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The Psychology of Censorship

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THE PSYCHOLOGY OF CENSORSHIP

Honorable Jennifer M. Kinsley[†]

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. Alexander Meiklejohn’s political participation rationale would suppress substantially more speech than the First Amendment currently does. Thomas Emerson and Martin 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 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 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 that contradict the very bases upon which the First Amendment was supposedly founded.

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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: “[W]hat is the constitutional value of free speech” in the first place?¹ Indeed, few scholars question the underlying assumption that words can cause damage—emotionally,² reputationally,³ and economically.⁴ 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 catchall phrases to reference expression that generally targets a particular marginalized individual or group for criticism.⁵ 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.⁶ In fact,

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1. Joseph Blocher, *Free Speech and Justified True Belief*, 133 HARV. L. REV. 439, 447 (2019).
 2. See, e.g., DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 133–34, 140–41 (2014).
 3. 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).
 4. See, e.g., Erica Goldberg, *Common Law Baselines and Current Free Speech Doctrine*, 66 VILL. L. REV. 311, 353–54 (2021) (discussing types of economic harm that flow from speech).
 5. Admittedly the term “hate speech” is difficult, if not impossible, to define. See Danielle Keats 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 *U.N. Actions Against Hate Speech*, UNITED NATIONS, <https://www.un.org/en/hate-speech/united-nations-and-hate-speech/international-human-rights-law> [<https://perma.cc/W8XR-ANN8>]. 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).
 6. *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*

compared to our European counterparts, American constitutional doctrine elevates to the arena of free speech significantly more expression that denigrates other people or advances discriminatory ideas about race, gender, and equality.⁷ Critical race scholars like Professor Mari Matsuda have highlighted an important tension here.⁸ 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.⁹ 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.¹⁰ The fields of law, economics, sociology, cybertechnology, and ethics do not lack for quality research and debate over the impacts of harmful expression and how lawmakers and courts should address this perceived problem.¹¹ But, against this debate, surprisingly

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.”).

7. 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 (2013).
8. See, e.g., Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2322 (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 [F]ourteenth [A]mendment’s protection of equality”).
9. See, e.g., *Brown v. Board of Ed.*, 347 U.S. 483, 495 (1954) (holding that school segregation and separate-but-equal principle violates Fourteenth Amendment); *Brandenburg v. Ohio*, 395 U.S. 444, 446, 449 (1969) (finding speech by Klu Klux Klan leader in support of “white, Caucasian race” and encouraging “revengeance” to be protected by First Amendment).
10. See Blocher, *supra* note 1, at 447–48.
11. See, e.g., CITRON, *supra* note 2, at 1–31; Ekaterina Zhuravskaya Maria Petrova & Ruben Enikolopov, *Political Effects of the Internet and Social Media*, ANN. REV. ECON., Aug. 2020, at 426–27 (discussing studies from Germany, Russia, and the United States that link hate crime rates to hate speech on social media); James Banks, *Regulating Hate Speech Online*, 24 INT'L REV. L., COMPUTS. & TECH. 233, 237–38 (2010) (discussing technological approaches to hate speech); Stefanie Ullmann & Marcus Tomalin, *Quarantining Online Hate Speech: Technical and Ethical Perspectives*, 22 ETHICS AND INFO. TECH. 69, 74–75 (2020) (proposing

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.¹² 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 should and should not be protected, this Article instead seeks to justify the lines that 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*.¹³ 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*.¹⁴ 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

quarantining as an ethics-based approach to hate speech on social media platforms).

12. Throughout this Article, 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 not 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.
13. See, e.g., Carolyn McNamara, Note, *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).
14. See, e.g., Jennifer M. Kinsley, *Therapeutic Expression*, 68 EMORY L.J. 939, 964–66 (2019).

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.¹⁵ 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.¹⁶ 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.¹⁷ 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.¹⁸

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 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 violence,¹⁹ 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 freedom²⁰—and scarcity theory—which posits that an unmet need detracts from cognitive

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15. 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, 263–65 (2018).
 16. For an interesting exploration on the intersection of First Amendment protection and the spectrum of political engagement by citizens, see Daniel R. Ortiz, *The Engaged and the Inert: Theorizing Political Personality Under the First Amendment*, 81 VA. L. REV. 1 (1995).
 17. Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 838 (2008) (“[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.”).
 18. *Id.*
 19. See Kinsley, *supra* note 14, at 976.
 20. See generally JACK W. BREHM, A THEORY OF PSYCHOLOGICAL REACTANCE (1966) [hereinafter BREHM, PSYCHOLOGICAL REACTANCE]; SHARON S. BREHM & JACK W. BREHM, PSYCHOLOGICAL REACTANCE: A THEORY OF FREEDOM AND CONTROL (1981) [hereinafter BREHM & BREHM, FREEDOM AND CONTROL].

bandwidth and reduces intellectual functioning²¹—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 that 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*,²² 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.²³ 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.²⁴ That work focused on the psychological *value* the freedom of speech provides to speakers.²⁵ 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 American Mind*²⁶ by lawyer Greg Lukianoff and psychologist Jonathan Haidt, a widely discussed book that expanded upon Haidt and Lukianoff's essay in *The Atlantic* of the same name;²⁷

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21. See SENDHIL MULLAINATHAN & ELДАР SHAFIR, SCARCITY: THE NEW SCIENCE OF HAVING LESS AND HOW IT DEFINES OUR LIVES 4, 13, 29 (2013).
 22. See generally Kinsley, *supra* note 14.
 23. *Id.* at 941–43.
 24. *Id.* at 961–68.
 25. See *id.*
 26. GREG LUKIANOFF & JONATHAN HAIDT, THE CODDLING OF THE AMERICAN MIND: HOW GOOD INTENTIONS AND BAD IDEAS ARE SETTING UP A GENERATION FOR FAILURE (2018).
 27. Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, ATLANTIC (Sept. 2015), <https://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/> [<https://perma.cc/UUM3-U3L7>]. Lukianoff and Haidt's work has also been turned into a documentary film with the same title.

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.²⁸ 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.²⁹ 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.³⁰ In this regard, both works focus upon the psychological harms of censorship upon the listener.³¹

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 Article hypothesizes that, just as speech may provide a therapeutic alternative to violence, censorship actually encourages counteraction by inspiring feelings of marginalization, oppression, and hopelessness.

This Article unfolds in three parts. It begins in Part I 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's dissent in *Abrams v. United States*³² (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, including in cases like *Matal v. Tam*.³³ Part I will also discuss the intersection with economic theory and the foundational roots of the marketplace of ideas rationale in American capitalism. 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.

28. See generally NADINE STROSSEN, *HATE: WHY WE SHOULD RESIST IT WITH FREE SPEECH, NOT CENSORSHIP* (2018).

29. LUKIANOFF & HAIDT, *supra* note 26, at 31.

30. STROSSEN, *supra* note 28, at 86–88.

31. See generally *id.*; LUKIANOFF & HAIDT, *supra* note 26.

32. 250 U.S. 616 (1919).

33. 582 U.S. 218, 242 (2017).

Moving to Part II, 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 to freedom by seeking to restore the freedom, a state of motivation described as reactance.³⁴ Reactance manifests 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 II 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 tunneling effect in turn limits cognitive bandwidth.³⁸ Studies have also shown that perceived scarcity in one area of a person's life impedes intellectual function 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 tunneling effect in scarcity theory, therefore, mimics the boomerang effect in psychological reactance theory. When a freedom is threatened or an emotional need

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34. BREHM, PSYCHOLOGICAL REACTANCE, *supra* note 20, at 2.
35. *Id.* at 9–10; Benjamin D. Rosenberg & Jason T. Siegel, *A 50-Year Review of Psychological Reactance Theory: Do Not Read This Article*, 4 MOTIVATION SCI. 281, 282 (2018).
36. BREHM, PSYCHOLOGICAL REACTANCE, *supra* note 20, at 95; *see generally* Jack F. Heller, Michael S. Pallak & James M. Picek, *The Interactive Effects of Intent and Threat on Boomerang Attitude Change*, 26 J. PERSONALITY & SOC. PSYCH. 273 (1973).
37. MULLAINATHAN & SHAFIR, *supra* note 21, at 4, 13, 29.
38. *Id.* at 47.
39. Amy Novotney, *The Psychology of Scarcity*, AM. PSYCH. ASS'N (Feb. 2014), <https://www.apa.org/monitor/2014/02/scarcity> [<https://perma.cc/665Q-N5EM>].
40. *See* MULLAINATHAN & SHAFIR, *supra* note 21, at 12, 60–62.

is unmet, a person will respond by fixating on the need or freedom to the exclusion of other needs, desires, and areas of growth.

Part III 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 instructions,⁴¹ and the abbreviated scholarly treatment of these theories by constitutional experts.⁴² It 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, 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 hate speech 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,

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41. Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCH. PUB. POL'Y & L. 677, 693–94 (2000).
 42. *See generally* Meirav Furth-Matzkin & Cass R. Sunstein, *Social Influences on Policy Preferences: Conformity and Reactance*, 102 MINN. L. REV. 1339 (2018).
 43. 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).
 44. Steven 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. *See generally* BREHM, PSYCHOLOGICAL REACTANCE, *supra* note 20; MULLAINATHAN & SHAFIR, *supra* note 21.

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 wrong. In fact, the empirical data of psychological reactance and scarcity actually support much of what traditional First Amendment scholars have to say 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 who are 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*,⁴⁹ which extended constitutional protection to cross burning absent the intent to threaten a specific person;⁵⁰ *Snyder v. Phelps*,⁵¹ which shielded speech condemning the LGBTQ community at military funerals from civil liability;⁵² and *Brandenburg v. Ohio*,⁵³ the seminal case on incitement, which protected a vitriolic speech by a Klu Klux Klan leader on the grounds that the Ohio statute did not make a clear distinction between

46. See *infra* Part III.

47. See generally BREHM, PSYCHOLOGICAL REACTANCE, *supra* note 20; MULLAINATHAN & SHAFIR, *supra* note 21.

48. See, e.g., Matsuda, *supra* note 8, at 2348–56; Michelle Onello, *Supreme Court Decision on Reckless Speech Will Cost Victims of Stalking and Harassment*, MS. MAGAZINE (June 29, 2023), <https://msmagazine.com/2023/06/29/supreme-court-online-stalking-harassment-women-free-speech-counterman-v-colorado/> [https://perma.cc/EYM2-TLWN].

49. 538 U.S. 343 (2003).

50. *Id.* at 347–48.

51. 562 U.S. 443 (2011).

52. *Id.* at 458.

53. 395 U.S. 444 (1969) (per curiam).

protected speech versus speech that would lead to “imminent lawless action.”⁵⁴ 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.⁵⁵ Early reaction to the Supreme Court’s recent decision in *Counterman v. Colorado*,⁵⁶ which defined a true threat as that which the speaker is reckless in not recognizing as threatening,⁵⁷ continues this line of criticism.

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.⁵⁸ 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 hate speech.⁵⁹ Finding the existing justifications to

54. *Id.* at 447–49.

55. *See, e.g.,* Matsuda, *supra* note 8, at 2336–39. 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 (2018).

56. 143 S. Ct. 2106 (2023).

57. *Id.* at 2113. 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.,* Linah Mohammad, Patrick Jarenwattananon & Ari Shapiro, *Supreme Court Sets New Standards for What Constitutes “True Threats,”* NPR (June 27, 2023, 4:28 PM), <https://www.npr.org/2023/06/27/1184655817/supreme-court-sets-new-standards-for-what-constitutes-true-threats> [<https://perma.cc/P3W7-Y3PV>] (interviewing Professor Mary Anne Franks regarding implications of the *Counterman* decision on victims of stalking and intimate-partner violence).

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

59. 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, first, determining whether those who ratified the First Amendment all coalesced around a common understanding of values and, second, 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 Article, 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

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*.⁶⁰ 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.⁶¹ As Greenawalt rightly points out, no constitutional principle is served by a singular value, but rather a plurality of norms.⁶² I summarize those norms here.

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

Professor Richard Epstein describes Alexander Meiklejohn as “the father of modern [F]irst [A]mendment theory.”⁶³ 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.⁶⁴ Its purpose, he believed, is to enable more robust education of the electorate, who in turn participate in democracy in a more informed way.⁶⁵ This furthers the constitutional goal of a healthy democracy.⁶⁶ In turn, efforts by the government to limit speech that is central to democratic participation undermine the political function of the First Amendment and therefore, in Meiklejohn's view, violate the constitutional free speech guarantee.⁶⁷

jurisprudence. Another benefit is investing the polity in the principle of the First Amendment so that even controversial decisions are more widely embraced.

60. Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 119 (1989).

61. *Id.* at 127.

62. *Id.* at 119–20.

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

64. Joseph Russomanno, *The “Central Meaning” and Path Dependence: The Madison-Meiklejohn-Brennan Nexus*, 20 COMM'N. L. & POL'Y J. 117, 129 (2015).

65. *Id.*

66. *Id.*

67. *Id.*

To Meiklejohn, the ultimate goal of the First Amendment is “the voting of wise decisions.”⁶⁸ This theory gained traction in some of the Supreme Court’s early First Amendment cases, particularly those authored by Justice Brennan.⁶⁹ 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.⁷⁰

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.⁷¹ 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.

1. Justice Brandeis’s 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*.⁷² 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.⁷³

68. ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 26 (1960).

69. Russomanno, *supra* note 64, at 129.

70. See Joseph Blocher, *supra* note 17, at 830–31 (2008) (identifying the marketplace of ideas as the dominant free speech metaphor).

71. Emerson, *supra* note 43, at 881; Redish, *supra* note 43, at 593–94.

72. 277 U.S. 438, 478–79 (1928) (Brandeis, J., dissenting).

73. *Id.* at 478.

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.⁷⁴

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.⁷⁵ 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.”⁷⁶

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 are less likely to engage with government in productive ways.⁷⁷ 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.⁷⁸ In this way, Emerson viewed First Amendment freedoms as a prophylactic against radicalization and political violence.⁷⁹

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

74. Rogers M. Smith, *The Constitution and Autonomy*, 60 TEX. L. REV. 175, 184 (1982).

75. See Emerson, *supra* note 43, at 881; Redish, *supra* note 43, at 593–94.

76. Emerson, *supra* note 43, at 881.

77. *Id.* at 884–85.

78. *Id.*

79. *Id.* at 885 (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”).

“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.⁸⁰

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.”⁸¹

3. Modern Case Law Examples

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*,⁸² 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.⁸³ He observed, idealistically, that “[t]he right to think is the beginning of freedom.”⁸⁴

This echoed principles initially espoused in *Stanley v. Georgia*,⁸⁵ which recognized the constitutional right to possess even illegal expressive material in the privacy of one’s own home.⁸⁶ 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.⁸⁷

80. Redish, *supra* note 43, at 593–94.

81. *Id.* at 604.

82. 535 U.S. 234 (2002).

83. *Id.* at 253.

84. *Id.*

85. 394 U.S. 557 (1969).

86. *Id.* at 568.

87. *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.

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.⁸⁸ 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 a free and open encounter?”⁸⁹ Two centuries later, politician and economist John Stuart Mill seized on this theme in his famous treatise *On Liberty*.⁹⁰ 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.”⁹¹

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.⁹² 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.⁹³

2. Holmes’s 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:

88. Jared Schroeder, *Information, Community, and Change: A Call for a Renewed Conversation About First Amendment Rationales*, 18 FIRST AMEND. L. REV. 123, 124–25 (2020).

89. JOHN MILTON, *AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING* 45 (H.B. Cotterill ed., MacMillan & Co., Ltd. 1904) (1644).

90. JOHN STUART MILL, *ON LIBERTY* 117 (John W. Parker and Son ed., 2d ed. 1859).

91. Greenawalt, *supra* note 60, at 131 (citing MILL, *supra* note 90, at 149–50).

92. See MILL, *supra* note 90, at 149–50; Blocher, *supra* note 17, at 871 (noting that Mill’s theory excluded children from the free speech marketplace).

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

[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.⁹⁴

In this passage, Justice Holmes described speech as a commodity and the First Amendment as a guarantee of free market competition.⁹⁵ Picking up on the economic themes espoused by Mill, Holmes viewed the Constitution as trusting marketplace consumers to sort out the true from the false.⁹⁶

Holmes's 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 eighty-one Supreme Court opinions, the most of any of the predominant justifications for expansive free speech protection.⁹⁷ Scholars today consider this the most widely used metaphor to describe the First Amendment.⁹⁸

3. 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.⁹⁹ 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.¹⁰⁰ And, most recently, in

94. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

95. *Id.*; see also Blocher, *supra* note 1, at 449 (describing Holmes's theory that “competition of ideas will lead to truth”).

96. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

97. As of April 2024, Westlaw search results show eighty-one Supreme Court cases using the phrase “marketplace of ideas.”

98. See Blocher, *supra* note 17, at 823–24.

99. *Matal v. Tam*, 582 U.S. 218, 249 (2017) (Kennedy, J., concurring) (“By mandating positivity, the law here might silence dissent and distort the marketplace of ideas.”).

100. *See Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2374 (2018) (“[W]hen the government polices the content of professional speech, it can fail to ‘preserve an uninhibited marketplace of ideas 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 her stated objection.¹⁰¹ 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 hate speech. This is so because following each justification to its logical end with regard to hate speech 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.¹⁰² In general, these historical paradigms are largely grounded in ideas and lack empirical or scientific support.¹⁰³ 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.¹⁰⁴ 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.¹⁰⁵

which truth will ultimately prevail.”) (quoting *McCullen v. Coakley*, 573 U.S. 464, 476 (2014)).

101. See 303 Creative, LLC v. Elenis, 143 S. Ct. 2298, 2311 (2023) (“For these reasons, ‘[i]f 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.’”) (quoting *W. Va. State Bd. of Ed., v. Barnette*, 319 U.S. 624, 642 (1943) and *McCullen*, 573 U.S. at 476).
102. See Greenawalt, *supra* note 60, at 154–55.
103. See, e.g., Daniel E. Ho & Frederick Schauer, *Testing the Marketplace of Ideas*, 90 N.Y.U. L. REV. 1160, 1162–63 (2015) (reporting results of empirical analysis from two time, place, and manner restrictions on expression that suggest that the marketplace of ideas theory is a fallacy); Tim Wu, *Disinformation in the Marketplace of Ideas*, 51 SETON HALL L. REV. 169, 170 (2020) (criticizing the distorting impacts of the marketplace of ideas rationale, which allows for disinformation with corrective measures).
104. See Greenawalt, *supra* note 60, at 136–38.
105. A full examination of each theory relative to what is known about social science is outside the scope of this Article. However, other scholars, either expressly or indirectly, have sought to question the validity of each justification. See, e.g., Ho & Schauer, *supra* note 103, at 1221–23 (analyzing results of the authors’ empirical studies to question the validity of the marketplace of ideas theory); Greenawalt, *supra* note 60, at 132–38 (questioning validity of truth-seeking function of First Amendment from

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 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 because hate speech necessarily disadvantages the political participation of those falling in the targeted minority groups.¹⁰⁶ 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.¹⁰⁷ This justification thus fails to provide a comprehensive theory that explains why the First Amendment embraces hate speech as a normatively permissible 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.¹⁰⁸ Child pornography, for example, is excluded from First

a theoretical perspective); Blocher, *supra* note 1, at 451–59 (outlining standard internal and external critiques of marketplace of ideas rationale from a theoretical rather than empirical lens).

106. Mark A. Graber, *Old Wine in New Bottles: The Constitutional Status of Unconstitutional Speech*, 48 VAND. L. REV. 349, 385–86 (1995).

107. *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 protect. *Id.* at 362–63. 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, 362–63, 367–68.

108. *See, e.g.*, Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435, 1454–56 (2015) (discussing ways in which lies can be harmful and how harm impacts First Amendment protection of low-value speech).

Amendment coverage because its creation and circulation impart harm to the children whose images are contained in the depictions.¹⁰⁹ Libel, slander, and defamation are unprotected because they damage the reputation of another.¹¹⁰ And true threats of violence are not deserving of protection because a reasonable listener will objectively feel afraid in hearing them.¹¹¹

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.¹¹² Harm to others does count in the calculus at some First Amendment inflection points.¹¹³ 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.

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.¹¹⁴ 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

109. *See* *New York v. Ferber*, 458 U.S. 747, 758–59 (1982) (“[T]he use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. . . . [T]he materials produced are a permanent record of the children’s participation and the harm to the child is exacerbated by their circulation.”).

110. *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.”).

111. *See* *Counterman v. Colorado*, 143 S. Ct. 2106, 2114 (2023) (“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.’”) (quoting *Black*, 538 U.S. at 360).

112. Obscenity doctrine is yet another place where harm has factored into the categorization of speech as constitutionally unprotected. *See generally, 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).

113. *See, e.g.*, *Ferber*, 458 U.S. at 758–59; *Counterman*, 143 S. Ct. at 2117–18; *Gertz*, 418 U.S. at 341.

114. *See, e.g.*, Wu, *supra* note 103, at 169.

ultimate truth-seeking objective.¹¹⁵ To the extent truth is something that can be discovered, scholars have also expressed skepticism at the role speech plays in truth seeking.¹¹⁶ 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.¹¹⁷

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.¹¹⁸ 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.¹¹⁹ 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.¹²⁰ In other words, that idea is known to be untrue.¹²¹ 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 protection?¹²² 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

115. *See, e.g.*, Greenawalt, *supra* note 60, at 131 (indicating that the fallacy of objective truth is a basis upon which the marketplace of ideas rationale has been criticized).

116. *Id.* at 138–40.

117. *Id.*

118. *See* Ho & Schauer, *supra* note 103, at 1162–63.

119. *See, e.g.*, Marshall W. Van Alstyne, Free Speech, Platforms, and the Fake News Problem 1, 4 (Jan. 28, 2023) (unpublished manuscript), <https://ssrn.com/abstract=3997980> [<https://perma.cc/S2EW-W67G>].

120. Graber, *supra* note 106, at 376–77 (citing Matsuda, *supra* note 8, at 2360).

121. *Id.*

122. *Id.*

given time, an amount so large no one person could sort through them all.¹²³ With regard to news outlets, information is now more concentrated in online media platforms rather than traditional print media.¹²⁴ 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.¹²⁵ 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.¹²⁶ 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 inability 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, which 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 speakers in a way that informs the status of First Amendment jurisprudence.¹²⁷

123. Kathy Haan, *Top Website Statistics for 2023*, FORBES (Feb. 14, 2023, 12:31 PM), <https://www.forbes.com/advisor/business/software/website-statistics/> [<https://perma.cc/7NP6-HY5V>].

124. See DAVID ARDIA, EVAN RINGEL, VICTORIA SMITH EKSTRAND & ASHLEY FOX, UNIV. N.C. CTR. FOR MEDIA L. & POL'Y, ADDRESSING THE DECLINE OF LOCAL NEWS, RISE OF PLATFORMS, AND SPREAD OF MIS- AND DISINFORMATION ONLINE: A SUMMARY OF CURRENT RESEARCH AND POLICY PROPOSALS (2020), <http://dx.doi.org/10.2139/ssrn.3765576> [<https://perma.cc/7A8F-WBEY>].

125. *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).

126. See Greenawalt, *supra* note 60, at 139.

127. 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

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.¹²⁸ 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.¹²⁹ 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 sex,¹³⁰ toys,¹³¹ sweet foods like cookies and desserts,¹³² and music records.¹³³

From the outset, Brehm's postulate embodied the same explicit normative assumptions about freedom as Emerson and Meiklejohn: "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."¹³⁴ 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.¹³⁵ He thus dismissed the psychological relevance of the incongruence

by empirical data and actual scientific evidence. This is the case with both psychological reactance theory and scarcity theory. *See generally* BREHM, PSYCHOLOGICAL REACTANCE, *supra* note 20; MULLAINATHAN & SHAFIR, *supra* note 21.

128. *See* BREHM, PSYCHOLOGICAL REACTANCE, *supra* note 20, at 4, 10; BREHM & BREHM, FREEDOM AND CONTROL, *supra* note 20, at 3–12.

129. BREHM, PSYCHOLOGICAL REACTANCE, *supra* note 20, at 4.

130. *See* James W. Pennebaker et al., *Don't the Girls Get Prettier at Closing Time: A Country and Western Application to Psychology*, 5 PERSONALITY & SOC. PSYCH. BULL. 122, 123–24 (1979).

131. *See* Thomas Hammock & Jack W. Brehm, *The Attractiveness of Choice Alternatives When Freedom to Choose Is Eliminated by Social Agent*, 34 J. PERSONALITY 546, 547–48, 551, 553 (1966).

132. *See* Jack W. Brehm & Elena Rozen, *Attractiveness of Old Alternatives When a New, Attractive Alternative Is Introduced*, 20 J. PERSONALITY & SOC. PSYCH. 261, 263–66 (1971); Stephen Worchel, Jerry Lee & Akanbi Adewole, *Effects of Supply and Demand on Ratings of Object Value*, 32 J. PERSONALITY AND SOC. PSYCH. 906 (1975).

133. BREHM, PSYCHOLOGICAL REACTANCE, *supra* note 20, at 20–28.

134. BREHM & BREHM, FREEDOM AND CONTROL, *supra* note 20, at 2.

135. BREHM, PSYCHOLOGICAL REACTANCE, *supra* note 20, at 1, 3–4.

between actual and relative freedom.¹³⁶ 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.¹³⁷ Based on its subjective qualities, Brehm and Brehm later came to define freedom as an expectancy.¹³⁸

Brehm also postulated that the degree of reactance a person experiences will fluctuate based on the need the threatened freedom fills.¹³⁹ The greater the importance of the freedom to the person, the greater the degree of reactance he will experience when the freedom is threatened.¹⁴⁰ 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.¹⁴¹

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.¹⁴² Because freedom is inherently subjective, the freedom does not have to objectively exist in order to trigger a reactance response.¹⁴³ Rather, people need only to be subjectively aware of the freedom and feel capable of exercising it.¹⁴⁴

136. *Id.* at 4.

137. *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.*

138. BREHM & BREHM, FREEDOM AND CONTROL, *supra* note 20, at 5.

139. BREHM, PSYCHOLOGICAL REACTANCE, *supra* note 20, at 4–5.

140. BREHM & BREHM, FREEDOM AND CONTROL, *supra* note 20, at 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 Part III. *See infra* Part III.

141. BREHM & BREHM, FREEDOM AND CONTROL, *supra* note 20, at 38–39.

142. Rosenberg & Siegel, *supra* note 35, at 282.

143. *Id.* (citing BREHM & BREHM, FREEDOM AND CONTROL, *supra* note 20, at 5).

144. *Id.*

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

The second stage of psychological reactance theory is the elimination of or a threat to freedom.¹⁴⁵ This stage can take various forms. An outright ban on a particular freedom constitutes a form of freedom elimination sufficient to trigger reactance.¹⁴⁶ In addition, anything that impedes, but does not entirely eliminate, the freedom constitutes a threat to freedom as well.¹⁴⁷ In this context, Brehm and Brehm identified the “passage of restrictive laws” as one type of threat to freedom that would trigger reactance.¹⁴⁸

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.¹⁴⁹ 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.¹⁵⁰

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.¹⁵¹

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.¹⁵² The degree of reactance is determined by two factors: (1) the characteristics of the freedom, and (2) the nature of the threat.¹⁵³ With regard to the freedom, Brehm hypothesized that reactance would be stronger when the freedom uniquely fills a need.¹⁵⁴

145. *Id.*

146. *Id.* (citing Michael B. Mazis, Robert B. Settle & Dennis C. Leslie, *Elimination of Phosphate Detergents and Psychological Reactance*, 10 J. MKTG. RSCH. 390 (1973)).

147. *Id.* (citing BREHM, PSYCHOLOGICAL REACTANCE, *supra* note 20, at 14 (identifying attempted social influence as a form of threat to freedom)).

148. BREHM & BREHM, FREEDOM AND CONTROL, *supra* note 20, at 31.

149. *Id.* at 33.

150. *See id.* at 151–60.

151. Rosenberg & Siegel, *supra* note 35, at 282 (citing Lila Krishnan & David William Carment, *Reactions to Help: Reciprocity, Responsibility and Reactance*, 9 EUR. J. SOC. PSYCH. 435, 435–38 (1979)).

152. *Id.*

153. *Id.*

154. *Id.* (citing BREHM, PSYCHOLOGICAL REACTANCE, *supra* note 20, at 4–5).

With regard to the threat, both the intensity and motivation of the threat impact reactance.¹⁵⁵ There is a proportional relationship between intensity and reactance, such that a more intense threat will produce a heightened reactance response.¹⁵⁶ Moreover, when people perceive that the person making the threat is trying to influence them, they will respond with greater reactance as well.¹⁵⁷

Threats do not need to be directly targeted at a person to arouse reactance.¹⁵⁸ 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 conversation topic because they anticipated losing their own freedom to choose a topic in the future.¹⁵⁹

A person's competence in a particular subject area may also influence threat perception.¹⁶⁰ For example, in one study, women were less susceptible to threats about bread prices at the grocery store than men.¹⁶¹ 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.¹⁶²

d. Stage Four: Restoration of Freedom

At stage four, in response to reactance, people whose freedom is threatened exhibit behavioral and attitudinal responses.¹⁶³ In the behavioral context, people tend to seek to engage in the restricted behavior to a greater degree.¹⁶⁴ Reactance can produce antisocial or

155. *Id.* at 282–83 (citing BREHM, PSYCHOLOGICAL REACTANCE, *supra* note 20, at 6).

156. *Id.* (citing Madeline E. Heilman, *Oppositional Behavior as a Function of Influence Attempt Intensity and Retaliation Threat*, 33 J. PERSONALITY & SOC. PSYCH. 574, 574, 577 (1976)).

157. *Id.* at 283 (citing BREHM, PSYCHOLOGICAL REACTANCE, *supra* note 20, at 94); Heller et al., *supra* note 36, at 278.

158. *Id.* (citing BREHM, PSYCHOLOGICAL REACTANCE, *supra* note 20, at 7).

159. *Id.* (citing Virginia A. Andreoli, Stephen Worchel & Robert Folger, *Implied Threat to Behavioral Freedom*, 30 J. PERSONALITY & SOC. PSYCH. 765, 766 (1974)).

160. BREHM & BREHM, FREEDOM AND CONTROL, *supra* note 20, at 20–21.

161. *Id.* at 17–18.

162. *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.

163. Rosenberg & Siegel, *supra* note 35, at 283 (citing BREHM & BREHM, FREEDOM AND CONTROL, *supra* note 20, at 99).

164. *Id.* This phenomenon does not occur, however, when people believe the freedom is irrevocably lost. *See* BREHM & BREHM, FREEDOM AND CONTROL, *supra* note 20, at 99. Such instances instead produce what is

uncivil behavior as individuals work to restore freedoms that they perceive they have lost.¹⁶⁵ People also tend to deny their reactance when confronted.¹⁶⁶ Alongside reactance, those who experience threats to their freedom may also manifest accentuated anger towards the source of the threat.¹⁶⁷

A good example of this phenomenon occurred when the drinking age was raised from eighteen to twenty-one.¹⁶⁸ 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 thirty years prior to the change, older adult students had engaged in more drinking.¹⁶⁹

In addition to seeking to exercise the freedom behaviorally, reactance also changes a person's attitudes and beliefs.¹⁷⁰ They come to view the freedom with greater attractiveness and may also seek to derogate or show hostility towards the source of the threat.¹⁷¹ Opinion entrenchment, or what Brehm described as "boomerang attitude change," is therefore a key manifestation of reactance.¹⁷²

Attempts to restore freedom can be limited by external factors such as cost, punishment, and harm to third parties.¹⁷³ In addition, where there are alternative methods available for restoring freedom,

known as learned "helplessness." In these situations, individuals do not seek to restore the freedom but instead behave in accordance with the restriction of the freedom. *Id.*

165. BREHM, PSYCHOLOGICAL REACTANCE, *supra* note 20, at 9–10.

166. *Id.* at 9.

167. Golnoosh Behrouzian, Erik C. Nisbet, Aysenur Dal & Ali Çarkoğlu, *Resisting Censorship: How Citizens Navigate Closed Media Environments*, 10 INT'L J. COMM'N 4345, 4347 (2016) (citing James Price Dillard & Lijiang Shen, *On the Nature of Reactance and Its Role in Persuasive Health Communication*, 72 COMM'N MONOGRAPHS 144 (2005); Thomas H. Brandon, *Negative Affect as Motivation to Smoke*, 3 CURRENT DIRECTIONS PSYCH. SCI. 33 (1994))

168. Rosenberg & Siegel, *supra* note 35, at 283.

169. *Id.* (citing Ruth Engs & David J. Hanson, *Reactance Theory: A Test with Collegiate Drinking*, 64 PSYCH. REPS. 1083 (1989)).

170. *See id.*

171. *Id.* (citing Brehm & Rozen, *supra* note 132; Jack W. Brehm, Lloyd K. Stires, John Sensenig & Janet Shaban, *The Attractiveness of an Eliminated Choice Alternative*, 2 J. EXPERIMENTAL SOC. PSYCH. 301 (1966)).

172. BREHM, PSYCHOLOGICAL REACTANCE, *supra* note 20, at 95.

173. BREHM & BREHM, FREEDOM AND CONTROL, *supra* note 20, at 99.

individuals tend to select the method with the greatest ease and likelihood of success.¹⁷⁴

2. The Boomerang Effect

The hallmark of psychological reactance is what Brehm described as a “boomerang” effect.¹⁷⁵ This data represents the empirical proof of the phenomenon of psychological reactance.¹⁷⁶ 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.¹⁷⁷

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.”¹⁷⁸

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.¹⁷⁹ In a study published in *Current Psychology*, 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.¹⁸⁰ The study hypothesized that those of Iranian cultural backgrounds would experience heightened reactance compared to those from European and East Asian 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.¹⁸¹ Data collected from the study confirmed the hypothesis.¹⁸² 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.¹⁸³ However, when faced with a

174. *See id.*

175. BREHM, PSYCHOLOGICAL REACTANCE, *supra* note 20, at 95.

176. BREHM & BREHM, FREEDOM AND CONTROL, *supra* note 20, at 38.

177. *Id.* at 60–61.

178. *Id.* at 108.

179. Andy H. Ng, Mohammad S. Kermani & Richard N. Lalonde, *Cultural Differences in Psychological Reactance: Responding to Social Media Censorship*, 40 CURRENT PSYCH. 2804, 2809 (2021).

180. *Id.* at 2806–07.

181. *Id.* at 2806.

182. *Id.* at 2807.

183. *Id.*

similar threat from a low-power authority (i.e., students) all three groups experienced similarly reduced reactance.¹⁸⁴

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.¹⁸⁵ 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.¹⁸⁶ 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.¹⁸⁷

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 tunneling effect, or a singular focus on the unfilled need, that limits cognitive bandwidth.¹⁸⁸ The theory originated as an offshoot of starvation experiments conducted during World War II.¹⁸⁹ 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.¹⁹⁰ While the initial goal of the project was physiological, researchers maintained a significant volume of psychological data that informs modern understanding of scarcity.¹⁹¹

Not surprisingly, participants in the study experienced what Mullainathan and Shafir label a tunneling effect, meaning that their mental focus sharpened on anything having to do with food.¹⁹² When shown a movie for entertainment, for example, they ignored the

184. *Id.* at 2807–08.

185. *See id.* at 2809.

186. *See id.*

187. *See id.*

188. MULLAINATHAN & SHAFIR, *supra* note 21, at 13, 29.

189. SHARMAN APT RUSSELL, HUNGER: AN UNNATURAL HISTORY 113–14 (2005).

190. *Id.* at 114.

191. MULLAINATHAN & SHAFIR, *supra* note 21, at 7.

192. *Id.* at 6–7, 29.

romance scenes and focused exclusively on what the couple was eating for dinner.¹⁹³ They spent hours comparing newspaper ads containing the prices of fruits and vegetables.¹⁹⁴ “They dreamed of new careers as restaurant owners” and lost their will for other academic interests.¹⁹⁵ Quite simply, they began “constantly thinking of food.”¹⁹⁶

Mullainathan and Shafir describe this tunneling effect as the single-minded focus on managing the scarcity at hand.¹⁹⁷ It leads those in its grip to ignore needs and tasks falling outside of the mental tunnel.¹⁹⁸ 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.”¹⁹⁹ 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.”²⁰⁰

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.²⁰¹ 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.²⁰² 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.²⁰³ Next, participants were told their car broke down and needed a significant repair totaling \$1,500, something only the rich people would find manageable.²⁰⁴ Under these circumstances, the rich people did equally well on the IQ tests under either scenario.²⁰⁵ But the poor people performed much less well when told they would need to pay \$1,500 to repair their cars.²⁰⁶ In other words, their scarcity of financial resources

193. *Id.* at 6–7 (citing RUSSELL, *supra* note 189, at 127).

194. *Id.* at 6 (citing RUSSELL, *supra* note 189, at 118).

195. *Id.* (quoting RUSSELL, *supra* note 189, at 118, 122).

196. *Id.* at 7.

197. *Id.* at 29.

198. *Id.* at 36.

199. *Id.* at 41–42.

200. *Id.* at 47 (emphasis omitted).

201. Novotney, *supra* note 39 (interviewing Mullainathan and Shafir about their research).

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

impacted their cognitive bandwidth and reduced their intellectual performance.²⁰⁷

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.²⁰⁸ Introducing a financially taxing scenario reduced poor participants' performance by a rate of 20 percent.²⁰⁹ Similarly, a study of Indian farmers revealed that the *same farmer* performed nine to ten 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.²¹⁰ 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.²¹¹

Mullainathan and Shafir's work on the scarcity mindset focuses on three kinds of need in particular: monetary needs, time, and human companionship.²¹² 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 human connection suffer the same tunneling and diminished bandwidth impacts as people who lack money or food.²¹³ This suggests that it is not only physical needs, like water, sleep, or shelter, that trigger the scarcity mindset.²¹⁴ 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.²¹⁵

If we accept Emerson's idea that self-expression is central to self-development,²¹⁶ 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

207. *Id.*

208. MULLAINATHAN & SHAFIR, *supra* note 21, at 55–56.

209. *Id.* at 56.

210. *Id.* at 58.

211. *Id.* at 62.

212. *Id.* at 12, 13, 56, 62.

213. *Id.* at 60–62.

214. *Id.*

215. *Id.* at 12; Goldberg, *supra* note 4, at 354–56 (analyzing the complexity of addressing nonphysical harms for First Amendment claims).

216. *See* Emerson, *supra* note 71, at 879–81.

other thoughts. Censorship, 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 a 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.²¹⁷ 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.²¹⁸ In a courtroom, jurors likely feel that the ability to process evidence is within their control and, thus, a free behavior.²¹⁹ As Lieberman and Arndt posit, jurors will respond with

217. Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCH. PUB. POL'Y & L. 677, 693–95 (2000).

218. *Id.* at 694.

219. *Id.*

reactance when judges attempt to limit that freedom by admonishing them to disregard or discount certain evidence.²²⁰

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.²²¹ 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.²²² As a result, researchers recommend that lawyers temper their objections to avoid triggering reactance responses in the jury.²²³

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*,²²⁴ the Tennessee Criminal Court of Appeals discussed the reasons why defense attorneys may not always object to evidence or arguments they view as damaging.²²⁵ In the court's view, doing so could risk emphasizing the harmful nature of the evidence to the jury.²²⁶ 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.²²⁷ 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

220. *Id.* at 694–95.

221. 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. PSYCH. 205, 216–18 (1977).

222. *Id.*

223. See, e.g., Krystia Reed & Brian H. Bornstein, *Objection! Psychological Perspectives on Jurors' Perceptions of In-Court Attorney Objections*, 63 S.D. L. REV. 1, 36–37 (2018).

224. No. W2008-02784-CCA-R3-PC, 2010 WL 161493 (Tenn. Crim. App. Jan. 15, 2010).

225. *Id.* at *15 (“[A]ttorneys may often choose not to object to damaging evidence for strategic reasons, such as to ‘avoid emphasizing [the unfavorable evidence] to the jury.’”) (quoting *Lance v. State*, No. M2005-01765-CCA-R3-PC, 2006 WL 2380619, at *6 (Tenn. Crim. App. Aug. 16, 2006)).

226. *Id.*

227. *Id.*

discussing the role of reactance in influencing public opinion, Professor Cass Sunstein and Meirav Furth-Matzkin, 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.²²⁸ Their study 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.²²⁹ But where the person is questioned regarding an issue about which the person has a deeply held belief, exposure to contrary public opinion will cause reactance and therefore be counterproductive.²³⁰ In other words, reactance may contribute to polarity in public opinion.²³¹

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*.²³² 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.²³³ Like Sunstein, Winnick confined his discussion of psychological reactance theory to the theoretical, rather than the doctrinal or substantive dimensions of law.

3. 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.²³⁴ These cases, however, do not debunk reactance or otherwise express doubt about its validity.²³⁵

Scarcity theory, on the other hand, has been cited by at least one court to justify vacating its previous rent arrearage order against a

228. See generally Furth-Matzkin & Sunstein, *supra* note 42.

229. *Id.* at 1376–77.

230. *Id.* at 1377.

231. *Id.* at 1378–79.

232. See generally Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705 (1992).

233. *Id.* at 1767–68.

234. See *Carty v. Metro. Life Ins. Co.*, 224 F. Supp. 3d 606, 613 (M.D. Tenn. 2016) (citing a mental health professional's treatment notes); *In re Dillon M.*, Nos. M08CP05009713A, M08CP05009714A, 2007 WL 4239444, at *10–11 (Conn. Super. Ct. Sept. 20, 2007) (citing an evaluator's report).

235. See *Carty*, 224 F. Supp. 3d at 613; *In re Dillon M.*, 2007 WL 4239444, at *10–11.

seventy-two-year-old man who suffered from various health problems and was unaware of the court proceedings.²³⁶ 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.²³⁷ The court's reliance upon Mullainathan and Shafir's work constitutes an implicit recognition of the tunneling effect where legal expectations may not match a person's cognitive reality.²³⁸ This untapped area is therefore ripe for further exploration by the courts.²³⁹

*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 on the speech being silenced, the greater degree of reactance the speaker will experience.²⁴⁰ 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.²⁴¹ Thus, a speaker will experience the impacts of scarcity when she feels a need to speak out on a subject, but cannot.²⁴² The loss of the ability to speak is thus at the beginning of both the desire to restore freedom and the tunneling 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

236. *See* *Elliot Place Props., Inc. v. Perez*, No. 33324/2016, 2016 WL 6641065, at *3–4, *5 & n.3 (N.Y. Civ. Ct. Nov. 10, 2016).

237. *Id.* at *5 n.3, *7.

238. *Id.* at *5 n.3 (citing MULLAINATHAN & SHAFIR, *supra* note 21, at 83–84).

239. 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.

240. BREHM, PSYCHOLOGICAL REACTANCE, *supra* note 20, at 4–5, 95–97.

241. MULLAINATHAN & SHAFIR, *supra* note 21, at 10–13.

242. *See id.*

counterproductive can help explain why the First Amendment protects as much harmful speech as it does.

1. Individual Harms

a. Intellectual Reduction

When 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 grounded in Mullainathan and 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.²⁴³ 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),²⁴⁴ then individuals who 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 tunneling effect that occurs when an individual tends to focus on an unmet need.²⁴⁵ 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.²⁴⁶ 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.²⁴⁷ 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 empirical data about human behavior, whereas Emerson and Redish dwelled more in the philosophical.²⁴⁸ For another thing, scarcity theory begins at a

243. *Id.* at 47–52.

244. *See, e.g.*, Joyce Thomas & Deana McDonagh, *Shared Language: Towards More Effective Communication*, 6 AUSTRALASIAN MED. J. 46, 46 (2013) (identifying the ability to communicate and express ourselves as a basic human need).

245. MULLAINATHAN & SHAFIR, *supra* note 21, at 26–29.

246. *See Stanley v. Georgia*, 394 U.S. 557, 564 (1969). The First Amendment also protects the right to receive information, not just the right to communicate it outwardly. *Id.* (“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.”) (citation omitted).

247. *See supra* Part I.B.2 (describing self-actualization justification for First Amendment norms).

248. *See supra* Parts I.B.2 and II.B (describing Emerson and Redish's theory of self-actualization and the empirics of scarcity respectively).

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.²⁴⁹ 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.

b. Bandwidth Limitations

In addition to reduced intellectual capacity, individuals in positions of scarcity also experience limitations on their cognitive bandwidth.²⁵⁰ In this state, people are less able to consider the impact of outside information and are less self-sufficient at problem-solving.²⁵¹ The speech-related impacts on the individual of this phenomenon are rather obvious. As a censored speaker tunnels and focuses heavily on the unmet need to communicate, the speaker will operate at a lower IQ, make mistakes on executive tasks, and fail to integrate information falling outside the mental tunnel into his viewpoint.²⁵²

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.²⁵³ 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.²⁵⁴ In other words, one documented response to censorship results in reactance-motivated efforts to engage in and with the censored speech.²⁵⁵

A recent study of media consumers in Turkey, Iran, and the United States specifically confirmed this conclusion for the latter two countries.²⁵⁶ Citizens there report experiencing reactance when they

249. See MULLAINATHAN & SHAFIR, *supra* note 21, at 4–10.

250. See *id.* at 47.

251. *Id.*

252. *Id.* at 52–56.

253. See Golnoosh Behrouzian, *From Reactance to Political Belief Accuracy: Evaluating Citizens' Response to Media Censorship and Bias 4* (2018) (Ph.D. dissertation, The Ohio State University), https://etd.ohiolink.edu/acprod/odb_etd/etd/r/1501/10?clear=10&p10_accession_num=osu1523974517249645 [<https://perma.cc/WM8X-287R>].

254. *Id.* at 58–60, 69–70.

255. *Id.* at 58–59, 69–70, 75.

256. *Id.* at 69–74.

perceive that mass-media censorship has occurred and turning to less accurate internet sources in that circumstance.²⁵⁷ 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.²⁵⁸ 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.²⁵⁹ When individuals' ability to freely speak is challenged, they tend to respond with anger towards the source of the threat by deepening their emotional connection to the suppressed freedom.²⁶⁰ 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 that freedom.²⁶¹ 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.²⁶² 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 for securing other rights make threats to free speech more psychologically damaging.²⁶³ Studies reveal a direct correlation between

257. *Id.* at 72–74.

258. *Id.* at 73–74.

259. BREHM & BREHM, FREEDOM AND CONTROL, *supra* note 20, at 91–97.

260. *Id.* at 96–97.

261. BREHM, PSYCHOLOGICAL REACTANCE, *supra* note 20, at 2; Rosenberg & Siegel, *supra* note 35, at 282–83.

262. *See* Behrouzian, *supra* note 253, at 4.

263. *See, e.g.*, Marc O. DeGirolami, *Virtue, Freedom, and the First Amendment*, 91 NOTRE DAME L. REV. 1465, 1470–74 (2016) (describing the nature of the First Amendment).

the value of the freedom and the intensity of the reactance.²⁶⁴ 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.²⁶⁵ The fact that the government retains significant power with regard to regulating the channels of free speech makes 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.²⁶⁶ As a result, those with reduced perceptions of freedom are less prone to experience reactance and less prone to engage in boomerang effect behaviors.²⁶⁷ With regard to the freedom of speech, this means that people adjust to censorship over time and limit their expectations accordingly.²⁶⁸ Citizens of countries where free speech rights are highly circumscribed may experience, over a prolonged period of time, less, not more, reactance in the face of additional governmental censorship.²⁶⁹ 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.²⁷⁰ As such, further restrictions on the publication of the Nazi swastika in Germany are unlikely to inspire individual reactance or lead to a collective boomerang effect. On the other hand, as the Canadian communication study demonstrates, threats to perceived

264. Rosenberg & Siegal, *supra* note 35, at 284.

265. BREHM & BREHM, FREEDOM AND CONTROL, *supra* note 20, at 33.

266. Rosenberg & Siegal, *supra* note 142, at 281–82, 284.

267. *Id.* at 283–84, 286.

268. See Behrouzian, *supra* note 253, at 49 (describing learned helplessness as a response to prolonged threats against freedoms).

269. Nearly 80 percent of the world's population resides under regimes where access to mass media is partially or fully censored. *See id.* at 1, 34.

270. See Strafgesetzbuch [StGB] [Penal Code], §§ 86, 86a, https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0922 [<https://perma.cc/E69L-T43R>] (Ger.) (criminalizing symbols of banned organizations); *see also* BUNDESAMT FÜR VERFASSUNGSSCHUTZ, RIGHT-WING EXTREMISM: SYMBOLS, SIGNS AND BANNED ORGANISATIONS 17, 19, 80 (2022).

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.²⁷¹

With regard to the United States, studies show that Americans highly value their perceived right to free expression.²⁷² 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.”²⁷³ Given these statistics, high rates of reactance are predictable when American citizens believe the government is limiting their freedom of expression.²⁷⁴

Indeed, we need not dig too deep into the cultural lexicon to uncover examples of this type of boomeranging. 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.²⁷⁵ So too is the migration of online social media users, including some high-profile ones, to alternative platforms with fewer content restrictions.²⁷⁶ As these

271. Ng et al., *supra* note 179, at 2806–07.

272. See, e.g., JOHN P. WIHBEY & BROOKE FOUCAULT WELLES, NORTHEASTERN UNIV., HIGH SCHOOL STUDENT VIEWS ON THE FIRST AMENDMENT: TRENDS IN THE 21ST CENTURY 6, 14, 21 (2019) (reporting statistics on students’ views and perceptions of the First Amendment); *Free Speech for All? Poll Reveals Americans’ Views on Free Expression Post-2020*, KNIGHT FOUND. (Jan. 6, 2022), <https://knightfoundation.org/press/releases/free-speech-for-all-poll-reveals-americans-views-on-free-expression-post-2020/> [<https://perma.cc/CR5A-Y75J>] [hereinafter *Free Speech for All?*].

273. *Free Speech for All?*, *supra* note 272.

274. Relative to this observation, a study reported in a recent communications dissertation reveals that reactance to perceived threats of censorship causes enhanced online information seeking only in those of self-described conservative political persuasion. See Behrouzian, *supra* note 253, at 63, 73. While outside the scope of this Article, 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.* at 63–64, 73.

275. See Jennifer M. Kinsley, *Black Speech Matters*, 59 U. LOUISVILLE L. REV. 1, 8–16 (2020) (describing protests that arose across the United States in response to the murder of George Floyd).

276. Former President Donald Trump, for example, was motivated by the more speech-restrictive policies of Facebook and what was, at the time, Twitter to create his own social media platform, Truth Social. David Rosen, *Truth Social’s Censorship, Terms of Service Defy Free Speech Promises*, PUB. CITIZEN (Sept. 19, 2022), <https://www.citizen.org/news/truth-socials-censorship-terms-of-service-defy-free-speech-promises/> [<https://perma.cc>

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 tunneling. 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 tunneling.²⁷⁷ Those in a state of tunneling struggle to integrate new information or to make decisions in areas that fall outside of their mental tunnel.²⁷⁸ Censorship, therefore, creates ripple effects on the level 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 a greater emotional affinity for the censored expression in speakers and by limiting their ability to consider inputs outside the tunnel, which increases focus on the censored content.²⁷⁹ 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.²⁸⁰ This is particularly the case for those of conservative political persuasion, who

[/HS2S-TKB2]. Trump described Truth Social "as a haven for free speech where content would be only sparsely moderated." *Id.*

277. MULLAINATHAN & SHAFIR, *supra* note 21, at 29, 36, 41–42.

278. *Id.*

279. *Id.*; see also Furth-Matzkin & Sunstein, *supra* note 42, at 1351, 1377, 1379.

280. See Behrouzian et al., *supra* note 167, at 4346–47, 4349–50.

are more likely to seek inaccurate information from unvetted sources in the face of speech regulation.²⁸¹

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.

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: (1) that free speech is necessary to an informed and effective political process, (2) that free speech promotes self-actualization and personal development, and (3) 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 time,²⁸² 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.

Psychology 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.²⁸³ Scarcity theory elucidates the tunneling effect and resulting loss of intellectual capability and bandwidth a person experiences when their need for free expression goes unmet.²⁸⁴ Both

281. See Behrouzian, *supra* note 253, at 63–65.

282. See *supra* Part I.D.

283. BREHM & BREHM, FREEDOM AND CONTROL, *supra* note 20, at 37–38, 98–99.

284. MULLAINATHAN & SHAFIR, *supra* note 21, at 29, 41–42, 47.

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 the silenced expression.²⁸⁵ Rather than accepting a reduction in freedom, speakers will instead seek alternative ways to communicate, most often online.²⁸⁶ 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.²⁸⁷ 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.²⁸⁸

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

285. See BREHM & BREHM, FREEDOM AND CONTROL, *supra* note 20, at 98–99; *see also supra* Part III.

286. See Behrouzian, *supra* note 253, at 72–75.

287. See MULLAINATHAN & SHAFIR, *supra* note 21, at 41–42, 47.

288. *Id.* at 41–42, 47.