The Lactating Angel or Activist? Public Breastsfeeding as Symbolic Speech

Elizabeth Hildebrand Matherne

Law Offices of Robert Wesley, Public Defender, Ninth Judicial Circuit of Florida
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INTRODUCTION 

"[T]he history of women's visibility is predominately the history of women's objectification and oppression."1

† The term "lactating angel" borrowed with the author's permission from the article of St. Thomas University School of Law Professor, Amy D. Ronner, Women Who Dance on the Professional Track: Custody and the Red Shoes, 23 HARV. WOMEN'S L.J. 173, 184 (2000) (discussing the Florida case Young v. Hector, 740 So. 2d 1153 ( Fla. Dist. Ct. App. 1988) rev'd en banc, 763 So. 2d 1046 (Fla. 2000), in which the panel decision and en banc dissent would have awarded custody to the father because the mother was a partner in a law firm).

* Elizabeth Hildebrand Matherne—Assistant Public Defender, Law Offices of Robert Wesley, Public Defender, Ninth Judicial Circuit of Florida. J.D., 2007 St. Thomas University School of Law; B.S. International Trade, 2001, Georgia Southern University. I dedicate this Article to my two incredible children, Maitland and Madeline. I am forever grateful to them for being the catalyst in finding my Courage. I express my deepest gratitude to my husband, Joe, who I love so dearly and who is truly my partner in life. I would like to thank my mother, Alice Hildebrand, and my aunt, Susan Anderson for their love and support and for passing along the tradition and importance of breastfeeding. I would also like to thank my friend and mentor Professor Amy Ronner, as well as, my friend Melissa O'Connor for their invaluable insight and friendship. Finally, I would like to thank Professor John Kang; without his First Amendment Seminar, advice, and encouragement this Article would not exist.

"Resistance can take the form of momentous acts of organized, planned and disciplined protests, or it may consist of small, everyday actions of seeming insignificance."

"Breastfeeding is perceived by many as dirty, sexual, embarrassing, and generally, something that should be kept behind closed doors." The women who bravely breastfeed in public reject these notions and prioritize their children's health above patriarchal societal mores. I propose that a cultural climate that elevates modesty over health by relegating breastfeeding to behind closed doors is an extension of a patriarchal desire to subjugate women by confining them the home.

Negative attitudes against public breastfeeding persist in spite of the fact that the majority of current research shows clear evidence that breastfeeding is exceedingly beneficial to mothers, infants, and society. The social stigma against breastfeeding in public prevents many women from even attempting to breastfeed their children. Although "most states have instituted some type of legislation to exempt breastfeeding mothers from criminal liability," most "[b]reastfeeding women wonder whether they will be harassed, evicted, or even arrested for feeding their babies in public" under indecent exposure statutes. While recent state statutes attempt to shield women from harassment, they do not provide any redress or penalties for harassment faced by these women.

The only way to combat this stigma against public breastfeeding is through the act of breastfeeding in public. I propose that breastfeeding is a powerful act of symbolic speech vital for discarding one of the lingering shackles of women's inequality that triggers first amendment protection. Breastfeeding in public addresses this stigma by treating two ills at once: 1) greater public exposure to the practice decreases the severity of society's reactions, and 2) the less stares and confrontation that publicly nursing mothers receive, the more likely they will be to breastfeed, whenever or wherever their baby is hungry. This will have an impact not only on the number of mothers that even attempt to breast-

4. See, e.g., Breast-Feeding Controversy: The Fight to Nourish in Public, Is it Inappropriate to Breast-Feed in Public?, ABC News, Good Morning America (July 18, 2006) http://www.abcnews.go.com/ print?id=2206291) (last visited Dec. 13, 2007) (stating "[a]lthough studies show that breast-feeding is healthy for both mother and child, 57 percent of the public are uncomfortable . . . .")
5. Id.
feed, but also, on the number of mothers that are able to make it to the American Pediatrics Association's recommended 1 year.

In the First Section of this Article I will explore the current cultural context surrounding public breastfeeding. I segment this discussion into three separate parts: 1) the benefits of breastfeeding, 2) the social stigma against public breastfeeding, and 3) how the combinations of parts 1 and 2 send a clear message to mothers and women in general that women belong in the home. This is a message feminists have been fighting against for decades, and rightly so. I then explain how the situation is worsened by a lack of viable legal recourse for public breastfeeding discrimination.

In the Second Section, I explore the First Amendment and symbolic speech. Next, I explain how, at first glance, the Spence test sounds simple, but in practice is very difficult to apply and does not accomplish the intended goals of the First Amendment. In response, I highlight the part of the Spence test that seems to be most dispositive to the United States Supreme Court's determination that an act is expressive: the context. In conclusion, I explain why public breastfeeding is symbolic speech and how the cultural context of the act elevates a seemingly mundane and unexpressive act to the levels of protected symbolic speech.

I. Cultural Context—The Benefits of Breastfeeding

"Breastfeeding is universally endorsed by the world's health and scientific organizations as the best way of feeding infants."7 The United States Breastfeeding Committee states "[y]ears of research have shed light on the vast array of benefits not only for children but also for mothers and society."8 The benefits of breastfeeding are far more numerous than this Article can address. In general, breastfeeding provides children with "optimal development and protects against acute and chronic illness."9 Breastfeeding is also beneficial to mothers because it

9. Id.
promotes a milder "recovery from pregnancy and child-birth" and "life-long health advantages." On a larger scale, "breastfeeding provides a range of economic and environmental rewards" for society as a whole.

A. Breastfeeding Benefits the Infant

"Each year more and more scientific evidence is gathered to prove what many people already intuitively know: that a mother's milk is the best food for her baby." The advantages that breastmilk offers for children "cannot be duplicated by any other form of feeding." Not only does breastmilk contain "the right amount of nutrients, in the right proportions" for optimal physical and mental development of a growing baby until the age of 6 months, breast milk is a living biological fluid that contains many unique components. For example, lactoferrin provides optimal absorption of iron and protects the gut from harmful bacteria; lipases assist in the digestion of fats; and special growth factors and hormones contribute to optimal growth and development. Amazingly, the composition of breastmilk changes "as the baby grows to meet baby's changing nutritional needs.

The benefits of breastfeeding extend beyond nutrition—"human milk is baby's first immunization." It provides antibodies which protect baby from many common respiratory and intestinal diseases, and also contains living immune cells. "Compared with formula-fed children, those who are breastfed are healthier and have fewer symptoms and shorter illnesses when they do get sick." Artificially fed infants "have higher rates of middle ear infections, pneumonia, and cases of... stomach flu." On the other hand, children who are breastfed have a
lower incidence of all of the above mentioned conditions, as well as a lower incidence of sudden infant death syndrome (SIDS), a lower risk of Crohn’s disease, ulcerative colitis, Hodgkin’s disease, childhood leukemia, juvenile diabetes, asthma, and obesity. Additionally, “[b]reastfed children score higher on cognitive and IQ tests at school age and also on visual acuity [tests].” Breastfeeding has even been shown to result in fewer cavities and a decreased likelihood of [need for] braces. As a result of the prevalence of studies showing the myriad benefits of breastfeeding, “[i]n December 1997 the American Academy of Pediatrics issued its most aggressive statement to date urging mothers to breastfeed for at least a year and beyond, ‘for as long as mutually desired’.”

B. Breastfeeding Benefits the Mother

Furthermore, ‘breastfeeding offers a range of benefits for mothers . . . ’ “[H]ealthier babies are less stressful to care for, and the decreased medical costs are a boon to the family.” Mothers “who have breastfed are less likely to develop ovarian and pre-menopausal breast cancers,”


23. Id.


and there is some evidence to suggest the incidence of coronary artery disease may be reduced.28 The longer “a woman has spent breastfeeding, the greater the beneficial effect.”29 Additionally, “[b]reastfeeding reduces osteoporosis.”30 Breastfeeding has also been linked with a faster recovery after childbirth and a higher likelihood that the mother will return to her pre-pregnancy weight, compared with mothers who formula feed.31 Mothers who breastfeed “are reported to be more confident and less anxious than bottle-feeding mothers,”32 perhaps because of the greater “feelings of attachment between mother and . . . child”33 that breastfeeding offers. These feelings alone are the spring board for a plethora of benefits to children, mothers and even society.

C. Breastfeeding Benefits Society

“Breastfeeding offers society not only improved health of children and mothers but also economic and environmental benefits.”34 There is evidence, although not conclusive, that the increased hormonal production caused by breastfeeding may be linked to mother-child bonding.35 Studies have shown a lower abandonment rate36 and have suggested a “lower rate of child abuse in breastfeeding mothers in families that were considered to be at risk.”37 “Breastfeeding reduces the need for costly health services that must be paid for by insurers, government agencies, or families.”38 “[T]he number of sick days that families must use to care for their sick children” is reduced.39 Feeding an infant with artificial methods ($1,200 per year for powdered formula) is four times more expensive than that of breastfeeding (approximately $300 per year for

30. Id.
31. Id. (citing Heinig & Dewey, supra note 27.)
32. Id (citing Ruth A. Lawrence & Robert M. Lawrence, Breastfeeding: A Guide for the Medical Profession (5th ed. 1999)).
33. Id.
34. Id.
39. Id.
increased food for a lactating woman). “Breastfeeding requires no packaging, and ... [the] production [of breastmilk] does not harm the environment” while infant formula production requires electricity or fuel.

II. CULTURAL CONTEXT—SOCIAL STIGMA

As technology advances and more studies are done, it is becoming less controverted that breast milk is superior to formula. As discussed above, breastfeeding benefits not only mother and infant, but society as a whole. Yet, there are countless newspaper reports of women being shunned, harassed and even ejected from public places for nursing a hungry baby. According to an MSNBC report, Emily Gillette, 27, who was breastfeeding her daughter on a an airplane as flight attendants and pilots prepared to depart from Baltimore International Airport on Oct. 13, 2008, was actually removed from the flight. Even though, as she described, “she was seated by the window in the next-to-last row, her husband was seated between her and the aisle and no part of her breast was showing,” a Freedom Airlines flight attendant insisted she cover up.

40. Id.
41. Id.
42. See, e.g., Amy Harmon, 'Lactivists' Taking Their Cause, And Their Babies to the Streets, N.Y. Times, June 7, 2005, at B1, available at http://www.nytimes.com/2005/06/07/nyregion/07nurse.html?ex=1184644800&en=055037dea877ab2&ei=5070 (describing a nurse's response to Barbra Walters' negative remarks about public breastfeeding as well as the stories of hundreds of women who were asked to stop nursing in public spots, including the Children's Museum in Huntsville, Alabama, a knitting store in the East Village, New York City, a Radisson Hotel lobby in Virginia, a public bus in Los Angeles, and a city commission meeting in Miami Beach); Virginia L. Marchant, Are your breasts bound by law?, MOTHERING, Jan.–Feb. 2005, available at http://findarticles.com/p/articles/mi_m0838/is_128/ai_n8692163/pg_1 (depicting, among many other stories, the story of one mother who was harassed by a store manager for nursing in a quite corner of an H&M clothing store in August of 2003); Isabelle Schallreuter Olson, Comment, Out of the Mouth of Babes: No Mother's Milk for U.S. Children, 19 HAMLIN L. REV. 269, 269 (1995) (highlighting a Dear Abby column where a woman who was discreetly breastfeeding her baby in a beauty parlor was asked to hurry up and finish because she was offending other customers and also documenting the responses of other women to this column, saying they felt that breasts “should not be flaunted in public” and that it was “gross”); Breast-Feeding Controversy, supra note 4, at 1.(stating “Although studies show that breast-feeding is healthy for both mother and child, 57 percent of the public are uncomfortable with public breast-feeding, according to babytalk magazine.”).
44. Id.
with a blanket. Mrs. Gillette declined, asserting that she “had a legal right to breast-feed her baby.” Because Mrs. Gillette did not “want to make a scene,” she, her husband and child “complied” with the flight attendant and security guards and exited the plane.

Emily Gillette’s story is an example of what many mothers face every day. Many of these women never report such harassment. Further, and more tragic for the nation’s children, countless women do not even attempt to breastfeed their children because of the dreaded consequences (looks, stares, comments, confrontation, harassment, and eviction) of nursing a baby in public. Yet, there are other women who, regardless of the potential conflicts, march out into the sunlight and reclaim their stake in parenting. These women are not only reaching backwards to a lost time, prior to Christianity and the industrial revolution, where natural acts of motherhood were commonplace in the lives of all mothers, but at the same time, forging forward to break down barriers to women’s mobility in the world. By breastfeeding in public these women are challenging society’s idea of a woman’s body as purely sexual and shameful.

III. Society’s Message—Women Belong in the Home

Any real and complete independence and equality that women achieve must be accompanied by autonomy over their own bodies.

Male power is perpetuated by regarding women as objects that men act on and react to rather than as actors themselves. When women are regarded as objects, a great deal of importance rests on their appearances because their entire worth is derived from the reaction they can induce from men. In order

45. Id.
46. Id.
47. Id.
to maintain the patriarchal system, men must determine when and where this arousal is allowed to take place.\textsuperscript{50}

Requiring women to cover their breasts with indecency statutes and erotic dancing regulations have codified the "male myth of a woman's breast" as sexual and erogenous into law.\textsuperscript{51} "Because women are [regarded as] the sexual objects and property of men, it follows that what might arouse men can only be displayed when men want to be aroused."\textsuperscript{52} The result? Society has accepted that women must cover their breasts in public. Requiring women to cover their breasts in public has discouraged women from breastfeeding\textsuperscript{53} and erected further barriers to women's mobility in society.\textsuperscript{54}

This is a "vivid example of the inequities in the power structure [of our society]. A male norm focuses the difference as resting with women. Because men cannot breast-feed, it is not accepted as a form of appropriate public behavior."\textsuperscript{55} As Ann Scales stated in her 1981 article, historically,

[T]he subjection of women is based upon biological differences between the sexes which resulted in a basic division of labor along domestic and non-domestic lines: men were out in the world developing culture and a market, while women, due to pregnancy, nursing and the maintenance of children, were restricted in their function to . . . tasks that could be accomplished in the home.\textsuperscript{56}

\textsuperscript{50} Id. at 116 (citing Janet Rifkin, \textit{Towards a Theory of Law and Patriarchy}, 3 Harv. Women's L.J. 83, 90-91 (1980); Mary Whisner, Note, \textit{Gender-Specific Clothing Regulation: A Study in Patriarchy}, 5 Harv. Women's L.J. 73, 77 (1982)).

\textsuperscript{51} Id.

\textsuperscript{52} Id.

\textsuperscript{53} Id. at 138 (citing Brief of Defendant-Appellant at 27, People v. Santorelli, 600 N.E.2d 232 (N.Y. 1992) (No. 115) (referencing testimony of psychologist Dr. Rita Freedman)).

\textsuperscript{54} "[T]he pervasive historical underpinnings of the oppression of women must be recognized. It has been argued that the subjection of women is a basic form of dominance in that women have been relegated to the home regardless of their racial or socio-economic status." Ann C. Scales, \textit{Toward a Feminist Jurisprudence}, 56 Ind. L.J. 375, 424-25 (1981).

\textsuperscript{55} Glazer, \textit{supra} note 49, at 139.

\textsuperscript{56} Scales, \textit{supra} note 54, at 425. "This division of labor, originating in biological circumstance, became a necessity . . . to sustain first, an agricultural, and later, an industrial society." Id. Now that the social order is not as largely dependant on the supply of workers and heirs "[i]t is no accident that the statutes and common law doctrines which conceived women and children as private property are breaking
"Legal sanctions and prohibitions have historically served to reinforce this social framework."57 Yet, as Scales pointed out, the "historical subjection of women was premised on biological differences," while today the "elements of necessity that once prescribed the social order . . . no longer exist."58 The social stigmas and harassment women face regarding breastfeeding in public is an extension of these divisions. And, just as forced maternity leaves, pregnancy discrimination, and sexual harassment are no longer legally or socially accepted practices, it is time that discrimination and harassment against public breastfeeding follows suit.

Further, "[b]reastfeeding serves a vital purpose."59 It is well documented that breastmilk is the best nutrition for an infant.60 As discussed, breastfeeding provides numerous benefits for both mother and child.61 Further, burdens on society are lessened when babies are breastfed. "The connection between mother and infant is critical" and "male observers are irrelevant to the process."62 Negative reactions that breastfeeding mothers encounter are the result of the proliferation and acceptance of the male perspective of sexualizing female breasts. This particular male perspective impedes complete female autonomy. As Corey Silberstein Shdaimah so eloquently states, "[w]hen the message of the benefits of breastfeeding intermingles with the lack of acceptance of breastfeeding in public, this creates the anti-woman, anti-feminist message that a good mother must breastfeed and a breastfeeding mother must stay at home, down . . . ." Id. at 425 n. 288; See also, Dahleen Glanton, Moms Have the Right, But Public Still Frowns: Despite Health Benefits and 34 States’ Laws, Public Breast-feeding Makes Some Queasy, CHI. TRIB., August, 7, 2006 (quoting Melissa Vance, La Leche League attorney, as saying "[f]ifty years ago, most moms stayed home and [were] not running kids back and forth to soccer games .... We are an increasingly mobile society today, and women are much more visible so it is more likely to see them breast-feeding in public. There are also more women in the workplace, so it’s out there. It’s a generational thing ....").

57. Scales, supra note 54, at 425.
58. Id.
59. Glazer, supra note 49, at 139.
60. See supra Part I; See e.g. Emmanuel Cheraskin, Breastfeeding Versus Animal Milk, NUTRITION HEALTH REV., Spring 1995, at 8 (stating that breastfeeding "is the best way of nourishing the infant").
61. See Olson, supra note 42, at 271–72 (noting that breast-fed infants are less likely to suffer from diarrhea, ear infections, and various other childhood diseases including some cancers, allergies, and respiratory infections); Id. at 271–273 nn. 19–38 (citing numerous medical studies on the effects of breastfeeding, including a study which found that breastfed children perform better on developmental and IQ tests); Id. at 274 nn. 43–45 (noting that women who breastfeed their children reduce the risk of developing both ovarian and breast cancer and also that "prolonged lactation helps a woman lose weight after pregnancy").
i.e., a good mother must stay home. I believe the more opportunity mothers have to be equal members of society, which is accomplished by freedom of movement and having complete autonomy over their bodies and, for that matter, their lives, the better mothers they will be. Further, as the New York legislature stated when it declared breastfeeding a civil right:

The promotion of family values and infant health demand putting an end to the vicious cycle of embarrassment and ignorance that constricts women . . . and represents hostility to mothers and babies in our culture based on archaic and outdated moral taboos. Any genuine promotion of family values should encourage public acceptance of this most basic act of nurture between mother and baby, and no mother should be made to feel incriminated or socially ostracized for breastfeeding her baby.64

IV. No Viable Legal Recourse

While many people are aware of the benefits of breastfeeding, they are, at the same time, unaware of the legal issues surrounding breastfeeding.65 However, most breastfeeding women are keenly aware of such issues.66 The La Leche League is an international organization created in 1956 by seven women67 whose mission is “to help mothers worldwide to breastfeed through mother-to-mother support, encouragement, information, and education, and to promote a better understanding of breastfeeding as an important element in the healthy development of the

64. N.Y. Civ. Rights Law § 79-e (McKinney Supp. 2008) (legislative findings). The New York legislature went on to find that “breastfeeding a baby is an important and basic act of nature which must be encouraged in the interests of maternal and child health and family values.” Id. In the 13 years since it was enacted, only one case has been brought under this statute. (See Landor-St. Gelais v. Albany Int'l Corp., 763 N.Y.S.2d 369 (2003) (holding that the employer did not violate the statute by requiring the mother to use a separate facility to pump and store milk during her breaks because the statute refers to public breastfeeding and not to pumping milk.)
65. See Shelton, supra note 3, at 180.
66. Id.
baby and mother.”

Melissa R. Vance, a La Leche League leader, and an attorney in private practice, maintains a running summary for the La Leche League website. According to Vance, there are two types of laws in the area of public breastfeeding in the United States: “(1) those which exclude breastfeeding from indecent exposure or other criminal laws; and (2) those which expressly state a mother may breastfeed in public.”

Further, according to her research, “[t]hirty-four states currently have laws that fall into one of those categories.” Additionally, “[a]pproximately 16 states exempt breastfeeding from various types of criminal statutes, while several of these states also have separate statutes addressing breastfeeding in public.” For example, “Virginia, only addresses breastfeeding on property that is owned, leased, or controlled by that state,” while North Carolina “exempts breastfeeding from the indecent exposure laws, and states that a woman has a right to breastfeed in any public or private location in the same statute.”

What went unnoticed to most was a small victory for breastfeeding advocates when, “[i]n 1999, an amendment was added to a US postal appropriations (spending) bill that included language that stated a woman may breastfeed her child at any location in a federal building or on federal property, if the woman and her child are otherwise authorized to be present at the location.”

While now in the minority, the District of Columbia, Massachusetts, North Dakota and West Virginia do not have any laws addressing breastfeeding.

71. Id.
72. Id. The sixteen states that exempt breastfeeding from criminal statutes are: Alaska, Florida, Illinois, Michigan, Minnesota, Missouri, Nebraska, North Carolina, New York, Oklahoma, Rhode Island, South Dakota, Utah, Virginia, Washington, Wisconsin. Id. at n.5. The states that have separate breastfeeding statutes are Florida, Illinois, Minnesota, Missouri, Nebraska, New York, Oklahoma, Utah, Virginia. Id. at n.6.
73. Id.; VA. CODE ANN. 2.2-1147.1 (2002).
75. Id. (citing Pub. L. 106-058, sec. 647 (1999)).
One court, the 5th Circuit, has declared breastfeeding a constitutional right,\(^7\) but the issue has not yet been approached by the United States Supreme Court. As Vance states in her article, "[t]here is a constitutional right to privacy that includes the right to marry, procreate, use birth control, and engage in consensual adult sexual activity; thus, the Supreme Court might well likely find breastfeeding to be a constitutional right."\(^7\) Additionally, there is a constitutional right to association and intimate association, both of which, like free speech and symbolic speech, protect a personal freedom;\(^9\) similar reasoning could be applied to make breastfeeding a constitutional right as well.

Qualifying an action as a constitutional right does not create an absolute right that is free of any and all restrictions.\(^8\) "The government may restrict a fundamental right"\(^8\) if the government has a countervailing interest that outweighs the individual interest in asserting that right. "Thus, assuming there is a constitutional right to breastfeed, this right does not automatically override other interests such as those of a private employer who may refuse a mother breaks for pumping, or a private restaurant asking a mother to leave . . . ."\(^8\)

U.S. Courts, like the Sixth Circuit in Derungs v. Wal-Mart Stores, Inc.\(^8\) have not found "actions regarding breastfeeding, such as asking a nursing mother to leave or refusing to allow her to pump while working . . . to constitute discrimination under federal and/or state civil rights statutes."\(^8\) Therefore, it may be legally justifiable for "a private person,

\(^7\) See Vance, supra note 70 (citing Dike v. Sch. Bd. of Orange County, Fla., 650 F.2d 783 (5th Cir. 1981).
\(^8\) Vance, supra note 70.

In Roberts v. United States Jaycees, 468 U.S. 609 . . . (1984), we noted two different sorts of "freedom of association" that are protected by the United States Constitution: "Our decisions have referred to constitutionally protected 'freedom of association' in two distinct senses. In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment . . . ."

\(^8\) Vance, supra note 70.
\(^8\) Id.
\(^8\) Id.
\(^8\) Derungs v. Wal-Mart Stores, Inc., 374 F.3rd 428 (6th Cir. 2004).
\(^8\) Vance, supra note 70.
such as a restaurant owner . . . to ask a breastfeeding mother to leave." This leaves breastfeeding mothers vulnerable in their everyday lives and pushes them back into the home by making the world so uncomfortable and full of potential confrontations.

In order to give women full autonomy and equality in society, public breastfeeding must be protected. Therefore, establishing a woman's right to breastfeed in public calls for the development of "legal theories supporting such a right" and the assertion of these theories "by and for women who have suffered this form of harassment and discrimination." Theories based on the Due Process Clause of the Fourteenth Amendment and Title VII, as amended by the Pregnancy Discrimination Act, are being refined, but have not proved to be very fruitful.

V. History of First Amendment and Symbolic Speech

The First Amendment of the United States Constitution protects freedom of speech and expression. "The Freedom of Speech clause . . . has been pulled, twisted, stretched, and interpreted to encompass a boundless array of ideas . . . " Yet, "a hierarchy of speech has . . .

85. Vance, supra note 70.
86. Shelton, supra note 3, at 191.
87. See Shelton, supra note 3, at 191–202 for an extensive discussion of these theories as they relate to a woman's right to breastfeed. Dike held that a woman has a constitutionally protected right to breastfeed her child that is based in the Fourteenth and Ninth Amendments, however the court also stated that the mother's interest must be balanced against her employer's interests. On remand, the district court did not find in favor of the mother. Shelton, supra note 3, at 192-194. The Pregnancy Discrimination Act prohibits pregnancy discrimination, but the Supreme Court has not yet determined whether the Act also protects breastfeeding as either a "related medical condition" or because a breastfeeding woman is "affected by pregnancy". Shelton, supra note 3, at 198. The Pennsylvania Supreme Court has held that breastfeeding is not protected under the Act. Shelton, supra note 3, at 192–194 (citing Bd. Sch. Dirs. V. Rossetti, 411 A.2d 486 (Pa. 1979)).
88. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of press, or the right of the people peaceable to assemble, and to petition the government for a redress of grievances." U.S. Const. amend. I; See also Texas v. Johnson, 491 U.S. 397, 404 (1989) ("The First Amendment literally forbids the abridgement only of 'speech,' but we have long recognized that its protection does not end at the spoken or written word.").
emerged" from "the vast body of case law interpreting the First Amendment."90 Further, as Susan Williams explains, "[t]he constitutional protection for 'speech' should then be understood not as limited to verbal behavior, but rather as identifying a more general category of symbolic meaning-making activity (of which speech—conventionally understood, as verbal behavior—is the most common example)."91 "Pure speech is roughly defined as verbal expression used to convey political messages or individual opinions and is entitled to absolute protection under the First Amendment."92 "[R]egulations based on the content of the speech, will not be permitted unless those restrictions meet the strict scrutiny standard of serving a compelling government interest by narrowly tailored means."93 There is an additional category of speech known as "speech plus," as Clinton Hansen explains:

Speech that contains an . . . element of conduct has been referred to as symbolic speech or "speech plus."94 The "plus" element signifies when pure speech, defined in the minds of the public, has become so entangled with an action or symbolic representation that it is difficult to determine where speech stops and where conduct begins.95

Because speech plus contains an action or symbolic representation it is also known as symbolic speech.

One should not consider symbolic speech a new doctrine of the law.96 "[T]he freedom to speak through symbolic speech has evolved to

90. Id. at 567–568 (citing LIEBERMAN, supra note 89, at 470).
93. Id. at 568.
94. "[T]he political culture in the 1950's, '60's and '70's resulted in the increased protesting of the government and government policy through marches, picketing, and sit-ins evolved into a new derivative of 'pure speech' (i.e., verbal expression) called 'speech plus')." Id. at 569 n.47. ((citing Paul L. Murphy, Symbolic Speech and the First Amendment, in THE BILL OF RIGHT IN MODERN AMERICA: AFTER 200 YEARS 43 (David J. Bodenhamer & James W. Ely, Jr. eds., 1993).
95. Hansen, supra note 89, at 569.
96. Id. at 569. "Symbolic expression is as old as mankind. It has played a vital role in political, and certainly in religious, life for centuries. The colonial cause in the American Revolution was expressed symbolically at many turns, the Boston Tea Party being a prime example."). Id. at 569 n.49 (citing Murphy, supra note 92, at 43–44).
include a broad array of mediums including those outlets which, upon first glance, would never have been considered speech in the past,"\(^{97}\) such as nude erotic dancing\(^ {98}\), flag burning\(^ {99}\), wearing symbolic black armbands\(^ {100}\), and burning a draft card\(^ {101}\).

VI. Symbolic Speech under the Spence Test

The Supreme Court’s present test for symbolic speech, announced in Spence v. Washington,\(^ {102}\) requires that the speaker intend to communicate a particular message and that the audience be likely to understand that message.\(^ {103}\) Does anyone really know what that means or how to apply this “test?”\(^ {104}\) A cynical theory would be that the test is just a vehicle for intellectual dishonesty; meaning it is vague enough that it gives the Supreme Court Justices room to make the statements necessary to support their desired result.\(^ {105}\)

The United States Supreme Court rejected the free speech challenge of David O’Brien who claimed burning his draft card should be protected under the First Amendment.\(^ {106}\) The Court did not debate

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97. Id. at 569–570.
98. See Barnes v. Glen Theater, Inc., 501 U.S. 560, 566 (1991) (stating “nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so.”).
103. Spence, 418 U.S. at 410–11.
104. See e.g. James M. McGoldrick, Jr., United States v. O’Brien Revisited: Of Burning Things, Waving Things, and G-Strings, 36 U. MEM. L. REV. 903, 925 (2006) (stating “[e]ven with the additional gloss from these cases, the Spence test is almost impossible to apply. It should come as no surprise that the lower courts are in almost hopeless confusion about how to apply the Spence test.”)
105. There has been widespread criticism of the Spence test by scholars. See e.g. Robert Post, Recuperating First Amendment Doctrine, 47 STAN. L. REV. 1249, 1252 (1995) (stating the Spence test does not require enough: routine vandalism should not create an entitlement to First Amendment review whenever the perpetrator can claim he or she was intending to express meaning that the audience would have understood); Jed Rubenfeld, The First Amendment’s Purpose, 53 STAN. L. REV. 767, 772–773 (2001) (stating the Spence test requires too much: it requires an intent to communicate a particularized message, therefore it would exclude from First Amendment protection large areas of art, which lack a specific message but which most people think should be protected nonetheless).
whether the act constituted symbolic speech. In fact, it assumed that the act constituted speech and went on to develop a four-part test for when government regulation of the non-speech element of the act would be allowed. Legal scholars point to the myriad of mistakes in O'Brien. Specifically relevant here, O'Brien did not "distinguish between expressive conduct that would be accorded a high level of protection under the Free Speech Clause of the First Amendment and that conduct which, like the regulation of walking on the grass, would only have to be justified by at most conceivably-valid governmental interest."

The United States Supreme Court made its first attempt to define symbolic speech in Spence. In that case, Spence had taped "a peace symbol upon both sides of his own American flag and hung it upside down" from the window of his Seattle apartment. The simple, yet powerful symbol was intended as a protest to the expansion of the Vietnam War, specifically, the invasion of Cambodia and the subsequent killing of war protestors at Kent State University. Ultimately, the United States Supreme Court ruled that the altered flag was "a form of protected expression." The obvious symbolism of a flag and the fact that the State conceded Spence had engaged in speech enabled the Court to refrain from giving a clear definition of symbolic speech that would serve as guidance in more difficult cases. Rather, the Court

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110. Id. at 909.
111. Id. at 915.
112. McGoldrick, supra note 104, at 915. See also, Spence, 418 U.S. at 406.
113. Spence, 418 U.S. at 408. "The Kent State shootings also known as 'May 4' and 'Kent State massacre' occurred at Kent State University in the city of Kent, Ohio, and involved the shooting of students by the Ohio National Guard on Monday, May 4, 1970." The altercation ended in the death of four students and the wounding of nine others. The shootings were the culmination of four days of increasingly agitated demonstrations by members of the student body. The students were protesting the American invasion of Cambodia which President Nixon launched on April 25, and announced in a television address five days later. For an in depth discussion of the events surrounding the Kent State shooting please see Jerry M. Lewis & Thomas R. Hensley, The May 4 Shootings at Kent State University, The Search for Historical Accuracy, 34 OHIO COUNCIL SOCIAL STUDIES REV. 9–21 (Summer 1998), available at http://dept.kent.edu/sociology/lewis/LEWIHEN.htm. See also, Gary Tuchman, Kent State Shootings Remembered, CNN, May 4, 2000, http://archives.cnn.com/2000/US/05/04/kent.state.revisit/.
114. Spence, 418 U.S. at 405.
115. McGoldrick, supra note 104, at 917.
stated that mere intent to express an idea is not enough. First, there must be an intent to communicate a "particularized message" and, second, "in the surrounding circumstances the likelihood [should be] great that the message would be understood by those who viewed it." The Court also stated that relevant factors include both the nature of the communicative activity and its factual context and environment.

Then, the Court applied these principles to the underlying facts, noting that flags are "a short cut from mind to mind." The Court suggested that the "[f]actual context and environment were all important . . . because 'they give meaning to the symbol.'" The fact that Spence's flag was posted so temporally close to the invasion of Cambodia and the later killing of protestors at Kent State, created a clear meaning and gave importance to the symbolic conduct. "In modern times, an upside down flag with a trident might be viewed as eccentric or odd, but at the time the political message would have been clear." The Court clarified that "this 'was not an act of mindless nihilism' but 'a pointed expression of anguish' about a then important topic of government."

"The Supreme Court has made little attempt to clarify the Spence factors." This produced a progeny of cases in which courts simply assumed the act in question was symbolic speech without analysis. For example, "in Barnes v. Glen Theater, Inc., the Court assumed that nude dancing was expressive conduct protected by the First Amendment . . . without making any attempt to apply any of the Spence factors." Additionally, the Court in Clark v. Community for Creative Nonviolence

117. *Spence*, 418 U.S. at 410–11. The full quote reads: "It may be noted, further, that this was not an act of mindless nihilism. Rather, it was a pointed expression of anguish by appellant about the then-current domestic and foreign affairs of his government. An intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."
118. *Spence*, 418 U.S. at 409–410 (noting that "the nature of appellant's activity, combined with the factual context and environment in which it was undertaken, lead to the conclusion that he engaged in a form of protected expression.").
120. *Id.*
121. *Id.* note 104, at 918 (citing *Spence* 418 U.S. at 410).
122. *Id.*
123. *Id.* at 919 (citing *Spence* 418 U.S. at 410).
124. *Id.*
125. *Id.* See *Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 566 (1991) (finding that "nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so.").
assumed overnight sleeping in connection with a demonstration is expressive conduct.126

VII. Breastfeeding is Symbolic Speech

At first glance, public breastfeeding may seem like too insignificant or mundane of an issue (like the upside down trident mentioned in Spence) to classify as symbolic speech. Yet, in the context of the inequities of power and the pervasiveness of male-dominated ideology that persists in American society, breastfeeding is full of symbolism. The act of breastfeeding in public is a shortcut from mind to mind. Just as the flag is "[p]regnant with expressive content,"127 so too is breastfeeding. A mother providing a child with comfort, warmth and perfect nutrition is the epitome of a mothering act. In today's culture the proliferation of assertions about the benefits of breastfeeding, the countless stories of breastfeeding mothers being harassed, and the attempts to provide protection for such women, create a cultural context where breastfeeding in public is clearly not a "mindless" act. Rather, it is a deliberate and courageous act meant to bring about great change in society.

Not every expressive activity is "speech" protected by the First Amendment: "It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment."128 While there can be a kernel of speech in almost every activity, the societal context is the most important element of the Spence test because context provides the philosophical texture and depth of meaning to the action. Black armbands do not have much meaning outside of the Vietnam War protests.129 The refusal of a student to salute a flag is just adolescent defiance outside of a certain religious ideology.130 The frequent stories of mothers being harassed and evicted from quasi-public places, increased numbers of nurse-ins to protest such treatment, and the increase in legislative acknowledgement of such harassment, all create the cultural context necessary to elevate public breastfeeding to symbolic speech.

“The only Supreme Court case to examine the Spence test critically . . . was Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston.” The private group in this case argued that participating in the annual Boston St. Patrick’s Day Parade was an act of expressive association entitled to free speech protection. The Court was particularly critical of the Spence test and its ‘particularized message’ requirement. In Hurley, the Court gave examples of where “the Constitution looks beyond written or spoken words as mediums of expression” and cited various acts which the Court has held were protected by the First Amendment’s shield including: saluting a flag (and refusing to do so), wearing an armband to protest a war, displaying a red flag, and even marching, walking or parading in uniforms displaying the swastika.

Justice Souter stated “[a]s some of these examples show, a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a ‘particularized message’, . . . would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.” In light of Hurley, even if there were no “particularized” message in public breastfeeding, a case can still be made that it is symbolic/expressive speech. The lack of a glaring, single particularized message does not preclude an act from falling within the protection of The First Amendment. Rather, it seems to be common among all symbolic speech. As Professor Susan H. Williams explains:

[The intent to communicate] does not require that the symbolic speech take the form of an argument or that it appeal to reason rather than to other faculties, such as emotion or imagination. An intent to create meaning is, however, more than merely an intent to change the physical world in some direct way. Such an intent must include the purpose of contributing to the way people (oneself and perhaps others) understand something, where understanding includes emotional, imaginative, and other elements along with rational ones . . . . Some relevant issues include public nature of the act, the use of commonly understood symbols, and the connection of the act to the agent’s deep commitments. The

133. Hurley, 515 U.S. at 569.
134. Hurley, 515 U.S. at 569.
central question is whether the act is valued, at least in part, because of its symbolic meaning (to the speaker and/or others) and not only for its physical effects in the world. It is this intent that must be present (although it need not be the only intention) in order for an activity to qualify as symbolic speech.  

On the other hand, one can argue that there is a clear “particularized” message. Breastfeeding in public is the only way to change the social stigma and the attitude that breastfeeding should be hidden behind closed doors. Additionally, the emotional and visceral reaction caused by witnessing public breastfeeding, by those who find it offensive, is much like the reactions to witnessing the burning of a draft card or a flag. This reaction is rooted in the outdated patriarchal ideology that women should be relegated to the home, an ideology that publicly breastfeeding mothers seek to change.

Just because an act is utilitarian as well as symbolic does not take away its expressive character. For example, flag burning incinerates a flag, erotic dancing provides income for the dancer, and breastfeeding creates a change in the physical world at the most basic level—feeding a hungry child. Yet, breastfeeding in public, like other expressive acts, at the same time affects a greater change.

Breastfeeding in public impacts the way that the public views women, their bodies and their mobility in society. Coming into contact with a woman breastfeeding her child in public conjures the emotional and imaginative reactions that Professor Williams discusses. Many of these reactions are negative, as evidenced by the countless number of incidents of disgusted stares, negative comments and ejections from places of business that breastfeeding mothers face when nursing in public.  

Mothers who venture to breastfeed in public, in spite of the possibility of being confronted by horrific reactions show a deep commitment to the value and impact of the act. The value of the act is in its capacity to influence the way women view their own bodies and the way their bodies are viewed by society, to challenge the sexist notions that women should be relegated to the home (allegedly the “appropriate” place for breastfeeding) and that women’s bodies are sexual objects.


137. See supra, notes 42–43.
The idea that something so natural and important to the health of a child and mother is "dirty, sexual, embarrassing, and generally something that should be kept behind closed doors"\(^\text{138}\) is simply an extension of the patriarchal desire to subjugate women and keep them in the home. Just as other discrimination against women is no longer legally or socially acceptable, discrimination against public breastfeeding should no longer be acceptable.

Breastfeeding is incredibly beneficial to children, mothers and society. In my opinion, the fight against patriarchal ideas has sparked a new movement in a new generation. Women now seek to have all the success in career and personal life that previous generations thought were mutually exclusive. A new group of women see that the benefits of breastfeeding are undeniable and challenge the idea that breastfeeding should only happen behind closed doors. This new group of women seeks to shake off the patriarchal shackle that ties "good" women to the home.

Public breastfeeding is a link in this chain. The mobility of women is directly related to their rejection of and freedom from the relegation to the home. By freeing women to breastfeed in public, or any other place they could give their child a bottle, they are freer to create and pursue their own paths in life. The negative reactions to public breastfeeding must stop. The only way to combat the stigma is through the act of breastfeeding in public. And such a deeply expressive and symbolic act should be protected by the First Amendment as Symbolic Speech. §

\(^{138}\) Shelton, supra note 3, at 179.