

THE PSYCHOLOGY OF CENSORSHIP

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ABSTRACT

A perplexing question in First Amendment law, and one that is the subject of ongoing and rigorous debate, surrounds the protection of speech that causes harm to others. Indeed, few scholars question the underlying assumption that words can cause damage – emotionally, reputationally, and economically. But when it comes to so-called “hate speech,” the United States is a comparative outlier in affording constitutional protection to expression that many deem hateful, offensive, and disgusting. Why does the First Amendment protect these ideas?

Traditional First Amendment justifications prove ill-equipped to answer this question. Meiklejohn’s political participation rationale would suppress substantially more speech than the First Amendment currently does. Emerson and Redish’s self-actualization theory focuses exclusively on the benefit of expression to the speaker, rather than harm caused by speech to the listener, and therefore fails to explain existing First Amendment norms. And the dominant marketplace of ideas rationale is itself so internally flawed and empirically incapable of leading to truth discovery that ongoing reliance upon it seems shaky. Thus, existing theories fail to explain existing norms.

This Article posits a new basis for the protection of free expression that better embraces what we know today about the relationship between speech and the human mind: censoring expression leads to damaging psychological harm on the part of the speaker that, in the long-term, solidifies censored ideas. The paper exposes the broader psychological truths about censorship and its counterproductive tendencies. Drawing on psychological reactance theory, which teaches that threats to freedom will produce internal motivation and, at times, outward action to restore the freedom, and scarcity theory, which posits that an unmet need detracts from bandwidth and reduces intellectual functioning, the Article demonstrates that attempts to censor expression actually lead to greater fixation on the speech in question and reduced ability to consider other ideas. Censorship is therefore psychologically counterproductive. It contributes to idea entrenchment, viewpoint polarization, and reduced intellectual capacity, all outcomes which

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contradict the very bases upon which the First Amendment was supposedly founded.

INTRODUCTION

A perplexing question in First Amendment law, and one that is the subject of ongoing and rigorous debate, surrounds the protection of speech that causes harm to others. Professor Joseph Blocher, for example, frames the question as one of foundational origin: “what is the constitutional value of free speech” in the first place?² Indeed, few scholars question the underlying assumption that words can cause damage – emotionally³, reputationally⁴, and economically⁵. In fact, speech-related harms to both individuals and groups can be so wide-ranging that it becomes difficult to categorize exactly what we mean in this arena. For this reason, amorphous categorizations like “hate speech” or “cyberstalking” serve as catch-all phrases to reference expression that generally targets a particular marginalized individual or group for criticism.⁶ Why does the First Amendment protect this expression?

When it comes to so-called “hate speech” and other forms of potentially harmful speech, the United States is a comparative outlier in affording a high degree of constitutional protection to expression that many people might deem hateful, offensive, and disgusting.⁷ In fact, compared to our European counterparts, American constitutional doctrine elevates to the arena of free speech significantly more expression that denigrates other

² Professor Joseph Blocher, for example, frames the question as one of foundational origin: “what is the constitutional value of free speech” in the first place? See Joseph Blocher, *FREE SPEECH AND JUSTIFIED TRUE BELIEF*, 133 Harv. L. Rev. 439, 447 (2019).

³ See, e.g., Danielle Keats Citron, *HATE CRIMES IN CYBERSPACE*, 133-34, 140-41 (2014).

⁴ See generally David S. Ardia, *Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law*, 45 Harv. C.R.-C.L. L. Rev. 261 (2010) (discussing the nature of reputation in a digital age and how speech harms reputation).

⁵ See, e.g., Erica Goldberg, *Common Law Baselines and Current Free Speech Doctrine*, 66 Vill. L. Rev. 311, 353-4 (2021) (discussing types of economic harm that flow from speech).

⁶ Admittedly the term “hate speech” is difficult, if not impossible, to define. See Danielle Citron & Helen Norton, *INTERMEDIARIES AND HATE SPEECH: FOSTERING DIGITAL CITIZENSHIP FOR OUR INFORMATION AGE*, 91 B.U. L. Rev. 1435, 1458 (2011). In fact, under international human rights law, there is no formal definition of “hate speech.” See https://www.un.org/en/hate-speech/ited-nations-and-hate-speech/international-human-rights-law?gclid=Cj0KCQjwwtWgBhDhARIsAEMcxeDxICDxhGUVlc7yx2iKlbfYBTWOMCZCFsT06D2Achmlcy7-e_8K0UaAk2xEALw_wcB (last viewed March 17, 2023). In general, “hate speech” is thought to encompass

“words or symbolic utterances that are calculated to injure, degrade, or ridicule people, most often less powerful members of society, because of their race, religion, gender, or other distinguishing characteristics.” Daniel T. Kobil, *INTRODUCTION TO THE SYMPOSIUM ON HATE SPEECH*, 24 Cap. U. L. Rev. i, i (1995).

⁷ *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”); see also Timothy Zick, *The Dynamic Relationship Between Freedom of Speech and Equality*, 12 Duke J. Const. L. & Pub. Pol’y 13, 16 (2017) (“First Amendment doctrine has generally protected forms of hateful expression directed toward African-Americans, gay persons, and other marginalized groups.”).

people or advances discriminatory ideas about race, gender, and equality.⁸ Critical race scholars like Professor Mari Matsuda have highlighted an important tension here.⁹ The Fourteenth Amendment constitutionalizes equality, at least where state action is concerned, but the First Amendment, as interpreted by courts, continues to protect speech that undermines equality.¹⁰ This dichotomy begs a number of questions. To what extent does the First Amendment cover speech that causes harm to disadvantaged persons and groups? What value exists in protecting expression that embodies discriminatory ideas? And should First Amendment doctrine be changed to address the discrete and known damage that flows from specific kinds of speech?

Much has been said, and continues to be said, in response to the latter question.¹¹ The fields of law, sociology, cybertechnology, ethics, and public policy do not lack for quality research and debate over the impacts of harmful expression and how lawmakers and courts should address this perceived problem.¹² But, against this debate, surprisingly little discussion has occurred as to how and why the First Amendment operates in the way it does currently in the realm of so-called hate speech.¹³ Calls for change in any direction can be better informed by a deeper and more fulsome understanding of the current state of affairs.

Thus, rather than taking a normative position as to where First Amendment law should land vis-à-vis hate speech and other potentially harmful expression, this Article instead interrogates the justifications for how First Amendment jurisprudence has developed in the way that it has and introduces new psychological support for existing First Amendment norms. Rather than arguing for particular outcomes in terms of what speech is protected and what is not, this Article instead seeks to justify the lines that

⁸ For a comparative perspective on the American and European approaches to hate speech, see Robert A. Kahn, *Why Do Europeans Ban Hate Speech? A Debate Between Karl Loewentstein and Robert Post*, 41 Hofstra L. Rev. 545 (Spring 2013).

⁹ See, e.g., Mari Matsuda, PUBLIC RESPONSE TO RACIST SPEECH: CONSIDERING THE VICTIM'S STORY, 87 Mich. L. Rev. 2320 (1989); see also Mary Ellen Gale, REIMAGINING THE FIRST AMENDMENT: RACIST SPEECH AND EQUAL LIBERTY, 65 St. John's L. Rev. 119, 162 (1991) (arguing in favor of an anti-racist interpretation of the First Amendment "strengthened and sharpened by the fourteenth amendment's protection of equality").

¹⁰ See, e.g., *Brown v. Board of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483 (1954) (holding that school segregation and separate but equal principle violates Fourteenth Amendment); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (finding speech by Klu Klux Klan leader in support of "white, Caucasian race" and encouraging "revengeance" to be protected by First Amendment).

¹¹ See Blocher, *supra* note 1, at 447-8.

¹² See, e.g., Citron, *supra* note 2; Shosana Zuboff, *THE AGE OF SURVEILLANCE CAPITALISM* (2019).

¹³ Throughout this paper, I use the term "hate speech," for lack of a better term, to describe expression that targets an individual or group for disparate, violent, or discriminatory treatment on the basis of a defining characteristic. It is fair to criticize this generalization. However, because I do seek to alter or even address where the current First Amendment lines are drawn, but merely to understand the underlying justifications at play, rigid categorizations are less important.

have already been drawn by looking outside of traditional First Amendment doctrine to the field of psychology.

To date, the expanding understanding of human psychology has played a pivotal role in the scholarship that seeks to examine how speech impacts *listeners*.¹⁴ That knowledge is valuable, and nothing in this Article seeks to either undermine or take a position on questions regarding whether or how words can damage those who hear them and whether or how First Amendment doctrine should accommodate those harms. Separate from those inquiries, I am interested in exploring what psychology has to teach about the impacts of speech-related freedoms on *speakers*.¹⁵ This Article therefore focuses on the contributions of psychology to the speaker side of the free speech equation.

I begin by examining whether the traditional explanations for First Amendment expansiveness support broad protection for hate speech and ultimately conclude that they do not. In addressing the hate speech paradigm, advocates for free expression tend to respond by focusing heavily on the democratic ideals underlying the protection of political expression and the marketplace function of the First Amendment.¹⁶ They contend that airing out ideologies that undermine equality will make for a more informed and impassioned electorate and that allowing unfettered access to democratic debate will encourage a more engaged polity.¹⁷ They further argue that eliminating a perspective from the dialogue makes the discussion itself less robust, trusting that the process of sorting bad ideas from good ones will enable only the most worthy speech to remain in the end.¹⁸ But, as I argue, these conventional paradigms for protecting free speech focus too heavily on the internal theoretical, and not the external pragmatic, aspects of modern speech realities.¹⁹

This Article posits a new basis for the protection of free expression that better embraces what we know today about the relationship between speech and the human mind: that censoring expression leads to damaging

¹⁴ See, e.g., Carolyn McNamara, *Cyberbullying Beyond the School Gate: Does Every Student Deserve a National Standard of Protection?*, 45 Hofstra L. Rev. 1343, 1350-52 (2017) (cataloging statistics related to the impacts of cyberbullying on victims); Ari Ezra Waldman, *Hostile Educational Environments*, 71 Md. L. Rev. 705, 711-15 (2012) (discussing negative impacts of targeted hate speech online for victims, including withdrawal from activities, depression, increased suicidal ideation, and post-traumatic stress disorder).

¹⁵ See, e.g., Jennifer M. Kinsley, *THERAPEUTIC EXPRESSION*, 68 Emory L. J. 939 (2019).

¹⁶ See, e.g., Joe Dryden, *PROTECTING DIVERSE THOUGHT IN THE FREE MARKETPLACE OF IDEAS: CONSERVATISM AND FREE SPEECH IN HIGHER EDUCATION*, 23 TEX. REV. L. & POL. 229, 263-5 (2018).

¹⁷ For an interesting exploration on the intersection of First Amendment protection and the spectrum of political engagement by citizens, see Daniel Ortiz, *THE ENGAGED AND THE INERT: THEORIZING POLITICAL PERSONALITY UNDER THE FIRST AMENDMENT*, 81 Va. L. Rev. 1 (1995).

¹⁸ Joseph Blocher, *INSTITUTIONS IN THE MARKETPLACE OF IDEAS*, 57 Duke L. J. 821, 838 (2009) (“[the] marketplace metaphor invokes a place where individuals (speakers) trade goods and services (ideas) in a competitive environment where the good ideas are destined to beat out the bad.”).

¹⁹ *Id.*

psychological harm on the part of the speaker which, in the long-term, solidifies censored ideas. Following on previous work exploring the therapeutic attributes of enabling expressive outlets for those with a penchant towards anger and violence²⁰, this Article exposes the broader psychological truths about censorship and its counterproductive tendencies. Drawing on psychological reactance theory, which teaches that threats to freedom will produce internal motivation and, at times, outward action to restore the freedom²¹, and scarcity theory, which posits that an unmet need detracts from cognitive bandwidth and reduces intellectual functioning²², the Article demonstrates that attempts to censor free expression actually lead to greater fixation on the speech in question and reduced ability to consider other ideas. Censorship is therefore psychologically counterproductive. It contributes to idea entrenchment, viewpoint polarization, and reduced intellectual capacity, all outcomes which contradict the very bases upon which the First Amendment was supposedly founded.

This Article is not the first project to import modern psychological understanding into free speech theory. In *Therapeutic Expression*²³, for example, I considered the therapeutic qualities embedded in the right to free expression and the likelihood that therapeutic, speech-based outlets forestall future violence. This work explored the interconnectedness between speech and violence, examining specific high-profile cases including Charlottesville and the Aurora, Colorado movie theater massacre.²⁴ It relied in part upon studies from the fields of psychology and sociology suggesting a link between expression and violence prevention to support the hypothesis that the preservation of free speech may play a role in limiting aggression, rebellion, and crime.²⁵ That work focused on the psychological *value* the freedom of speech provides to speakers.²⁶ (In this Article, I explore the potential psychological *harms* of censoring speakers and the results of censorship on individuals and communities.)

There is good reason to believe that the broader legal profession, if not society in general, embraces such an endeavor. To date, the intersection of free speech law and psychology has been the subject of at least two acclaimed publications written for a lay audience: 1) *The Coddling of the*

²⁰ Jennifer M. Kinsley, THERAPEUTIC EXPRESSION, 68 Emory L. J. 939 (2019).

²¹ See Jack W. Brehm, *A Theory of Psychological Reactance* (1966); Sharon S. Brehm & Jack W. Brehm, *Psychological Reactance: A Theory of Freedom and Control* (1981).

²² See Sendhil Mullainathan and Eldar Shafir, *Scarcity: The New Science of Having Less and How it Defines our Lives* (2013), at pp. 4, 13, 29.

²³ Jennifer Kinsley, THERAPEUTIC EXPRESSION, 68 Emory L. J. 939 (2019).

²⁴ *Id.* at 941-43.

²⁵ *Id.* at 961-8.

²⁶ See *id.* generally.

*American Mind*²⁷, by lawyer Greg Lukianoff and psychologist Jonathan Haidt, a widely-discussed book that expanded upon Haidt and Lukianoff's essay in *The Atlantic*²⁸ of the same name, and 2) *Hate: Why We Should Resist It With Free Speech, Not Censorship* by Professor Nadine Strossen, which discussed the reasons why governmental regulation of hate speech is dangerous to those who seek progressive societal change.²⁹ Both of these works consider psychological justifications for protecting speech that listeners find distasteful and offensive. On the one hand, Haidt and Lukianoff explain that shielding adolescents from harmful expression prohibits the development of coping mechanisms and critical thinking skills.³⁰ On the other hand, Strossen argues that hate speech prohibitions create greater, not less, opportunity for the government to punish those the hate speech laws are intended to protect.³¹ In this regard, both works focus upon the psychological harms of censorship upon the listener.³²

This Article furthers the work of Lukianoff, Haidt, Strossen, and *Therapeutic Expression* by contemplating the psychological impacts of censorship on speakers and considering the psychological and societal benefits of allowing even distasteful expression to continue unregulated. It explores not only the role of free expression in providing therapeutic alternatives to action, but the dangers of censorship as well. The paper hypothesizes that, just as speech may provide a therapeutic alternative to violence, censorship actually encourages counter-action by inspiring feelings of marginalization, oppression, and hopelessness.

This Article unfolds in three parts. It begins in Part One by examining the historical justifications for the First Amendment right of free expression, beginning with Meiklejohn's democratic process rationale and moving through Emerson and Redish's self-realization and self-actualization theories before landing with the predominant justification adopted by the courts, the marketplace of ideas rationale. This Part considers the historic works of John Stuart Mill, Justice Holmes' dissent in *Abrams* (which is widely, but wrongfully, credited as originating the marketplace of ideas theory), and more modern examples of how the marketplace of ideas rationale functions,

²⁷ Greg Lukianoff and Jonathan Haidt, *THE CODDLING OF THE AMERICAN MIND: HOW GOOD INTENTIONS AND BAD IDEAS ARE SETTING UP A GENERATION FOR FAILURE* (Penguin Press 2018).

²⁸ Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, *THE ATLANTIC* (Sept. 2015), <https://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/>. Lukianoff and Haidt's book has also been turned into a documentary film.

²⁹ Nadine Strossen, *HATE: WHY WE SHOULD RESIST IT WITH FREE SPEECH, NOT CENSORSHIP* (Oxford University Press 2018).

³⁰ Lukianoff & Haidt, *supra* note 23.

³¹ Strossen, *supra* note 25.

³² *Id.*; Lukianoff & Haidt.

including in cases like *Matal v. Tam*.³³ The intersection with economic theory and the foundational roots of the marketplace of ideas rationale in American capitalism will also be discussed in this section. Here, the Article considers the shortcomings of these theories in explaining why First Amendment doctrine extends protection to speech that arguably undermines equality and imparts harm to marginalized groups.

Moving to Part Two, the Article considers the relevant contributions of psychological research to the question of censorship and its impacts on human thinking and functioning. Here, the Article both summarizes the origins of psychological reactance theory and the studies supporting its logic, while also examining the considerable overlap between Meiklejohn and Emerson's First Amendment justifications and how the human mind actually operates. In this vein, psychological reactance theory explains that people respond to threats on freedom by seeking to restore the freedom, a state of motivation described as reactance.³⁴ Reactance is manifested both behaviorally and ideologically, as individuals both engage in antisocial behavior to restore freedoms they perceive they have lost, as well as viewing the freedom itself with greater attractiveness and affinity.³⁵ Rigid adherence to one's challenged beliefs, or what psychologists describe as "boomerang attitude change," is therefore a key manifestation of reactance.³⁶ This is a critical observation for the impact of censorship on human thinking and behavior, as it suggests that silencing unpopular speech will only result in individuals deepening their connection to the censored expression.

Part Two also draws parallels between psychological reactance theory and scarcity theory. Drawing from starvation studies conducted during World War II, scarcity theory demonstrates that people who have less than they subjectively feel they need will tunnel – or singularly focus – on filling the unfilled need.³⁷ This tunnelling effect in turn limits cognitive bandwidth.³⁸ Studies have also shown that perceived scarcity in one area of a person's life impedes intellectual functioning and problem solving in other areas.³⁹ These impacts exist even when the need being unfilled is not physiological, but is instead connected to a person's emotional or psychological well-being.⁴⁰ The tunnelling effect in scarcity theory therefore

³³ 582 U.S. 218 (2017).

³⁴ Brehm.

³⁵ Brehm at p. 5, 91-95 (citing Brehm & Rozen, 1971; Brehm, Stires, Sensenig, & Shaban, 1966).

³⁶ Brehm at pp. 91-95.

³⁷ Sendhil Mullainathan and Eldar Shafir, *Scarcity: The New Science of Having Less and How it Defines our Lives* (2013), at pp. 4, 13, 29.

³⁸ *Id.*

³⁹ Amy Novotney, "The Psychology of Scarcity," *Monitor on Psychology*, Vol. 45 No. 2, p. 28 (Feb. 2014), available at <https://www.apa.org/monitor/2014/02/scarcity>.

⁴⁰ Mullainathan and Shafir, *supra* note 34.

mimics the boomerang effect in psychological reactance theory. When a freedom is threatened or an emotional need is unmet, a person will respond by hyper-focusing on the need or freedom to the exclusion of other needs, desires, and areas for growth.

Part Three of the Article addresses how the doctrines of psychological reactance and scarcity – and their lessons about what taking away the right to speak freely causes – might be imported into First Amendment jurisprudence. This part of the Article initially examines the limited instances in which the law has already taken note of these theories, largely in the context of jury instructions⁴¹, and the abbreviated scholarly treatment of these theories by constitutional experts.⁴² The part then extrapolates observations from psychological reactance theory and scarcity theory specific to the concept of censorship. On an individual level, these theories prove what Emerson and Redish hypothesized: that threatening people with the loss of the freedom to speak freely on topics of concern to them limits intellectual and emotional development.⁴³ On a collective level, the theories also support Meiklejohn's idea that the freedom of speech is central to a healthy democracy.⁴⁴ But where Emerson, Redish, and Meiklejohn failed to provide data or empirical support for their ideas, psychologists have demonstrated through rigorous scientific studies that human behavior and thinking is negatively shaped by threats to free expression.⁴⁵

The field of psychology, and the concepts of psychological reactance and scarcity in specific, therefore provide a more robust picture of the dangers of censorship than traditional First Amendment justifications. These theories help us understand why expansive protection of speech we hate advances equality to a far greater extent than forced silence, and therefore why First Amendment jurisprudence may have developed in the direction it has. Because censorship leads to opinion entrenchment and fixation on the underlying censored idea, it does very little to root out discriminatory ideologies. The psychology of censorship therefore supports robust First Amendment protection, at least with regard to speech that encourages inequality, discrimination, or abuse of others.

This is not to say that psychology offers the sole or even dominant justification for protecting hate speech and other distasteful expression or that other attempts to address the perplexing hate speech question are objectively

⁴¹ Joel D. Lieberman and Jamie Arndt, UNDERSTANDING THE LIMITS OF LIMITING INSTRUCTIONS, 6 *Psychol. Pub. Pol'y & L.* 677, 693-4 (2000).

⁴² See, e.g., Meirav Furth-Matzkin & Cass R. Sunstein, *Social Influences on Policy Preferences: Conformity and Reactance*, 102 *Minn. L. Rev.* 1339 (2018).

⁴³ Brehm; Mullainathan and Shafir.

⁴⁴ Stephen B. Lichtman, BLACK LIKE ME: THE FREE SPEECH JURISPRUDENCE OF CLARENCE THOMAS, 114 *Penn St. L. Rev.* 415, 448-49 (2009) (describing Meiklejohn's perspective on the First Amendment and democracy).

⁴⁵ Brehm; Mullainathan and Shafir.

wrong. In fact, the empirics of psychological reactance and scarcity actually support much of what traditional First Amendment scholars have to save about the role free speech plays in human and societal development.⁴⁶ But compared to the self-fulfillment, democratic participation, and marketplace of ideas justifications traditionally advanced to justify First Amendment protection, psychology is far less theoretical and both far more scientific and relatable. As psychological reactance and scarcity theories demonstrate, those are who censored will become more fixed and rigid in their viewpoints and cognitively less capable of learning information that challenges their existing beliefs.⁴⁷ Censorship of hate speech therefore more deeply entrenches hate.

I. THE FIRST AMENDMENT, HARMFUL SPEECH, AND TRADITIONAL JUSTIFICATIONS

A current critique of the First Amendment, from both inside and outside the legal academy, is that the Constitution protects significantly more discriminatory expression than it should.⁴⁸ Those who hold this perspective cite decisions like *Virginia v. Black*, which extended constitutional protection to cross burning performed absent the intent to threaten a specific person⁴⁹; *Snyder v. Phelps*, which shielded speech condemning the LGBTQ community at military funerals from civil liability⁵⁰; and *Brandenburg v. Ohio*, the seminal case on incitement, which protected a vitriolic speech by a Klu Klux Klan leader on the grounds that the violence he threatened was not sufficiently imminent.⁵¹ They contend that these decisions fail to take into account the harm that hate speech imparts not only to the collective discourse, which suffers from the inclusion of ideas that are normatively damaging, but also to individuals who might not have been the target of such expression but inadvertently discover it.⁵² Early reaction to the Supreme Court's recent decision in *Counterman v. Colorado*, which defined a true threat as that

⁴⁶ See Section III, *infra*.

⁴⁷ Brehm; Mullainathan and Shafir.

⁴⁸ See, e.g., Matsuda, *supra* note 5; Michelle Onelle, "Supreme Court Decision on Reckless Speech Will Cost Victims of Stalking and Harassment," Ms. Magazine (June 29, 2023), available at <https://msmagazine.com/2023/06/29/supreme-court-online-stalking-harassment-women-free-speech-counterman-v-colorado/> (last viewed Aug. 3, 2023).

⁴⁹ 538 U.S. 343 (2003).

⁵⁰ 562 U.S. 443 (2011).

⁵¹ 395 U.S. 444 (1969).

⁵² See, e.g., Matsuda. In contrast, global constitutional frameworks that adopt a more limited approach with respect to hate speech do so on the grounds that hateful ideas damage the level of debate, exclude minority voices, and therefore harm everyone, not just the groups that are targeted and demeaned by the expression. See Craig Martin, *Striking the Right Balance: Hate Speech Laws in Japan, the United States, and Canada*, 45 Hastings Const. L. Q. 455, 504-06.

which the speaker is reckless in not recognizing as threatening, continues this line of criticism.⁵³

While there are fair debates to be had about the scope of constitutional protection afforded to different kinds of speech, those questions do not lack for thorough treatment elsewhere.⁵⁴ Rather than rehash what has already been said or stake my own position in that ongoing debate, I instead endeavor to unpack and understand the values the First Amendment is intended to serve relative to its treatment of so-called hate speech.⁵⁵ Finding the existing justifications to insufficiently explain the lines drawn by free speech jurisprudence, I turn to psychology to better understand how the First Amendment currently operates in this domain.

The most comprehensive treatment of the question of why our constitution so heavily values freedom of expression to date is found in Professor Kent Greenawalt's article *Free Speech Justifications*.⁵⁶ Greenawalt observes that there is no one paradigm for examining the justifications for free speech protection, and that those justifications break down into various categorizations including individuals and collectives, speakers and listeners, optimism and pessimism, and governmental and non-governmental.⁵⁷ As Greenawalt rightly points out, no constitutional principle is served by a singular value, but rather a plurality of norms.⁵⁸ I summarize those here.

⁵³ ___ U.S. ___, 143 S.Ct. 2106 (2023). Commentators have noted that the true threats test adopted by the Court in *Counterman* condones threats of violence against vulnerable victims by failing to recognize the distorted thinking often embodied by stalkers. *See, e.g., Supreme Court Sets New Standards for What Constitutes "True Threats," All Things Considered*, NPR (June 27, 2023), available at <https://www.npr.org/2023/06/27/1184655817/supreme-court-sets-new-standards-for-what-constitutes-true-threats> (last viewed July 20, 2023) (interviewing Professor Mary Anne Franks regarding implications of *Counterman* decision on victims of stalking and intimate partner violence).

⁵⁴ *See* Blocher, *supra* note 1, at 447.

⁵⁵ One might question whether it matters whether the First Amendment was ratified to further this particular value or that particular objective. After all, the Constitution says what it says. One might also question the feasibility of determining whether those who ratified the First Amendment all coalesced around a common understanding of values and in assessing those possible values now. These are fair critiques. But assessing the underlying justifications for protecting free expression is still a worthy endeavor even in light of these obstacles. Although outside the scope of this paper, one benefit of pinning down constitutional justifications for the First Amendment is to assess outcomes in free speech cases against these justifications to ensure internal consistency in the jurisprudence. Another benefit is investing the polity in the principle of the First Amendment so that even controversial decisions are more widely embraced.

⁵⁶ Kent Greenawalt, *Free Speech Justifications*, 89 Colum. L. Rev. 119 (1989).

⁵⁷ *Id.* at 127.

⁵⁸ *Id.* at 119-20.

A. The Political Process Justification and the Writings of Alexander Meiklejohn

Professor Richard Epstein describes Alexander Meiklejohn as “the father of modern First Amendment theory.”⁵⁹ Drawing on the writings of James Madison and Alexander Hamilton in the Federalist Papers, Meiklejohn viewed the First Amendment’s core function as preserving democratic participation in a free society.⁶⁰ Its purpose, he believed, is to enable more robust education of the electorate, who in turn participate in democracy in a more informed way.⁶¹ This furthers the constitutional goal of a healthy democracy.⁶² In turn, efforts by the government to limit speech that is central to democratic participation undermines the political function of the First Amendment and therefore, in Meiklejohn’s view, violates the constitutional free speech guarantee.⁶³

To Meiklejohn, the ultimate goal of the First Amendment is “the voting of wise decisions.”⁶⁴ This theory gained traction in some of the Supreme Court’s early First Amendment cases, particularly those authored by Justice Brennan.⁶⁵ However, as free speech cases have shifted in focus over time from those questioning the legality of political expression to the criminalization of other kinds of speech, the political participation theory has failed to endure as a predominant justification for the broad protection of free expression.⁶⁶

B. The Self-Realization/Self-Actualization Justification

An additional potential justification for the First Amendment is one that serves more individualistic, rather than collective democratic, goals. That is the idea that free speech fosters human development.⁶⁷ Among the more romanticized notions of free expression, this rationale has been less concentrated in a single scholar’s work and appears more frequently in jurisprudence, albeit in a more indirect way, than the political participation justification.

⁵⁹ Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782, 782 (1986).

⁶⁰ Joseph Russomanno, *The “Central Meaning” and Path Dependence: The Madison-Meiklejohn-Brennan Nexus*, 20 Comm. L. Pol’y J. 117, 129 (2015).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* 26 (1960).

⁶⁵ Russomanno, *supra* note 56, at 129.

⁶⁶ See Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 Duke L.J. 821, 821 (2008) (identifying the marketplace of ideas as the dominant free speech metaphor).

⁶⁷ Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 881 (1963); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593–94 (1982).

1. Justice Brandeis' dissent in *Olmstead*

While not specifically about the First Amendment, the earliest notion that constitutional values promote self-actualization can be found in Justice Brandeis's 1928 dissent in *Olmstead v. United States*.⁶⁸ Considering the validity of a warrantless wiretap under the Fourth Amendment, Justice Brandeis wrote:

The protection guaranteed by the amendments is [broad] in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.⁶⁹

This single paragraph laid the foundation for future exploration of the intersection between constitutional norms and human development and has shaped the more modern view on constitutional autonomy.⁷⁰

2. The work of Professors Emerson and Redish

Following on the themes introduced by Justice Brandeis, two influential scholars, Thomas Emerson and Martin Redish, have advanced, as a primary justification for the First Amendment, that protecting free speech enables individuals to become more self-realized and self-actualized.⁷¹ Writing in the 1960s, Emerson highlighted the primacy of the First Amendment as the gateway to personal development, arguing that "thought and communication are the fountainhead of all expression of the individual personality."⁷²

Emerson's work drew a curious, if not explicit, connection between self-fulfillment and the political participation justification championed by Meiklejohn. He hypothesized that individuals whose expression is silenced

⁶⁸ *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

⁶⁹ *Id.*

⁷⁰ Rogers M. Smith, *The Constitution and Autonomy*, 60 *Tex. L. Rev.* 175, 184 (1982).

⁷¹ See Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877, 881 (1963); Martin H. Redish, *The Value of Free Speech*, 130 *U. PA. L. REV.* 591, 593-94 (1982).

⁷² Emerson, *supra* note 68.

are less likely to engage with government in productive ways.⁷³ For example, he believed that victims of censorship would be more likely to participate in underground opposition movements rather than to engage in healthy democratic debate.⁷⁴ In this way, Emerson viewed First Amendment freedoms as a prophylactic against radicalization and political violence.⁷⁵

Professor Martin Redish crystalized these themes two decades later, more explicitly connecting free speech to the development of the self:

[T]he constitutional guarantee of free speech ultimately serves only one true value, which I have labeled “individual self-realization.” This term has been chosen largely because of its ambiguity: it can be interpreted to refer either to development of the individual’s powers and abilities—an individual “realizes” his or her full potential—or to the individual’s control of his or her own destiny through making life-affecting decisions—an individual “realizes” the goals in life that he or she has set. In using the term, I intend to include both interpretations. I have, therefore, chosen it instead of such other options as “liberty” or “autonomy,” on the one hand, and “individual self-fulfillment” or “human development,” on the other. The former pair of alternatives arguably may be limited to the decisionmaking value, whereas the latter could be interpreted reasonably as confined to the individual development concept.⁷⁶

Redish viewed speech as an active freedom, much like a muscle, that served its purpose only through its exercise. To this end, he noted: “Free speech fosters the [self-realization] goal *directly* in that the very exercise of one’s freedom to speak, write, create, appreciate, or learn represents a use, and therefore a development, of an individual’s uniquely human faculties.”⁷⁷

3. Modern case law examples

⁷³ *Id.* at 844-45.

⁷⁴ *Id.*

⁷⁵ *Id.* (explaining that “resistance to the political order is unlikely to reach the stage of disorder unless a substantial section of the population is living under seriously adverse or discriminatory conditions”).

⁷⁶ Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593-94 (1982).

⁷⁷ *Id.* at 604.

The themes advanced by Emerson and Redish have gained some traction in judicial decisions involving the First Amendment. Justice Kennedy’s opinion in *Ashcroft v. Free Speech Coalition*, for example, characterized the First Amendment right of free speech as securing not only the right to express one’s thoughts in words, but also the very right to think itself.⁷⁸ He observed, idealistically, that “thought is the beginning of freedom.”⁷⁹

This echoed principles initially espoused in *Stanley v. Georgia*, which recognized the constitutional right to possess even illegal expressive material in the privacy of one’s own home.⁸⁰ Like Redish and Emerson, the *Stanley* Court saw the First Amendment as critical to personhood:

If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control [persons’] minds.⁸¹

C. The Marketplace of Ideas Justification

By far the most dominant paradigm in American First Amendment jurisprudence to justify the protection of free expression is the marketplace of ideas rationale.⁸² This explanation for normative free speech values relies upon truth-seeking as the ultimate basis for free speech protection and empowers individual speech consumers in the speech marketplace to both assess and control collective truth.

1. Early origins and the intersection with economic theory

The earliest reference to the benefits of a free speech marketplace is attributed to poet John Milton. In *Areopagitica*, published in 1644, he wrote: “Let [Truth] and falsehood grapple; who ever knew Truth put to the worse in

⁷⁸ 535 U.S. 234, 253 (2002).

⁷⁹ *Id.*

⁸⁰ 394 U.S. 557 (1969).

⁸¹ *Id.* at 565. The quoted language was updated to eliminate the use of gendered language. The original decision highlighted the role of the First Amendment in protecting “*men’s* minds.” *Id.* (emphasis added). Surely the Supreme Court did not mean to imply that free speech only contributes the self-realization of people who identify as men and not those in other places on the gender spectrum.

⁸² Jared Schroeder, *Information, Community, and Change: A Call for Renewed Conversation about First Amendment Rationales*, 18 First Amend. L. Rev. 123, 124-5 (2020.)

a free and open encounter?”⁸³ Two centuries later, politician and economist John Stuart Mill seized on this theme in his famous treatise *On Liberty*.⁸⁴ There, he argued that, “if voice is given to a wide variety of views over the long run, true views are more likely to emerge than if the government suppresses what it deems false.”⁸⁵

Mill was the first to even indirectly interject economic theory into the First Amendment. In so doing, he described the principle of free speech as a search for truth best served by allowing both good and bad ideas to be vetted by mature adult consumers, who will over time settle on only those that are the most inherently wise.⁸⁶ Based on economic ideals, he advocated for laissez-faire policies that minimized the distorting impact of government censorship on the market, noting that repression of ideas interferes with the market’s ability to ultimately seek and identify truth.⁸⁷

2. Holmes dissent in *Abrams*

The earliest judicial reference to the marketplace of ideas theory came several decades after Mill’s influential work. Dissenting in *Abrams v. United States*, Justice Oliver Wendell Holmes wrote:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas--that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.⁸⁸

In this passage, Justice Holmes described speech as a commodity and the First Amendment as a guarantee of free market competition.⁸⁹ Picking up on the economic themes espoused by Mill, Holmes viewed the

⁸³ John Milton, *Areopagitica: A Speech for the Liberty of Unlicense Printing* 46 (H.B. Cotterill ed., MacMillan & Co. 1961) (1644).

⁸⁴ John Stuart Mill, *On Liberty*, in *Selected Writings of John Stuart Mill* 121 (M. Cowling ed. 1968) (1st ed. 1859).

⁸⁵ Greenawalt, at 131 (citing *id.* at 164-5).

⁸⁶ See Mill, at 164-5; Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 *Duke L.J.* 821, 871 (2008) (noting that Mill’s theory excluded children from the free speech marketplace).

⁸⁷ See Stanley Ingber, *The Marketplace of Ideas: A Delegitimizing Myth*, 1984 *Duke L.J.* 1, 6 (1984) (describing Mill’s views on censorship).

⁸⁸ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

⁸⁹ *Id.* See also Blocher, *supra* note 1, at 449 (describing Holmes’ theory that “competition of ideas will lead to truth”).

Constitution as trusting marketplace consumers to sort out the true from the false.⁹⁰

Holmes' dissent laid the foundation for further judicial consideration of the marketplace of ideas rationale. In fact, since his *Abrams* dissent, the phrase "marketplace of ideas" has appeared in 81 Supreme Court opinions, the most of any of the predominant justifications for expansive free speech protection.⁹¹ Scholars today consider this the most widely used metaphor to describe the First Amendment.⁹²

2. Modern case law examples of the speech marketplace

If there were any doubt about the marketplace of ideas rationale's longevity, one need look no further than recent Supreme Court decisions in the free speech context to confirm its stronghold. In *Matal v. Tam*, for example, a 2017 case in which the Court struck down a restriction on disparaging trademarks, Justice Kennedy's concurring opinion expressed concern that mandated positivity distorts the marketplace.⁹³ In 2018, the Court relied upon the importance of an "uninhibited marketplace of ideas" in applying the content-based strict scrutiny doctrine to restrictions on professional speech.⁹⁴ And, most recently, in 2023, the Court relied upon the need for a robust free speech marketplace in holding that a person may not be compelled to create speech for a same-sex wedding against their stated objection.⁹⁵ The notion that the First Amendment ensures a robust marketplace of ideas is therefore very much alive and well today in America's courts.

D. Free Speech Paradigms and the Approach to Harmful Expression

The three traditional lines of First Amendment theory are of limited utility in examining why free speech jurisprudence adopts an expansive approach in including protection for so-called hate speech. This is so because following each justification to its logical ends with regard to hate speech

⁹⁰ *Abrams*, 250 at 630 (Holmes, J., dissenting).

⁹¹ See Westlaw search results (July 28, 2023) (on file with author).

⁹² See Blocher, *Institutions in the Marketplace of Ideas*, at 821.

⁹³ 582 U.S. 218, 249 (2017) (Kennedy, J., concurring) ("By mandating positivity, the law here might silence dissent and distort the marketplace of ideas.")

⁹⁴ See *Nat. Inst. of Fam. & Life Advocates v. Bercerra*, ___ U.S. ___, 138 S.Ct. 2361, 2374 (2018) ("when the government polices the content of professional speech, it can fail to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail") (quotations omitted).

⁹⁵ See *303 Creative, LLC v. Elenis*, ___ U.S. ___, 143 S.Ct. 2298, 2311 (2023) ("For these reasons, if there is any fixed star in our constitutional constellation, it is the principle that the government may not interfere with an uninhibited marketplace of ideas.") (citations omitted).

produces a different result than where First Amendment jurisprudence has evolved today.

To begin, a general critique of the democratic participation, self-realization, and marketplace of ideas theories as a whole is that they are just that: theoretical.⁹⁶ In general, these historical paradigms are largely grounded in ideas and lack empirical or scientific support.⁹⁷ Although they were developed at least in part at a time when scientific understanding of human behavior patterns and the human brain was emerging, they did not take into account available social science that would have supported or called into question the bases of the theories.⁹⁸ As a result, these theories do not fully align with what we now know to be true about how human thinking or human decision-making works.⁹⁹

But even if we assume that each theory has some relative merit, or can be of some use in describing the existing First Amendment jurisprudential landscape, these rationales all have serious shortcomings in justifying the First Amendment's relative tolerance of so-called hate speech.

1. Hate speech and the political participation justification

The political participation justification for the First Amendment fails to justify robust protection of hate speech and, in fact, would permit significantly more governmental regulation of hate speech than the courts' jurisprudence currently allows. This is the case because hate speech necessarily disadvantages the political participation of those falling in the targeted minority groups.¹⁰⁰ Moreover, a significant amount of personally-targeted hate speech has nothing to do with the political process and therefore would fall outside the more circumscribed protection afforded to non-political speech.¹⁰¹ This justification thus fails to provide a comprehensive

⁹⁶ See Greenawalt.

⁹⁷ See, e.g., Daniel E. Ho & Frederick Schauer, *Testing the Marketplace of Ideas*, 90 N.Y.U. L. Rev. 1160 (2015) (reporting results of empirical analysis from two time, place, and manner restrictions on expression that suggests marketplace of ideas theory is a fallacy); Tim Wu, *Disinformation in the Marketplace of Ideas*, 51 Seton Hall L. Rev. 168, 169 (2020) (criticizing distorting impacts of marketplace of ideas rationale, which allows for disinformation with corrective measures).

⁹⁸ See Greenawalt.

⁹⁹ A full examination of each theory relative to what is known about social science is outside the scope of this paper. However, other scholars, either expressly or indirectly, have sought to question the validity of each justification. See, e.g., Ho & Schauer, 90 N.Y.U. L. Rev. 1160; Kent Greenawalt, *Free Speech Justifications*, 89 Colum. L. Rev. 119, 132-8 (1989) (questioning validity of truth-seeking function of First Amendment from a theoretical perspective); Blocher, *supra* note 1, at 451-9 (outlining standard internal and external critiques of marketplace of ideas rationale from a theoretical rather than empirical lens).

¹⁰⁰ Graber, at 385.

¹⁰¹ See, e.g., *Virginia v. Black*, 538 U.S. 343, 349-50 (2003). In *Black*, the Court distinguished cross-burning directed at a particular person with the intent to intimidate the target, which the First Amendment does not protect, from the general expressive activity of burning a cross absent a targeted victim, which the First Amendment does.

theory that explains why the First Amendment embraces hate speech as a normatively correct outcome.

2. Hate speech and the self-realization justification

So too does the self-actualization theory have limited utility in explaining the status of First Amendment jurisprudence vis-à-vis hate speech. For one thing, focusing solely on the individual development of the speaker ignores any potential harm that could come to others as a result of the speech, and the First Amendment has never so entirely discounted harm in determining which expression is protected and which is not.¹⁰² Child pornography, for example, is excluded from First Amendment coverage because its creation and circulation imparts harm to the children whose images are contained in the depictions.¹⁰³ Libel, slander, and defamation are unprotected because they damage the reputation of another.¹⁰⁴ And true threats of violence are not deserving of protection because a reasonable listener will objectively feel afraid in hearing them.¹⁰⁵

The existence of these (and other) First Amendment doctrines that consider harm expose the ineffectiveness of the self-actualization theory at fully explaining the development of free speech law.¹⁰⁶ Harm to others does count in the calculus at some First Amendment inflection points.¹⁰⁷ By focusing exclusively on the speaker, the self-actualization theory fails to help us understand where to draw the line between the speaker's need to grow and the listener's need for safety.

Id. at 362-3. In describing the former, the Court highlighted the interpersonal nature of the communication and the cross-burners' particularized purpose to threaten their neighbor, in whose yard they placed the cross. *Id.* at 349-50. This intent to threaten, which was heightened by the specific message a burning cross sends, separated the expression from that undertaken to inform political or social dialogue. *Id.* at 357, 362-3, 367-8.

¹⁰² See, e.g., Alan K. Chen and Justin Marceau, HIGH VALUE LIES, UGLY TRUTHS, AND THE FIRST AMENDMENT, 68 Vand. L. Rev. 1435, 1454-55 (2015) (discussing ways in which lies can be harmful and how harm impacts First Amendment protection of low-value speech).

¹⁰³ See *New York v. Ferber*, 458 U.S. 747, 758-9 (1982) ("the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. . . . the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation.").

¹⁰⁴ See, e.g., *Gertz v. Welch*, 418 U.S. 323, 341 (1974) ("The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood.").

¹⁰⁵ See *Counterman*, 143 S.Ct. at 2114 ("When the statement is understood as a true threat, all the harms that have long made threats unprotected naturally follow. True threats subject individuals to 'fear of violence' and to the many kinds of 'disruption that fear engenders.'") (citations omitted).

¹⁰⁶ See, e.g., Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 Colum. L. Rev. 1635 (2005) (discussing possible harms caused by obscene expression as a basis for excluding obscenity from First Amendment protection and criticizing moral harm as a justification for obscenity doctrine).

¹⁰⁷ See, e.g., *Ferber*; *Counterman*; *Gertz*.

3. Hate speech and the marketplace of ideas

In the panoply of First Amendment justifications, the marketplace rationale is particularly poor at explaining the extension of First Amendment protection to hate speech. For starters, the marketplace theory as a whole has been widely criticized for its relatively poor ability to actually discover truth.¹⁰⁸ On the theoretical side, scholars have questioned whether objective truth even exists and thus whether the First Amendment marketplace can ever be effective at reaching its ultimate truth-seeking objective.¹⁰⁹ To the extent truth is something that can be discovered, scholars have also expressed skepticism at the role speech plays in truth-seeking.¹¹⁰ As advocates of this critique point out, the whole of human experience, and not just words that are expressed, contribute to our understanding of what is true and what is false.¹¹¹

On the empirical side, data suggests that an unregulated free speech marketplace is actually a very poor test ground for true ideas. For example, a recent controlled study by Professors Daniel Ho and Frederick Schauer of the efficacy of the free speech marketplace showed that speech consumers do not perform well at discerning truth after consuming unregulated expression.¹¹² And the literature in the fields of journalism and communications is so replete with studies of disinformation and its spread on social media that the term “fake news” has become ubiquitous.¹¹³ In other words, there are plenty of reasons to doubt the validity of the marketplace of ideas rationale generally, even without considering its application to the hate speech question.

Narrowing the focus to harmful speech produces no more satisfying result. In that vein, critical race scholars have specifically challenged the effectiveness of the marketplace of ideas rationale in explaining First Amendment protectionism. As they point out, the idea that one race is inherently superior to another has been universally debunked.¹¹⁴ In other words, that idea is known to be untrue.¹¹⁵ If the core function of the First Amendment is to preserve the process of truth-seeking, why would an idea the marketplace has deemed to be untrue still be deserving of constitutional

¹⁰⁸ See, e.g., Wu, at 169.

¹⁰⁹ See, e.g., Greenawalt, at 131 (indicating that the fallacy of objective truth is a basis upon which the marketplace of ideas rationale has been criticized).

¹¹⁰ Greenawalt, at 138-40.

¹¹¹ *Id.*

¹¹² See Ho & Schauer, *supra* note 99.

¹¹³ See, e.g., Van Alstyne, Marshall W., FREE SPEECH, PLATFORMS & THE FAKE NEWS PROBLEM (December 31, 2021), at 1, available at <https://ssrn.com/abstract=3997980> (last viewed Aug. 6, 2023).

¹¹⁴ Mark A. Graber, *Old Wine in New Bottles: The Constitutional Status of Unconstitutional Speech*, 48 Vand. L. Rev. 349, 376-7 (1995) (citing Matsuda, PUBLIC RESPONSE, *supra* note 8, at 37).

¹¹⁵ *Id.*

protection?¹¹⁶ The failure of the marketplace rationale to address this key question is yet another critique of its cohesiveness.

Moreover, as the marketplace of ideas continues to multiply, the relative power of truthful voices in the marketplace becomes distorted. At last estimate, more than 1.13 billion websites exist in the world, with around 200 million of those being viewed and trafficked at any given time, an amount so large no one person could sort through them all.¹¹⁷ With regard to news outlets, access to information is also at an all-time high.¹¹⁸ Studies show that, despite increased engagement with online information, the average person's ability to discern truth from fiction in an online environment is not strong.¹¹⁹ As a result, the saturation of the free speech marketplace has in many ways actually undermined the truth-seeking function of the First Amendment.

To summarize, then, the First Amendment rationales developed by Emerson, Meiklejohn, Redish, and Justice Holmes primarily dwell in the theoretical underpinnings for the First Amendment and lack empirical, pragmatic, or even anecdotal support. These notions, while interesting to debate and important to consider in the discourse about why the First Amendment operates in the way it does, are therefore somewhat disconnected from reality.¹²⁰ In the end, existing justifications fail to explain existing norms. Which leaves us still asking – why does the First Amendment protect speech that harms others?

II. WHAT PSYCHOLOGY TEACHES ABOUT CENSORSHIP

The shortcomings of existing free speech justifications to answer that question may be offset by considering how individuals actually respond, both cognitively and behaviorally, to being censored. Indeed, the field of psychology has much to say about the impacts of censorship that melds both theory and evidence into a compelling narrative of how the human mind operates. Both psychological reactance theory and scarcity theory contribute to our burgeoning understanding of the impacts of the freedom of speech on

¹¹⁶ *Id.*

¹¹⁷ Kathy Haan, "Top Website Statistics for 2023," *Forbes Advisor* (Feb. 14, 2023), available at <https://www.forbes.com/advisor/business/software/website-statistics/#:~:text=1...are%20actively%20maintained%20and%20visited> (last viewed Aug. 6, 2023).

¹¹⁸ See Ardia, David S. and Ringel, Evan and Ekstrand, Victoria and Fox, Ashley, *Addressing the Decline of Local News, Rise of Platforms, and Spread of Mis- and Disinformation Online: A Summary of Current Research and Policy Proposals* (December 22, 2020). UNC Legal Studies Research Paper, available at <https://ssrn.com/abstract=3765576> or <http://dx.doi.org/10.2139/ssrn.3765576> (last viewed Aug. 6, 2023).

¹¹⁹ *Id.* at 41 (summarizing study of teenage social media users by Stanford researchers that demonstrates ineptitude at identifying online disinformation despite high social media usage).

¹²⁰ See *supra* note 98.

speakers in a way that informs the status of First Amendment jurisprudence.¹²¹

A. Brehm's Psychological Reactance Theory

Originally developed by psychologist Jack Brehm, and later expanded in collaboration with Brehm's former student and wife Sharon Brehm, the theory of psychological reactance posits that when something threatens or eliminates a person's freedom, they will react by seeking to restore the freedom.¹²² The core assumption of Brehm's reactance theory is that a threat to freedom will arouse motivation to restore the freedom, whether or not successful.¹²³ More than a hypothesis, study after study has confirmed the validity of Brehm's essential principle. For example, perceived threats to a person's choice have produced reactance in the context of increased attractiveness effects for members of the opposite sex¹²⁴, toys¹²⁵, and sweet foods like cookies and deserts¹²⁶.

From the outset, Brehm's postulate embodied the same explicit normative assumptions about freedom as Emerson and Meilkejohn: "that to have control or freedom is good and beneficial to the individual, while not to have control or freedom is bad or potentially harmful."¹²⁷ Introduced in 1966, Brehm's initial theory made several important observations about freedom and its limitations in the context of human behavior. First, Brehm indicated that freedom is inherently subjective, at least in terms of its causal links to motivation and decision-making.¹²⁸ He thus dismissed the psychological relevance of the incongruence between actual and relative freedom.¹²⁹ Brehm's theory assumes that all that is necessary for a person to believe that her freedom is being threatened is an underlying belief that she possesses the freedom, whether she actually does or not.¹³⁰ Based on its subjective

¹²¹ The discipline of psychology, like the field of law, uses the term "theory" to describe a particular idea or cluster of knowledge. Unlike law, however, psychology uses the term "theory" in a way that does not imply the idea is fully theoretical. Psychological theories can be and are often supported by empirical data and actual scientific evidence. This is the case with both psychological reactance theory and scarcity theory. See Brehm, *infra* note 122; Mullainathan and Shafir, *infra* note 181.

¹²² Jack W. Brehm, *A Theory of Psychological Reactance* (1966); Sharon S. Brehm & Jack W. Brehm, *Psychological Reactance: A Theory of Freedom and Control* (1981).

¹²³ Brehm, at 4.

¹²⁴ Pennebaker et al., 1979.

¹²⁵ Hammock & Brehm, 1966.

¹²⁶ J. W. Brehm & Rozen, 1971; Worchel, Lee, & Adewole, 1975. Brehm at p. 26.

¹²⁷ Brehm and Brehm at p. 2.

¹²⁸ Brehm at p. 4.

¹²⁹ *Id.*

¹³⁰ *Id.* In support of this point, Brehm offered the example of a jaywalker who might feel the freedom to jaywalk after frequently jaywalking despite the illegality of that act. *Id.*

qualities, Brehm and Brehm later came to define freedom as an expectancy.¹³¹

Brehm also postulated that the degree of reactance a person experiences will fluctuate based on the need the threatened freedom fills.¹³² The greater the importance of the freedom to the person, the greater the degree of reactance he will experience when the freedom is threatened.¹³³ Both the importance and the magnitude of the need define the freedom, and thus the degree of reactance that results from attempts to endanger the freedom.¹³⁴

As their work on psychological reactance unfolded, and ongoing research contributed to our understanding of the phenomenon, Brehm and Brehm made important observations about the stages of reactance and how reactance operates in response to threats to freedom.

1. The Stages of Psychological Reactance

a. Stage One: The Presence or Perceived Presence of Freedom

The first stage of psychological reactance theory is the presence or perception of freedom.¹³⁵ Because freedom is inherently subjective, the freedom does not have to objectively exist in order to trigger a reactance response.¹³⁶ Rather, people need only to be subjectively aware of the freedom and feel capable of exercising it.¹³⁷

b. Stage Two: The Elimination of or A Perceived Threat to Freedom

The second stage of psychological reactance theory is the elimination of or a threat to freedom.¹³⁸ This stage can take various forms. An outright ban on a particular freedom constitutes a form of freedom elimination

¹³¹ Brehm and Brehm, p. 5.

¹³² Brehm at p. 5.

¹³³ Brehm and Brehm at p. 5. This observation has critical implications for the First Amendment right of free speech, which occupies a primary position in securing American democracy and facilitating self-actualization. The primacy of the First Amendment and its impacts on psychological reactance when First Amendment freedoms are threatened will be discussed in Section III, *infra*.

¹³⁴ *Id.* at 38.

¹³⁵ Rosenberg, Benjamin and Siegel, Jason T., “A 50-year review of psychological reactance theory: Do not read this article” (2016). Psychology | Faculty Scholarship (2016), at p. 3, available at <https://doi.org/10.1037/mot0000091>.

¹³⁶ *Id.* (citing Brehm, 1996).

¹³⁷ *Id.*

¹³⁸ Rosenberg & Siegel, *supra*, at p. 4.

sufficient to trigger reactance.¹³⁹ In addition, anything that impedes, but does not entirely eliminate, the freedom constitutes a threat to freedom as well.¹⁴⁰ In this context, Brehm and Brehm identified the “passage of restrictive laws” as one type of threat to freedom that would trigger reactance.¹⁴¹

The degree of threat a person will experience is magnified based on a number of factors about the source of the threat. For example, where a person expects to have future interactions with the source of the threat, the person will take the threat more seriously.¹⁴² In addition, the power or authority that the source of the threat has over the person will influence how the person perceives the threat as well.¹⁴³

Threats can even take the form of actions that may typically be thought of as beneficial. For example, in one study, researchers found that having a participant help with a task pressured others to feel compelled to return the favor, thus limiting the participant’s perceived freedom.¹⁴⁴

c. Stage Three: Arousal of Reactance

Stage three occurs when reactance is piqued and a person becomes motivated to seek freedom restoration in response to the threat or elimination of freedom.¹⁴⁵ The degree of reactance is determined by two factors: 1) the characteristics of the freedom, and 2) the nature of the threat.¹⁴⁶ With regard to the freedom, Brehm hypothesized that reactance would be stronger when the freedom uniquely fills a need.¹⁴⁷ With regard to the threat, both the intensity and motivation of the threat impact reactance.¹⁴⁸ There is a proportional relationship between intensity and reactance, such that a more intense threat will produce a heightened reactance response.¹⁴⁹ Moreover, when people perceive that the person making the threat is trying to influence them, they will respond with greater reactance as well.¹⁵⁰

Threats do not need to be directly targeted at a person to arouse reactance.¹⁵¹ For example, one study showed that simply listening to a threat to someone else’s freedom was sufficient to change people’s ratings of a

¹³⁹ *Id.* (citing Mazis, Settle, & Leslie, 1973).

¹⁴⁰ *Id.* (citing Brehm, 1966) (identifying attempted social influence as a form of threat to freedom).

¹⁴¹ Brehm and Brehm at p. 31.

¹⁴² *Id.* at p. 33.

¹⁴³ *Id.*

¹⁴⁴ Rosenberg & Siegel (citing Krishnan and Carment (1979)).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at pp. 4-5.

¹⁴⁹ *Id.* at p. 5 (citing Heilman (1976)).

¹⁵⁰ *Id.* (citing Heller, Pallak, and Picek (1973)).

¹⁵¹ *Id.* (citing Brehm, 1996).

conversation topic because they anticipated losing their own freedom to choose a topic in the future.¹⁵²

A person's competence in a particular subject area may also influence threat perception.¹⁵³ For example, in one study, women were less susceptible to threats about bread prices at the grocery store than men.¹⁵⁴ This sex-based difference was explained by the difference in shopping competence, given that women likely perceived themselves as more informed about a fair price for bread at the market than men.¹⁵⁵

d. Stage Four: Restoration of Freedom

At stage four, in response to reactance, people whose freedom is threatened exhibit behavioral and attitudinal responses.¹⁵⁶ In the behavioral context, people tend to seek to engage in the restricted behavior to a greater degree.¹⁵⁷ Reactance can produce antisocial or uncivil behavior as individuals work to restore freedoms that they perceive they have lost.¹⁵⁸ People also tend to deny their reactance when confronted.¹⁵⁹ Alongside reactance, those who experience threats to their freedom may also manifest accentuated anger towards the source of the threat.¹⁶⁰

A good example of this phenomenon occurred when the drinking age was raised from 18 to 21.¹⁶¹ Following the change, newly underage college students whose freedom was now restricted drank more than older adult college students whose freedom had not been restricted, even though for 30 years prior to the change, older adult students had engaged in more drinking.¹⁶²

In addition to seeking to exercise the freedom behaviorally, reactance also changes a person's attitudes and beliefs.¹⁶³ They come to view the

¹⁵² *Id.* (citing Andreoli, 1974).

¹⁵³ Brehm and Brehm at pp. 18-19.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* Note that this study took place either in the late 1970s or early 1980s at the latest, and gender roles regarding who does the grocery shopping and how competent a shopper might be to assess fair food prices based on their sex has likely shifted in the decades since the study was performed.

¹⁵⁶ Rosenberg & Siegel, at p. 6 (citing Brehm & Brehm, 1981).

¹⁵⁷ *Id.* This phenomenon does not occur, however, when people believe the freedom is irrevocably lost. See Brehm and Brehm at p. 99. Such instances instead produce what is known as "learned helplessness." *Id.* In these situations, individuals do not seek to restore the freedom but instead behave in accordance with the restriction of the freedom.

¹⁵⁸ Brehm at p. 5.

¹⁵⁹ *Id.*

¹⁶⁰ Behrouzian, G., Nisbet, E. C., Dal, A., & Çarkoğlu, A. (2016). Resisting censorship: How citizens navigate closed media environments. *International Journal of Communication*, 10, 4345-4367.

¹⁶¹ Rosenberg & Siegel at p. 6.

¹⁶² *Id.* (citing Engs & Hanson, 1989).

¹⁶³ *Id.*

freedom with greater attractiveness and may also seek to derogate or show hostility towards the source of the threat.¹⁶⁴ Opinion entrenchment, or what Brehm described as “boomerang attitude change,” is therefore a key manifestation of reactance.¹⁶⁵

Attempts to restore freedom can be limited by external factors such as cost, punishment, and harm to third parties.¹⁶⁶ In addition, where there are alternative methods available to restoring freedom, individuals tend to select the method with the greatest ease and likelihood of success.¹⁶⁷

2. The Boomerang Effect

The hallmark of psychological reactance is what Brehm described as a “boomerang effect.”¹⁶⁸ This data represents the empiric proof of the phenomenon of psychological reactance.¹⁶⁹ The strength of the boomerang effect correlates to the importance of the freedom and whether the force against the freedom is of low or high power.¹⁷⁰

There is evidence of boomerang effects in a wide variety of contexts, including the aforementioned drinking age studies. In the specific context of communication, research shows that when a communication is censored, desire to hear that communication increases.¹⁷¹

3. Reactance and Censorship: The Canadian Social Media Studies

Interesting new research directly demonstrates that people experience reactance in response to censorship and that the reactance is stronger when the censoring agent is the government, as opposed to an actor with less perceived power and authority.¹⁷² In a study published in the *International Journal of Communication*, researchers examined cultural differences in psychological reactance in response to a threat of social media censorship among Canadians of Iranian, European, and East Asian descent.¹⁷³ The study hypothesized that those of Iranian cultural backgrounds would experience heightened reactance compared to those from European and East Asian

¹⁶⁴ *Id.* (citing Brehm & Rozen, 1971; Brehm, Stires, Sensenig, & Shaban, 1966).

¹⁶⁵ Brehm at pp. 91-95.

¹⁶⁶ Brehm and Brehm at p. 99.

¹⁶⁷ *Id.*

¹⁶⁸ Brehm at 95.

¹⁶⁹ Brehm and Brehm at p. 38.

¹⁷⁰ *Id.* at p. 60.

¹⁷¹ Brehm and Brehm at p. 108.

¹⁷² Behrouzian, G., Nisbet, E. C., Dal, A., & Çarkoğlu, A. (2016). Resisting censorship: How citizens navigate closed media environments. *International Journal of Communication*, 10, 4345-4367.

¹⁷³ *Id.* at abstract.

backgrounds when threatened with censorship from a powerful source, i.e., the government, given the very real experience of Iranian citizens with repressive governmental policies.¹⁷⁴ Data collected from the study confirmed the hypothesis.¹⁷⁵ Iranian Canadians did exhibit stronger degrees of reactance when faced with the idea that the government would censor their social media than European and East Asian Canadians.¹⁷⁶ However, when faced with a similar threat from a low-power authority, i.e., students, all three groups experienced similarly reduced reactance.¹⁷⁷

The Canadian censorship study confirms powerful truths about how people respond when their right to express themselves is threatened. First, the study demonstrates that the freedom of expression is deeply held and that threats to this freedom from a powerful source like the government can produce reactance.¹⁷⁸ Second, the study shows that repeated threats to the right of free expression can exacerbate reactance levels over time, making people more sensitive to perceived threats to their freedom.¹⁷⁹ And finally, the study elucidates the collective effect of censorship and how it can shape and define entire cultures, even those within a culture who may not have been the direct target of the threat at first.¹⁸⁰

B. Scarcity Theory

Brehm's findings around psychological reactance and boomerang effects share common themes with scarcity theory. Pioneered by Harvard economist Sendhil Mullainathan and Princeton psychologist Eldar Shafir, scarcity theory posits that people who have less than they subjectively feel they need will experience a tunnelling effect, or a singular focus on the unfilled need, that limits cognitive bandwidth.¹⁸¹ The theory originated as an offshoot of starvation experiments conducted during World War II. Designed to determine how best to reintegrate starving people back into daily life following the war, the starvation studies deprived participants of food for a lengthy time period and then studied their reactions to reintroduction. While the initial goal of the project was physiological, researchers maintained a significant volume of psychological data that informs modern understanding of scarcity.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Sendhil Mullainathan and Eldar Shafir, *Scarcity: The New Science of Having Less and How it Defines our Lives* (2013), at pp. 4, 13, 29.

Not surprisingly, participants in the study experienced what Mullainathan and Shafir label a tunnelling effect, meaning that their mental focus sharpened on anything having to do with food.¹⁸² When shown a movie for entertainment, for example, they ignored the romance scenes and focused exclusively on what the couple was eating for dinner.¹⁸³ They spent hours comparing newspaper ads containing the prices of fruits and vegetables.¹⁸⁴ They dreamed of new careers as restaurant owners and lost their will for other academic interests.¹⁸⁵ Quite simply, they began “constantly thinking of food.”¹⁸⁶

Mullainathan and Shafir describe this tunnelling effect as the single-minded focus on managing the scarcity at hand.¹⁸⁷ It leads those in its grip to ignore needs and tasks falling outside of the mental tunnel.¹⁸⁸ As a result, scarcity imposes a bandwidth tax that limits “our ability to pay attention, to make good decisions, to stick with our plans, and to resist temptations.”¹⁸⁹ As Mullainathan and Shafir explain, “scarcity directly reduces bandwidth – not a person’s inherent capacity but how much of that capacity is currently available for use.”¹⁹⁰

Various empirical experiments confirm this theory. For example, one study conducted by Mullainathan and Shafir demonstrates that scarcity has negative impacts on IQ test performance.¹⁹¹ Mullainathan and Shafir studied two groups of people, rich people and poor people, at the mall and asked them to perform components of IQ tests under various circumstances.¹⁹² Under the first scenario, participants were told their car broke down and needed a \$150 repair, something all participants in the study would regard as manageable.¹⁹³ Next, participants were told their car broke down and needed a significant repair totaling \$1500, something only the rich people would find manageable.¹⁹⁴ Under these circumstances, the rich people did equally well on the IQ tests under either scenario.¹⁹⁵ But the poor people performed much less well when told they would need to pay \$1500 to repair their cars.¹⁹⁶ In

¹⁸² *Id.* at 6-7, 29.

¹⁸³ *Id.* at 6.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 7.

¹⁸⁷ *Id.* at 29.

¹⁸⁸ *Id.* at 36.

¹⁸⁹ *Id.* at 41-42.

¹⁹⁰ *Id.* at 47 (emphasis omitted).

¹⁹¹ Amy Novotney, “The Psychology of Scarcity,” *Monitor on Psychology*, Vol. 45 No. 2, p. 28 (Feb. 2014), available at <https://www.apa.org/monitor/2014/02/scarcity>.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

other words, their scarcity of financial resources impacted their cognitive bandwidth and reduced their intellectual performance.¹⁹⁷

These findings were not isolated. Similar studies demonstrated that poverty status negatively impacted people's ability to perform well on an executive control task where they were required to hit a button on the same side of the screen as a heart but the opposite side of the screen as a flower.¹⁹⁸ Introducing a financially taxing scenario reduced poor participants' performance by a rate of 20 percent.¹⁹⁹ Similarly, a study of Indian farmers revealed that the *same farmer* performed 9 to 10 IQ points lower during times of financial strain than during times of financial flushness, was 11 percent slower in responding to an executive control task, and made 15 percent more errors.²⁰⁰ These results replicate for dieters and lonely people too, who may perceive that they have less food or less human companionship than they actually need.²⁰¹

Mullainathan and Shafir's work on the scarcity mindset focuses on three kinds of need in particular: monetary needs, time, and human companionship.²⁰² It does not directly address the human need for self-expression, although the applicability of the theory to loneliness suggests that the scarcity mindset transcends physiology. In that context, Mullainathan and Shafir found that people who are lonely and lack for human connection suffer the same tunnelling and diminished bandwidth impacts as people who lack for money or food.²⁰³ This suggests that it is not only physical needs, like water, sleep, or shelter, that trigger the scarcity mindset.²⁰⁴ In fact, the researchers are careful to point out that need is subjective and that scarcity can be felt across a spectrum of needs, including those beyond physical constraint.²⁰⁵

If we accept Emerson's idea that self-expression is central to self-development,²⁰⁶ then self-expression is indeed a subjective human need. Its absence can therefore trigger feelings of scarcity and the resulting lack of cognitive bandwidth that follows. In other words, when people are unable to say what is on their mind, their singular focus on that idea drowns out all others and diminishes their ability to develop other thoughts. Censorship

¹⁹⁷ *Id.*

¹⁹⁸ *Scarcity*, at pp. 55-56.

¹⁹⁹ *Id.* at 56.

²⁰⁰ *Id.* at 58.

²⁰¹ *Id.* at 62.

²⁰² *Id.* at 56, 62.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 12 and note 4.

²⁰⁶ *See* Emerson, *supra* note 71.

therefore makes people less intellectually capable and more prone to poor decisions.

III. THE PSYCHOLOGY OF CENSORSHIP AND ITS PLACE IN THE LAW

What exactly do psychological reactance and scarcity have to do with the First Amendment? If we rely exclusively on the literature that exists to date, the answer to that question would be very little. But deeper exploration of the impacts of censorship on human thinking, attitudes, and behavior can explain First Amendment norms in a way existing doctrine tries to but does not. Thus, it is fruitful to consider what psychology reflects back to us about the impacts of censorship on speakers.

A. Importing Scarcity and Psychological Reactance Theories into Law

Before considering how psychological reactance and scarcity theories inform the First Amendment, it is fair to question whether they have had any impact on the development of the law already. Although these theories are not mainstays of our constitutional tradition, they are not entirely strangers to either the courts or legal scholarship. Examining the places where these theories have appeared before can help inform their impact in the First Amendment arena as well.

1. Jury instructions

To the extent Brehm's psychological reactance theory has been discussed in any significant way by the legal academy, it has been in the context of jury instructions. For example, in *Understanding the Limits of Limiting Instructions*, Professors Joel D. Lieberman and Jamie Arndt explain that psychological reactance is the leading cause of the failure of limiting instructions and judicial admonitions to juries.²⁰⁷ In reaching this conclusion, Lieberman and Arndt highlight the connectivity of reactance and communication and the strong empirical research linking heightened reactance responses to attempts to control perception and expression.²⁰⁸ In a courtroom, jurors likely feel that the ability to process evidence is within their control, and thus a free behavior.²⁰⁹ As Lieberman and Arndt posit, they will

²⁰⁷ 6 *Psychol. Pub. Pol'y & L.* 677, 693-4 (2000).

²⁰⁸ *Id.* at 694.

²⁰⁹ *Id.*

respond with reactance when judges attempt to limit that freedom by admonishing them to disregard or discount certain evidence.²¹⁰

Further research has demonstrated the validity of this theory. For example, one study concluded that mock jurors are less likely to disregard a judge's admonishment if the instruction is delivered mildly rather than sternly.²¹¹ In other words, the strength of the perceived threat to the jury's freedom controls the level of reactance the jurors experience to the judge's limiting instruction.²¹² As a result, researchers recommend that lawyers temper their objections to avoid triggering reactance responses in the jury.²¹³

Courts have given some limited recognition to the notion that lawyers may make strategic choices in trials based on a juror's psychological reaction. For example, in *Payne v. State*, the Tennessee Criminal Court of Appeals discussed the reasons why defense attorneys may not always object to evidence or arguments they view as damaging.²¹⁴ In the court's view, doing so could risk emphasizing the harmful nature of the evidence to the jury.²¹⁵ In acknowledging this danger, however, the court did not specifically focus on the reactance experienced when jurors are instructed to disregard evidence they previously believed they could consider.²¹⁶ Rather, as has been the case in the First Amendment domain, the court's observation was grounded in theory, rather than known scientific fact.

2. Scholarly treatment in other contexts

Discussion of Brehm's reactance theory in broader legal contexts outside of jury instructions has been limited, largely theoretical, and untethered from substantive legal discipline. For example, in one study discussing the role of reactance in influencing public opinion, Professor Cass Sunstein and a Harvard law, economics, and business fellow demonstrated that reactance can occur when people are exposed to contrary public opinion on an issue about which they hold entrenched views and that reactance can therefore influence social norms in counterproductive ways.²¹⁷ Their study

²¹⁰ *Id.* at 694-5.

²¹¹ Sharon Wolf & David A. Montgomery, *Effects of Inadmissible Evidence and Level of Judicial Admonishment to Disregard on the Judgments of Mock Jurors*, 7 J. Applied. Soc. Psychol. 205, 216-18 (1977).

²¹² *Id.*

²¹³ See, e.g., Krystia Reed & Bryan H. Bornstein, *Objection! Psychological Perspectives on Jurors' Perceptions of In-Court Attorney Objections*, 63 S. Dak. L. Rev. 1, 37 (2018).

²¹⁴ *Payne v. State*, 2010 Tenn. Crim. App. LEXIS 44, *43 (Tenn. Crim. App. Jan. 15, 2010) ("attorneys may often choose not to object to damaging evidence for strategic reasons, such as to avoid emphasizing the unfavorable evidence to the jury") (internal citations omitted).

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ Meirav Furth-Matzkin & Cass R. Sunstein, *Social Influences on Policy Preferences: Conformity and Reactance*, 102 Minn. L. Rev. 1339 (2018).

found that exposure to majority public opinion can significantly impact a person's thinking on an issue about which the person does not already hold a fixed or entrenched view.²¹⁸ But where the person is questioned about an issue about which the person has a deeply-held belief, exposure to contrary public opinion will cause reactance and therefore be counterproductive.²¹⁹ In other words, reactance may contribute to polarity in public opinion.²²⁰

In a very abbreviated sense, Professor Bruce Winick touched on psychological reactance theory as a basis for protecting individual autonomy in his 1992 article, *On Autonomy: Legal and Psychological Perspectives*.²²¹ His argument was that coercion in government programs – probation, education, and the like – may backfire, given that individuals often experience reactance in response to forced participation.²²² Like Sunstein, Winnick confined his discussion of psychological reactance theory to the theoretical, rather than the doctrinal or substantive, dimensions of law.

2. Case law references to reactance and scarcity

Virtually no case law discusses or incorporates Brehm's theory of psychological reactance. The only references that exist to the concept are in passing and come in the form of citations to mental health expert reports.²²³ These cases, however, do not debunk reactance or otherwise express doubt about its validity.²²⁴

Scarcity theory, on the other hand, has been cited by at least one court to justify vacating its previous rent arrearage order against a 72-year-old man who suffered from various health problems and was unaware of the court proceedings.²²⁵ In reaching the decision to vacate the arrearage, the court noted that people in positions of financial scarcity, as the tenant was, would be less able to read and comprehend fine print in important documents.²²⁶ The court's reliance upon Shafir's work constitutes an implicit recognition of the tunnelling effect where legal expectations may not match a person's cognitive reality.²²⁷

²¹⁸ *Id.* at 1376-7.

²¹⁹ *Id.* at 1377.

²²⁰ *Id.* at 1378-9.

²²¹ 37 Vill. L. Rev. 1705 (1992).

²²² *Id.* at 1767-8.

²²³ See *Carty v. Metropolitan Life Insur. Co.*, 224 F.Supp.3d 606, 613 (M.D. Tenn. 2016) (citing mental health professional's treatment notes); *In Re Dillon M.*, Nos. M08CP05009713A, M08CP05009714A, 2007 WL 4239444, at *11 (Ct. Supr. Ct. Sept. 20, 2007) (citing evaluator's report).

²²⁴ See *id.*

²²⁵ See *Elliot Place Properties, Inc. v. Perez*, 53 Misc.3d 1212(A), 48 N.Y.S.3d 265 (Table), at *4 fn. 3 (N.Y. Civ. Ct. Nov. 10, 2016).

²²⁶ *Id.*

²²⁷ *Id.*

This untapped area is therefore ripe for further exploration by the courts.²²⁸

B. What Scarcity and Psychological Reactance Theories Teach about Censorship

Turning to the psychology of censorship, psychological reactance and scarcity theories teach us that, in general, censorship is psychologically dangerous. Both theories suggest that the speaker's subjective belief as to the import of the speech will have a determining effect on the damage the censorship causes. As Brehm explains, the greater degree of importance the speaker places in the speech being silenced, the greater degree of reactance the speaker will experience.²²⁹ So too does scarcity theory derive from subjective need. Under Mullainathan and Shafir's theory, a scarcity mindset arises when people have less of something than they subjectively think they need.²³⁰ Thus, a speaker will experience the impacts of scarcity when she feels a need to speak out on a subject, but cannot.²³¹ The loss of the ability to speak is thus at the beginning of both the desire to restore freedom and the tunnelling effect that reduces cognitive bandwidth, and these impacts are only amplified when a person places higher importance on the speech being censored.

We can sharpen the focus on how censorship impacts speakers by separately focusing on the individual psychological harms of censorship and how those harms, when aggregated, damage collective discourse. Understanding the ways in which censorship is psychologically counterproductive can help explain why the First Amendment protects as much harmful speech as it does.

1. Individual harms

a. Intellectual reduction

Applying psychological reactance and scarcity theories to censorship, it becomes apparent that a person who is censored will experience corresponding reductions in their intellectual ability. This conclusion is

²²⁸ By introducing psychological reactance and scarcity theories in the context of the First Amendment, I encourage jurists like me to both consider areas in which existing jurisprudence and psychological realism are incongruent and to inform their work with empirical science that in some cases contravenes the direction in which the law has developed.

²²⁹ Brehm, *supra*.

²³⁰ Mullainathan and Shafir, *supra*.

²³¹ *Id.*

grounded in Shafir's simulated car repair studies, where individuals operating out of scarcity performed less well on IQ tests than the same individuals performed when their needs were being met.²³² If we accept that the ability to communicate and express ideas is a basic human need (and there is plenty of support for that notion)²³³, then individuals whose experience censorship will similarly operate from a place of reduced intellectual capability.

Mullainathan and Shafir explain that this reduction in intellectual functioning comes from the tunnelling effect that occurs when an individual tends to focus on an unmet need.²³⁴ It is reasonable to assume that this impact will be heightened with regard to speech, given that a reduction in an individual's ability to communicate will limit their ability to receive information.²³⁵ Censorship therefore negatively impacts intellectual functioning in a multitude of ways.

Interestingly, this conclusion sounds similar to the self-actualization justification promoted by Emerson and Redish.²³⁶ In many ways, scarcity theory may prove what the self-actualization theory merely hypothesized. Nonetheless, there are key differences in these approaches. For one thing, scarcity theory is based upon actual empirics about human behavior, whereas Emerson and Redish dwelled more in the philosophical.²³⁷ For another thing, scarcity theory begins at a different starting point. Rather than questioning what value the fulfillment of a person's need for self-expression has in their developmental process, Mullainathan and Shafir instead focus – as I do – on what happens when a person's need to express themselves is threatened.²³⁸ Scarcity theory therefore more closely tracks the concept of censorship than the scholarship of Emerson and Redish and is therefore more helpful in unpacking existing First Amendment doctrine.

²³² Mullainathan and Shafir, *supra*.

²³³ See, e.g., Joyce Thomas and Deena McDonagh, *Shared Language: Towards More Effective Communication*, 6 *Australas Med. J.* 46, available at <http://dx.doi.org/10.4066/AMJ.2013.1596>. (last viewed Aug. 6, 2023) (identifying the ability to communicate and express ourselves as a basic human need).

²³⁴ Mullainathan and Shafir, *supra*.

²³⁵ The First Amendment also protects the right to receive information, not just the right to communicate it outwardly. See, e.g., *Stanley*, 394 U.S. at 564 (“It is now well established that the Constitution protects the right to receive information and ideas. This right to receive information and ideas, regardless of their social worth, is fundamental to our free society.”).

²³⁶ See Section I(B), *supra* (describing self-actualization justification for First Amendment norms).

²³⁷ See Sections I(B) and II(B), *supra* (describing Emerson and Redish's theory of self-actualization and the empirics of scarcity respectively).

²³⁸ See Mullainathan and Shafir, at 4.

b. Bandwidth limitations

In addition to reduced intellectual capacity, individuals in positions of scarcity also experience limitations on their cognitive bandwidth.²³⁹ In this state, people are less able to consider the impact of outside information and less self-sufficient at problem solving.²⁴⁰ The speech-related impacts on the individual of this phenomenon is rather obvious. As a censored speaker tunnels and focuses heavily on the unmet need to communicate, the speaker will lose IQ, will make mistakes on executive tasks, and will fail to integrate information falling outside the mental tunnel into his viewpoint.²⁴¹

c. Reduced viewpoint accuracy

Consistent with the bandwidth and intellectual reductions experienced by those undergoing scarcity, reactance responses to censorship may also negatively impact the accuracy of a person's views.²⁴² As reactance to censorship piques, individuals will act to restore diminished access to speech channels through increased online communication, not all of which will be vetted or fully accurate.²⁴³ In other words, one documented response to censorship is reactance-motivated efforts to engage in and with the censored speech anyways.²⁴⁴

A recent study of media consumers in Turkey, Iran, and the United States specifically confirmed this conclusion for the latter two countries.²⁴⁵ Citizens there report experiencing reactance when they perceive that mass media censorship has occurred and turning to less accurate internet sources in that circumstance.²⁴⁶ With respect to the United States, the study confirmed a link between reactance and reduced accuracy of political beliefs that flows from this behavior based on political persuasion.²⁴⁷ As this study demonstrates, in the long run, censorship can lead people to hold less accurate beliefs.

This outcome is consistent with the opinion entrenchment that follows a period of piqued psychological reactance.²⁴⁸ When individuals' ability to

²³⁹ See Mullainathan and Shafir, at 47.

²⁴⁰ *Id.*

²⁴¹ *Id.* at 55-58.

²⁴² See Golnoosh Behrouzian, *From Reactance to Political Belief Accuracy: Evaluating Citizens' Response to Media Censorship and Bias*, OhioLINK Electronic Theses and Dissertations Center (2018), at 3, available at http://rave.ohiolink.edu/etdc/view?acc_num=osu1523974517249645 (last viewed Aug. 6, 2023).

²⁴³ *Id.* at 57, 68.

²⁴⁴ *Id.* at 69.

²⁴⁵ *Id.* at 57, 68.

²⁴⁶ *Id.* at 72-74.

²⁴⁷ *Id.* at 74.

²⁴⁸ Brehm and Brehm, at 91-95.

freely speak is challenged, they tend to respond with anger towards the source of the threat and by deepening their emotional connection to the suppressed freedom.²⁴⁹ In this way, then, censorship leads individuals to strengthen their previously-held beliefs about the censored topic and to ignore contradictory inputs.

2. Collective harms

a. Boomerang effect

Perhaps the most significant societal impact of censorship is the boomerang effect. As Brehm and others have demonstrated, individuals who experience a threat to their freedom or a loss of freedom will act to restore the freedom.²⁵⁰ In the context of free speech, this means that individuals who perceive that their freedom to express a certain position or to offer a certain form of speech is threatened will take actions to continue engaging in the censored expression, thereby contributing their message to the free speech marketplace to a greater degree than before the censorship took place.²⁵¹ As a result, governmental attempts to silence a particular message are only likely to amplify that message, given the boomerang effect that will follow governmental regulation.

Several factors contribute to predicted high reactance in the face of censorship. First, the primacy of First Amendment rights in the constitutional bundle of freedoms and the necessity of the First Amendment to securing other rights makes threats to free speech more psychologically damaging.²⁵² Studies reveal a direct correlation between the value of the freedom and the intensity of the reactance.²⁵³ The special constitutional position afforded the right of free speech therefore enhances the reactance response when free speech rights are endangered.

Second, the power of the government to both restrict speech and punish its circulation leads to heightened reactance. As the data demonstrates, high reactance follows the restriction of freedom by those in perceived positions of authority.²⁵⁴ The fact that the government retains significant power with regard to regulating the channels of free speech makes

²⁴⁹ *Id.*

²⁵⁰ Rosenberg & Siegel, at 6.

²⁵¹ See Behrouzian, *supra* note 244.

²⁵² See, e.g., Marc O. DeGerolami, VIRTUE, FREEDOM, AND THE FIRST AMENDMENT, 91 Notre Dame L. Rev. 1465, syllabus (describing nature of First Amendment).

²⁵³ Rosenberg & Siegel, at 4.

²⁵⁴ Brehm and Brehm, at 33.

society more prone to responding negatively when the government censors expression.

Over time, however, this phenomenon can weaken. To experience reactance and therefore to boomerang, people must perceive that they have the freedom to engage in the underlying behavior in the first place.²⁵⁵ As a result, those with reduced perceptions of freedom are less prone to experience reactance and less prone to engage in boomerang effect behaviors.²⁵⁶ With regard to the freedom of speech, this means that people adjust to censorship over time and limit their expectations accordingly.²⁵⁷ Citizens of countries where free speech rights are highly circumscribed as it is thus may experience, over a prolonged period of time, less, not more, reactance in the face of additional governmental censorship.²⁵⁸ This would be the case even though these citizens have, on balance, fewer freedoms than citizens in more speech-protective countries.

Bans on the Nazi swastika in Germany provide a useful example of this phenomenon. Because display of the swastika is already largely prohibited, German citizens likely do not feel free to communicate using this symbol.²⁵⁹ As such, further restrictions on the publication of the Nazi swastika in Germany are unlikely to inspire individual reactance or to lead to a collective boomerang effect. On the other hand, as the Canadian communication study demonstrates, threats to perceived freedom of speech by citizens who are already in a state of reactance with regard to that freedom are more likely to produce reactance and boomerang.²⁶⁰

With regard to the United States, studies show that Americans highly value their perceived right to free expression.²⁶¹ In fact, a recent nationwide survey demonstrates that 91 percent of Americans agree that protecting free speech is an important part of American democracy, and 90 percent believe people should be allowed to express unpopular opinions.²⁶² Given these statistics, high rates of reactance are predictable when American citizens believe the government is limiting their freedom of expression.²⁶³

²⁵⁵ Rosenberg & Siegal, at 4.

²⁵⁶ *Id.*

²⁵⁷ See Behrouzian, at 45 (describing learned helplessness as a response to prolonged threats against freedoms).

²⁵⁸ Nearly 80 percent of the world's population resides under regimes where access to mass media is partially or fully censored. See Behrouzian, at 1.

²⁵⁹ See Strafgesetzbuch §§ 86, 86a (criminalizing symbols of banned organizations).

²⁶⁰ See Behrouzian, Nisbet, et al., *supra* note 176.

²⁶¹ See, e.g., Wihbey, John and Foucault Welles, Brooke, High School Student Views on the First Amendment: Trends in the 21st Century, Knight Foundation Report (November 1, 2019), available at <https://ssrn.com/abstract=3502788> (last viewed Aug. 6, 2023) (reporting statistics on students' views and perceptions of the First Amendment); Knight Foundation, *Free Speech for All? Poll Reveals Americans' Views on Free Expression Post-2020* (Jan. 6, 2022), available at <https://knightfoundation.org/press/releases/free-speech-for-all-poll-reveals-americans-views-on-free-expression-post-2020/> (last viewed Aug. 6, 2023).

²⁶² *Id.*

²⁶³ Relative to this observation, a study reported in a recent communications dissertation reveals that reactance to

Indeed, we need not dig too deep into the cultural lexicon to uncover examples of this type of boomerang. The George Floyd protests during the summer of 2020 and the subsequent violence that took place in a number of large cities exemplify a collective boomerang effect arising from heightened reactance.²⁶⁴ So too is the migration of online social media users, including some high-profile ones, to alternative platforms with fewer content restrictions.²⁶⁵ As these examples demonstrate, the importance of the First Amendment in American society drives high reactance responses and more intense boomerang effects following governmental censorship.

In this vein, psychological reactance and scarcity more credibly explain the connection between free speech and democratic participation than existing First Amendment paradigms. Reactance and scarcity theories do in many ways overlap with the political participation justification and the importance of self-actualization highlighted by Emerson and Redish. In the same way that Meiklejohn hypothesized that free speech promotes democratic participation, psychology confirms that censoring political debate stifles intellectual curiosity and growth. However, reactance and scarcity theories prove what Meiklejohn merely surmised, and their empirical nature makes them a superior method for understanding First Amendment norms.

b. Narrowing of discourse

In addition to creating a boomerang effect with regard to the regulated expression, censorship also narrows the range of discourse on a particular topic by encouraging tunnelling. Under Mullainathan and Shafir's scarcity theory, people who experience an unmet need tend to focus so sharply on fulfilling that need that they lose bandwidth to deal with other problems, an effect known as tunnelling.²⁶⁶ Those in a state of tunnelling struggle to integrate new information or to make decisions in areas that fall outside of their mental tunnel.²⁶⁷ Censorship therefore creates ripple effects on the level

perceived threats of censorship causes enhanced online information-seeking only in those of self-described conservative political persuasion. See Behrouzian, at 63. While outside the scope of this paper, the study suggests that reactance rates and the behavior that ensues may vary based upon demographic factors and that reactance is not a completely homogeneous response. *Id.*

²⁶⁴ See Jennifer M. Kinsley, BLACK SPEECH MATTERS, 59 U. Louisville L. Rev. 1, 8-16 (describing protests that arose across the United States in response to the murder of George Floyd).

²⁶⁵ Former President Donald Trump, for example, was motivated by the more speech-restrictive policies of Facebook and what was at the time called Twitter to create his own social media platform, Truth Social. See David Rosen, *Truth Social's Censorship, Terms of Service Defy Free Speech Promises*, Public Citizen (Sept. 19, 2022), available at <https://www.citizen.org/news/truth-socials-censorship-terms-of-service-defy-free-speech-promises/#:~:text=Trump%20described%20the%20platform%20as,biased%20censorship%20and%20account%20suspensions> (last viewed Aug. 6, 2023). Trump described Truth Social as a haven for free speech where content would be only sparsely monitored. *Id.*

²⁶⁶ Mullainathan and Shafir, at 36, 41-42.

²⁶⁷ *Id.*

of discourse. It not only eliminates a particular form of expression from ongoing debate, but also reduces the capability of censored populations to consider outside evidence or other perspectives.

c. Polarity and entrenchment

Lastly, censorship directly contributes to opinion polarity and viewpoint entrenchment by creating both a greater emotional affinity for the censored expression in speakers and by limiting their ability to consider inputs outside the tunnel focus on the censored content.²⁶⁸ Speakers in a state of reactance will feel greater anger towards the censor (i.e., the government) and will stubbornly stick to preconceived understandings due to cognitive limitations.²⁶⁹ This is particularly the case for those of conservative political persuasion, who are more likely to seek inaccurate information from unvetted sources in the face of speech regulation.²⁷⁰

None of this leads to actualized personal development or hearty, robust, or effective debate. In fact, as psychological studies demonstrate, censoring expression actually undermines the First Amendment's core values. Censorship therefore imparts a panoply of harms, both to our individual development and processing and to the collective discourse. At the individual level, censorship reduces intellectual functioning, limits a person's bandwidth to engage in other productive activities, and leads to less accurate viewpoints. As to society in general, censorship creates boomerang effects, narrows the level of discourse, and entrenches polarity and division. The application of psychological understandings to censorship outcomes demonstrates just how damaging censorship is on the human mind and societal functioning. This, more than other rationales for protecting free speech, might explain the First Amendment's expansive coverage.

V. CONCLUSION

Why does the First Amendment protect hate speech and other forms of harmful expression? The answer to that question is admittedly complex. Decades of scholarly debate have produced three leading theories for why the First Amendment embraces speech that others find distasteful and damaging: that free speech is necessary to an informed and effective political process, that free speech promotes self-actualization and personal

²⁶⁸ *Id.*; see also Furth-Matzkin & Sunstein, *supra* note 47.

²⁶⁹ See Behrouzian, Nisbet, et al., *supra* note 165.

²⁷⁰ See Behrouzian, at 63.

development, and that an unregulated free speech marketplace promotes the collective quest for truth.

But these theories do not fully explain existing First Amendment norms. Their utility in general has been questioned by scholars over time²⁷¹, and they are in many ways too theoretical to apply to the modern hate speech debate. As a result, scholars and students alike often struggle to understand why First Amendment jurisprudence has evolved as expansively as it has.

Psychological realities can fill the legal gap in this area. Psychological reactance theory helps explain the boomerang phenomenon, where interest in censored expression only piques following governmental regulation.²⁷² Scarcity theory elucidates the tunnelling effect and resulting loss of intellectual capability and bandwidth a person experiences when their need for free expression goes unmet.²⁷³ Both theories contribute to our understanding that censorship damages human functioning in measurable ways.

By looking to psychology, we can also discern that censorship tends to produce the opposite outcomes of its stated goal. Contrary to the logical expectation that governmental censorship eliminates a particular message or point of view from discourse, censorship actually leads to increased interest in silenced expression.²⁷⁴ Rather than accepting a reduction in freedom, speakers will instead seek alternative ways to communicate, most often online.²⁷⁵ And until the freedom is restored, individuals who operate under a censorship regime will experience the reduced ability to consider outside information and lower cognitive and intellectual functioning.²⁷⁶ Censorship is therefore an innately counterproductive measure. It often fails to eliminate the underlying censored message and instead solidifies the individual and collective desire to engage with the silenced content. Censorship also undermines the ability of speakers in the marketplace to distinguish truthful, good, or worthy speech from untruthful, bad, or unworthy speech by reducing an individual's intellectual bandwidth.²⁷⁷

The psychological paradigm of censorship therefore informs the inquiry into modern free speech jurisprudence with regard to speech that harms others. As it turns out, the American right of free speech may embrace hate speech not because it contributes value to a hypothetical speech

²⁷¹ See Section I(D), *supra*.

²⁷² Brehm & Brehm, at 99.

²⁷³ Mullainathan and Shafir, at 41-42, 47.

²⁷⁴ See Brehm & Brehm, at 99; Section III, *supra*.

²⁷⁵ See Behrouzian, at 75.

²⁷⁶ Mullainathan and Shafir, at 41-42, 47.

²⁷⁷ *Id.* at 47.

marketplace or because it is necessary for individual self-actualization, but because censoring hate will only amplify its power.