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I. INTRODUCTION

The choice to feed an infant with breast milk or formula is an important and personal one. Although the nutritional benefits of breast milk are clear, it is not always the best solution and should not be mandated. Instead, informed choice is of the essence. Each mother faces a variety of factors that makes her situation unique. What each new mother needs is unbiased, thorough information that will help her make the best choice not only for her child but also for herself and her family. However, within the United States, a variety of barriers all too frequently prevent or make difficult the weighing of appropriate factors. These barriers often stem from the desire for corporate profit, often with the approval and even support of the government.

Breast milk has been found to be superior than formula for a multitude of reasons, most well-known being its health benefits for the infant.[1] Nevertheless, the United States overly complicates the choice to breastfeed or formula feed. Formula companies' marketing tactics unduly influence how women choose to feed their babies.[2] This includes marketing in

1. Andrea Freeman, *"First Food" Justice: Racial Disparities in Infant Feeding as Food Oppression*, 83 FORDHAM L. REV. 3053, 3061 (2015); RUTH LAWRENCE & ROBERT LAWRENCE, BREASTFEEDING - A GUIDE FOR THE MEDICAL PROFESSIONAL 214-220 (8th ed. 2016); Bo Lonnerdal, *Nutritional and Physiologic Significance of Human Milk Proteins*, 77 AM. J. CLINICAL NUTRITION 1537S, 1539S (2003); Miriam H. Labbok et al., *Breastfeeding: Maintaining an Irreplaceable Immunological Resource*, 4 NAT. REV. IMMULOGY 565, 565-68 (2004); Benjamin Mason Meier & Miriam Labbok, *From the Bottle to the Grave: Realizing a Human Right to Breastfeeding through Global Health Policy*, 60 CASE W. L. REV. 1073, 1078–79 (2010). Breast milk adjusts with each feeding and naturally contains all of the nutrients an infant needs, including proteins, water, carbohydrates, antibodies, hormoe, and macronutrients. It provides immunological benefits that protect the infant as well. An infant's long-term health is also impacted by breast milk, including neural and cognitive development, and heightened defense against medical issues like sudden infant death syndrome (SIDS), asthma, and type one and type two diabetes.

2. *See* Laura Epstein, *Women and Children Last: Anti-Competitive Practices in the Infant Formula Industry*, 5 AM. U. J. GENDER & LAW 21, 21 (1996).

hospital buildings directly to medical professionals.[3] Additionally, "discharge packs" are given to mothers that include items like toys and toiletries, but also formula samples, ensuring hospitals have an extremely large influence on a woman's choice.[4]

These formula companies have infiltrated various other systems to market their products to as many women as possible. Significantly, the Special Supplemental Nutrition Program for Women, Infants, and Children ("WIC"), a governmental program administered by the United States Department of Agriculture ("USDA") that assists new mothers, has a lower breastfeeding rate among its participants than those outside of the program.[5] WIC is the largest domestic market for formula because the government purchases more than half of the formula sold in the United States to distribute to those in the program at a discounted rate through rebates.[6] Moreover, all formula products contain milk or soy, goods subsidized by the United States government.[7] Women also encounter barriers in regard to their choice to breastfeed or formula feed when in the workplace through lack of legal protections.[8]

International efforts like the World Health Organization's Code of Marketing of Breast-milk Substitutes (hereinafter "WHO Code") help make the decision to breastfeed or formula feed more informed and equitable by lessening the marketing of formula.[9] The United States, however, was the only Member State to vote against the WHO Code.[10] Other potential solutions include treating women as intelligent consumers, including multilevel intervention strategies, changing and implementing new legislation, using an environmental perspective to further breastfeeding efforts, and using New York and California as models.[11]

3. Simonetti Samuels, *Infant Formula WIC Rebates: Altruism or Exclusionary Practices?*, 2 J. PHARM. & L. 185, 190–91 (1993).

4. Epstein, *supra* note 2, at 224–25.

5. Alan S. Ryan & Wenjun Zhou, *Lower Breastfeeding Rates Persist Among the Special Supplemental Nutrition Program for Woman, Infants, and Children Participants, 1978-2003*, 117 PEDIATRICS 1136, 1136–37 (2006).

6. Freeman, *supra* note 1, at 1, 3067.

7. The dairy program is Subchapter III, Agricultural Act of 2014, 7 U.S.C. § 9051 (2012). Food Conservation and Energy Act of 2008, 7 U.S.C. § 8702(4) (2008) (indicating soy as a "covered commodity").

8. *See generally,* Liz Morris et al., *Exposed: Discrimination Against Breastfeeding Workers,* U.C. HASTINGS COLLEGE OF THE LAW, CENTER FOR WORKLIFE LAW (2019).

9. *International Code of Marketing of Breastmilk Substitutes*, WORLD HEALTH ASSEMBLY, WHA 34.22 (May 21, 1981), reprinted in 20 INT'L LEGAL MATERIALS 1004 (1981).

10. Deborah L. Kaplan & Kristina M. Graff, *Marketing Breastfeeding—Reversing Corporate Influence on Infant Feeding Practices*, 85 J. URBAN HEALTH 486, 489 (2008).

11. Jennifer Bernstein & Laine Rutkow, *Hospital Breastfeeding Laws in the U.S.: Paternalism or Empowerment?*, 44 U. BALT. L. REV. 163, 178–187 (2015). (discussion and comparison of the pertinent New York and California legislation). *Id.* at 499 (discussion of the New York City Department of Health and Mental Hygiene's strategy). *See generally*

This Article has four parts synthesizing some of the main topics and issues regarding the barriers that women face in their right to choose between breastfeeding or formula feeding. Part I reviews the potential benefits and setbacks found in breast milk and formula. This includes infant and maternal health, workplace difficulties, the role of race, and economic and environmental factors. Part II discusses the history of infant formula marketing and reveals the ways the industry as well as hospitals and the government strip women of the meaningful choice as whether to breastfeed or formula feed their children. The WHO Code will be evaluated as a response to these marketing influences. Part III highlights some overarching themes and more specific solutions to this problem of choice. Part IV gives a summary of this Article.

II. BREAST MILK'S AND FORMULA'S POTENTIAL BENEFITS AND DISADVANTAGES

A. Health Benefits and Disadvantages for the Child

Breastfeeding is widely known to be the best health choice for infants as it helps protect them against many illnesses and infections, including middle ear and respiratory tract infections.[12] Studies show that some protection against some infection may extend past the time breastfeeding ends.[13] Infants who were never breastfed are about fourteen times more likely to die in their first six months.[14] From six months to two years, the likelihood of death is two times more likely than a breastfed child.[15]

Kim Diana Connolly, *The Ecology of Breastfeeding*, 13 SE ENVTL. L.J. 157 (2005). Epstein, *supra* note 2 at 27. Angela Johnson et al., *Enhancing Breastfeeding Rates Among African American Women: A Systematic Review of Current Psychosocial Interventions*, 10 BREASTFEEDING MEDICINE 45, 45 (2015).

12. Alice H. Cushing et al., *Breastfeeding Reduces Risk of Respiratory Illness in Infants*, 147 AM. J. EPIDEMIOLOGY 863, 867–68 (1998). Linda C. Duffy et al., *Exclusive Breastfeeding Protects Against Bacterial Colonization and Day Care Exposure to Otitis Media*, 100 PEDIATRICS e7, e7 (1997).

13. Wendy H. Oddy, *Breastfeeding Protects Against Illness and Infection in Infants and Children: A Review of the Evidence*, 9 BREASTFEEDING REV. 11, 15 (2001).

14. WHO Collaborative Study Team on the Role of Breastfeeding on the Prevention of Infant Mortality, *Effect of Breastfeeding on Infant and Child Mortality Due to Infectious Diseases in Less Developed Countries: A Pooled Analysis*, 355 LANCET 451, 451 (2000) as cited in Meier & Labook, *supra* note 1at 1079–80.

15. *Id*. Kim Diana Connolly, *The Ecology of Breastfeeding*, 13 SE ENVTL. L.J. 157, 157–58 (2005). "Breastfed babies receive immune protection; undergo superior neurological development; have higher IQs; experience better jaw, tooth and speech development; and are subject to decreased incidence of Sudden Infant Death Syndrome, intestinal disorders (pediatric and adult), juvenile diabetes, childhood cancers, and allergies."

Breastfeeding has also been found to lead to higher neurodevelopment scores for infants and reduce the risk of obesity later in life.[16]

However, there are those who take issue with the scientific evidence that suggests breastfeeding is needed in a child's diet. Some find a lack of relative risk analysis in the studies, including comparing the benefits of breastfeeding with healthy behaviors in the home, like parents quitting smoking, lowering negative environmental factors the child is exposed to, or having the infant vaccinated.[17] Other critics argue that the studies do not sufficiently differentiate between causation and association, thus ignoring the important fact that there are many variables that affect health outcomes in infants.[18] Critics also question if it is the breast milk itself or the act of breastfeeding, including the special attention given to the baby and the physical closeness between the infant and mother, that leads to its many health benefits.[19]

Many find that formula feeding is only acceptable when needed, i.e., when the risks of breastfeeding have become too great.[20] Compared to breast milk, formula has been linked to higher rates of health problems including cancer, infections, asthma, diabetes, and impaired development.[21] In addition to the many potential health issues stemming from its ingredients, formula may also be a health concern when used improperly, which is more often a concern in the developing world and in low income communities and communities of color in the United States.[22] Formula product can be overly diluted, and can become contaminated when mixed

16. Thomas Harder et al., *Duration of Breastfeeding and Risk of Overweight: A Meta-Analysis*, 162 AM. J. EPIDEMIOLOGY 397, 401–02 (2005). M. Vestergaard et al., *Duration of Breastfeeding and Developmental Milestones During the Latter Half of Infancy*, 88 ACTA PAEDIATRICA 1327, 1327, 1329 (1999).

17. Linda C. Fentiman, *Marketing Mothers' Milk: The Commodification of Breastfeeding and the New Markets for Breast Milk and Infant Formula*, 10 NEV. L.J. 29, 47 (2009).

18. *Id*.

19. Rebecca Kukla, *Mass Hysteria: Medicine, Culture, and Mothers' Bodies* 148–50, 160–63(2005).

20. Sami Schubber, *The International Code of Marketing of Breast-milk Substitutes: An International Measure to Protect and Promote Breast-feeding* 49 (1998).

21. Am. Acad. of Pediatrics, *POLICY STATEMENT: Breastfeeding and the Use of Human Milk*, 115 PEDIATRICS 496, 496 (Feb. 2 2005), https://pediatrics.aappublications.org/content/pediatrics/115/2/496.full.pdf [https://perma.cc/LK92-DXWX].

22. *See* Meier & Labook, *supra* note 1at 1081–84 for a greater discussion on the topic. *Water Injustice: Economic and Racial Disparities in Access to Safe and Clean Water in the United States*, FOOD AND WATER WATCH, Mar. 2017, *available at* https://www.foodandwaterwatch.org/sites/default/files/ib_1703_water-injustice-web.pdf. *See* MONA HANNA-ATTISHA, WHAT THE EYES DON'T SEE: A STORY OF CRISIS, RESISTANCE, AND HOPE IN AN AMERICAN CITY, ch. 1 (2018) for a discussion regarding the Flint, Michigan water crisis and her personal experience as a physician making a recommendation to an African-American mother regarding whether to use the local tap water when using infant formula.

with unclean water.[23] Bottles and teats can also contain large amounts of bacteria when not cleaned properly.[24]

There are instances in which women should not breastfeed, like when a mother could transmit a disease like HIV or tuberculosis to her infant, or when a woman is undergoing chemotherapy or radiation, or is using certain drugs.[25] Additionally, some women who have breast augmentation surgery may not be able to provide enough breast milk.[26] Some women also experience hypernatremia, a dehydration condition in which breast milk may be lacking to the point that malnutrition and dehydration are experienced by the infant, potentially leading to seizures, hemorrhages, and death.[27] Mothers with high toxic loads also should consider not breastfeeding, although studies are showing that some of the chemicals feared are not risks to infants.[28] It has also been found that the probability of HIV transmission from mother to infant, while still very present, is not as high as the risks found when using formula in situations where there is an increased likelihood of infection, poor hygiene, and bad water quality.[29] Thus, even in a circumstance when formula feeding is found to be acceptable, there are still exceptions in which breastfeeding remains the best option.

B. Additional Benefits and Disadvantages Found in Breastfeeding and Formula Feeding

There are many other factors at play in regard to breastfeeding and formula feeding other than the health of the child. Potential health benefits for a breastfeeding mother include protection against developing breast cancer and certain types of ovarian cancer, a decreased risk of hip fractures, an increase of certain immune defenses in the postpartum period, and an

23. *See* Meier & Labook, *supra* note 1 at 1081–84 for a greater discussion on the topic.

24. *Id*.

25. Jennifer S. Read & Am. Acad. of Pediatrics Committee on Pediatric AIDS*, Human Milk, Breastfeeding, and Transmission of Human Immunodeficiency Virus Type 1 in the United States*, 112 PEDIATRICS 1196, 1196 (2003) as cited in Fentiman, *supra* note 17at 49. Am. Acad. of Pediatrics, *supra* note 21, at 5, 497.

26. General and Plastic Surgery Devices Panel, Medical Devices Advisory Comm., U.S. Food & Drug Admin. Ctr. for Devices & Radiological Health, 66th Meeting (2005) (testimony of Jane Kueck, RN, citing a study by Dr. Marianne Neifert) as cited in Fentiman, *supra* note 17, at 50.

27. Michael L. Moritz et al., *Breastfeeding-Associated Hypernatremia: Are We Missing the Diagnosis?*, 116 PEDIATRICS e343, e343 (2005). Arlan L. Rosenbloom, *Permanent Brain Damage from Hypernatremic Dehydration in Breastfed Infants: Patient Reports*, 43 CLINICAL PEDIATRICS 855, 855–56 (2004).

28. Am. Acad. of Pediatrics, *supra* note 21, at 5.

29. Michael C. Latham, *Human Nutrition in the Developing World* 72 (1997).

increased recovery time after childbirth.[30] The increased period of postpartum infertility leads to more space between pregnancies.[31]

One disadvantage of breastfeeding is the unequal labor required. The mother has to, at the very least, pump throughout her day on a schedule, often timed with the baby's specific needs, and perhaps also get up in the night to feed the baby, and possibly go through physical difficulties like painful nipple conditions. Formula feeding, on the other hand, can allow the mother to share the feeding burden more equally, if she has assistance from others like her partner or family members, perhaps allowing her to return to the workforce and become more independent. The workplace includes its own hurdles, however, including the necessity of a private space, sufficient break times, and an outlet if one is using an electric breast pump. Even if breastfeeding laws are in place, many are not sufficient.[32] Over nine million women are not covered by the federal Break Time for Nursing Mothers law due to a legal technicality.[33] Even if a mother is covered by this law, it is often unenforceable in practice.[34] Many employers do not comply with the law, and the government agencies that are meant to regulate these workplace protections are underfunded and understaffed.[35] Hurdles like these make women who return to work within the first twelve weeks after giving birth less likely to breastfeed.[36]

Many women of color and women of lower socioeconomic status face additional or heightened barriers to breastfeeding. African American women experience especially difficult challenges stemming from deep

30. Marina F. Rea, *Benefits of Breastfeeding and Women's Health*, 80 J. PEDIATRICS S142, S142 (2004). Miriam H. Labbok, *Effects of Breastfeeding on the Mother*, 48 PEDIATRIC CLINICS OF N. AM. 143, 143, 150–51 (2001). Maureen Wimberly Groer et al., *Immunity, Inflammation and Infection in Post-partum Breast and Formula Feeders*, 54 AM. J. REPROD. IMMUNOLOGY 222, 230 (2005).

31. *Id*.

32. Morris et al., *supra* note 8 at 2, 19-45.

33. *Id*. at 5. Heidi Shierholz, *Millions of Working Women of Childbearing Age Are Not Included In from Key Protections for Nursing Mothers*, ECONOMIC POLICY INSTITUTE (Dec. 2018**),** https://www.epi.org/blog/break-time-for-nursing-mothers/ [https://perma.cc/6QWN-52SM]. In the Fair Labor Standards Act, the workers who are exempt from overtime protections are also exempt from the break time protections for nursing mothers. 29 U.S.C. §203.

34. *Id*. at 32. Almost every legal claim has been thrown out of court as the case law and the Department of Labor do not provide support to ensure a remedy. When a case does not get thrown out, the fees involved in participating in a lawsuit, like filing fees, are often higher than the possible damages awarded.

35. *Id*. Interview with Liz Morris, Deputy Director, U.C. Hastings College of the Law Center for Worklife Law (Mar. 22, 2019).

36. Brian Roe et al., *Is There Competition Between Breast-Feeding and Maternal Employment?,* 36 DEMOGRAPHY 157, 167 (1999). Alan S. Ryan et al., *The Effect of Employment Status on Breastfeeding in the United States*, 16 WOMEN'S HEALTH ISSUES 243, 247 (2006). Women who work part time or are homemakers are much more likely to still be breastfeeding at the six-month mark than are mothers employed full time.

rooted prejudices and tropes, beginning in the times of slavery in the United States.[37] Additional factors that affect African American women's choice to breastfeed include "comfort with formula; lack of information about infant behavior; cultural norms, including discouragement of breastfeeding; media influence; race-targeted marketing; disproportionate representation among the poor and in federal programs to assist women and children; unequal distribution of resources for new mothers; immigration status; and historical and present discrimination."[38] These difficulties faced by African American women have led to large race-based disparities in breastfeeding rates.[39] There may also be other external factors that make breastfeeding difficult for all women, such as being sexually abused, having body image issues, perhaps increased by the mixed messages introduced by American society regarding the role of the female breast, and fear of not producing sufficient milk.[40]

There are also economic and environmental concerns regarding breastfeeding and formula feeding. For example, a report by the Agency for Healthcare Research and Quality stated that "[i]f 90% of US families could comply with medical recommendations to breastfeed exclusively for 6 months, the United States would save $13 billion per year and prevent an excess 911 deaths, nearly all of which would be in infants."[41] A 2001 source estimates that $3.6 billion would be saved if the breast feeding rates of the United States increased to the Surgeon General's recommended rates, which would require an increase from sixty-four percent to seventy percent in-hospital and twenty-nine percent to fifty percent after six-months.[42] Not only are there societal economic costs to formula feeding,

37. Telephone Interview with Dr. Ifeyinwa Asiodu, Assistant Professor in Family Health Care Nursing, Univ. of California, San Francisco (Apr. 12, 2019). *See* Andrea Freeman, *Unmothering Black Women: Formula Feeding as an Incident of Slavery*, 69 HASTINGS L.J. 1546, 1552–70 (2018) for a more in-depth discussion of this history.

38. Freeman, *supra* note 1, at 1, 3065. Asiodu, *supra* note 37. *See generally* Andrea Freeman, *U.S. Support of Formula Over Breastfeeding is a Race Issue*, THE CONVERSATION (July 23, 2018) http://theconversation.com/u-s-support-of-formula-over-breastfeeding-is-a-race-issue-99987 [https://perma.cc/YJ89-F6X7].

39. Jessica A. Allen, et al., *Progress in Increasing Breastfeeding and Reducing Racial/Ethnic Differences - United States, 2000-2008 Births*, 62 MORBIDITY & MORTALITY WKLY. REP. 77, 77–78 (2013), http://www.cdc.gov/mmwr/pdf/wk/mm6205.pdf [https://perma.cc/HJV6-W2GK]. Only about fifty-nine percent of African American mothers attempt to breastfeed, while roughly seventy-five percent of Caucasian mothers and eighty percent of Latina mothers make the attempt. One year after birth, only about twelve percent of African American women are still breastfeeding while Caucasian women are at around twenty-four percent and Latina women are at roughly twenty-six percent.

40. Kukla, *supra* note 19, at 4, 165, 194. Iris Marion Young, ON FEMALE BODY EXPERIENCE: "THROWING LIKE A GIRL" AND OTHER ESSAYS 75, 75–90 (2005).

41. Melissa Bartick & Arnold Reinhold, *The Burden of Suboptimal Breastfeeding in the United States: A Pediatric Cost Analysis*, 125 PEDIATRICS e1048, e1052 (2010).

42. *See generally* Jon Weimer, *The Economic Benefits of Breastfeeding: A Review and Analysis*, FOOD ASSISTANCE AND NUTRITION RESEARCH RPT. NO. 13 (Mar. 2001).

but there are also personal economic costs to formula feeding, including medical fees, lost wages, and sick child care costs.[43] Families could save around $1,350 in the first year by breastfeeding.[44] However, potentially crucial funds are lost if a mother is forced to work less, is fired or quits because she is breastfeeding, or if she breastfeeds when it is unadvisable.

Breastfeeding is the more environmentally friendly option.[45] Formula feeding depends on formula cans and bottles as well as their production and transportation.[46] Formula feeding thus increases air and water pollution and energy use, as well as questionable land use processes.[47]

III. FORMULA MARKETING

A. A Brief History of Formula Marketing

Infant formula is a $25 billion industry.[48] It began with cow's milk, an inexpensive ingredient.[49] The formula companies introduced additional ingredients over time, and the retail price of formula has continued to be a great deal higher than the production cost of the product, creating high profit.[50] Three formula companies make up the majority of the market:

43. Thomas M. Ball & David M. Bennett, *The Economic Impact of Breastfeeding,* 48 PEDIATRIC CLINICS N. AM. 253, 256–58 (2001) as cited in Bernstein & Rutkow, *supra* note 11, at 11, 168.

44. *Breastfeeding: Surgeon General's Call Fact Sheet*, SURGEONGENERAL.GOV (Jan. 20, 2011), http://www.surgeongeneral.gov/library/calls/breastfeeding/factsheet.html.

45. Alison Linnecar et al., *Formula for Disaster: Weighing the Impact of Formula Feeding vs. Breastfeeding on Environment*, IBFAN-ASIA AND BPNI, 1, 8-11 (2014), *available at* http://www.gifa.org/wp-content/uploads/2015/01/FormulaForDisaster.pdf [https://perma.cc/53V5-4ZPN].

46. *Breastfeeding: Making the Decision to Breastfeed*, OFFICE OF WOMEN'S HEALTH, https://www.womenshealth.gov/breastfeeding/making-decision-breastfeed [https://perma.cc/J3W9-6HXS] (last visited April 1, 2019). Am. Acad. of Pediatrics, *supra* note 21, at 5, 497.

47. *See generally* Wendy Correa, *Eco-Mama: Why Breastfeeding Is Best for Babies . . . and the Environment*, 95 MOTHERING 67 (July 1999). Connolly, *supra* note 11, at 11, 161 64 (includes a more in depth discussion of the negative environmental impacts of formula feeding). For a more in-depth discussion regarding the environmental impacts of breastfeeding and formula feeding, *see* Linnecar et. al, *supra* note 45 at ch. 1 and 2.

48. Jackson Segal, *The Breastfeeding Battle: How the Infant Formula Industry's Political Power is Putting Babies at Risk*, BROWN POLITICAL REVIEW (5 Dec. 2018), http://www.brownpoliticalreview.org/2018/12/breastfeeding-battle-infant-formula-industrys-political-power-putting-babies-risk/ [https://perma.cc/TFR5-Q9B7].

49. Victor Oliveira et al., U.S. Dep't of Agric., *WIC and the Retail Price of Infant Formula*, FOOD ASSISTANCE AND NUTRITION RESEARCH REPORT No. 39 (FANRR 39-1), at 16 (2004).

50. *Id.* Thomas M. Burton, *Spilt Milk: Methods of Marketing Infant Formula Land Abbott in Hot Water - It Pushed Baby-Food Rivals to Bar Ads, Limiting a New Player's Chances - A Big Antitrust Settlement*, WALL ST. J., May 25, 1993, at A1. Victor Oliveira et al., U.S. Dep't of Agric., *WIC and the Retail Price of Infant Formula*, FOOD ASSISTANCE AND NUTRITION RESEARCH REPORT No. 39 (FANRR 39-1), at 30 (2004).

Abbot Laboratories, Mead Johnson, and Nestle.[51] Abbot Laboratories and Mead Johnson are both pharmaceutical companies that make up the largest shares of the formula market in the United States.[52] Abbot Laboratories manufactures Similac and Isomil and controls around thirty-eight percent of the market.[53] Mead Johnson makes Enfamil and Prosobee and controls about forty percent of the market.[54] Nestle, which manufactures food, including Gerber baby food, has a large formula market share outside of the United States, as well as about fifteen percent of the United States market.[55] There has been a great deal of controversy concerning the companies, especially regarding Nestle, but it is clear that the three companies control the majority of the national and international formula market.[56]

Information given to mothers during prenatal care greatly influences their choice to breastfeed or formula feed, giving these formula companies a powerful window of opportunity.[57] The United States was introduced to infant formula in the early 1880s.[58] Over the years, formula companies have focused on direct marketing, including advertising in women's magazines and giving mothers free samples with information.[59] The wide range of advertising techniques led to a great deal of influence, verging on coercion, over mothers. This influence is evidenced by the ever changing rates of breastfeeding and formula feeding. Formula has been presented as the best option for a baby as it was scientifically made for infant nutrition.[60] Such marketing played on people's general faith in science and women's fear of their infant dying.[61] Because of these targeted marketing strategies

51. Miriam Jordan, *Nestle Markets Baby Formula to Hispanic Mothers in U.S.*, WALL ST. J., Mar. 4, 2004, at B1. *Market Share of the Leading Vendors of Baby Formula (Powder) in the United States in 2016, Based on Dollar Sales*, *infra* note 53.

52. *Id*.

53. *Market Share of the Leading Vendors of Baby Formula (Powder) in the United States in 2016, Based on Dollar Sales*, STATISTICA, https://www.statista.com/statistics/443975/market-share-of-the-leading-us-baby-formula-powder-companies/ [https://perma.cc/3QPK-K2ER].

54. *Id*.

55. *Id.* Dale D. Murphy, *Interjurisdictional Competition and Regulatory Advantage*, 8 J. INT'L ECON. L. 891, 912 (2005).

56. *See generally* Epstein, *supra* note 2 (for an in-depth discussion of the controversies surrounding the formula companies, especially Nestle at 40–54).

57. *See* Deborah L. Kaplan & Kristina M. Graff, *Marketing Breastfeeding—Reversing Corporate Influence on Infant Feeding Practices*, 85 J. URB. HEALTH 486 (2008).

58. Rima D. Apple, "*Advertised by Our Loving Friends": The Infant Formula Industry and the Creation of New Pharmaceutical Markets, 1870-1910*, 41 J. HIST. MED. ALLIED SCI. 3, 6 (1986).

59. *Id*. at 5, 10, 13–14.

60. Fentiman, *supra* note 17, at 4, 69–70.

61. M. David Ermann & William H. Clements II, *The Interfaith Center on Corporate Responsibility and Its Campaign Against Marketing Infant Formula in the Third World*, 32 SOC. PROBS. 185, 189 (1984).

throughout American society, many women's confidence in their ability to breastfeed, the amount of breast milk they could produce, and the nutritional adequacy of their breast milk decreased, leading to more use of formula.[62] Today such predatory marketing remains problematic, especially when formula companies, with their large and professional marketing teams, are spending "$480 million (10% of net sales) each year marketing infant formula in the U.S. That's more than *six times* the $68 million in total U.S. federal government expenditures for breastfeeding support through the WIC Peer Counselor program ($60 million) and the CDC initiatives ($8 million)."[63]

B. Formula Marketing and the Medical Field

Initially, pediatricians used scientifically developed infant formula as a response to infant deaths.[64] From the early 1900s to the late 1980s, the majority of formula companies used the medical community as a form of advertising.[65] Such marketing continues today.[66] By the 1930s, pediatricians found formula to be to the nutritional equivalent of breast milk, sometimes even recommending it over breast milk.[67] They urged that to better a child's current and future health, nutritional intervention was important.[68] And yet, although the formula industry was the American Association of Pediatrics' ("AAP") largest financial donor, the first publication of the AAP's journal in 1948 recommended breast milk over formula.[69] Undaunted, formula companies continued to promote their product to doctors. Pediatricians have a great deal of power and influence. People generally trust medical professionals due to their expertise, rather than focus on the fact that physicians work for profit and are represented by a well-funded lobby.[70] This faith in pediatricians as unbiased and altruistic is exploited by formula marketing companies. Their work is made easier in that medical providers are not trained in breastfeeding to the same

62. Janet E. Oglethorpe, *Infant Feeding as a Social Marketing Issue: A Review*, 18 J. CONSUMER POL'Y 293, 299–02 (1995). Kimberly Seals Allers, *The Big Letdown: How Medicine, Big Business, and Feminism Undermine Breastfeeding* 22–24 (2017).

63. Alison Stuebe, *It's Time to Disarm the Formula Industry*, BREASTFEEDING MED. (May 20, 2016, 4:01 PM).

64. Adrienne Berney*, Reforming the Maternal Breast: Infant Feeding and American Culture*, *1870-1920*, 41–43 (1998).

65. *See* Frank R. Greer & Rima D. Apple, *Physicians, Formula Companies, and Advertising: A Historical Perspective*, 145 AM J. DISEASES CHILD 282 (1991).

66. *Id*.

67. Ann Hulbert, *Raising America: Experts, Parents, and a Century of Advice About Children* 67-70, 102–03 (2003). Kukla, *supra* note 19, at 4, 174–75. Berney, *supra* note 64.

68. *Id*.

69. Burton, *supra* note 50, at 10, A1. Freeman, *supra* note 37, at 8, 1567–68.

70. Fentiman, *supra* note 17, at 4, 35.

degree as they are in other infant care topics.[71] Breastfeeding information is sometimes not taught in school unless a student specifically seeks such information.[72]

Nestle was wrapped in controversy in 1968 when it showed how marketing can go wrong in developing countries.[73] The company used picture advertisements along with free samples, sometimes distributed by women dressed as nurses, giving the façade of the medical community's endorsement of the product.[74] Due to a lack of sufficient instruction and this disguised endorsement, along with problems such as illiteracy (making reading directions problematic), and unclean drinking water, many infant deaths resulted from this marketing disaster.[75]

Starting in the 1950s, other companies began more directly influencing pediatricians through "ethical marketing," creating mixed-messages to mothers regarding the best way to feed their infants.[76] "Ethical marketing" is directed to and through medical professionals.[77] Its advocates distinguish it from the kind of unethical direct marketing practices, especially in low income communities globally, that led to a number of protests.[78] These include the widely publicized boycott launched in the United States in 1977 against the Nestle corporation.[79] In "ethical" marketing, corporate representatives communicate with hospitals and doctors, and provide free samples of formula to mothers.[80] They sometimes induce doctors through gifts to recommend, or in a sense prescribe, their brand of formula.[81] This

71. Phone interview with Dr. Laura Kair, Assistant Professor of Clinical Pediatrics, University of California, Davis (April 8, 2019).

72. *Id*.

73. Finkle, *infra* note 149 at 22, 603.

74. Smith, *Let the Buyer Beware*, NEWSDAY, May 14, 1989, at 23 as cited in Finkle, *supra* note 149, at 22, 603.

75. Finkle, *infra* note 149, at 22, 603.

76. Starr-Renee Corbin, *Raising Parents: Breastfeeding Trends from 1900 to Present Day* (May 2010) (unpublished M.A. report, University of Texas at Austin), https://repositories.lib.utexas.edu/bitstream/handle/2152/ETD-UT-2010-05-819/CORBIN-MASTERS-REPORT.pdf, cited in Freeman, *supra* note 37, at 8, 1565.

77. Bob D. Cutler & Robert F. Wright, *The U.S. Infant Formula Industry: Is Direct-to-Consumer Advertising Unethical or Inevitable?*, HEALTH MARKETING Q., 2002, at 39, 41–42 (2002) cited in Fentiman, *supra* note 17, at 4, 37.

78. *Protecting Breastfeeding – Protecting Babies Fed on Formula*, BABY MILK ACTION, http://www.babymilkaction.org/nestlefree#overview [https://perma.cc/MT5M-X488].

79. *Why was a Nestle Boycott Launched?*, NESTLE, https://www.nestle.com/ask-nestle/our-company/answers/nestle-boycott [https://perma.cc/8R99-N2UX]. *See Id*. The boycott continues today.

80. *Id*.

81. *Id*. Samuels, *supra* note 3, at 2. Jacqueline H. Wolf, *Don't Kill Your Baby: Public Health and the Decline of Breastfeeding in the Nineteenth and Twentieth Centuries* 192 (2001). Burton, *supra* note 50, at 10, A1, A7. Plaintiff's Petition at P 9.2, Abbott Lab. (No. 91-13079) cited in Epstein, *supra* note 2 at 25.

"ethical marketing" includes "discharge pack" distribution.[82] Gift baskets featuring toys, toiletries, and samples of products like formula are given to mothers before they leave the hospital.[83] These doctor-sanctioned discharge packs lead mothers to be less likely to continue breastfeeding.[84] By the early 1970s, only twenty-five percent of infants were breastfed at one week of age and only fourteen percent at two and three months of age.[85] "Ethical marketing" through "discharge packs" created new consumers that would have otherwise breastfed.[86] Brand loyalty developed as well.[87]

These tactics created an overall decrease in breastfeeding until the 1970s, but the ratio of formula use to breastfeeding continues to fluctuate. The theory of "bonding" came to be popularized in the 1970s, leading to an increase in breastfeeding in the late 1970s and early 1980s.[88] A decrease in breastfeeding occurred from 1984 to 1989 and was attributed to the huge increase of women entering the paid work force, and was followed by an increase in breastfeeding rates until the 2000s as the health benefits of breastfeeding were emphasized.[89] Since then, breastfeeding rates have stayed relatively consistent.[90]

C. Formula Marketing and the United States Government

The United States government is contradictory in its infant formula marketing involvement. On the one hand, there are protections and campaigns in place to help work against coercive marketing. Many laws foster breastfeeding like the Family Medical Leave Act and the Affordable

82. Burton, *supra* note 50, at 10 A7. Epstein, *supra* note 2 at 3, 24–25.

83. *Id*.

84. United States Government Accountability Office (GAO), *Breastfeeding: Some Strategies Used to market Infant Formula May Discourage Breastfeeding: State Contracts Should Better Protect Against Misuse of WIC Name*, Report to Congressional Addresses, GAO-06-282, Feb. 2006, cited in Kaplan & Graff, *supra* note 10, at 3, 498. Cynthia Howard et al*., Office Prenatal Formula Advertising and its Effect on Breast-Feeding Patterns*, 95 OBSTETRICS & GYNECOLOGY 296–303 (2000).

85. Nicoletta Iacovidou et al., *Breastfeeding in the Course of History*, 2 J. PEDIATRIC & NEONATAL CARE 1, 7 (2015).

86. Kenneth D. Rosenberg et al., *Marketing Infant Formula Through Hospitals: The Impact of Commercial Hospital Discharge Packs on Breastfeeding*, 98 AM. J. PUB. HEALTH 290, 290 (2008). Kaplan & Graff, *supra* note 10, at 3, 489.

87. *Id*.

88. *See generally* Diane E. Eyer, *Mother Infant Bonding: A Scientific Fiction*, 5 HUM. NATURE 69 (1994) (for a discussion of "bonding"). Anne L. Wright & Richard J. Schanler, *The Resurgence of Breastfeeding at the End of the Second Millennium*, 131 J. NUTRITION 421S (2001).

89. Eyer, *Supra* note 88. Alan S. Ryan et al., *Breastfeeding Continues to Increase into the New Millennium*, 110 PEDIATRICS 1103, 1104 fig.1 (2002). Ctrs. for Disease Control & Prevention, *Breastfeeding Trends and Updated National Health Objectives for Exclusive Breastfeeding—United States, Birth Years 2000-2004*, 56 MORBIDITY & MORTALITY WKLY. 760, 761 (2007), http://www.cdc.gov/mmwr/PDF/wk/mm5630.pdf [https://perma.cc/X9PA-XTES], cited in Fentiman, *supra* note 17 at 38.

90. Ctrs. For Disease Control & Prevention, *supra* note 89.

Care Act, as well as national policies such as the Baby-Friendly Hospital Initiative.[91] Breastfeeding rates in the country have risen, likely in part due to these laws and national policies that influence the choice to breastfeed or formula feed.[92] The government also has initiated advertising like the Bush Administrations' 2004 campaign to increase breastfeeding.[93] However, this campaign was criticized for many reasons, including that it emphasized not the benefits of breastfeeding, but the risks of not breastfeeding, leading mothers to feel increasingly fearful.[94]

Even as the government sought to encourage breastfeeding, it has often been deeply involved with formula marketers, as evidenced by a 2018 Donald Trump tweet in response to a *New York Times* story.[95] He stated, "[t]he U.S. strongly supports breast feeding but we don't believe women should be denied access to formula. Many women need this option because of malnutrition and poverty."[96] This ignorant tweet showed the influence of the formula industry on the government, and led to a public outcry.[97] Additional governmental involvement has been shown through campaign contributions and lobbying by formula companies, and employees who hold positions in both the formula companies and the government.[98]

WIC is a federal program administered by the USDA's Food and Nutrition Services for low-income women and children up to the age of five who are at risk nutritionally, including pregnant women, breastfeeding women, non-breastfeeding postpartum women, infants, and very young children.[99] WIC provides aid to around half of all United States born infants.[100] This takes the form of supplemental foods, nutritional education and counseling, and screening and referrals for social services.[101] WIC

91. Johnson et al., *supra* note 11at 3.

92. *Id*. Anne L. Wright & Richard J. Schanler, *The Resurgence of Breastfeeding at the End of the Second Millennium*, 131 J. NUTRITION 421S (2001). *See* Part III. B.

93. Press Release, U.S. Dep't of Health & Human Servs., Public Service Campaign to Promote Breastfeeding Awareness Launched (June 4, 2004) cited in Fentiman, *supra* note 17, at 4, 42.

94. Brian Ross & Jill Rackmill, *Breast-Feeding Ads Stalled, 'Watered Down,'* ABC NEWS, June 4, 2004, https://abcnews.go.com/2020/story?id=124271&page=1&page=1 [https://perma.cc/6KC5-N9PH], cited in Fentiman, *supra* note 17, at 4, 43.

95. Donald J. Trump (@realDonaldTrump, Twitter (July 9, 2018, 10:04 AM). Roni Caryn Rabin, *Trump Stance on Breast-Feeding and Formula Criticized by Medical Experts*, N.Y. TIMES (July 9, 2018), https://www.nytimes.com/2018/07/09/well/breastfeeding-trump-resolution.html [https://perma.cc/7L27-7BER].

96. *Id*.

97. *Id*. Interview with Stacey Geis, California Regional Office Managing Attorney, Earthjustice (Apr. 5, 2019).

98. *See* Freeman *supra* note 1, at 1, 3080.

99. *About WIC-WIC at a Glance*, U.S. DEP'T OF AGRIC., FOOD AND NUTRITION SERV., (last published Feb. 27, 2015), https://www.fns.usda.gov/wic/about-wic-wic-glance [https://perma.cc/6ACS-RDJG].

100. *Id*.

101. *Id*.

purchases more than half of the formula consumed in the United States, making it free to the mothers in the program.[102] The women who participate in WIC have lower breastfeeding rates than those who do not participate.[103] While it is difficult to know whether this is the result of the demographics of the participating women, the WIC program itself, or both, the program clearly has an effect on this rate.[104]

In the past, WIC endorsed formula feeding more than breastfeeding.[105] WIC receives large rebates (partial refunds) from formula companies if the company giving the rebate gains exclusive rights to the formula given out to WIC participants in a particular state.[106] "Each WIC State agency, or group of agencies, awards a contract to the manufacturer offering the lowest net wholesale price, defined as the difference between the manufacturer's wholesale price and the rebate."[107] This system guarantees formula companies advanced marketing opportunities, like better shelf placement in stores and being advertised as "WIC approved."[108] "The rebate money constitutes a substantial portion of WIC's budget, and it can only be used to expand the program's reach—thereby providing a broader consumer base of potential formula purchasers."[109] This fulfills one of WIC's goals: to serve a wider group of people.[110] Subsidies in the agricultural field, through the Farm Bill, which helps to financially support dairy and soybean farmers, give the USDA another reason to provide WIC with formula: the surpluses created by this subsidy means the USDA uses formula as an additional market to get rid of such surpluses.[111]

102. Victor Oliverira et al., *Infant Formula Prices and Availability: Final Report to Congress*, ECONOMIC RESEARCH SERVICE, U.S. DEPT. OF AGRIC. (E-FAN-020-001) 1, 1, 3, 33 (2001) https://www.ers.usda.gov/webdocs/publications/43025/35759_efan02001.pdf?v=0 [https://perma.cc/57VL-BPE7]. *See* George Kent, *WIC's Promotion of Infant Formula in the United States*, 1 INT'L BREASTFEEDING J. 1, 1 (2006) *available at* https://internationalbreastfeedingjournal.biomedcentral.com/articles/10.1186/1746-4358-1-8.

103. Ryan & Zhou, *supra* note 5, at 2, 1136, 1144.

104. *Supra* note 103, at 16.

105. *See generally* Kent, *supra* note 102 at 1–14.

106. *Id*.

107. Victor Oliveira et al., *Rising Infant Formula Costs to the WIC Program: Recent Trends in Rebates and Wholesale Prices*, ECON. RESEARCH SERV., U.S. DEP'T AGRIC. [https://perma.cc/6UBM-XN8X].

108. U.S. GOV'T ACCOUNTABILITY OFFICE, *Breastfeeding: Some Strategies Used to Market Infant Formula May Discourage Breastfeeding; State Contracts Should Better Protect Against Misuse of WIC Name*, app. I at 9, 22-23, 27 (2006), cited in Kent, *supra* note 102, at 16.

109. Kaplan & Graff, *supra* note 10, at 497.

110. *Frequently Asked Questions about WIC*, U.S. DEP'T OF AGRIC., FOOD AND NUTRITION SERV., https://www.fns.usda.gov/wic/frequently-asked-questions-about-wic [https://perma.cc/DS5P-HHA6].

111. Subchapter III, Agricultural Act of 2014, 7 U.S.C. § 9051 (2012) and § 8702(4) as cited in Freeman, *supra* note 1, at 1, 3068.

In addition to the rebate and subsidy, WIC's actions in regard to their participants' access to formula versus breastfeeding information and assistance sometimes differ so as to increase formula feeding and decrease breastfeeding. In the past, the cost of formula was covered entirely by WIC while supplemental food to help support breastfeeding was not covered at all.[112] Women must also choose between breastfeeding and formula plans, which lay out dollar amounts to be spent, the types of food to be purchased for the mother and child, and the quantities of those foods.[113] Additionally, WIC spends less on their outreach regarding breastfeeding as compared to formula and many state programs offer insufficient breastfeeding programs.[114] It seems that even with WIC attempting to change its ways to allow for more breastfeeding support, some women still feel that they are induced into formula feeding, as a Latina in the South Bronx of New York City stated in a focus group, "It is not easy to breastfeed or pump when you work. It is easier to get the [formula] from WIC . . . and family members can help you with the feeding."[115]

However, there has been a great deal of work done, especially in California, to increase breastfeeding support within the WIC program.[116] Dr. Ifeyinwa Asiodu, an assistant professor at UCSF and an International Board Certified Lactation Consultant ("IBCLC") who has worked with WIC, "sees WIC as really being supportive of breastfeeding."[117] According to Dr. Asiodu, the breastfeeding monthly meal package in California has improved in the past few years, allowing for even more food than the formula program.[118] While in the past, there were fewer options regarding

112. Fentiman, *supra* note 17, at 4, 72.

113. Kair, *supra* note 71, at 13. *Your WIC Foods: Healthy Choices, More Variety*, CALIFORNIA WIC PROGRAM, http://cms.sbcounty.gov/Portals/46/WIC-NE-EdMaterials-YourWICFoods-2016.pdf?ver=2017-05-02-115107-520 [https://perma.cc/B4GU-LBHG] *What's in Your WIC Food Package: What Your WIC Food Package Offers if You're Breastfeeding*, U.S. DEP'T OF AGRIC., WIC BREASTFEEDING SUPPORT, https://wicbreastfeeding.fns.usda.gov/whats-your-wic-food-package [https://perma.cc/T7NM-SMRF].

114. Kent, *supra* note 102, at 16, 6.

115. Joan Casado, *A Cultural Perspective on Breastfeeding: Results From Community Focus Groups in the Bronx*, Address at the Annual NYC Breastfeeding Conference (May 26, 2007), cited in Kaplan & Graff, *supra* note 10, at 3, 498. *See generally* Joan E. McLaughlin et al., *Breastfeeding Intervention Design Study*, U.S. DEP'T OF AGRIC., FOOD AND NUTRITION SERV., Nutrition Assistance Program Report Series i, iii (2004), *available at* https://fns-prod.azureedge.net/sites/default/files/BreastfeedingStudy.pdf.

116. Asiodu, *supra* note 37, at 8. *See generally Breastfeeding Policy and Guidance: Special Supplemental Nutritional Program for Women, Infants and Children (WIC)*, U.S. DEP'T OF AGRIC. (July 2016), *available at* https://fns-prod.azureedge.net/sites/default/files/wic/WIC-Breastfeeding-Policy-and-Guida nce.pdf.

117. Asiodu, *supra* note 37, at 8. Kair, *supra* note 71, at 13. Dr. Laura Kair also spoke of WIC as an organization found to be supporting breastfeeding.

118. Asiodu, *supra* note 37, at 8. Kair, *supra* note 71, at 13.

breastfeeding and whether a mother could qualify to receive formula if she also breastfed, there are more options now.[119]

The current California WIC food package policy, which supports breastfeeding even more, helps women pay for food and has many types of packages that differ based on how much breastfeeding the mother is doing.[120] The California WIC program also has a robust Breastfeeding Peer Counselors Program and majority of WIC sites have IBCLCs on staff.[121] Breastfeeding classes are available as well and there is some collaboration with local breastfeeding coalitions and hospitals.[122] While Dr. Asiodu wishes the Breastfeeding Peer Counseling Program was more widely funded and supported, this goal is complicated by the fact that each state and local program is different.[123] WIC is generally making great strides to have more breastfeeding support and California is one of its most progressive models.[124]

D. The WHO Code

Due to pervasive and effective strategies by formula companies, leading to lower rates of breastfeeding, and scandals like the Nestle international disaster, the WHO International Code of Marketing of Breast-milk Substitutes created guidelines in 1981 to help promote breastfeeding and limit the advertising of formula.[125] The Preamble establishes that every child and pregnant and lactating woman has the right to sufficient nourishment to obtain and keep health.[126] The purpose of the Code was to "contribute to the provision of safe and adequate nutrition for infants, by the protection and promotion of breast-feeding, and by ensuring the proper use of breast-milk substitutes, when these are necessary, on the basis of adequate information and through appropriate marketing and distribution."[127]

The Code's eleven articles include information on appropriate infant feeding education.[128] The articles also break down instructions to health

119. *Id*.
120. *Id. Your WIC Foods: Healthy Choices, More Variety supra* note 113, at 18.
121. Asiodu, *supra* note 37, at 8.
122. *Id*.
123. *Id*.
124. *Id*.
125. *See generally* WORLD HEALTH ORGANIZATION, WHO/UNICEF INTERNATIONAL CODE OF BREAST-MILK SUBSTITUTES, (1981), *available at* https://www.who.int/nutrition/publications/infantfeeding/9241541601/en/ [https://perma.cc/SB37-JCV9]. *See* Part III. B.
126. *Id*. at 10.
127. *Id*. at 13.
128. *Id*. at 9. "Article 1: Aim of the Code. Article 2: Scope of the Code. Article 3: Definitions. Article 4: Information and education. Article 5: The general public and mothers. Article 6: Health care systems. Article 7: Health workers. Article 8: Persons employed by manufacturers and distributors. Article 9: Labelling. Article 10: Quality. Article 11: Implementation and monitoring."

workers, those employed by the manufacturers and distributors, and the general public.[129] Health care systems and facilities are discussed as well as food product labelling and quality.[130] Finally, the Code describes optimum implementation and monitoring of the Code.[131] Overall, a country's decision to implement the Code shows dedication to protecting and promoting breastfeeding while recognizing breast milk substitutes as acceptable when necessary.[132]

Advertising, promotion, and free samples of breast milk substitutes are banned at the retail level, along with contact between marketing employees and pregnant women and mothers.[133] Advice is given to health care workers as to how to encourage and protect breastfeeding as well as how to deal with those working for formula companies.[134] Formula labels are to include the ingredients used and recommended storage conditions, and should be clearly readable and understandable.[135] The quality of the food products are to be of a "high recognized standard."[136] The Code generally leaves it up to participating governments to implement it and monitor their progress, stating they should seek cooperation from UN agencies like WHO and UNICEF.[137] Additionally, manufacturers and distributors are to hold themselves responsible for adhering to the Code's provisions.[138] Finally, the Director-General reports his or her country's WHO Code implementation status every other year to the World Health Assembly.[139] Overall, the Code's ban on formula advertising and promotion is its most implemented section.[140]

While the Code seemed like a wonderful solution to such a serious set of problems, it was not, and is still not, as influential as it could have been. It may seem odd that the United States was the only Member State to vote against it, despite support for the Code within the State Department.[141] However, the Reagan Administration was successfully lobbied by the formula companies who wanted expanded sales overseas, stating the Code was not sufficiently backed by scientific evidence and unconstitutionally

129. *Id*.
130. *Id*.
131. *Id*.
132. WORLD HEALTH ORGANIZATION, *supra* note 125.
133. *Id*. at 15–18.
134. WORLD HEALTH ORGANIZATION, *supra* note 125.
135. *Id*. at 17–19.
136. *Id*. at 20–21.
137. *Id*. at 21.
138. *Id*. at 21–22.
139. *Id*.
140. Schubber, *supra* note 20, at 5, 118.
141. Murphy, *supra* note 55, at 10, 913.

restricted free speech.[142] Many other countries found issue with the Code as well, leading only seven countries to adopt it by 1989.[143]

The Code failed in many ways to gain the support of the United States and it was not drafted to make it as acceptable as possible. First, it was aimed at governments that did not market formula themselves, meaning it was not aimed at the United States, which markets formula through programs like WIC.[144] The Code also has no international enforcement, simply putting its trust in the governments that voted for it to act in accordance with the guidelines.[145] This recommendation format, as opposed to a binding and legally enforceable document, led to more wide acceptance and support.[146] However, it also weakened the Code overall in the fight for maternal and child nutrition and informed decision making by mothers.[147] Moreover, the Code is not meeting its goals and expectations because countries, even those that voted for it, can disregard its guidelines without any repercussions internationally.[148]

Others criticize the Code's endorsement of shielding people from marketing, stating that marketing should be allowed and only the exploitation of the people who could be potentially harmed should be disallowed.[149] Caryn Finkle discusses the need for allowing developing countries to be decision makers concerning their wants and needs.[150] She describes the WHO Code as "depriving [developing countries] of the cultural and political autonomy it claims it is trying to preserve . . . [and] the positive effects advertising can have on a country are eliminated."[151] While not giving an entirely positive view of advertising and marketing in developing countries, Finkle discusses the welcome impact advertising can have on funding communication structures and supporting tech innovations.[152] The United States is even given as a model for a system

142. *Id*.

143. Nancy Ellen Zelman, *The Nestle Infant Formula Controversy: Restricting the Marketing Practices of Multinational Corporations in the Third World*, 3 TRANSNAT'L LAW 697, 727 n. 158 (1990), cited in Finkle, *infra* note 149 at 22, 606. Finkle, *infra* note 149, at 22, 606, fn. 29.

144. Kent, *supra* note 102, at 16, 9.

145. Schubber, *supra* note 20, at 5, 232.

146. Ellen J. Skol, *The Code Handbook: A Guide to Implementing the International Code of Marketing of Breastmilk Substitutes* 11 (1997).

147. *Id*.

148. Emily Lee, *The World Health Organization's Global Strategy on Diet, Physical Activity, and Health: Turning Strategy into Action*, 60 FOOD & DRUG L.J. 569, 598–99 (2005).

149. *See generally* Caryn L. Finkle, *Nestle, Infant Formula, and Excuses: The Regulation of Commercial Advertising in Developing Nations*, 14 NW J. INT'L L. & BUS. 602 (1994). Martha M. Ertman, *What's Wrong with a Parenthood Market?: A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 47 (2003).

150. Finkle, *supra* note 149 at 606.

151. *Id*.

152. *Id*. at 611.

that regulates advertisement for the protection of the consumer, allowing both the government and the consumer to have a choice.[153] She also finds positivity in the persuasiveness of advertisements.[154] She argues that while the ability of advertisements to impart messages to its viewers or readers subconsciously can be used for evil, it can also be used for good, for example, providing information on how to stop smoking or sit safely on a bus.[155] These differences of opinion regarding the WHO Code make clear that while it was a step in the right direction, it was not as stringent or effective as it could have been.

IV. POTENTIAL SOLUTIONS

While the WHO Code was not adopted by the United States and has its critics, there are other solutions to the problem of coercive marketing and the lack of choice and agency women experience when deciding to breastfeed or formula feed. These solutions are numerous, cover a wide variety of topics, and range from solving particular problems to having multi-faceted approaches.

A. Medically Focused Approaches to Assuring Informed Choice

To earn an international baby-friendly certification, hospitals must meet a ten-point checklist, which includes the facility having a written breastfeeding policy that the staff is trained to follow.[156] Mothers must be informed about breastfeeding and given encouragement to breastfeed.[157] This information and encouragement includes establishing practices like giving mothers information regarding support after hospital discharge.[158]

At first glance the ten requirements suggest that certification calls for significant training and staffing, making them undesirable to hospitals. However, meeting the requirements does not lead to an extraordinary

153. *Id*. at 613.
154. *Id*. at 613–14.
155. *Id*. at 614.
156. BABY FRIENDLY USA, INC., GUIDELINES AND EVALUATION CRITERIA FOR FACILITIES SEEKING BABY-FRIENDLY DESIGNATION (2016), [https://perma.cc/78XN-KZ9Z]; "Step 1: Have a written breastfeeding policy that is routinely communicated to all health care staff. Step 2: Train all health care staff in the skills necessary to implement this policy. Step 3: Inform all pregnant women about the benefits and management of breastfeeding. Step 4: Help mothers initiate breastfeeding within one hour of birth. Step 5: Show mothers how to breastfeed and how to maintain lactation, even if they are separated from their infants. Step 6: Give infants no food or drink other than breast milk, unless medically indicated. Step 7: Practice rooming in – allow mothers and infants to remain together [twenty-four] hours a day. Step 8: Encourage breastfeeding on demand. Step 9: Give no pacifiers or artificial nipples to breastfeeding infants. Step 10: Foster the establishment of breastfeeding support groups and refer mothers to them on discharge from the hospital or birth center."
157. *Id*. at 12, 20.
158. *Id*. at 22.

increase in hospital expenses.[159] Moreover, when compared to the cost of treating the health issues that may come from lower breastfeeding rates, the increased cost is still an overall savings.[160] This certification's requirements and detailed criterion have been updated throughout the years, allowing it to be continually improved.[161] Hospitals that gained the certification in the South found increased breastfeeding rates in African American women.[162] Nevertheless, Certified Baby-Friendly Hospitals accounted for only fifteen percent of hospitals in the United States in 2015.[163] While this number had increased by fourteen percent since 2005, in order for these numbers to continue to rise, information needs to be spread regarding the true cost of obtaining the certification as some hospitals may be dismayed by the initial cost. Moreover, state and city legislatures need to make this certification a requirement to establish or continue to operate a hospital.[164] Congress should begin promoting the Baby-Friendly Hospital Certification, which it could do in a variety of ways, including creating financial incentives for hospitals, allowing them to break free from the formula companies' coercive financial support.[165]

Some take a simpler but less box-checking approach, urging those in the medical community to change their policies to allow not just certain formula brands but all formula brands on their premises and to rotate those brands, or give free formula only to those who request it.[166] Others encourage removing formula marketing in medical spaces and displaying instead images of women breastfeeding, making sure to include women of color in those images as positive role models.[167] Overall, these medical approaches allow for less influence by formula companies while also helping women get breastfeeding information and support. These options allow women to have more agency and freedom in their choice to breastfeed or formula feed.

159. Freeman, *supra* note 1, at 1, 3071.

160. *Id*.

161. *See The Guidelines and Evaluation Criteria*, BABY FRIENDLY USA, INC., https://www.babyfriendlyusa.org/for-facilities/practice-guidelines/ (last visited Mar. 12, 2019). Indicating 2010 and 2016 criteria, as well as a 2018 update to the 2016 criteria, https://www.babyfriendlyusa.org/for-facilities/practice-guidelines/ [https://perma.cc/Y3EZ-GY4F].

162. Asiodu, *supra* note 37, at 8.

163. *Hospital Actions Affecting Breastfeeding*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/vitalsigns/breastfeeding2015 (last visited Mar. 14, 2019) [https://perma.cc/FCA8-EPYD].

164. Freeman, *supra* note 1, at 1, 3071.

165. Fentiman, *supra* note 17, at 4, 60.

166. Epstein, *supra* note 2, at 2, 22.

167. Freeman, *supra* note 1, at 8, 1605–06.

B. Governmental Approaches to Assuring Informed Choice

Many call for local, state, and/or federal governments to take action by passing legislation.[168] First, if found to be appropriate, the WHO Code can be implemented through avenues like legislation and regulations, meaning that a state (rather than the nation) could adopt the WHO Code.[169] These modes allow for flexibility in implementation as different states or groups may have different needs and wants.[170] Legislation would be the strongest means of implementing the WHO Code.[171] It could be achieved through amending a law already in existence, like the laws limiting certain types of advertisements. Laws could also restrict the influence formula companies can have in medical facilities, another setting where certain restrictions are already in place. Regulations can have less effect as compared to legislation but allow for more ease in implementation into governmental systems and acceptance by society.[172] Regulations could be issued by governmental groups based on existing powers like public health law or food law.[173]

Some argue for a constitutional protection of breastfeeding through adding a right to health or healthy food that would include breastfeeding. However, this would almost certainly not occur in the United States, which relies on its Bill of Rights.[174] Breastfeeding was deemed a constitutional right under the Fifth Amendment's Due Process by the Fifth Circuit, but the Supreme Court has not adopted this, making implementation of policies following the holding much more difficult.[175] Others argue for the environmental benefits of breastfeeding to be integrated into state laws. In

168. *See Breastfeeding State Laws*, NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/health/breastfeeding-state-laws (last updated Apr. 4, 2019) (for a list of state breastfeeding laws) [https://perma.cc/3EKK-QMYK].

169. Schubber, *supra* note 20, at 5, 207.

170. SCHUBBER, *supra* note 20, at 207.

171. *Id*. at 208.

172. *Id*. at 209.

173. *Id*.

174. Freeman, *supra* note 37, at 8, 1600.

175. Dike v. Sch. Bd. of Orange Cty., Fla., 650 F.2d 783, 787 (1981). Stating "Breastfeeding is the most elemental form of parental care. It is a communion between mother and child that, like marriage, is 'intimate to the degree of being sacred . . . we conclude that the Constitution protects from excessive state interference [into] a woman's decision respecting breastfeeding her child." *See* Freeman, *supra* note 37, at 1600-04 for a more in-depth discussion regarding constitutional avenues to ensure greater breastfeeding protections in the United States. Some potential options include the Supreme Court adopting the holding in *Dike*, leading governmental restrictions on breastfeeding to be subject to strict scrutiny. Another option is an expansion of the Fourteenth Amendment in which plaintiffs can prove discriminatory treatment by using statistics, which could allow for a lessening of racial breastfeeding disparities.

Colorado, the environmental benefits of breastfeeding are included in the introduction of a legislative declaration regarding breastfeeding support.[176]

Workplace roadblocks can also be remedied. In an interview with Liz Morris, one of the authors of the 2019 report *Exposed: Discrimination Against Breastfeeding Workers*, she stated that as a worker's right breastfeeding is different than other rights in that people who profess family values can support the right.[177] According to Morris, "[i]f anything would pass, it would be this," meaning breastfeeding in the workplace protections.[178] Additionally, the report lists "Seven Components of a Model Lactation Policy" for the government to follow.[179] In order to have an employment policy that enables women who breastfeed at work to experience equality in that space, the report states there must be strong enforcement by government agencies and individuals, coverage for all who breastfeed at work, and reasonable accommodations provided by employers, including job modifications.[180] Additionally, the report states particular physical needs and circumstances must be accounted for, adequate spaces should be made for these working mothers, and economic situations faced by women who breastfeed at work should be addressed.[181]

Governmental approaches can be tailored to attack the formula companies' undue influence on women's choice as to how they feed their children. These approaches can reach the specific needs of different groups and the individualized problems in the various arenas in which formula companies have an impact. Legislation and government influence should put further pressure on formula companies to alter or stop their coercive tactics. Other groups, like employers, should receive government directives to raise the bar in terms of what women are offered, furthering their agency.

C. Models for Action

There are many models for how to give women agency when it comes to breastfeeding and formula feeding. Two include New York and California. First, New York passed a Breastfeeding Mother's Bill of Rights ("BFMBR") in 2009.[182] The BFMBR separates the mother's rights into three time periods: before delivery, in the healthcare facility, and after leaving the healthcare facility, and states:

You have the right to make your own choice about breastfeeding. Whether you choose to breastfeed or not you have the following basic rights

176. Connolly, *supra* note 11, at 3, 168-69. Colo. Rev. Stat. § 25-6-301(2004).
177. Morris, *supra* note 35, at 8.
178. *Id*.
179. Morris et al., *supra* note 8, at 2, 46.
180. *Id*. at 46–47.
181. *Id*. at 47–48. *See* Fentiman, *supra* note 17, at 4, 58–63 for further discussion regarding legal obstacles and state law.
182. N.Y. Pub. Health Law § 2505-a (2009).

regardless of your race, creed, national origin, sexual orientation, gender identity or expression, or source of payment for your health care. Maternal health care facilities have a responsibility to ensure that you understand these rights.[183]

Twenty-two listed rights are given throughout those three time periods and the law is to be clearly posted in all pertinent healthcare facilities.[184] While many of the requirements seen in the BFMBR were already in the New York Codes Rules & Regulations on Perinatal Services from 1988, some additions were made, including ensuring that newborns have the right to not have pacifiers and mothers have the right to information about community breastfeeding resources.[185] Additionally, marketing material distribution is prohibited along with educational materials that refer to proprietary products or have product logos.[186] Passing the BFMBR while already having the Perinatal Regulations in place shows that a state can have laws and regulations to mitigate the systems in place that interfere with womens' choice in how to feed their infants, and can continue to improve and broaden these regulations to fight to further these mothers' choice.

After the BFMBR's passage, the New York Department of Health developed a State Model Hospital Breastfeeding Policy, which on top of the Perinatal Regulations and the BFMBR, added recommended provisions and that the Department later reach out regarding compliance.[187] The Department found that just seven of the 132 hospitals were in full compliance and initiated enforcement proceedings quickly, leading to a seventy-five percent compliance rate just two years later in 2013.[188] The New York City Department of Health and Mental Hygiene also took action, developing a multilevel strategy to promote breastfeeding focusing on individual-level change, institutional-and-community level change, and

183. *Id*. at § 2505-a(3).

184. *Id*. at § 2505-a(1)-(3).

185. *Id*. at § 2505-a(3)(2)-(3). N.Y. Comp. Codes R. & Regs., tit. 10, § 405.21(c)(1)(c), (f)(3) (2011) *available at* https://regs.health.ny.gov/content/section-40521-perinatal-services [https://perma.cc/GZ6J-HWFB].

186. N.Y. Comp. Codes R. & Regs., tit. 10, § 405.21(c)(16)(3)(i)(b)(6-7) (2011) *available at* https://regs.health.ny.gov/content/section-40521-perinatal-services [https://perma.cc/5S7P-YRKL].

187. N.Y. STATE DEP'T HEALTH, *New York State Model Hospital Breastfeeding Policy: Implementation Guide (2011),* https://www.urmc.rochester.edu/MediaLibraries/ URMC Media/finger-lakes-regional-perinatal/NYSImplementationGuide.pdf [https://per ma.cc/ F77M-4Y69]; Timothy D. Lytton et al., *There is More to Transparency than Meets the Eye: The Impact of Mandatory Disclosure Laws Aimed at Promoting Breastfeeding*, 40 AM. J.L. & MED. 393, 402–03 (2014).

188. Lytton, *supra* note 187.

policy change.[189] Some aspects of the City work include resources to help create community lactation rooms and to provide a toolkit for businesses and a guide to breastfeeding in New York City.[190]

California is also used as a model. Beginning in 1995, the state has been passing laws supporting breastfeeding in hospitals, such as requiring hospitals to have breastfeeding consultants available or have support so that mothers can access breastfeeding information.[191] While this 1995 law is not particularly impactful as it is can be easily complied with simply by providing some information, it was a start. In 2007, the state passed a law requiring the State Department of Public Health to recommend training for general acute care hospitals that had breastfeeding rates in the lowest twenty-five percent of the state.[192] Again, while this law was a positive step, it is a less efficient piece of legislation because it required recommendation, not implementation. In 2011, California passed the Hospital Infant Feeding Act, requiring certain hospitals that provide maternity care to have an infant feeding policy guided by the Baby-Friendly Hospital Initiative or the State Department of Public Health Model Hospital Policy Recommendations.[193] This policy must be posted in the perinatal unit or on the hospital website, and the policy must be communicated to the perinatal staff.[194] This law launched California towards further enhancing mothers' right to choose what their infants are fed. Subsequently, the state passed a law making the Hospital Infant Feeding Act policy adoption mandatory.[195]

V. CONCLUSION

The choice to breastfeed or formula feed is extremely important and personal. There are many potential health benefits and negatives that come with using breast milk or formula, but breastfeeding is widely recognized as the gold standard of infant nutrition.[196] However, the choice is not always simple. There are many external factors that mothers can face, including maternal benefits and disadvantages, unequal labor within a family, labor law issues, socioeconomic and racial factors (especially for

189. *Breastfeeding*, N.Y.C. HEALTH, https://www1.nyc.gov/site/doh/health/health-topics/breastfeeding.page [https://perma.cc/MA37-ELFV]. *See* Kaplan & Graff, *supra* note 10, at 499–501 for a more in-depth discussion of New York City's work.

190. N.Y.C. HEALTH, *supra* note 189.

191. Cal. Health & Safety Code § 123365(1996). *See* Bernstein & Rutkow, *supra* note 11, at 3, 182–83.

192. Cal. Health & Safety Code § 1257.9(a)(1) (2007).

193. Hospital Infant Feeding Act, Cal. Health & Safety Code § 123366 (2014).

194. *Id*. at § 123366(d).

195. Cal. Health & Safety Code § 123367 (2014). Hospitals were given eleven years to comply as physical space and time are required to meet the specifications.

196. *See* Part II. A.

African American women), societal judgement, and economic and environmental factors.[197]

Formula marketing plays a tremendous role in influencing whether mothers use breast milk or formula to feed their infants. Formula companies promote their product in many ways, the first being through medical professionals and hospitals by using "ethical marketing" and "discharge packs."[198] Formula companies also work with the United States government. The companies have made great headway acquiring large subsidies and rebates and using those to infiltrate the WIC system. This makes breastfeeding even more difficult for the program's participants, although the program's support for breastfeeding seems to be increasing.[199]

There was an attempt to address these issues internationally with the WHO Code, banning formula marketing and advertising and emphasizing the importance of breastfeeding. However, the United States did not vote for the Code and the Code continues to be criticized.[200] Unlike tobacco, which is never a healthy or necessary choice, formula is sometimes a mother's only option, making efforts to ban its dissemination unacceptable to many. While the Code is not perfect, there are other solutions that have been or could be implemented, including medical and governmental approaches.[201] There are also models for action, including New York and California, which worked differently towards the same goal of creating a space for women to have more agency in deciding whether to breastfeed or formula feed.[202] However, there are many barriers still in place that obstruct a woman's unfettered agency in the decision to breastfeed or formula feed. There is much work to be done to assure both unbiased information and the ability to carry out one's choice, but the future is hopeful that society will encourage and respect choices by women as intelligent consumers.

197. *See* Part II. B.
198. *See* Part III. B.
199. *See* Part III. C.
200. *See* Part III. D.
201. *See* Part IV. A-C.
202. *See* Part IV. D.

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