

GOT MILK? A PROPOSED MODEL LACTATION POLICY FOR AMERICAN CARCERAL SETTINGS

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INTRODUCTION

In the grand scheme of things, there have been worse times to be lactating in the United States.¹ A decades-long pro-lactation movement led by physicians, government officials, and parents has attempted to lessen the stigma of public lactation, and during the past several decades, the popularity and publicity of breastfeeding has soared as a result.² Since the start of this movement, a number of states, and even the federal government, have enacted pro-lactation policies. These policies together show a national trend of viewing breastfeeding and pumping as not just tolerable, but worthy of accommodation in workplaces, public universities, and courthouses. However, while all of these pro-lactation policies are taking effect in the “outside world,” inside America’s prisons and jails, lactating parents are inconsistently afforded the ability to breastfeed their young children, or even to express milk through pumping.³ For years, journalists have written about the notoriously poor pre- and post-natal care in many American detention centers.⁴ It is unclear why, yet unsurprising that, a schism

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1. See, e.g., Mythili Sampathkumar, *Breastfeeding in public is finally legal in all 50 US states*, INDEPENDENT (July 24, 2018), 21:21), <https://www.independent.co.uk/news/world/americas/breastfeeding-public-legal-us-idaho-utah-a8462321.html>. See also Tiffany Hsu, *On TV, a Rare Realistic Look at Breastfeeding*, N.Y. TIMES (Feb. 28, 2021), <https://www.nytimes.com/2021/02/28/business/media/breastfeeding-ad-frida-golden-globes.html?searchResultPosition=1> [<https://perma.cc/FME6-FMRZ>].

2. U.S. DEP’T OF HEALTH AND HUM. SERVS., THE SURGEON GENERAL’S CALL TO ACTION TO SUPPORT BREASTFEEDING iii (2011), https://www.ncbi.nlm.nih.gov/books/NBK52682/pdf/Bookshelf_NBK52682.pdf [<https://perma.cc/29NA-RNSU>].

3. See, e.g., MELISSA GOODMAN ET AL., AM. C.L. UNION OF CAL., REPROD. HEALTH BEHIND BARS IN CALIFORNIA 19–20 (2016), <https://www.aclunc.org/sites/default/files/Reproductive%20Health%20Behind%20Bars%20in%20California.pdf> [<https://perma.cc/VWR5-B3MX>].

4. See, e.g., The Editorial Board, *Handcuffed While Pregnant*, N.Y. TIMES (Sept. 23, 2015), <https://www.nytimes.com/2015/09/23/opinion/handcuffed-while->

developed between lactation policy in the outside world and in carceral settings.

This Note explores the current status of lactation policies (or lack thereof) inside American detention centers as compared to the outside world. Considering these discrepancies and the cases that have brought them to light, this Note proposes a model policy to ensure that lactating parents be allowed to pump or breastfeed—depending on their specific situation and personal wishes—while incarcerated. The proposal creates accommodations that validate both the medical nature of lactation as well as the constitutional rights of parents, establishing that access to lactation opportunities should not be dependent on the whim of individual wardens.

This Note has three main parts. Part I examines the history of this issue. Part II analyzes the lessons learned from pro-lactation legislation and litigation and the current problems with the state of lactation in detention centers. Part III offers a model of a policy that treats lactation as a medical condition and right that is worthy of accommodations and protection in jails and prisons.

Part I includes overviews of the federal landscape of lactation policy since 2000 and the state landscape of lactation policy, with special emphasis on a “pro-lactation” state. Next, it explores examples of lactation litigation in carceral settings and some of the legal theories that surround these cases. It offers examples of statutes and other non-litigation attempts to change lactation policies in carceral settings. Finally, Part I offers insight into the medical rights of prisoners, the medical nature of lactation, and the current state of the affected prison population.

Part II analyzes the who, what, where, when, and why of a proposal for a new lactation law structure. It discusses the benefits of pro-breastfeeding litigation and non-litigation tactics, as well as the shortfalls of methods. It answers questions about what a policy should prioritize and offers an example of what it should *not*. Part II considers the strengths and weaknesses of many of the approaches explored in Part II to expand lactation access in carceral settings.

Part III proposes a pro-lactation policy that includes carceral settings.

pregnant.html?searchResultPosition=4 [https://perma.cc/SB29-YZBC] (arguing against the fairly widespread practice of shackling of pregnant incarcerated people before, during, or immediately after labor and delivery and quoting the American Medical Association’s assertion that this practice is “barbaric”).

This Note proposes state-wide legislation since it can build upon existing infrastructure and will avoid patch-work county policies. But state-wide policies need not be the only mechanism for supporting lactation for incarcerated populations. Whatever method is adopted, the policy should be one that allows incarcerated individuals who have a need to express breast milk or a desire to provide it to a nursing child to do so in a clean, safe environment with proper facilities and storage.

Before expanding on each of these different topics, it is first important to make a comment on the language used in this Note. It may seem clinical, clunky, or perhaps even awkward to refer to the act of extracting breast milk as “lactation” or “expressing breast milk” rather than “breastfeeding” or “nursing.” The phrase “lactating individual” is used rather than “new moms” or “women.” This language has been chosen in an effort to be more inclusive to all those who lactate—and those who do not. Due to the complex nature of gender identity, not all people who lactate are “women.”⁵ And, of course, not all women lactate, have the ability to lactate, or want to lactate at all. Furthermore, not everyone who needs lactation-related accommodations is breastfeeding (for example, those who pump), and some may not even be parents in the traditional sense.⁶ However, it is unfortunately not always possible to use inclusive language when citing literature, as many statistics, statutes, and secondary sources cited in this Note use language like “breastfeeding,” “women,” and “mother.” “Human milk” is preferred to the term “breast milk” in some scholarly circles,⁷ but this Note uses the “breast milk” in line with most statutory and judicial language. Furthermore, when discussing the objective facts of specific cases or incidents, there is no need to use more generic terms that might be necessary when discussing broader policy. Whenever possible, this Note

5. Some scholars on lactation law also choose to make notes on language in their analyses of lactation laws. *See, e.g.*, Meghan Boone, *Lactation Law*, 106 CAL. L. REV. 1827, 1829 n.7 (2018). In a footnote, Boone clarified the intentionality of her language, discussing her use of the word “woman,” her intention to include transgender women and “transgender men who chose to breastfeed” within her use of the word “woman,” and some additional difficulties transgender people may face in conversations about lactation. *Id.*

6. *See id.* at 1829 (discussing the adverse employment outcomes a mother of a stillborn baby faced when she took time during the workday to pump so that she could donate her breast milk to babies in need).

7. INT’L LACTATION CONSULTANT ASS’N, ILCA STYLE GUIDELINES FOR WRITTEN PROF’L RES. 2 (2017), [https://higherlogicdownload.s3.amazonaws.com/ILCA/e3ee2b6e-c389-43de-83ea-f32482f20da5/UploadedImages/Learning/Resources/ILCA%20Style%20Guidelines%20for%20Written%20Professional%20Resources%20\(2016\).pdf](https://higherlogicdownload.s3.amazonaws.com/ILCA/e3ee2b6e-c389-43de-83ea-f32482f20da5/UploadedImages/Learning/Resources/ILCA%20Style%20Guidelines%20for%20Written%20Professional%20Resources%20(2016).pdf) [<https://perma.cc/DG8T-9CWK>].

uses more neutral words, but if doing so would potentially lead to inaccurate analyses of sources, the original language is preserved.⁸

I. BACKGROUND AND HISTORY

A. General Federal Pro-Lactation Moves Since 2000

In 2000, the Department of Health and Human Services Office on Women's Health issued a 38-page report on breastfeeding dubbed a "Blueprint for Action."⁹ Fourteen different federal offices, agencies, and departments were acknowledged for their contributions to the report, including the Centers for Disease Control and Prevention, the National Institutes of Health, and the Food and Drug Administration.¹⁰ To be clear, this was not the first time the federal government had addressed breastfeeding and expressed that it was an important public health issue for all Americans.¹¹ But this Blueprint for Action was intended by then-Surgeon General David Satcher to be the "comprehensive breastfeeding policy for the nation."¹²

The report stated that breastfeeding is the ideal method of nurturing infants because it provides the best nutrition and defenses against diseases.¹³ Notably, the report expressed concern at the racial disparities in breastfeeding rates, particularly the low breastfeeding rates among African American individuals, stating:

Increasing the rates of breastfeeding is a compelling public health goal, particularly among the racial and ethnic groups who are less likely to initiate and sustain breastfeeding throughout the infant's first year. . . . Significant steps must

8. Keeping this in mind, there is always a need for policymakers to consider how language plays a role in crafting inclusive legislation. The author hopes that as policymaking on this topic becomes more common, more inclusive language will be adopted.

9. See generally OFF. ON WOMEN'S HEALTH, U.S. DEP'T OF HEALTH & HUM. SERVS., HHS BLUEPRINT FOR ACTION ON BREASTFEEDING (2000), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015051989005&view=1up&seq=4> [<https://perma.cc/BFM5-CBWC>].

10. *Id.* at acknowledgements page.

11. *Id.* at 3 (explaining how the Office of the Surgeon General had highlighted breastfeeding as a public health issue for fifteen years).

12. *Id.* at 4.

13. *Id.* at 8.

be taken to increase breastfeeding rates in the United States and to close the wide racial and ethnic gaps in breastfeeding. This goal can only be achieved by supporting breastfeeding in the family, community, workplace, health care sector, and society.¹⁴

This government-sanctioned report made clear the federal government's position on lactation and supported adopting "a comprehensive framework to increase breastfeeding in the United States and to promote optimal breastfeeding practices."¹⁵ However, it stopped short of suggesting any specific pro-lactation policies that should be codified into law. One example of this private-sector-focused approach can be seen in a section entitled "The Workplace," which stated that the "workplace environment should enable mothers to continue breastfeeding as long as the mother and baby desire."¹⁶ It listed eleven "worksites programs" that could facilitate lactation in the workplace, among them "corporate policies providing information for all employees on the benefits of breastfeeding and services available to support breastfeeding women," breaks and flexible schedules, and "secure and relaxing" "Mother's Rooms" in the workplace.¹⁷ The report did not suggest that the onus of enacting these policies might in fact lie with the federal government rather than employers. In the strategic plan section of the report, two goals and objectives addressed policymaking directly, but did not mention who might be responsible for actually pushing legislation forward.¹⁸

In 2010, President Obama did just that through the Patient Protection and Affordable Care Act ("ACA"). In one of its many provisions, the ACA established a "breastfeeding promotion program."¹⁹ This section of the stipulated that the Secretary "shall establish a breastfeeding promotion program to promote breastfeeding as the best method of infant nutrition,

14. *Id.* at 9.

15. *Id.*

16. *Id.* at 16.

17. *Id.*

18. *Id.* at 33. One identified goal was: "Ensure that all Federal, State, and local laws relating to child welfare and family law recognize and support the importance and practice of breastfeeding." The related objective was: "Ensure that all lawmakers and government officials at Federal, State, and local levels are aware of the importance of protecting, promoting, and supporting breastfeeding." *Id.* However, the report does not specify who should be doing the ensuring, or what specific steps that entity should take to ensure.

19. 42 U.S.C.A. § 1790 (West, Westlaw through Pub. L. 116-259).

foster wider public acceptance of breastfeeding in the United States, and assist in the distribution of breastfeeding equipment to breastfeeding women.”²⁰ Furthermore, the ACA also amended the Fair Labor Standards Act (“FLSA”),²¹ which now contains a provision about breastfeeding individuals in the workplace. It states:

- (1) An employer shall provide—
- (A) a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk; and
- (B) a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.²²

This law aligns with many of the goals outlined in the Blueprint, particularly the “Mother’s Rooms,” break times, and flexible schedules.²³ The inclusion of these provisions in the ACA seemed to indicate that the government followed through on its goal of promoting pro-lactation policy.

To be clear, the law was not completely comprehensive. The ACA also stated that “[a]n employer shall not be required to compensate an employee receiving reasonable break time under paragraph (1) for any work time spent for such purpose.”²⁴ Also, employers with fewer than fifty employees would potentially be exempt from the requirements if the employers could show that the requirements impose an “undue hardship” when considering the employer’s needs.²⁵

In 2011, then-Secretary of Health and Human Services Kathleen Sibelius and then-Surgeon General Regina M. Benjamin issued a new 100-page report entitled “The Surgeon General’s Call to Action to Support

20. *Id.* at § 1790(a).

21. U.S. DEP’T OF LABOR, *Section 7(r) of the Fair Labor Standards Act – Break Time for Nursing Mothers Provision*, <https://www.dol.gov/agencies/whd/nursing-mothers/law> [https://perma.cc/BCM4-J59V].

22. 29 U.S.C.A. § 207(r)(1) (West, Westlaw through Pub. L. No. 116-252).

23. See OFF. ON WOMEN’S HEALTH, U.S. DEP’T OF HEALTH & HUM. SERVS., HHS BLUEPRINT FOR ACTION ON BREASTFEEDING, *supra* note 9.

24. *Id.* at (r)(2).

25. *Id.* at (r)(3).

Breast Feeding.”²⁶ This report was intended as an update to the 2000 Blueprint for Action, which it called “the first comprehensive framework for national action on breastfeeding.”²⁷ There were substantial differences between the Blueprint and the Call to Action—one of them being that the Call to Action was issued after the enactment of the ACA. As an illustration, consider how this implementation strategy in the Call to Action on employer lactation support programs for employees emphasizes the power of federal law in promoting lactation:

Develop resources to help employers comply with federal law that requires employers to provide the time and a place for nursing mothers to express breast milk.

As part of the Affordable Care Act enacted in 2010, the Fair Labor Standards Act was amended to require employers to provide reasonable break time and a private place for nursing mothers to express milk while at work. Programs are needed to educate employers about the new law, supply examples of how it can be implemented in a variety of work settings and provide assistance to businesses that find compliance difficult.²⁸

This implementation strategy nicely summarizes the arc of federal involvement in pro-lactation policy. The 2000 report emphasized that action (presumably private) should be taken to promote breastfeeding in the workplace. The ACA codified one small part of that report by placing obligations on employers in the workplace. And the 2011 Call to Action acknowledged the progress made after the ACA and created specific action items that could be taken to facilitate the implementation of the new law.²⁹

26. See generally U.S. DEP’T OF HEALTH AND HUM. SERVS., THE SURGEON GENERAL’S CALL TO ACTION TO SUPPORT BREASTFEEDING (2011), https://www.ncbi.nlm.nih.gov/books/NBK52682/pdf/Bookshelf_NBK52682.pdf [<https://perma.cc/M2XG-D8ML>].

27. *Id.* at v.

28. *Id.* at 51 (emphasis in original).

29. *Id.* at 31.

B. General Pro-Lactation State Action and a Case Study of a Lactation-Friendly State

The majority of states have passed *some* kind of pro-lactation policy. Mamava, a startup that creates mobile pumping rooms that can be rented or purchased for public spaces, rates states on a scale of one to five based on how lactation-friendly they are.³⁰ A score of one means: “[s]tate law protects breastfeeding in public (now true of all states). There are no state-level workplace breastfeeding laws. Breastfeeding mothers, who are paid hourly, are covered by the federal FLSA.”³¹ A score of five means: “[s]tate law protects all working breastfeeding mothers, identifies standards for lactation spaces (e.g., access to a refrigerator), AND additional state legislation protects specific populations AND mandates lactation accommodations for specific locations.”³² While many states have lactation laws, only three have a score of four (Illinois, New Jersey, and New York) and only one has a score of five (California)³³

While the ACA has laid the groundwork at the federal level, some states, such as Illinois and California, have put even more comprehensive protections in place. For example, the Illinois the Right to Breastfeed Act, predating the ACA, states that:

A mother may breastfeed her baby in any location, public or private, where the mother is otherwise authorized to be, irrespective of whether the nipple of the mother's breast is uncovered during or incidental to the breastfeeding; however, a mother considering whether to breastfeed her baby in a place of worship shall comport her behavior with the norms appropriate in that place of worship.³⁴

The statutory intent behind the Right to Breastfeed Act is no mystery. The statute was enacted because the Illinois legislature found that breast

30. *Mamava's Guide to U.S. Breastfeeding Laws*, MAMAVA, <https://www.mamava.com/breastfeeding-law> [<https://perma.cc/XRC7-XAGG>].

31. *Id.*

32. *Id.*

33. *Id.* Perhaps unsurprisingly, many more states have a score of one out of five: Alabama, Alaska, Arizona, Florida, Idaho, Iowa, Kansas, Michigan, Missouri, New Hampshire, North Carolina, North Dakota, Ohio, South Dakota, West Virginia, and Wyoming all received this low rating from Mamava, meaning that they only protect breastfeeding in public. *Id.*

34. 740 ILL. COMP. STAT. ANN. 137/10 (2004).

milk was a better option for a baby's nutrition, immune system, digestion, and IQ in addition to less tangible benefits, such as more opportunities for parent-child bonding.³⁵ The Illinois legislature also seemed to take notes from the 2000 Blueprint for Action. The law states that "[t]he General Assembly finds and declares that the Surgeon General of the United States recommends that babies be fed breast milk, unless medically contraindicated, in order to attain an optimal healthy start."³⁶

In addition to these protections for breastfeeding in Illinois, there are also certain protections for pumping. For example, the Nursing Mothers in the Workplace Act, which was originally passed in 2001 but was amended in the summer of 2018, provides that employers cannot reduce an employee's pay because of the time they have spent pumping.³⁷ The Illinois version of the law also removes the fifty-employee exemption.³⁸ The break time given to the breastfeeding employee must be "reasonable."³⁹

The summer of 2018 also brought another lactation-friendly policy to Illinois. The school code was expanded to create breastfeeding protections for students in Illinois public schools.⁴⁰ The statute states that public schools must provide their breastfeeding students with "reasonable accommodations" for "needs relating to breastfeeding." These accommodations could include a non-restroom pumping or breastfeeding room, permission to bring necessary equipment, access to outlets, a place to store the milk, time to pump or breastfeed, and protections from academic penalty resulting from time spent expressing breast milk under the provisions of the statute.⁴¹

35. 740 ILL. COMP. STAT. ANN. 137/5 (2004).

36. *Id.*

37. 820 ILL. COMP. STAT. 260/10 (2018).

38. *Id.*

39. *Id.*

40. 105 ILL. COMP. STAT. 5/34-18.53 (2018).

41. *Id.*

In 2019, Illinois enacted a law that expanded the availability of pumping rooms in government buildings by amending another statute on the equipment required in county offices.⁴² The law states:

On or before June 1, 2019, every facility that houses a circuit court room shall include at least one lactation room or area for members of the public to express breast milk in private that is located outside the confines of a restroom and includes, at minimum, a chair, a table, and an electrical outlet, as well as a sink with running water where possible. The court rooms and furnishings thereof shall meet with reasonable minimum standards prescribed by the Supreme Court of Illinois.⁴³

The location of the lactation room should be publicized.⁴⁴ Interestingly, the statute “respectfully request[s]” the Supreme Court of Illinois to develop and announce the “reasonable minimum standards” for the room.⁴⁵

While Illinois has taken great strides in enacting comprehensive lactation laws, California has taken its state-level lactation laws to an even higher level: Section 4002.5 of the Penal Code, effective as of 2020, states: “the sheriff of each county or the administrator of each county jail shall develop and implement an infant and toddler breast milk feeding policy for lactating inmates detained in or sentenced to a county jail.”⁴⁶ Previously, existing law placed the decision to enact county jail lactation policies with each individual county sheriff. The new law mandated the creation of local programs in line with best practices.⁴⁷ The California Breastfeeding Coalition, a state-wide advocacy group, urged supporters of the new law to use template outreach letters to encourage counties to adopt “pump and pick-up” lactation policies in their county jails.⁴⁸

42. 55 ILL. COMP. STAT. 5/5-1106 (2019).

43. *Id.*

44. *Id.*

45. *Id.* In September 2019, the Supreme Court of Illinois released the standards outlined by the state law. MINIMUM COURTROOM STANDARDS IN THE STATE OF ILLINOIS, SUPREME COURT OF ILLINOIS 26 (2019), https://courts.illinois.gov/SupremeCourt/Policies/Pdf/Courtroom_Standards.pdf [<https://perma.cc/8ZCD-HKQ6>].

46. CAL. PENAL CODE § 4002.5 (West 2019).

47. *County Jails: Infant and Toddler Breast Milk Feeding Policy: Hearing on AB 2507 Before the S. Comm. on Pub. Safety*, 2017-2018 Regular (Ca. 2018).

48. Pump and Pick Up of Breastmilk Program in County Jails, CAL. BREASTFEEDING

C. Litigation Surrounding Lactation Policies in Jails and Prisons

Case law indicates a mixed bag of failures and success for lactation advocates. Generally, successes for lactating parents in carceral settings are few and far between. The following cases demonstrate the multiple forms lactation litigation can take.

1. A Parent's Liberty Interest in Lactating and Constitutional Rights

In *Southerland v. Thigpen*, the Court of Appeals for the Fifth Circuit upheld the denial of an injunction that would have allowed an incarcerated mother to continue to breastfeed her newborn son.⁴⁹ In her suit, the plaintiffs (Diane Southerland and her infant son Matthew) claimed that Matthew's breastfeeding was rooted in his medical needs because breastfeeding was shown to reduce the risk of both diabetes and allergies, which ran in Matthew's family.⁵⁰ The court denied the injunction on the grounds that their case was unlikely to succeed on the merits.⁵¹

To assess the likelihood of success on the merits, the court took a two-pronged approach by analyzing both the mother's interest and the child's interest. Southerland claimed a fundamental liberty interest in breastfeeding Matthew.⁵² Southerland cited *Dike v. School Board*, in which the Fifth Circuit found that parents had a protected liberty interest in breastfeeding.⁵³ In *Dike*, the court "found the decision to breastfeed encompassed in the parents' constitutionally protected interest in nurturing and rearing their children because breast-feeding 'is the most elemental form of parental care.'"⁵⁴ The Fifth Circuit did recognize this constitutionally protected interest.⁵⁵ However, the court quickly rejected the notion that its holding in

COALITION, <http://californiabreastfeeding.org/focus-areas/pump-and-pick-up-in-jail/> [https://perma.cc/YN92-NKCX].

49. *Southerland v. Thigpen*, 784 F.2d 713, 714 (5th Cir. 1986).

50. *Id.*

51. *Id.* at 718.

52. *Id.* at 715–16.

53. *Id.* at 716 (citing *Dike v. School Bd.*, 650 F.2d 783, 786 & n.1 (5th Cir. 1981)). In *Dike*, a public school teacher had been prohibited from breastfeeding while on her lunch break. *Id.* The court found that this teacher had a protected liberty interest in breastfeeding and that the prohibition was unconstitutional. *Id.*

54. *Id.* at 716 (citing *Dike*, 650 F.2d at 787).

55. *Id.* (quoting *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)).

Dike was applicable to Southerland's claim specifically because Southerland was a prison inmate.⁵⁶ The court stated that the nature of incarceration means that inmates have many rights curtailed.⁵⁷ A recognized right for individuals outside the carceral setting would not necessarily apply to Southerland, because inmates only have rights that are consistent with the "systemic goals of deterrence, retribution, and correction."⁵⁸

The court held that allowing Southerland to breastfeed Matthew while serving her sentence would either work against the goals of deterrence and retribution (if her sentence were to be suspended to allow her time to breastfeed) or simply be too logistically burdensome (if Matthew were to be allowed into the prison).⁵⁹ In summary, the court found that accommodations for lactating individuals was incompatible with the objectives of the penal system.⁶⁰ Southerland's situation was a reasonable consequence of being incarcerated, which requires the loss of some rights.⁶¹

In a more recent case, a New Mexico state district court reached a conclusion more favorable to lactating individuals, finding that an incarcerated mother, like all lactating parents, had a constitutional right to breastfeed her baby under the New Mexico constitution.⁶² In *Hidalgo v. New Mexico Department of Corrections*, a woman was granted a temporary restraining order allowing her to breastfeed during visitation hours and pump breast milk to be stored for her child.⁶³ In this case, Monique Hidalgo's daughter Isabella was born addicted to opioids while Hidalgo was serving her sentence.⁶⁴ Because Isabella was going through symptoms of withdrawal, Hidalgo's doctor wanted her to breastfeed because breast milk

56. *Id.*

57. *Id.*

58. *Id.* at 717.

59. *Id.* at 716–17.

60. *Id.* at 717. The court goes on to discuss Matthew's potential liberty interest. I do not discuss this here because I do not believe a child-centered approach is relevant to my analysis, which will be discussed in detail later in this Note.

61. *Id.*

62. *New Mexico Prisoner Obtains Court Order to Allow Breastfeeding*, PRISON LEGAL NEWS (Apr. 2, 2018), <https://www.prisonlegalnews.org/news/2018/apr/2/new-mexico-prisoner-obtains-court-order-allow-breastfeeding/> [<https://perma.cc/E5K3-QT6J>].

63. *Hidalgo v. New Mexico Department of Corrections*, No. D-101-CV-2017-01658, Order Granting in Part and Denying in Part Plaintiff's Motion for Preliminary Injunction at 22 (1st Judicial District, County of Santa Fe 2017).

64. *Id.* at 4.

and skin-to-skin contact help newborns addicted to opioids.⁶⁵ When Hidalgo returned to prison after giving birth, she was told that she would not be able to breastfeed Isabella when Isabella’s father brought her for visitation.⁶⁶ She was also told that she would not be able to express breast milk for Isabella’s use.⁶⁷

After granting a preliminary injunction, the court later ruled on the merits and found that women have a “fundamental interest” in the decision to breastfeed, citing *Dike*.⁶⁸ Then, considering the conflicting viewpoint espoused in *Southerland*, the court found that a blanket breastfeeding ban was not related to legitimate penological interests and thus violated the New Mexico Constitution.⁶⁹ When asked about the ongoing litigation, the Department of Corrections (“DOC”) spokesperson stated that “[the DOC’s] primary concern has always been and continues to be the safety and the well-being of the infant, which may now be compromised by this ruling.”⁷⁰

2. Prisons as Public Spaces

In one Connecticut case, a state court found that a (non-incarcerated) mother did not have a right to breastfeed her infant in a prison visitation room even when state laws prohibit the restriction of breastfeeding in places of public accommodation.⁷¹ In *CHRO ex rel. Alsenet Vargas v. State of Connecticut Department of Correction*, a mother sued after she was prohibited from breastfeeding her baby on two separate occasions while visiting her baby’s father in the prison.⁷² Connecticut law stated that it was illegal for “a place of public accommodation, resort or amusement to restrict or limit the right of a mother to breast-feed her child.”⁷³ The court held that prison visitation rooms where inmates are allowed are not areas of public accommodation.⁷⁴ In its analysis, the court was particularly concerned with

65. *Id.* at 4–5.

66. *Id.* at 7.

67. *Id.*

68. *Id.* at 18.

69. *Id.* at 20–22.

70. *New Mexico Prisoner Obtains Court Order to Allow Breastfeeding*, *supra* note 62.

71. *CHRO ex rel. Vargas v. State Dep’t of Corr.*, No. HHBCV136019521S, 2014 WL 564478, at *1 (Conn. Super. Ct. Jan. 10, 2014).

72. *Id.*

73. *Id.* (quoting Conn. Gen. Stat. Ann. § 46a-64 (2019)).

74. *Id.*

whether inmates were allowed in the space, stating that it would not decide whether “all portions of a correctional facility, including administrative offices, employee areas, parking lots and other areas where inmates do not have access” are places of public accommodation.⁷⁵

The Commission on Human Rights & Opportunities (“CHRO”) argued that the visitation room was a place of public accommodation, which is defined in state statutes as an “establishment which caters or offers its services or facilities or goods to the general public.”⁷⁶ In its brief, the CHRO had based this argument on the idea that “[a] prison, as a public state facility that any member of the public is invited to go to if they commit a crime and are sentenced, is place of public accommodation subject to the state's anti-discrimination laws.”⁷⁷ The court disagreed, finding that correctional facilities are inherently areas in which the government has divided the public from the “the individuals who are compelled by our penal system to be confined there.”⁷⁸ In addressing this lactation issue, the court even went so far as to incorporate extensive precedent stating that inmates do not have a constitutional right to or liberty interest in visits and in fact are subject to strict restrictions on visits.⁷⁹

75. *Id.*

76. *Id.* at *3 (citing CONN. GEN. STAT. ANN. § 46a-63 (West)).

77. *Id.*

78. *Id.* at 4.

79. *Id.*

The court also addressed safety concerns in its opinion, stating that allowing breastfeeding in the visitation room created conflict with prison authority's ability to maintain prison security.⁸⁰ The court offers a hypothetical to illustrate why allowing breastfeeding would conflict with maintaining prison security:

Breastfeeding, however natural, non-sexual, and appropriate in a wide variety of contexts, may threaten the security and safety of the staff, inmates and other visitors when done in a visiting room at a correctional facility. It is easy to imagine the real possibility that puerile remarks by one or more inmates about the exposed breasts of another inmate's family member may lead to violent confrontations.⁸¹

For these reasons, the court found that the prison was not acting in violation of state law when a guard prohibited the visitor from breastfeeding her baby.⁸²

3. Pumping Devices as a Medical Need

In *Villegas v. Metro. Gov't of Nashville*, the Sixth Circuit determined that the analysis for an inmate's need for a lactation pump post-partum "fits neatly into the framework of our medical-needs jurisprudence" under the Eighth Amendment deliberate indifference doctrine.⁸³ In this case, an inmate was sent home from the hospital with a breast pump after giving birth, but was not allowed to take it back with her to jail because it was not considered a "critical medical device."⁸⁴ The court found that being sent home with a breast pump was not the same thing as being prescribed a breast pump and, furthermore, that the need for the breast pump was not "obvious" enough to fit within the medical-needs framework.⁸⁵ So, as *Villegas* demonstrates, being sent home from the hospital with a pumping device

80. *Id.* at 5.

81. *Id.*

82. *Id.* at 8.

83. *Villegas v. Metro. Gov't of Nashville*, 709 F.3d 563, 578–79 (6th Cir. 2013).

84. *Id.* at 579.

85. *Id.* at 579–80.

may not be enough to show medical need under current doctrine.⁸⁶

*D. Non-Litigation Efforts to Change Lactation Policies for
Incarcerated Populations*

Lactation policies in detention centers vary state-by-state, and these policies are enacted through a combination of litigation,⁸⁷ lobbying, independent action on the part of the detention centers, and legislation. The following examples, which are by no means comprehensive, demonstrate the breadth of these latter three approaches.

The Illinois Department of Corrections (“IDOC”) adopted a more lactation-friendly policy in the summer of 2019 after receiving a strongly worded letter from the ACLU of Illinois detailing their non-compliance with state law.⁸⁸ The letter described the situation of Emily French, an incarcerated woman who on seven or eight occasions was denied the right to breastfeed her son during visitation.⁸⁹ As a result, she experienced “engorgement, leaking, discomfort and emotional distress.”⁹⁰ This practice was a violation of the Illinois Right to Breastfeed Act (described above). The letter urged IDOC to change its policies in order to comply with the provision that breastfeeding is permitted “any location, public or private, where [the person breastfeeding is] otherwise authorized to be.”⁹¹ Two weeks later, IDOC Chief Legal Counsel responded to the letter, stating that they would revisit the policy and ensure that breastfeeding can be done in a private area during visitation.⁹² In an interview, Meek clarified that the change in policy would not affect all incarcerated persons; while the state prisons were fairly centralized, each county has its own unique policies that

86. *See id.*

87. *See supra* Part III C.

88. *Breastfeeding Mother’s Experience Leads to Illinois Department of Corrections to Change Policies*, ACLU OF ILLINOIS (July 19, 2019), <https://www.aclu-il.org/en/node/8700> [<https://perma.cc/9BR7-4H6P>].

89. Letter from Amy Meek to Rob Jeffreys (June 12, 2019), https://www.aclu-il.org/sites/default/files/field_documents/2019-06-11_letter_from_aclu-il_to_idoc_re_breastfeeding_in_visitation_rooms.pdf [<https://perma.cc/72QA-PHCG>].

90. *Id.*

91. *Id.*

92. Letter from Camile Lindsay to Amy Meek (June 26, 2019), https://www.aclu-il.org/sites/default/files/field_documents/letter_to_aclu_re-breastfeeding_at_lcc.pdf [<https://perma.cc/NFR7-5WLW>].

are not affected by the IDOC policy change.⁹³

It is fairly common to see this county-by-county patchwork change. At one Wisconsin county jail, a woman was not allowed to pump breast milk for one week, after which she was no longer able to lactate.⁹⁴ The jail stated that it only allowed women to express breast milk when medically necessary because of limited refrigerator space.⁹⁵ The jail changed its policy when a woman who had read about the story met with the sheriff to educate him on breast milk expression and donated a cooler and bags for storage.⁹⁶

In California, the ACLU worked to pass AB 2507, which requires county sheriffs to develop and implement a “infant and toddler breast milk feeding policy for lactating inmates detained in or sentenced to a county jail.”⁹⁷ The law states that the policies must include “medically appropriate support or care related to cessation of lactation;” procedures for expression, storage, and delivery of breast milk to the child; participation following a drug screening; and publication of the policy.⁹⁸ The law also states that it applies to jails run by private contractors and that it does not matter whether the inmate has been convicted of a crime.⁹⁹

Finally, on January 1, 2020, New Mexico mandated that “every correctional facility that houses female inmates shall develop and implement a breastfeeding and lactation policy for lactating female inmates that is based on current accepted best practices.”¹⁰⁰ “Every correctional

93. Telephone interview with Amy Meek, Senior Counsel, The Chicago Lawyer’s Committee for Civil Rights (Nov. 6, 2019). For more information on how lactation policies in Illinois jails can vary widely by county see, e.g., Ally Timm et. al., *Lactation Practices in Minnesota and Illinois Jails: Implications for health of justice-involved mothers and their children*, UNIV. OF MINN. SCH. OF PUB. HEALTH (2020), <https://www.sph.umn.edu/events-calendar/research-day/rd-2020/ally-timm> [<https://perma.cc/N2WN-ZUF8>].

94. Doug Schneider, *Brown County Jail alters approach on nursing mothers*, GREEN BAY PRESS GAZETTE (Mar. 14, 2014, 8:15 PM), <https://www.greenbaypressgazette.com/story/news/2014/03/14/brown-county-jail-alters-approach-on-nursing-mothers/6440583/> [<https://perma.cc/RU4X-FCPN>]. While the newspaper article does not state as such, there is typically a seven-to-ten-day window in before the milk supply dries up. Lisa Mildbrand, *How to Stop Breastfeeding (and Keep Baby Happy)*, THE BUMP (Mar. 2020), <https://www.thebump.com/a/how-to-stop-breastfeeding> [<https://perma.cc/7PWY-H2PZ>].

95. Eliana Dockterman, *Jail Forbids New Mother From Pumping Breast Milk*, TIME (Mar. 4, 2014, 11:39 AM), <https://time.com/12329/jail-forbids-a-new-mother-from-pumping-breast-milk/> [<https://perma.cc/98PH-7QMR>].

96. Schneider, *supra* note 94.

97. CAL. PENAL CODE § 4002.5 (West 2019).

98. *Id.*

99. *Id.*

100. N.M. STAT. ANN. § 33-1-23 (2020).

facility” is broadly defined in the statute to include any public or privately-run jails, prisons, and detention centers used to confine adults and juveniles.¹⁰¹ The law states that these breastfeeding and lactation policies must address breast milk expression requiring electric breast pumps, storage, transport, and disposal; addiction treatment; breastfeeding in facilities that accommodate skin-to-skin contact; and medical support related for people wishing to stop lactating.¹⁰²

E. The Medical Rights of Prisoners

The government has an “obligation to provide medical care for those whom it is punishing by incarceration.”¹⁰³ In other words, prisoners have a right to health care. This fact has been long established by several Supreme Court cases, some of which are discussed in this section.¹⁰⁴ These cases all analyze the Eighth Amendment, which states that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”¹⁰⁵

Before discussing the health care component of the Cruel and Unusual Punishments Clause, it is necessary to define “cruel and unusual punishment.” In *Trop v. Dulles*, the court determined the scope of the “cruel and unusual punishments clause” for the first time.¹⁰⁶ The petitioner in this case sought a declaratory judgment that he was still a citizen, fearing that it had been stripped because of his conviction and dishonorable discharge for desertion after he attempted to escape his post while serving in French

101. *Id.*

102. *Id.* Also in New Mexico, the legislature has made lactation rights for incarcerated individuals more explicit. In March 2019, the state enacted a law “requiring courts to consider pregnancy or lactation for release, bond or good time computation” in sentencing. The law states that:

The court shall consider an individual's pregnancy or lactation status when determining whether the individual is eligible for release or bond and in the computation of good time credit. A presumption shall be made in favor of release for an individual who is pregnant or lactating. An individual released pursuant to this section shall be placed on the least restrictive conditions of release necessary to ensure return to custody.

Id.

103. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

104. *See, e.g., id.*; *Trop v. Dulles*, 356 U.S. 86, 99 (1958).

105. U.S. CONST. amend. VIII.

106. *See Trop*, 356 U.S. at 99 (1958).

Morocco during World War II.¹⁰⁷ The Court found that the Amendment as written was imprecise and fluid, stating that “[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”¹⁰⁸

In *Estelle v. Gamble*, a state inmate sued the medical director and two correctional officers of the Texas Department of corrections after he was repeatedly denied access to medical care and was punished with solitary confinement for not working when he felt extremely ill.¹⁰⁹ The court ruled that “deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain,’ proscribed by the Eighth Amendment.”¹¹⁰ Failing to provide medical care need not result in some severe or deadly consequence; it is enough that the failure causes pain and suffering. The court wrote:

In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose. The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation codifying the common law view that “it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.”¹¹¹

Finally, in 1994, the Supreme Court further expanded the meaning of “deliberate indifference” in *Farmer v. Brennan*, holding that prison staff’s “deliberate indifference to a substantial risk of serious harm to an inmate violates the Cruel and Unusual Punishment Clause.”¹¹² The petitioner in *Farmer* was a transgender woman held in a male facility who was raped by another inmate and potentially exposed to HIV.¹¹³ Together, these two cases indicate that there is some constitutional protection for inmates who have medical needs.

107. *Id.* at 87–88.

108. *Id.* at 100–01.

109. *Gamble*, 429 U.S. at 98–101.

110. *Id.* at 104 (citing *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)) (citations omitted).

111. *Id.* at 103–04 (quoting *Spicer v. Williamson*, 132 S.E. 291, 293 (1926)) (citations omitted).

112. *Farmer v. Brennan*, 511 U.S. 825, 828 (1994) (internal citations omitted).

113. *Id.* at 830.

F. Lactation as a Medical Issue

Breast milk expression can often be a medical necessity for parents, and experts believe breast milk has benefits for babies as well.¹¹⁴ When breast milk is present and is not expressed, the breasts can become painfully swollen.¹¹⁵ Furthermore, complications such as lactation mastitis—an inflammation of the breast tissue which can be accompanied by an infection and may require surgical intervention—can arise from insufficient breast milk expression.¹¹⁶ According to the American College of Obstetricians and Gynecologists (“ACOG”), breastfeeding is the “preferred method of feeding for newborns and infants.”¹¹⁷ Citing the benefits to lactating individuals and their babies, ACOG recommends that inmates either be allowed to breastfeed or to pump breast milk for delivery to their babies.¹¹⁸ If pumping, the lactating individual should receive accommodations for proper milk storage and transport.¹¹⁹ Research has also shown that “breastfeeding improves maternal health by reducing postpartum bleeding and may lower the risk of pre-menopausal breast cancer and ovarian cancer.”¹²⁰

114. *Breastfeeding and Lactation for Medical Trainees*, AAFP (last visited Mar. 16, 2020), <https://www.aafp.org/about/policies/all/breastfeeding-lactation-medical-trainees.html> [<https://perma.cc/5R52-7PCQ>]. This Note is not intended to debate the merits of breast milk for babies. Rather, this section aims to highlight why breast milk expression is a medical issue.

115. Goodman, *supra* note 3, at 19.

116. *Id.* See also *Mastitis*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/mastitis/symptoms-causes/syc-20374829> [<https://perma.cc/234D-5M5Q>].

117. COMM. ON HEALTH CARE FOR UNDERSERVED WOMEN, THE AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS, COMM. OPINION NO. 511: HEALTH CARE FOR PREGNANT AND POSTPARTUM INCARCERATED WOMEN AND ADOLESCENT FEMALES 2 (Nov. 2011), <https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2011/11/health-care-for-pregnant-and-postpartum-incarcerated-women-and-adolescent-females.pdf> [<https://perma.cc/5FHQ-TBM6>].

118. *Id.*

119. *Id.*

120. OFFICE ON WOMEN'S HEALTH, U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 9, at 8.

G. The Current State of the Affected Population.

The Prison Policy Initiative estimates that there are approximately 231,000 women¹²¹ incarcerated in the United States in federal and state prisons, local jails, immigration detentions centers, and other types of detention centers.¹²² Slightly more of them are held in jails as opposed to prisons, and 80% of the women in jails are mothers.¹²³ Women are the fastest-growing group of the incarcerated population.¹²⁴ Most of the women who come into the criminal justice system are women are of reproductive age, and between five and ten percent of women enter their period of incarceration pregnant.¹²⁵ There are also racial disparities in the population of incarcerated women; Black and Native American women are overrepresented in prisons and jails.¹²⁶

121. Not all people who lactate are women. However, because there is not reliable data collected on the number of lactating men or nonbinary people in the criminal justice system, I briefly discuss the current situation of women here. The dearth of data on this topic leads to an unfortunately incomplete, but still useful, picture of the situation for lactating individuals.

122. Aleks Kajstura, PRISON POLICY INITIATIVE, *Women's Mass Incarceration: The Whole Pie 2019*, (Oct. 29, 2019), <https://www.prisonpolicy.org/reports/pie2019women.html> [<https://perma.cc/QK3S-5P66>]. "Other" types of detention centers mentioned in the report include youth detention centers, Indian Country jails, Military detention centers, and territorial prisons. *Id.*

123. *Id.* Typically, jails are used to detain inmates before and during trial or sentencing and to detain inmates after convictions if those inmates have been given shorter sentences. Prisons are post-trial detention centers that hold people with sentences longer than a year. *FAQ Detail*, BUREAU OF JUST. STAT., <https://www.bjs.gov/index.cfm?ty=qa&iid=322> [<https://perma.cc/7Z5P-A2YD>] (last visited Nov. 11, 2019).

124. Wendy Sawyer, *The Gender Divide: Tracking Women's State Prison Growth*, PRISON POLICY INITIATIVE (Jan. 9, 2018), https://www.prisonpolicy.org/reports/women_overtime.html [<https://perma.cc/KX9D-ZV6V>].

125. Jennifer G. Clark & Rachel E. Simon, AMA J. OF ETHICS, *Shackling and Separation: Motherhood in Prison*, (Sept. 2013), <https://journalofethics.ama-assn.org/article/shackling-and-separation-motherhood-prison/2013-09> [<https://perma.cc/X56P-UDH3>].

126. Kajstura, *supra* note 122.

II. ANALYSIS

The various sections of Part II discussing the background and history of this issue demonstrate the various levels of analysis that must be considered when designing a pro-lactation policy for those who are incarcerated. To begin, it is necessary to recognize the massive push towards pro-lactation policies at both the state and federal level over the past several decades.¹²⁷

Next, the history of litigation concerning lactation in carceral settings provides insight into three potential legal theories on which to base pro-lactation policies in carceral settings: lactation as a liberty interest, prisons as public spaces, and lactation as a medical need—which seemed promising but was unsuccessful at trial. The discussion of non-litigation approaches to obtaining lactation rights in carceral settings provides a glimpse into how pro-lactation policies might be achieved. The discussion on the medical rights of prisoners and lactation as a medical issue lays the groundwork for an additional legal theory of pro-lactation policy in carceral settings, but one that is thus far unfulfilled.

Finally, the brief overview of the current status of the affected population explains additional motivation for facilitate lactation in carceral settings—and some additional challenges for policymaking. Together, these levels of analysis can tell a complete picture of who should push for these policies, what the policies should establish, where this policymaking should take place, when this should be a priority, and why the United States should adopt a widespread policy facilitating lactation in carceral settings in the first place.

A. Who should be pushing for reform in carceral lactation policies?

Anyone who has pushed for pro-lactation policies on the “outside” should be equally concerned about access to lactation in the carceral setting. In the four court cases examined above—*Southerland*, *Hidalgo*, *CHRO ex rel. Alsenet Vargas*, and *Villegas*—the person at the heart of the debate was

127. See, e.g., OFF. ON WOMEN'S HEALTH, U.S. DEP'T OF HEALTH & HUM. SERVS., HHS BLUEPRINT FOR ACTION ON BREASTFEEDING (2000), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015051989005&view=1up&seq=4> [<https://perma.cc/BFM5-CBWC>]; 42 U.S.C.A. § 1790 (West, Westlaw through Pub. L. 116-259); CAL. PENAL CODE § 4002.5 (West 2019).

either an incarcerated person or someone very close to one. These attempts by those directly affected by the issue to influence lactation policy through the courts have been met with mixed success, as the courts have not agreed on an actual basis on which to grant these types of claims. Conversely, the ACLU of Illinois's letter to the Illinois Department of Corrections was able to change the policy throughout the state very quickly,¹²⁸ although individual jails were harder to influence at that high of a level.¹²⁹ And a generous donor was all it took to informally change the policy in one Wisconsin jail.¹³⁰

Ideally, those who are incarcerated should be allowed to push for reforms on the bases that they find best align with their interests. However, where powerful organizations and individuals can help, they should.

B. What would the policy look like?

This Note provides several examples of what pro-lactation policy can look like in carceral settings. Statewide legislation can target this issue specifically, as it does in California and New Mexico.¹³¹ Alternatively, lobbyists can attempt to tie any incarceration-specific lactation policies to laws already in existence.¹³² However, a request built on existing policy may severely limit the law. As stated previously, such a request may not have a sweeping effect on a hyper-local scale, since repeated requests for a policy change in every single county might prove onerous for advocates. Furthermore, many states do not have any pro-lactation policies besides what is mandated by the Affordable Care Act and Fair Labor Standards Act.¹³³ Finally, as seen in the *CHRO ex rel. Alsenet Vargas* case, even when there are general pro-lactation laws in the state, there can still be legal ambiguity as to whether or not those laws can and should be applied in a carceral setting.¹³⁴ Based on these considerations, the most comprehensive way to protect those who lactate while incarcerated is to already have very

128. Meek, *supra* note 84; Letter from Camile Lindsay to Amy Meek, *supra* note 92.

129. Meek, *supra* note 93.

130. Schneider, *supra* note 94.

131. CAL. PENAL CODE § 4002.5 (West 2019).

132. See, e.g., Meek, *supra* note 84.

133. *Mamava's Guide to U.S. Breastfeeding Laws*, *supra* note 30.

134. *CHRO ex rel. Vargas v. State Dep't of Corr.*, No. HHBCV136019521S, 2014 WL 564478, at *1 (Conn. Super. Ct. Jan. 10, 2014).

strong state-wide protections for lactation (which should exist in every state), and to then intentionally codify an additional law that specifically names incarcerated populations as especially in need of accommodations.

Because so many people are held in jails as opposed to prisons,¹³⁵ it is important that any state-level policy takes this into account. The ACLU of Illinois's strongly-worded-letter approach did prompt IDOC to change its policy on breastfeeding in state prisons; however, at the county jail level, lactation policies may vary widely or not exist at all.¹³⁶ The hyper-local nature of this issue demands broad-reaching statutory involvement to ensure that lactating individuals who are incarcerated *in any facility* are able to either breastfeed or pump breast milk.

C. Where should this policy battle be taking place?

Most pro-lactation policy work is currently being done at the state level. The California and New Mexico statutory examples demonstrate how specifically these statewide policies can address this very issue.¹³⁷

At the same time, it is clear that there is also federal support for pro-lactation policies, as evidenced by the 2000 Blueprint for Action, the Affordable Care Act in 2010, and the Surgeon General's Call to Action in 2011. So, while state-level policies might be where the most progress can be made, it is not unprecedented that the federal government speaks on and advocates for this issue.¹³⁸ Furthermore, while this Note has focused primarily on jails and state prisons, thousands of women and other individuals with the potential to lactate are held in immigration detention centers or federal prisons.¹³⁹ Individuals held in these facilities should also be granted the protections necessary to start or continue their preferred method of breast milk expression.¹⁴⁰

135. See Kajstura, *supra* note 122.

136. Meek, *supra* note 93.

137. See CAL. PENAL CODE § 4002.5 (West 2019); See also N.M. STAT. ANN. § 33-1-23 (LexisNexis (2019)).

138. See, e.g., OFF. ON WOMEN'S HEALTH, U.S. DEP'T OF HEALTH & HUM. SERVS., HHS BLUEPRINT FOR ACTION ON BREASTFEEDING (2000), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015051989005&view=1up&seq=4> [<https://perma.cc/BFM5-CBWC>]; 42 U.S.C.A. § 1790 (West, Westlaw through Pub. L. 116-259).

139. Kajstura, *supra* note 122.

140. For example, immigration detention centers comply with National Detention Standards. *Detention Mgmt.*, U.S. IMMIGR. & CUSTOMS ENFT (Feb. 5, 2020), <https://www.ice.gov/detention->

It is important to note that sometimes change can be created on a hyper-local scale. While statewide change may take time, people can also advocate for changes at their local county jails. This may not be the ideal tactic for creating real change, as it exacerbates the patchwork problem that currently exists. However, in the short term, for urgent circumstances, it cannot hurt to advocate for changes at the county level.

D. When did this become a pressing issue?

With the rapidly growing female prison population and the high rate of pregnancy among incarcerated women,¹⁴¹ the time to act is now. Women are the fastest growing prison population.¹⁴² Given the past two decades of pro-lactation policy in the United States, there is no better time to push for comprehensive, inclusive, pro-lactation policies that can help those in the criminal justice system decide if and how they would like to express their breast milk. With recent pro-lactation victories changing the “outside,” now is the time to harness this momentum for the benefit of those in the criminal justice system. This is also in line with the idea that an “evolving standard of decency” should affect how we treat prisoners.¹⁴³

At the same time, it is important to recognize that this change is long overdue. As long as there have been prisoners, prisoners have had a constitutional right to medical care.¹⁴⁴ As lactation is a medical issue, this policy change must be made with urgency. However, it would be wrong to suggest that incarcerated individuals *now* deserve to be able to express their breast milk simply because the past two decades have shown that pro-lactation policies are trendy. There is no “right” time to demand the exercise of constitutional rights—they have always been valid.

management [<https://perma.cc/Z79D-EJZ5>]. These detention standards stipulate that during an initial health assessment upon detention, a health profession should assess whether a female detainee is “currently nursing,” but it does not elaborate on what should be done with this information whatsoever. *Standard 4.3: Medical Care*, U.S. IMMIGR. & CUSTOMS ENF’T NAT’L DET. STANDARDS FOR NON-DEDICATED FACILITIES 124 (2019), https://www.ice.gov/doclib/detention-standards/2019/4_3.pdf [<https://perma.cc/XX34-A4P2>].

141. Clark & Simon, *supra* note 125.

142. Kajstura, *supra* note 122.

143. *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958).

144. *See generally Estelle v. Gamble*, 429 U.S. 97 (1976).

E. Why do incarcerated people have a right to these pro-lactation policies?

This Note has laid the groundwork for three main legal grounds on which these new carceral lactation policies might rest. The first is that carceral institutions are not only public accommodations, but government buildings; breastfeeding should be allowed in public accommodations and facilitated in government buildings.¹⁴⁵ The second is that parents have a constitutionally protected liberty interest in being able to express breast milk for their children.¹⁴⁶ Finally, the third argument is that incarcerated people have a constitutional right to express breast milk because lactation is, at its core, a biological function that needs to be accommodated to preserve the rights and dignity of the incarcerated and their medical needs.¹⁴⁷

As to the first point, carceral institutions should be viewed as both public places and government buildings, suggesting both that those in jails and prisons should be *allowed* to breastfeed in them in all states and that the government may have a higher obligation to *facilitate* the expression of breast milk. The Illinois law mandating quiet lactation rooms in courthouses in some small way demonstrates this sense of governmental obligation.¹⁴⁸ As government buildings, prisons and jails have some obligation to provide the people in them with, at minimum, a quiet place to breastfeed or pump. While all states protect breastfeeding in public, not all have enacted lactation-facilitating public accommodation lactation laws.¹⁴⁹ Establishing these policies in government buildings might be a promising first step, and prisons and jails should be included in that first step. Because the court in *CHRO ex rel. Alsenet Vargas v. State of Connecticut Department of*

145. See, e.g., 55 ILL. COMP. STAT. 5/5-1106 (2019); but see *CHRO ex rel. Vargas v. State Dep't of Corr.*, No. HHBCV136019521S, 2014 WL 564478, at *1 (Conn. Super. Ct. Jan. 10, 2014).

146. See *Hidalgo v. N.M. Dep't of Corr.*, No. D-101-CV-2017-01658, Order Granting in Part and Denying in Part Plaintiff's Motion for Preliminary Injunction at 22 (1st Judicial District, County of Santa Fe 2017).

147. See *supra* Part 1E.

148. 55 ILL. COMP. STAT. 5/5-1106 (2019). While courthouses and prisons are not equivalent to one another, they bear similarities. In both places, there many of the people present *must* be there—members of the jury, defendants, etc. They do not have a choice in whether or not they are there. Finally, many individuals in the criminal justice system will see the inside of the courthouse at some point in their due process. It seems illogical and short-sighted to see the need for lactation rooms in one government-run place where a person must pass through on their path to incarceration, but not another where they must actually serve that period of incarceration.

149. See Mamava, *supra* note 29.

Correction chose to reject the idea that jails and prisons are areas of public accommodation,¹⁵⁰ it is important that jails and prisons be included in these laws explicitly so that there is no doubt as to their functionality as public spaces.

Second, the parents' liberty interest in deciding whether to give their child breast milk may also be a justification for these laws. The constitutional right to raise children has long been recognized in case law.¹⁵¹ Parents who are incarcerated have their rights curtailed in many ways, but the decision to breastfeed, which is arguably outside of the realm of penological interests,¹⁵² should remain theirs and theirs alone. Breast milk is a "use it or lose it" resource: the decision to provide breast milk to an infant, whether through pumping or breastfeeding, is mostly only a decision that can be made once per child. When an anti-lactation policy prevents a parent from expressing breast milk in a timely manner, especially a parent immediately post-partum, the decision to feed the child breast milk may be taken from the parent for good. Since the right to parent is one of the fundamental liberty interests U.S. case law holds dear, pro-lactation policies also have a basis in this interest. Furthermore, in the past, the federal government has expressed concern over the racial disparities (particularly the lower rates among African-American parents) in breastfeeding.¹⁵³ These racial disparities are inversely reflected in the racial composition of the criminal justice system.¹⁵⁴ While making prisons more amenable to lactation will not do anything to solve racial disparities in incarceration, it will facilitate incarcerated individuals to make this decision if they so choose.

Third, the medical approach can better solve this problem, although as *Villegas* shows, the legal argument is not bulletproof. Incarcerated people

150. CHRO ex rel. Vargas v. State Dep't of Corr., No. HHBCV136019521S, 2014 WL 564478, at *1 (Conn. Super. Ct. Jan. 10, 2014).

151. See Southerland v. Thigpen, 784 F.2d 713, 716 (5th Cir. 1986) (citing *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)).

152. See Hidalgo v. N.M. Dep't of Corr., No. D-101-CV-2017-01658, Order Granting in Part and Denying in Part Plaintiff's Motion for Preliminary Injunction at 20-22 (1st Judicial District, County of Santa Fe 2017).

153. OFFICE ON WOMEN'S HEALTH, U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 9, at 9.

154. See Kajstura, *supra* note 122. This highlights the hypocrisy in attempting to remedy racial disparities in breastfeeding, while doing nothing to facilitate it in places where racial groups are disproportionately represented.

have a right to medical care. As *Gamble* and *Farmer* show, prisoners have a right to medical care and to be free from cruel and unusual punishment, which includes indifference to medical needs.¹⁵⁵ Ceasing or continuing lactation is a medical decision that should be made by the people going through this biological process and any physicians who assist them in this process. Lactation can only be sustained through constant expression, and the cessation of lactation can cause medical issues.¹⁵⁶ To provide their inmates with proper medical care in this respect, carceral institutions will need to provide their lactating residents with the facilities and equipment necessary to express breast milk.

This medical approach, combined with a liberty interest in parenting described above, better describes why those in detention deserve the ability to express breast milk in a suitable way *and* a chance to give it to their children. Considering the outcome in *Villegas*, though, it might be necessary to establish the “obviousness” of the medical need, as demonstrated by Sixth Circuit medical-needs doctrine. Establishing the obviousness of the medical need might be made easier through the creation of more statutes focused on facilitating lactation. While it would help if those statutes addressed incarcerated individuals directly, if they do not, they might still be used to advance the medical needs theory in litigation.

Finally, there exists one possible argument for the creation of pro-lactation policies that should *not* be the motivation behind facilitating lactation. Pro-lactation policies should *not* focus on the benefits breast milk offers to the child, however amazing they may be. While courts have toyed with this idea,¹⁵⁷ legislators and advocates should not open the Pandora’s box of children having any right to any part of their parents’ bodies. The right to lactate as one wishes should rest with the person who lactates, not with any child who may be the recipient of that breast milk.

155. See generally *Estelle v. Gamble*, 429 U.S. 97 (1976); *Trop v. Dulles*, 356 U.S. 86 (1958); *Farmer v. Brennan*, 511 U.S. 825 (1994).

156. OFFICE ON WOMEN’S HEALTH, U.S. DEP’T OF HEALTH & HUM. SERVS., *supra* note 9, at 8.

157. See *Southerland v. Thigpen*, 784 F.2d at 717–18 (discussing whether Diane Southerland’s infant son Matthew had a liberty interest in being breastfed).

III. PROPOSAL

Based on current caselaw, a survey of carceral lactation policies in various states, and an analysis of the potential justifications for this law, this Note proposes that states adopt legislation specifically identifying carceral institutions as protected spaces where lactation can take place and must be facilitated in certain ways. In states where there are already lactation-in-government-building policies, this legislation would be specifically aimed at naming jails and prisons as public government buildings and facilitating lactation in carceral settings. In states that do not have government building policies, the first step would be to draft a law that protects lactating individuals in government buildings and to specifically include jails and prisons as government buildings, so that visitors can express breast milk if necessary while visiting loved ones. Then, a second law could be enacted that facilitates lactation for those who have been incarcerated through skin-to-skin programs, pumping rooms and equipment, and breastmilk delivery services. This type of law would only be codifying what is already established as constitutionally required: a parents' liberty interest in breastfeeding and making decisions about the care of their children, and an incarcerated person's constitutional right to adequate medical care. State-level legislation is important for the equal adoption of this policy since more local efforts might result in a patchwork-quilt-type pattern across different state jurisdictions, which would cause unnecessary confusion and inequality. At the same time, federal regulations controlling the conditions of federal prisons and detention centers should be updated to reflect these goals.

This proposal best addresses the main issues seen today in carceral lactation policies. While in some cases carceral institutions may have policies actively prohibiting lactation, many seem to not have readily identifiable policies at all. And while some states have enacted legislation demanding that these institutions develop policies to facilitate breastfeeding, not all have specified what the policies should entail. Being as explicit as possible about what carceral institutions need to facilitate will fill in these gaps.

Policy changes like the ones proposed by this Note will still lead to implementation questions and risks. Simply demanding that institutions facilitate lactation for incarcerated individuals does not address how these

institutions will fund their programs or implement them in a way that makes sense for their own populations. There is also the risk that these policies adopt a child-centered perspective as opposed to a parent-centered perspective, undermining the goal of empowering incarcerated individuals to claim more liberties. However, the downsides of enacting this type of policy are far outweighed by the benefits they would bring to incarcerated people who need to express breast milk so that they can raise their children the way they want even while behind bars.

CONCLUSION

For whatever reason, the surge of pro-lactation policies on the outside did not trickle down into detention centers. There are a number of ways to combat this—legislation, litigation, and lobbying for individual change. While all of these can help, broad, pro-lactation legislation that does not limit the places people can express breast milk and specifically targets carceral settings as an area of protection is the most painless way to ensure that these protections are granted to people who are incarcerated. By crafting broad statutes, legislators can ensure that the incarcerated population does not fall through the cracks while the rest of the country moves forward.

Being incarcerated is not like being “on the outside,” and jails and prisons are not the workplace or any public space. Parents will not always have access to a pump. Parents will not always have access to their own children. Lactation is something that needs to be intentionally accommodated in carceral settings. Implementing these policies will mean that jails and prisons will be taking an affirmative step to facilitate the exercising of their residents’ rights as parents and as people. This would be a meaningful and radical change—certainly more radical than the regular lactation policies we have seen over the past two decades.

It might be difficult to reconcile this radicalness, then, with the fact that lactation in carceral settings is only a miniscule fraction of a much larger problem, which is the restriction of freedom that comes with being incarcerated in the first place. This Note would be irrelevant if not for the staggering number of incarcerated people in the United States, the surge of women inmates, and the high percentages of pregnant women and new parents in jails. These pro-lactation policies, while a good start, would only

be a temporary and partial solution to a bigger program about the conditions in prison and the ripple effects they cause on the outside. All of the pumping machines, freezers, and lactation rooms in the world will not help incarcerated parents be able to fully be present for their children. The opportunity to breastfeed will not make up for the many missed milestones, parenting opportunities, and years that parents will lose while incarcerated. Incarcerated people are especially vulnerable to not having necessary accommodations, which is why it is important that they are granted this small liberty, but these policies will not be the thing that solves the other devastating problems caused by our criminal justice system. Incarcerated people are especially vulnerable to having their rights infringed upon, and this Note has identified one such right. While we work towards implementing this right, we cannot forget about the others.

