freedom to Breastfeed Act's policy statement states, "[t]he General Assembly finds that breastfeeding a baby is an important and basic act of nurturing that must be protected in the interests of maternal and child health and family values." *Id.*; see also Barkhuis, *supra* note 3, at 420 ("Furthermore, even after adjusting for such factors as lower birth weight, maternal age, day care exposure, smoking, and socioeconomic, formula-fed infants require hospitalization at rates fifteen times higher than breast-fed babies."); *supra* notes 4-8 and accompanying text (regarding health benefits derived from breastfeeding for both mother and baby).

77. Marchant, *supra* note 27, at 69.

Since breastfeeding offers such great health benefits to both the mother and the infant,<sup>78</sup> it would seem to be in the state's best interest to fully support a mother's attempt to breastfeed in order to decrease health-maintenance costs and the incidence of preventable diseases.<sup>79</sup> Breastfeeding protection legislation thus can have a greater impact than breastfeeding awareness campaigns alone.<sup>80</sup> Mothers can be told ad nauseum that "breast is best"; however, that message will never be completely effective in its goal to make breastfeeding a primary infant food source if the community is not also in full support of mothers breastfeeding outside the home. Breastfeeding protection legislation "tells people that we should all be supporting breastfeeding, something that is best for moms, babies, families, and society. . . ."<sup>81</sup> This legislation legitimizes breastfeeding and takes a large step toward eliminating the stigma of public breastfeeding.

While breastfeeding protection legislation certainly has enormous benefits for children, mothers, and society at large, this kind of legislation also has its drawbacks. An important thing to consider is that even though a law may be passed protecting a mother and her choice to breastfeed outside of her home, if the people she meets while she is acting upon her choice vocally disapprove or otherwise make their distaste known, the legislation may eventually become useless. Though the law is in place to protect breastfeeding mothers, without some sort of remedy for those mothers otherwise harassed in public, the law alone will not be effective. Studies suggest that although a significant portion of a surveyed community supports a mother's right to breastfeed her child in a public place, "[a] smaller percentage, [twenty-eight] percent, disagreed or strongly disagreed" with the notion that a woman has a right to breastfeed her child in public.<sup>82</sup> Twenty-eight percent is nearly one-third of those surveyed, and it seems, anecdotally, that that one-third can be the most vocal in its disapproval of a young mother's choice to feed her child in the manner of her choosing.<sup>83</sup> Breastfeeding protection legislation may seem like

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78. Barkhuis, *supra* note 3, at 420; *supra* notes 4-8 and accompanying text.

79. Cruver-Smith, *supra* note 28, at 171.

80. See CTRS. FOR DISEASE CONTROL & PREVENTION, DEP'T OF HEALTH & HUMAN SERVS., BREASTFEEDING REPORT CARD—UNITED STATES, 2008 4 (2008), <http://cochise.az.gov/uploadedFiles/Health/2008%20Breastfeeding%20Report%20Card.pdf> ("Legislation reflects social acceptance of breastfeeding as a 'normal' activity, concern for the health and well-being of children, and the importance of breastfeeding as a public health issue.").

81. Marchant, *supra* note 27, at 69.

82. KEDROWSKI & LIPSCOMB, *supra* note 23, at 40-42.

83. See Lindt, *supra* note 61, at A1 (relating nursing mother Leigh Bellini's story of when she was threatened with police interference because she was breastfeeding her son in a shopping mall); Stauffer & Spinelle, *supra* note 68, at A1 (asking nursing mothers to cover up in public). Blair Stackhouse, questioning the Freedom to Breastfeed Act, wrote:

a wonderful idea, but in communities that foster little support for mothers choosing to breastfeed outside of the home, the creation of such legislation may be a waste of time if not accompanied by strong remedies for mothers who are made to feel uncomfortable and persecuted for their legal and healthy choice. The best way to change minds, however, may just be to change laws.<sup>84</sup>

Some scholars and commentators argue that breastfeeding legislation is both unnecessary and insulting to the autonomous structure of our society. George Kent suggests that breastfeeding protection legislation disturbs the “nurturing relationship between mother and child.”<sup>85</sup> This sacred relationship encompasses the mother’s right to make certain choices regarding the upbringing of her child and should not be interfered with by “what some governmental agencies decide is the optimal diet.”<sup>86</sup> Karen Kedrowski argues that the “breast is best” slogan “ignores and marginalizes women who are either unable or unwilling to go along with the command to breastfeed.”<sup>87</sup> These suggested norms, in which the breast is considered the absolute pinnacle of sources of infant nutrition, tend to ignore that women and mothers must make choices everyday for what is best for their own bodies and families, and that “the decision of whether or not to breastfeed is but one, regardless of its importance, competing concern.”<sup>88</sup> Both of these authors maintain that government should not interfere at all with a woman’s choice to breastfeed her child or not, especially since mothers must balance multiple concerns and basic realities when making that choice.<sup>89</sup> The argument, it seems, is that the

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What about the people who don’t want to see this? I, for one, do not want to be walking through a mall only to see mothers breast-feeding their children. One would think the mothers would have enough respect for those around them not to do this in public. Don’t they think about how uncomfortable this might make people around them?

Blair Stackhouse, *Disrespectful Moms*, PITTSBURGH POST-GAZETTE, July 14, 2007, at B6.

84. See Marchant, *supra* note 27, at 69 (“But, says Dr. [Barbara] Philipp, society won’t support breastfeeding until the laws change, which is why Massachusetts and other states need breastfeeding legislation. ‘We need this bill as fast as we can get it, and we need to support breastfeeding in the strongest terms,’ she says. ‘Let’s make it clear that breastfeeding is not a form of indecent exposure or lewd behavior.’”).

85. Kent, *supra* note 5.

86. *Id.* “It is only *in extremis* that the judgments of governments should override those of mothers, and then only when there is solid scientific evidence to support that judgment.” *Id.*

87. KEDROWSKI & LIPSCOMB, *supra* note 23, at 33.

88. *Id.*

89. See *id.* (referencing the “operative assumptions and biases within the medical community,” and the “cultural assumptions about the propriety of breastfeeding, the sexual nature of the breast, and about norms of what constitutes the proper space and body required for breastfeeding”); *id.* at 89 (suggesting that “diverse laws and court cases demonstrate how the question of breastfeeding rights is an area where several rights-bearing entities collide — mothers, fathers, infants, and employers”).

government's choice and support of one method over another, both relatively safe and effective, places women who cannot or do not choose to breastfeed at a relative disadvantage, imagined or not, in the greater community. One must remember, however, that in some communities, these laws may be the only thing that protects a woman who can and does make the choice to breastfeed. Reality requires a careful balancing of the feelings of non-breastfeeding mothers who may feel covertly rejected by these government campaigns with the overt hostility experienced by some mothers who actually attempt to breastfeed outside of the home.

Though there are varying opinions concerning the necessity or use of the breastfeeding protection laws, many states have written and enacted them in a widespread attempt to protect a woman's choice to breastfeed. Perhaps states write these in an attempt to change the social fabric regarding public breastfeeding,<sup>90</sup> or maybe these laws are solely in place to protect a woman's choice to feed her child a natural and legal substance without actually championing a particular cause. Each state that does have this kind of legislation in place<sup>91</sup> puts its own spin on it. Unfortunately, this tends to create "an uneven patchwork of state laws"<sup>92</sup> under which "some women continue to enjoy more legal protections for their right to breastfeed, simply by accident of location, than many of their sisters in other states."<sup>93</sup> Pennsylvania recently enacted its own version of a breastfeeding-protection law, the Freedom to Breastfeed Act.<sup>94</sup>

## II. PENNSYLVANIA'S FREEDOM TO BREASTFEED ACT

Pennsylvania Governor Edward G. Rendell signed the Freedom to Breastfeed Act into law on Sunday, July 8, 2007.<sup>95</sup> Pennsylvania thus became the "39th state to protect the rights of women who breastfeed in public."<sup>96</sup> The law's text recognizes the physical and mental health benefits breastfeeding can bring to both mother and infant,<sup>97</sup> stating that "breastfeeding a baby is an important and basic act of nurturing that must be protected in the interests of maternal and child health and family values."<sup>98</sup> Granting mothers some protection

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90. Marchant, *supra* note 27, at 69.

91. For a concise survey of individual state breastfeeding protection laws, see Nat'l Conference of State Legislatures, *supra* note 16.

92. KEDROWSKI & LIPSCOMB, *supra* note 23, at 114.

93. *Id.*

94. Freedom to Breastfeed Act, 35 PA. STAT. ANN. §§ 636.1-.4 (West 2009).

95. Lyons, *supra* note 2.

96. *Id.*

97. § 636.2.

98. *Id.*

when they choose to breastfeed their babies in public spaces, the Act states, “[a] mother shall be permitted to breastfeed her child in any location, public or private, where the mother and child are otherwise authorized to be present, irrespective of whether or not the mother’s breast is covered during or incidental to breastfeeding.”<sup>99</sup> The legislation also declares that public breastfeeding “shall not be considered”<sup>100</sup> to be a variety of crimes outlined in the criminal code, including public indecency,<sup>101</sup> “open lewdness,”<sup>102</sup> obscene conduct,<sup>103</sup> or a nuisance act.<sup>104</sup>

While the Freedom to Breastfeed Act is a great step forward for protection of mothers throughout the Commonwealth, it is not as strong as it could or should be. Some commentators argue that the law does not grant nursing mothers a right at all and is in fact a completely empty law.<sup>105</sup> This argument, which insists the Pennsylvania legislature should amend the law to grant mothers an explicit right to breastfeed in public, will only encounter further resistance in Pennsylvania, as demonstrated by the sponsoring state senator’s initial experience.<sup>106</sup> Instead, the Freedom to Breastfeed Act lacks substantial force, because it declines to give nursing mothers a legal remedy should someone interfere with their rights, regardless of the law.<sup>107</sup> The Act should thus be amended to provide a remedy for mothers who encounter such a situation.

#### *A. Legislative Word Choice and the “Right to Breastfeed” Argument*

A legislator’s word choice is an important consideration in the analysis of a particular piece of legislation, as it reveals exactly what the legislator is attempting to achieve. While the Freedom to Breastfeed Act was signed into law without the word “right,” it allegedly, and possibly facially, effectuates the same goal.<sup>108</sup> Interestingly, the Act’s sponsor, Senator Connie Williams, a Democrat

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99. *Id.* § 636.3.

100. *Id.* § 636.4.

101. *Id.* § 636.4(1).

102. *Id.* § 636.4(2).

103. *Id.* § 636.4(3).

104. *Id.* § 636.4(4).

105. *See infra* Part III.A (discussing Pennsylvania breastfeeding advocates and the “right to breastfeed” crusade).

106. *See infra* Part II.A (discussing the legislative battle over Pennsylvania’s Freedom to Breastfeed Act).

107. *See infra* Part IV (discussing the need for legal remedies).

108. *See* § 636.2 (stating the Freedom to Breastfeed Act’s Declaration of Policy). The legislature’s established goal was to support the efforts of breastfeeding mothers across the Commonwealth. *Id.*

of Montgomery County,<sup>109</sup> originally chose to specifically grant a “right” to breastfeed in public to nursing mothers.<sup>110</sup> Ultimately, she chose to drop the “right” language and replace it with the title “The Freedom to Breastfeed Act”<sup>111</sup> and the words, “[a] [nursing] mother *shall be permitted* to breastfeed her child . . . .”<sup>112</sup> The Senator’s spokesperson suggested that this change was absolutely necessary “to get the bill passed in the Senate,”<sup>113</sup> and that “the changes deal primarily with semantics, not substance.”<sup>114</sup> The Senator’s spokesperson suggested that “[i]n the eyes of many Republicans . . . listing breast-feeding as a right would have equated it to such basic freedoms as those described in the Bill of Rights.”<sup>115</sup> Though the Republicans may not have approved of the granting of a specific “right” to breastfeed one’s child in public, Senator Williams ultimately pushed the breastfeeding protection through, though she had to jump through some semantic hoops to achieve her goal.<sup>116</sup> The change in language, however, greatly displeased a segment of the Commonwealth’s breastfeeding rights lobby.

There is a small yet vocal contingent of Pennsylvania breastfeeding activists who submit that, when the text of the original proposed act was changed from granting mothers the “right to breastfeed”<sup>117</sup> to the “[f]reedom to [b]reastfeed,”<sup>118</sup> the Act lost nearly all of its strength. Jake Marcus, a Pennsylvania attorney with Birth Without Boundaries and a lactation activist,<sup>119</sup> suggested that, without the specific language making breastfeeding a “right,”

a woman who breastfeeds in a public accommodation — a privately owned place open to the public, such as a restaurant or shopping mall — might lawfully be asked to leave, either by the owner or in accordance with the owner’s instructions. If she

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109. Lyons, *supra* note 2.

110. S.B. 34, 191st Gen. Assem., Reg. Sess. (Pa. 2007) (Printer’s No. 67).

111. § 636.1.

112. *Id.* § 636.3 (emphasis added).

113. Kori Walter, *Nursing Mother Opposes Measure*, READING EAGLE (Reading, Pa.), May 23, 2007, available at 2007 WLNR 9665090.

114. *Id.*; see also Felix Alfonso Pena, *Breast-feeding Law Dissatisfies Activists*, READING EAGLE (Reading, Pa.), July 10, 2007, available at 2007 WLNR 1348040 (“According to Williams, the bill would have languished in the state Senate had the word ‘right’ not been replaced by ‘freedom’ because Senate Republicans took issue with calling breastfeeding a right.”).

115. Pena, *supra* note 114.

116. *Id.*

117. S.B. 34, 191st Gen. Assem., Reg. Sess. (Pa. 2007) (Printer’s No. 67).

118. Freedom to Breastfeed Act, 35 PA. STAT. ANN. § 636.1 (West 2009).

119. Walter, *supra* note 113.

refuses, she might be removed by the police or placed under arrest for trespass.<sup>120</sup>

Marcus has also stated that removing “right” from the Act shifted the legislation’s focus from active protection to mere policy statement.<sup>121</sup> She stated that this “law does not change the right of the owner of a public accommodation, a store or restaurant, to withdraw a woman’s authorization to be there. If he does that, she can be arrested for trespass.”<sup>122</sup> More specifically, Marcus argued that since the Act does not forbid owners of public accommodations from withdrawing consent for nursing mothers to be on the property, mothers would still be at risk for being charged with a number of trespass crimes,<sup>123</sup> such as defiant trespass.<sup>124</sup>

Marcus’s argument, however, may not be on such solid ground. Although she presents an interesting assertion, there may be a better solution for the problem at hand, like a change in syntax or word choice. Writing that nursing mothers “shall be permitted” to breastfeed instead of something similar to “have the right to breastfeed” helped Senator Williams get her bill through the Pennsylvania legislature, but it also created a semantic riddle. The Senator herself, however, has argued that the differing phrases mean the same thing. “We’re using ‘shall,’ which in legislative language means it must be permitted.”<sup>125</sup> The Senator further stated that many other states use the same or similar language.<sup>126</sup> The reasoning behind this word choice is facially correct, though the resulting legislation in this case is confusing.<sup>127</sup> The Act as it now stands apparently states that any person or business must allow a nursing mother to breastfeed where she is otherwise authorized to be; it imposes a duty upon a third

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120. Marcus, *supra* note 47, at 50.

121. See Walter, *supra* note 113 (“It doesn’t actually create any kind of law or enforceable activity.”).

122. *Breastfeeding in Public Bill Passes Pennsylvania House*, THE LACTIVIST, July 4, 2007, <http://thelactivist.blogspot.com/2007/07/breastfeeding-in-public-bill-passes.html>.

123. Marcus, *supra* note 47, at 50; see also Posting of Jake to THE LACTIVIST, <http://thelactivist.blogspot.com/2007/07/breastfeeding-in-public-bill-passes.html> (July 4, 2007, 09:03 EST) (“In states without language limiting the right to withdraw authorization to be in a space, women are routinely harassed or legally threatened with arrest for trespass by property owners.”).

124. 18 PA. CONS. STAT. ANN. § 3503 (West 2009). Since Pennsylvania has not used the Act to make nursing mothers a protected class, Marcus appears to argue that mothers asked to leave a public accommodation because of their choice to nurse would have no constitutional recourse available to them. This argument, however, is not the subject of this Note.

125. Pena, *supra* note 114.

126. *Id.*

127. See *infra* Part III for a more in-depth discussion of changes that could be made to the statutory language.

party not to interfere with a nursing mother's choice to breastfeed in public.<sup>128</sup> The *Legislative Drafter's Desk Reference* states that a legislator should, "[w]hen requiring that some action be taken, use 'shall' rather than 'is directed to' or 'must.'"<sup>129</sup> The Act thus requires those interacting with a nursing mother in public to allow her to continue breastfeeding.<sup>130</sup> A subsequent clause in the Act attempts to strengthen the permissive clause by stating that a mother must be allowed to breastfeed "irrespective of whether or not . . . [her] breast is covered during or incidental to the breastfeeding."<sup>131</sup> This clause preempts an attempt to remove a nursing mother from a public place for the sole reason that a part of her breast, or her entire breast, is exposed at any one moment. The Act also prevents a law enforcement officer from citing a nursing mother for crimes such as "[i]ndecent exposure,"<sup>132</sup> "[o]pen lewdness,"<sup>133</sup> "[o]bscenity or sexual conduct,"<sup>134</sup> or "nuisance."<sup>135</sup>

While the Act does not specifically state that a woman has the "right" to breastfeed, its sponsor's choice of words still grants a strong protection to nursing mothers throughout Pennsylvania, if only because it reminds the community that the Commonwealth officially supports breastfeeding. Although this Act is strong in that respect, it only clarifies what nursing mothers are generally permitted to do anyway, as there is, and was, no law in Pennsylvania explicitly forbidding public breastfeeding. The Act essentially gives mothers only the permission to do something they were otherwise permitted to do, and states that as long as they are breastfeeding in a location in which they are otherwise allowed to be, they cannot be removed from that location solely because they are breastfeeding. It offers, however, no hint of potential repercussions if a nursing mother is so ejected. The Freedom to Breastfeed Act is only the first step to guaranteeing women the ability to breastfeed in public without any fear of retribution or harassment; it serves only as an in-road for women's rights everywhere in the Commonwealth.

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128. See LAWRENCE E. FILSON & SANDRA L. STROKOFF, *THE LEGISLATIVE DRAFTER'S DESK REFERENCE* § 22.2 (2d ed. 2008) (discussing the implications of choosing "shall" and "may" when drafting legislation).

129. *Id.*

130. Compare *id.* (discussing legislative word choice), with Freedom to Breastfeed Act, 35 PA. STAT. ANN. § 636.3 (West 2009) ("A mother shall be permitted to breastfeed . . ."). See also REED DICKERSON, *LEGISLATIVE DRAFTING* § 7.4 (1954) ("If an obligation to act is imposed, use shall."). Here, the Act appears to be imposing the obligation on others to leave a nursing mother alone and permit her to continue to nurse her child.

131. § 636.3.

132. *Id.* § 636.4(1).

133. *Id.* § 636.4(2).

134. *Id.* § 636.4(3).

135. *Id.* § 636.4(4).

Pennsylvania's Freedom to Breastfeed Act appears relatively strong on its surface. It serves as a statutory reminder to the citizens of the Commonwealth that nursing mothers can in fact breastfeed their children in public places. It also puts fellow citizens on notice that the Pennsylvania legislature recognizes the benefits mothers and infants can gain from community-supported breastfeeding, which include a variety of psychological, social, and health benefits.<sup>136</sup> The Freedom to Breastfeed Act can be even stronger, and many states have had much success with stronger laws.<sup>137</sup> A stronger breastfeeding protection act would put Pennsylvania on par with its neighbors New York,<sup>138</sup> Connecticut,<sup>139</sup> and New Jersey,<sup>140</sup> as well as a number of other states across the country.<sup>141</sup> This Note applauds Pennsylvania for its initial foray into the realm of breastfeeding protection legislation and its support of nursing mothers. It argues, however, that Pennsylvania can take a lesson from its neighbors and make its statutory language more clear. In particular, Pennsylvania should provide a legal remedy for those mothers who may still find their opportunity to breastfeed in public limited or erased altogether.

### III. STRENGTHENING PENNSYLVANIA'S LEGISLATION

Pennsylvania's legislation offers nursing mothers essentially only the state legislature's blessing when these mothers attempt to

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136. See *supra* notes 4-10 and accompanying text (discussing the physical and mental health benefits derived from breastfeeding). Breastfeeding also "encourages women's self-reliance, reduces women's dependence on the medical profession, allows women to value their own capacities, encourages solidarity and cooperation among women, and reminds society that women's breasts are a source of food and comfort for children, not sex objects." Cruver-Smith, *supra* note 28, at 173.

137. Nat'l Conference of State Legislatures, *supra* note 16 (providing a survey of state breastfeeding protection laws).

138. N.Y. CIV. RIGHTS LAW § 79-e (McKinney 2009) (stating a mother "may breast feed her baby" in a public place); N.Y. LAB. LAW § 206-c (McKinney 2009) (instructing an employer to provide a time and location for a mother to express breast milk); N.Y. PENAL LAW § 245.01 (McKinney 2008) (exempting nursing mothers from prosecution for indecent exposure).

139. CONN. GEN. STAT. ANN. § 46a-64 (West 2009). Connecticut states that it is illegal discrimination for a public accommodation to restrict or limit the right of a mother to breastfeed her child, and provides for a fine. *Id.*

140. N.J. STAT. ANN. § 26:4B-4 (West 2007). In New Jersey, a mother is entitled to breastfeed her child in a public accommodation. New Jersey also provides a remedy in the form of fines for a nursing mother who is prevented from breastfeeding in public by another person. *Id.* § 26:4B-5.

141. See HAW. REV. STAT. § 489-21 (2009) (stating it is discrimination to limit access to a public accommodation because a woman is breastfeeding a child); *id.* § 489-22 (providing a private cause of action for a woman discriminated against because of her breastfeeding); VT. STAT. ANN. tit. 9, § 4502(j) (2009) (stating the operator of a public accommodation cannot discriminate against a breastfeeding woman). For further discussion regarding the Vermont statute, see *infra* notes 192-93 and accompanying text.

breastfeed their babies in public or quasi-public spaces. Therefore, Pennsylvania should amend the Freedom to Breastfeed Act in a number of ways. The legislature should clarify the Act's language in order to make Senator Williams's allegedly granted "right to breastfeed" more clear. There are several tactics the legislature could employ and other states the legislature could model.<sup>142</sup> Primarily, the legislature should enact a statutory method of remedy for nursing mothers whose ability to breastfeed in public is limited, especially since the legislature, by enacting this statute in the first place, has so publicly placed its support behind breastfeeding mothers. Instead of retaining an empty bill, Pennsylvania should stand strong for its nursing mothers and put the full power of the Commonwealth behind them and their decisions. This section first discusses the language issues the statute appears to have and will offer potential solutions. Part IV then argues for the inclusion of a remedy clause to the Act.

#### A. *Word Choice and the Freedom to Breastfeed Act*

As discussed, Pennsylvania's Freedom to Breastfeed Act states that a nursing mother "shall be permitted" to breastfeed her child in a place where she and her child are otherwise authorized to be present.<sup>143</sup> According to Senator Williams, this language is equivalent to granting the right to breastfeed in a public place to a nursing mother.<sup>144</sup> A plain reading of the statute, however, reveals that the language instead places a duty upon another to leave the mother alone to breastfeed her child. Since public breastfeeding is not prohibited in Pennsylvania, the Act is really only chiding others for interfering with something a mother is already permitted to do.<sup>145</sup> Saying a mother "shall be permitted" to do something she is implicitly already permitted to do is a waste of legislative time, statutory paper, and space on a law library's shelf. The language as it now stands has created confusion regarding exactly how much freedom nursing mothers have been granted:<sup>146</sup> is a mother's ability to nurse just reiterated

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142. See *infra* note 152 and accompanying text (referencing states using "may" language in their breastfeeding protection statutes); *infra* note 165 and accompanying text (referencing states using "entitled" language); see also *infra* Part III.D (referencing states granting remedies to mothers whose choice to breastfeed outside the home is limited by a bystander).

143. Freedom to Breastfeed Act, 35 PA. STAT. ANN. § 636.3 (West 2009).

144. See *supra* notes 113-16 and accompanying text (regarding the sponsoring Senator's defense of the legislation's word choice).

145. See Pena, *supra* note 114 ("It just says that you are permitted the freedom (to breastfeed), which we already had," Leigh Bellini said.).

146. See *supra* notes 117-25 and accompanying text (regarding the trespass argument).

or are there now consequences dealt to a person who restricts or removes her freedom to breastfeed? For example, regarding a business owner's ability to remove a nursing mother from his establishment, Sally Kalson of the *Pittsburgh Post-Gazette* wrote that the Freedom to Breastfeed Act allows mothers to nurse "without fear of being ejected from the premises."<sup>147</sup> Senator Williams, however, stated that rather than a business owner being completely banned from ejecting a mother, the Act makes it "very difficult to throw someone out now, which they did before."<sup>148</sup> Yet, this is not quite the same as a complete protection from ejection. Breastfeeding advocates argue that the law's language does nothing to protect a mother in this situation, as "a private business owner may still ask a breast-feeding mother to leave. And if she doesn't, she could still be charged with trespassing — a charge not specifically mentioned in the statute."<sup>149</sup>

A law which purports to protect nursing mothers, yet is so susceptible to such dramatic variations in interpretation, is far from useful or protective. While the law and the drafting legislature should be commended for so explicitly removing the possibility of a nursing mother being cited for indecency or obscenity violations,<sup>150</sup> these additions really only protect a nursing mother from the state or a state actor, such as the police. If Pennsylvania is so supportive of a woman's choice to breastfeed,<sup>151</sup> the legislature should make a stronger attempt to protect a nursing mother from harassment by bystanders and other non-state-actor citizens. A stronger breastfeeding protection statute would more completely protect today's nursing mothers, as well as begin minimizing, and ultimately erasing, the community's hidden disapproval of necessary, yet public, breastfeeding. The Pennsylvania legislature should amend the Act and choose one of several options, all of which would more accurately clarify a woman's ability to breastfeed in public and more strongly protect her choice to do so.

### B. "May" Language

At least twenty-two states with breastfeeding protection statutes on the books use language similar to "a mother may breastfeed her child in any public or private place in which she is otherwise

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147. Sally Kalson, *New Law Offers Breast-Feeding Guarantee*, PITTSBURGH POST-GAZETTE, July 11, 2007, at B3.

148. *Id.*

149. Lindt, *supra* note 61, at A1.

150. Freedom to Breastfeed Act, 35 PA. STAT. ANN. § 636.4 (West 2009).

151. *See id.* § 636.2 (stating the Freedom to Breastfeed Act's Declaration of Policy).

authorized to be.”<sup>152</sup> Contrary to Senator Williams’s assertion,<sup>153</sup> no other state currently uses language stating that a mother “shall be permitted” to breastfeed her child in a public place.<sup>154</sup> The reason for this may be quite obvious: the language Pennsylvania has chosen is incredibly confusing, as previously discussed. Neither the statute nor the Commonwealth’s statutory rules of construction<sup>155</sup> define what exactly “permission” is, and the statute fails to say exactly who is supposed to be the active “permitter” in an interaction between a nursing mother and a bystander. Is it the bystander, the owner or operator of the place where the mother happens to be, or somebody else? A change in phrase may most easily remedy this confusion.

Legislative drafters often choose the “may” language, rather than the “shall be permitted” language because it resolves the question of to whom exactly the law is speaking.<sup>156</sup> The statement that a mother “shall be permitted” to breastfeed implies that a person other than the mother is the subject of this statute, and that the other person is now limited in his actions regarding the nursing mother. This language muddles the overall issue and intent of the legislation, which was to protect a nursing mother. This language also affords nothing

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152. These states include: Alabama (ALA. CODE § 22-1-13 (2009)); Arkansas (ARK. CODE ANN. § 20-27-2001 (West 2009)); California (CAL. CIV. CODE § 43.3 (West 2009)); Colorado (COLO. REV. STAT. ANN. § 25-6-302 (West 2009)); Florida (FLA. STAT. ANN. § 383.015 (West 2009)); Georgia (GA. CODE ANN. § 31-1-9 (West 2008)); Illinois (740 ILL. COMP. STAT. ANN. 137/10 (West 2009)); Indiana (IND. CODE ANN. § 16-35-6-1 (West 2009)); Iowa (IOWA CODE ANN. § 135.30A (West 2009)); Kansas (KAN. STAT. ANN. § 65-1,248 (2009)); Kentucky (KY. REV. STAT. ANN. § 211.755 (West 2009)); Louisiana (LA. REV. STAT. ANN. § 51:2247.1(B) (2003)); Maine (ME. REV. STAT. ANN. tit. 5, § 4634 (2008)); Maryland (MD. CODE ANN., HEALTH-GEN. § 20-801 (West 2009)); Minnesota (MINN. STAT. ANN. § 145.905 (West 2009)); Mississippi (MISS. CODE ANN. § 17-25-9 (West 2009)); New Mexico (N.M. STAT. ANN. § 28-20-1 (West 2009)); North Carolina (N.C. GEN. STAT. ANN. § 14-190.9(b) (West 2009)); Oklahoma (OKLA. STAT. ANN. tit. 63, § 1-234.1 (West 2009)); Oregon (OR. REV. STAT. ANN. § 109.001 (West 2009)); Vermont (VT. STAT. ANN. tit. 9, § 4502(j) (2009)); and Virginia (VA. CODE ANN. § 2.2-1147.1 (West 2009)). Virginia only protects breastfeeding “on property owned, leased, or controlled by the Commonwealth.” § 2.2-1147.1. See Nat’l Conference of State Legislatures, *supra* note 16, for a concise collection of the current state breastfeeding protection laws.

153. Pena, *supra* note 114.

154. This information was gleaned from the author’s review of the information provided by Nat’l Conference of State Legislatures, *supra* note 16. Utah has the most similar language to Pennsylvania’s statute, stating that someone “may not prohibit” a mother from breastfeeding. UTAH CODE ANN. § 17-15-25 (West 2009). Utah, however, merely turns the “may” language on its end and removes a certain action from the mother’s potential opponent, while Pennsylvania’s language requires someone to take an affirmative action. *Id.*

155. 1 PA. CONS. STAT. ANN. § 1991 (West 2009).

156. FILSON & STROKOFF, *supra* note 128, § 22.2 (“When requiring that some action be taken, use ‘shall’ rather than ‘is directed to’ or ‘must’; and when permitting some action to be taken, or granting a right, privilege, power, or authority, use ‘may’ rather than ‘is authorized [or empowered] to.’”).

new to the nursing mother, as she is not the subject of the sentence; it only attempts to limit a bystander's actions. Pennsylvania's Act may be construed as directed toward nursing mothers, giving them the right to breastfeed in public, but instead its passive language states that the people around those mothers shall permit them to breastfeed, that those bystanders shall stay out of the way. The United States House of Representatives legislative drafting manual provides an example of the problems faced when utilizing the passive voice in statutory language: "[t]he use of the passive in 'Proceeds derived from such sale shall be deposited into the Treasury' obscures whose proceeds are covered and who bears responsibility for making the deposits."<sup>157</sup> By this example, the Freedom to Breastfeed Act propagates confusion; it is unclear to whom exactly the Act is speaking.

If Pennsylvania really wants to protect nursing mothers, the legislature should make the language of the Act active. Since the legislature appears uncomfortable with granting nursing mothers an explicit "right" to breastfeed,<sup>158</sup> I suggest that Pennsylvania adopt the "may" language that the majority of other states are using.<sup>159</sup> In fact,

[t]he best way to confer a right, privilege, power or authority upon an individual is through the use of a sentence, in the active voice, whose subject is that individual and whose main verb is accompanied by the auxiliary verb 'may'. . . . This form should not be unnecessarily varied or embellished either.<sup>160</sup>

Senator Williams and the Pennsylvania legislature chose not the best way, but a confused and twisted way, if in fact the Senator was trying to confer the right as she claimed. Though she avoided the Republicans' wrath by removing the "right" language, the Senator could have emphasized the same point by stating that breastfeeding mothers "may breastfeed" their children in a public place, like so many other states across the country. The "may" language removes the required action from the hands of the bystander and places authority squarely in the hands of the mother who made the choice to breastfeed in the first place. The Senator's ultimate word choice muddles the Act's stated intent<sup>161</sup> and confuses the day-to-day application of the statute.

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157. OFFICE OF THE LEGISLATIVE COUNSEL, U.S. HOUSE OF REPRESENTATIVES, HOUSE LEGISLATIVE COUNSEL'S MANUAL ON DRAFTING STYLE 59-60 (1995), available at <http://www.house.gov/legcoun/pdf/draftstyle.pdf>.

158. See *supra* note 115 and accompanying text (discussing the legislative problems with the "right" to breastfeed language).

159. See *supra* note 153 (listing states whose statutes use the "may" language).

160. FILSON & STROKOFF, *supra* note 128, § 22.2.

161. See 35 PA. STAT. ANN. § 636.2 (West 2009) (stating the Act's Declaration of Policy).

Though Pennsylvania's statutory construction rules state that "when the words of the statute are not explicit" the intention of the legislature controls,<sup>162</sup> the Act's own language frustrates this statute's intent. The legislature holds that it "finds that breastfeeding a baby is an important and basic act of nurturing that must be protected in the interests of maternal and child health and family values,"<sup>163</sup> but the statute's word choice for the General Rule clause fails to clarify whether the legislature wishes to protect nursing mothers by expanding their authority to breastfeed or by limiting others' rights to take certain actions or make comments regarding those nursing mothers.<sup>164</sup>

### C. "Entitlement" Language

Rather than choosing the "may breastfeed" language, though it does offer nearly unparalleled clarity and places the power of the statute in the hands of the mother rather than a bystander, Pennsylvania could have instead simply stated that a mother is "entitled to breastfeed." Several states use language like this,<sup>165</sup> some in conjunction with enforcement statutes and optional legal remedies.<sup>166</sup> The "entitlement" language has nearly the same effect as the "may" word choice, as it confers a right or privilege to take a certain action.<sup>167</sup> Some states simply may have chosen this language in order to completely resolve any "doubt about who has the option" to exercise that privilege.<sup>168</sup> Those legislatures, intending to give nursing mothers the option to breastfeed in public if they so wish,<sup>169</sup> may have chosen the "entitled to breastfeed" language because the "may" language could leave the statute unclear as to whether someone other than the nursing mother is statutorily obligated to facilitate a nursing mother's needs.<sup>170</sup> Pennsylvania's legislature could choose to state that a nursing mother "is entitled to breastfeed her child" in a public place; this choice would also clear up the confusion that the "shall be permitted" language

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162. 1 PA. CONS. STAT. ANN. § 1921 (West 2009).

163. 35 PA. STAT. ANN. § 636.2 (West 2009).

164. *See id.* § 636.3 (using the "shall be permitted to breastfeed" language).

165. These states include Arizona (ARIZ. REV. STAT. ANN. § 41-1443 (2009)), Delaware (DEL. CODE ANN. tit. 31, § 310 (2009)), New Jersey (N.J. STAT. ANN. § 26:4B-4 (West 2009)), Ohio (OHIO REV. CODE ANN. § 3781.55 (West 2009)), and Texas (TEX. HEALTH & SAFETY CODE ANN. § 165.002 (Vernon 2009)).

166. N.J. STAT. ANN. § 26:4B-5 (West 2009).

167. FILSON & STROKOFF, *supra* note 128, § 22.2.

168. *Id.*

169. *See supra* note 165 (states using "entitled" language and the accompanying statutory intent clauses).

170. *See* FILSON & STROKOFF, *supra* note 128, § 22.2 (discussing how inclusion of "may" often makes a statute ambiguous).

has created. The “may” language, however, is already very clear and, from a simplicity standpoint, would be the best choice.

#### *D. Anti-Discrimination and the Civil Right to Breastfeed*

A handful of legislatures opted to structure their breastfeeding protection laws differently than the aforementioned states. These states provide a private right of action to nursing mothers who were discriminated against based on their choice to breastfeed.<sup>171</sup> Some, like Louisiana, prohibit discrimination against a nursing mother because of her choice to breastfeed in public.<sup>172</sup> New Hampshire combined anti-discrimination language and the creation of a civil right when it codified that restricting or limiting a mother’s right to breastfeed in a public place is discriminatory.<sup>173</sup> Anti-discrimination language provides nursing mothers with a higher authority to turn to when they feel their opportunity to breastfeed has been limited; it “provide[s] a basis for asserting a violation of a woman’s civil rights stemming from discrimination against breastfeeding.”<sup>174</sup> It also places a greater amount of state force behind a nursing mother and asserts nearly outright that she has a “right” to breastfeed her child in public. Unfortunately, this anti-discrimination language would probably not be the best option for Pennsylvania given the resistance the original bill met in the legislative session.<sup>175</sup>

### IV. THE ‘REMEDY’ SOLUTION

Changing the statute’s chosen language is a good idea for clarification purposes, but this Note suggests that the legislature focus on adding a legal remedy for a nursing mother who is not “permitted” to breastfeed her child in a public place where she is otherwise authorized to be. The statute, as it now stands, provides no affirmative remedies for a woman who finds herself permitted by state law to breastfeed in public, but in day-to-day life is prohibited from doing so by external interference.<sup>176</sup>

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171. Clark & Wohl, *supra* note 4, at 1; *see also* Marcus, *supra* note 47, at 52 (“Laws in some states also create a private right of action for someone who has suffered discrimination, which means that a woman may file a lawsuit to recover money damages.”).

172. LA. REV. STAT. ANN. § 51:2247.1(B) (2009).

173. N.H. REV. STAT. ANN. § 132:10-d (2009).

174. Shelton, *supra* note 9, at 190.

175. *See supra* note 115 and accompanying text (discussing the political resistance with which the bill was met).

176. *See supra* note 61 (story of Leigh Bellini); *see also* Marcus, *supra* note 47, at 51-52 (cataloging more stories of mothers being harassed when attempting to breastfeed outside of their homes).

Interestingly, a draft version of the bill did include a remedy and private right of action for the harmed nursing mother.<sup>177</sup> Unfortunately, this provision was removed during discussion in the Commonwealth's House of Representatives only a few days before the governor signed the bill into law.<sup>178</sup> The amending state representative argued that the version of the bill without the remedy would be "more likely to actually make it to the Governor's desk."<sup>179</sup> He stated that the bill already had protection for nursing mothers from criminal prosecution, so "[t]here would be no basis . . . for anybody to interfere with any woman who is breastfeeding a child so long as both she and the child had a right to be in that place otherwise."<sup>180</sup> The representative suggested that since the bill explicitly stated that public breastfeeding was not illegal, "the justification for any untoward conduct towards a woman who was nursing a child would be removed under the statute."<sup>181</sup> Unfortunately, it seems that

[t]he general feeling among legislators and breast-feeding proponents is that the legislation in its present form is enough to empower women. They say it is as a result of the recently enacted statutes that many women stand firm in the face of harassment and refuse to leave public places to breast-feed their children, that women are empowered simply by knowing that breast-feeding is not only the right thing to do, but a protected right. Furthermore, they say breast-feeding legislation breeds confidence in women who make the choice to breast-feed.<sup>182</sup>

While this may be true, a nursing mother would be even more empowered when she has the full power of the law behind her, when she could say to a disapproving, harassing bystander that her choice to breastfeed is fully protected and that the Commonwealth is willing to levy fines and punishment against those who wish to infringe upon that protection.<sup>183</sup> After all, "a right without a remedy is no right at all."<sup>184</sup>

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177. S.B. 34, 191st Gen. Assem., Reg. Sess. (Pa. 2007) (Printer's No. 1252).

178. COMMONWEALTH OF PA., 64 LEGISLATIVE JOURNAL OF THE HOUSE OF REPRESENTATIVES, 1633 (July 3, 2007) [hereinafter PA. LEGIS. JOURNAL].

179. *Id.* at 1632.

180. *Id.*

181. *Id.* at 1633.

182. Cruver-Smith, *supra* note 28, at 177.

183. The sponsor of the original remedy clause responded to the amending representative, stating, "I brought my amendment because I really did believe that and do continue to believe, having been a victim of being harassed [for breastfeeding], that it is important for women to be able to go to court and to vindicate their right to breastfeed." PA. LEGIS. JOURNAL, *supra* note 178, at 1633.

184. Marcus, *supra* note 47, at 50 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)).

Without a remedy, Pennsylvania's statute appears to be largely useless; the Act only legalizes what is already legal, but provides no recourse for women who are prevented from breastfeeding. The legislature could attempt to imply a remedy by stating, as Maryland does, that a mother has a right to breastfeed and "that 'a person may not restrict or limit the right of a mother to breastfeed her child.'"<sup>185</sup> Maryland thus provides a nursing mother a "right" and also provides some protection against non-state actors who may interfere with that right by stating explicitly that a person is prohibited from interfering. The statute, however, does not explicitly state what would happen to a person who does limit that mother's right.<sup>186</sup> An actual remedy makes such language stronger, as the threat of fines and litigation may be a greater deterrent than the idea that one would be imposing on another's rights by illegally prohibiting public breastfeeding.<sup>187</sup>

At least four states currently provide some sort of remedy for a nursing mother prevented, in violation of the law, from breastfeeding her child in public.<sup>188</sup> Interestingly, three of these states are Pennsylvania's neighbors. Connecticut and New Jersey both impose fines for interfering with a nursing mother's right to breastfeed, and New York allows a mother to sue for damages when another person prevents her from breastfeeding in public.<sup>189</sup> New York, perhaps the best model for breastfeeding legislation, allows a nursing mother to claim damages against any individual who violates that mother's civil right to breastfeed.<sup>190</sup> Vermont, like Pennsylvania, allows a mother to breastfeed her child in "any place of public accommodation in which the mother and child would otherwise have a legal right to be."<sup>191</sup> Vermont enforces its provision, however, by giving "mothers the ability to file a charge of discrimination with the HRC [Human Rights Commission] . . . or to 'bring an action for injunctive relief and compensatory and punitive damages and any other appropriate relief'" in court.<sup>192</sup>

A remedy similar to New York's or Vermont's would eliminate the worry surrounding the effect private trespass law would have on a mother nursing in a restaurant or a shopping mall in Pennsylvania.<sup>193</sup>

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185. Marchant, *supra* note 27, at 67.

186. MD. CODE ANN., HEALTH-GEN. § 20-801 (West 2009).

187. See Shelton, *supra* note 9, at 189 ("The availability of a remedy is important in deterring much of the informal harassment surrounding breastfeeding.")

188. KEDROWSKI & LIPSCOMB, *supra* note 23, at 98.

189. *Id.*

190. *Id.*

191. VT. STAT. ANN. tit. 9, § 4502(j) (2009).

192. Clark & Wohl, *supra* note 4, at 2 (quoting VT. STAT. ANN. tit. 9, § 4506 (2009)).

193. Shelton, *supra* note 9, at 189.

For instance, a mother nursing her baby “who is asked to leave a restaurant can say more than just, ‘I have a right to breastfeed here, you know.’ Indeed she can threaten or even bring suit.”<sup>194</sup> A “business, concerned about breastfeeding on the premises, must be careful about the manner in which it approaches the mother and child,” because these laws give a discriminated-against mother a remedy and seem to strike a balance between the rights of nursing mothers and the rights of businesses.<sup>195</sup> Currently, a nursing mother in Pennsylvania is protected by the statute in name only; she cannot stand up for herself using the threat of a lawsuit or fine as her cudgel.<sup>196</sup> The legislature may believe that the protectionist language is enough to protect these mothers,<sup>197</sup> but in an American society where “two out of three Americans think breast-feeding is the best way to feed a baby,”<sup>198</sup> but “a quarter say they feel uncomfortable seeing women do it,”<sup>199</sup> and in a state where a front page article in the *Lancaster New Era* following the passage of the Act pleads, “[j]ust cover it up, ladies,”<sup>200</sup> it appears mothers certainly do need the full power of a remedy with which to back their claim of right.

Other states also offer their nursing mothers injunctive relief against the individual or entity preventing them from breastfeeding their infants in public, or otherwise harassing them.<sup>201</sup> An injunction, however, may not be as useful as it appears, especially for a woman harassed by a private citizen she has only just met and will most likely never see again. One can imagine a mother breastfeeding her child on a park bench and being excoriated by a passerby for exercising her option to feed her child in such a manner. In this situation, an injunction is neither timely nor appropriate, as it is unlikely the passerby will ever have the opportunity to harass the mother again. The option of an injunction, however, is better than no option of remedy at all.

This Note proposes that Pennsylvania provide a remedy much like those in the statutes of New York, New Jersey, or Vermont. Given the conservative resistance to the original bill’s rights-granting language, proclaiming breastfeeding a civil right in Pennsylvania, like it is in New York, may be difficult. The simpler option would be to

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194. *Id.*

195. Clark & Wohl, *supra* note 4, at 2.

196. *See supra* note 61 (describing the Leigh Bellini story).

197. Cruver-Smith, *supra* note 28, at 177.

198. Karen Springen, *Indecent Exposure?*, NEWSWEEK, 2007, <http://www.newsweek.com/id/34218>.

199. *Id.*

200. Stauffer & Spinelle, *supra* note 68.

201. Marcus, *supra* note 47, at 51 (discussing Vermont’s statute).

adopt a sentence like that in Maryland's statute, prohibiting a person from restricting or limiting a mother's ability to breastfeed her child in public.<sup>202</sup> This language would clarify the purported intent of Pennsylvania's Act, and erase the confusion created by the "shall be permitted" language by designating the specific actor to whom the statute is speaking and specifying that actor's responsibilities. Since Senator Williams ran up against resistance due to political worries about restricting the right of private property owners,<sup>203</sup> an amending legislator may again encounter resistance. Pennsylvania could instead insert a section specifying fines to be levied against people limiting a mother's ability to nurse, but again, the question of private property rights emerges. Language like that in Vermont's statute, which protects breastfeeding as part of its public accommodations law,<sup>204</sup> may ultimately be the best solution, especially since Pennsylvania already has a public accommodations law in place.<sup>205</sup> Whatever solution the legislature chooses, its passage will require a significant amount of politicking and legislative haggling. As the Freedom to Breastfeed Act currently stands, however, it only serves as the legislature's public recognition that breastfeeding is important for both women and infants; it does little, if anything, to protect nursing mothers from harassment or restrictions in public.

### CONCLUSION

Breastfeeding is one of the most intimate and instinctual acts of motherhood, yet across the country, fewer mothers breastfeed their children for extended periods of time. This is so even though both the medical and sociological communities recognize breastfeeding's benefits for health and well-being. One of the most important reasons for the drastic departure away from the breast and towards the formula-filled bottle is the American culture's over-sexualization of the woman's breasts and body. "We define breast-feeding as good, and we define breast-feeding as disgusting. We have this split personality about it."<sup>206</sup> State legislatures have taken up the cause of promoting the medical and monetary benefits of breastfeeding, as they have realized that the only way to increase the rate of breastfeeding is to make the communities comfortable with it again, and that

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202. MD. CODE ANN., HEALTH-GEN. § 20-801(b) (West 2009).

203. *See supra* notes 113-16 and accompanying text.

204. VT. STAT. ANN. tit. 9, § 4502(j) (2009).

205. 43 PA. STAT. ANN. §§ 951-953 (West 2009).

206. Springen, *supra* note 198 (quoting Jacqueline Wolf, Associate Professor of the History of Medicine, Ohio University).

requires the protection of mothers who choose not to be secluded in their homes for the duration of their natural, supportive choice.

Pennsylvania, in an attempt to support the Commonwealth's nursing mothers and shield them from unnecessary harassment, is one of the latest states to finally pass a breastfeeding protection law. While Pennsylvania's Freedom to Breastfeed Act is commendable for its first leap into the world of breastfeeding protection, it is an empty law. It only gives women the permission to breastfeed in public; it does not explicitly or implicitly give women the right to breastfeed their children outside of their homes, as so many other states do. Nor does the Act provide women with a legal remedy should their permission to breastfeed be revoked by someone without the legislature's approval. If the Commonwealth truly wants to support its nursing mothers and persuade new mothers to breastfeed for longer periods of time, it must provide some sort of remedy for the inevitable situation when a mother is harassed at the shopping mall while sitting discretely on a bench in the corner.<sup>207</sup> A permission slip to breastfeed, buried in the Commonwealth's code books, does nothing to help these mothers who are made to feel embarrassed and wrong through no fault of their own, just because they have not been given the legal tools to stand up for their right to nourish their children the best way they can. Pennsylvania owes it to these mothers to step up and truly support their breastfeeding efforts, instead of giving them an empty statute and patting itself on the back.

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207. See *supra* note 61 (describing Leigh Bellini's story).

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