

TESTING THE LIMITS OF AUTONOMY IN FREE SPEECH: IDENTITY, HATE SPEECH, AND MISGENDERING

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I. INTRODUCTION

Free speech claims pervade almost every aspect of modern American life. From the events that define modern American history¹ to the mundane tweets of a high-school cheerleader,² the weight of the modern free-speech right is constantly called into question and underlies many controversies. While the Supreme Court may not have addressed a case focusing on a free speech claim until the beginning of the nineteenth century,³ since that time the Court has gone on to produce a comprehensive set of doctrines to understand the parameters of freedom of speech.⁴ Concurrent to this elucidation of free speech doctrine, the United States has undergone significant cultural, technological, and political change.⁵ The focus of free speech issues has shifted over time as well, from the actors concerned (moving from government to corporations)⁶ to the medium (turning from newspapers and print media to more democratized forms of mass communication, like social media).⁷ Amid all of this change, it seems necessary to determine whether existing free speech doctrine is still relevant or even appropriate.

One area of free-speech doctrine in particular needs reexamination is the treatment of hate speech.⁸ While “hate speech” has never been precisely defined by the Supreme Court, there is a general sociological understanding of what it means.⁹ But without a clear legal definition, parties are left to

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¹ Elliott C. McLaughlin, *Violence at Capitol and Beyond Reignites a Debate Over America’s Long-Held Defense of Extremist Speech*, CNN (Jan. 19, 2021), <https://www.cnn.com/2021/01/19/us/capitol-riots-speech-hate-extremist-first-amendment/index.html> [<https://perma.cc/Q7QC-RMMU>].

² See *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021) (holding that a high school infringed on a cheerleader’s free speech rights when it punished her for posting a profanity-laden caption on Snapchat).

³ *Schneck v. United States*, 239 U.S. 47, 49 (1919).

⁴ See generally Stewart Jay, *The First Amendment: The Creation of the First Amendment Right to Free Expression*, 34 WM. MITCHELL L. REV. 773 (2008).

⁵ See R. George Wright, *Freedom of Speech as a Cultural Holdover*, 40 PACE L. REV. 234 (2020).

⁶ See, e.g., Raven Smith, *On Dave Chappelle, Free Speech, and the Price of Netflix’s Trans-Indifference*, VOGUE (Oct. 20, 2021), <https://www.vogue.com/article/dave-chappelle-netflixs-trans-indifference> [<https://perma.cc/9KJH-HM2H>] (discussing Netflix’s responsibility as a private company in removing Dave Chappelle’s special “The Closer” for its transphobic content).

⁷ *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2043.

⁸ See Jean-Marie Kamatali, *“Hate Speech” in America: Is It Really Protected?*, 61 WASHBURN L.J. 163 (2021) (discussing hate speech doctrine and the role of new media in addressing hate speech).

⁹ *Id.* at 165.

litigate what qualifies as hate speech and what is merely “disrespectful, discourteous, and insulting, and used as an inartful way to express an ideological disagreement.”¹⁰ At its root, the resistance to regulate hate speech stems from the belief that the First Amendment “prevents the government from prescribing orthodoxy.”¹¹ Laws that restrict hate speech have traditionally been treated as either “content-based” or “viewpoint-based” regulations (or sometimes both) and the lawmakers drafting such laws face the difficult task of overcoming a presumption of invalidity.¹²

While “the First Amendment protects a wide array of distasteful, disturbing, defamatory or factually false, profane, ‘anti-American,’ and hateful speech,” the extent of that protection has been a constant topic of debate since the 1980s.¹³ At its core, much of the debate centers around the tension between the “liberty interest[s]” in favor of a speaker’s right to freedom of speech and the “equality, diversity, and tolerance interests” on the side of individual targets of hate speech.¹⁴ The Court has addressed hate speech in a set of foundational cases, generally favoring the speaker’s right to freedom of speech above all else.¹⁵

Hate speech exposes others to speech-related harms.¹⁶ This has been undeniable since the Court first considered whether such speech should be protected.¹⁷ Hate-speech cases have tended to focus on statutory analysis to determine whether ordinances or policies impose content or viewpoint restrictions, assessing the purpose of such speech regulations.¹⁸ By doing so, the Court has largely minimized the harms caused by hate speech to mere “abusive invective” without lasting impact.¹⁹ However, the connection between hate speech, resulting harm, and violence is continuing to come into greater focus.

There was an unprecedented increase in violence towards transgender and nonbinary people since 2020.²⁰ 2020 saw a similar increase in racially motivated hate crimes.²¹ There is a strong connection between speech that

¹⁰ Taking Offense v. State, 281 Cal. Rptr. 3d 298, 313 (Ct. App. 2021).

¹¹ S. Cagle Juhan, *Free Speech, Hate Speech, and the Hostile Speech Environment*, 98 VA. L. REV. 1577, 1578 (2012).

¹² See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (discussing that content-based regulations are “presumptively invalid”); see also *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017).

¹³ Juhan, *supra* note 11, at 1578, 1581.

¹⁴ *Id.* at 1578–79.

¹⁵ See e.g., *R.A.V.*, 505 U.S. at 377.

¹⁶ Ronald Turner, *On Free, Harmful, and Hateful Speech*, 82 TENN. L. REV. 283, 289 (2015).

¹⁷ Early cases placed a much greater emphasis on the harms caused by hateful speech, often looking at societal harms in the absence of individual harms. In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the Court affirmed the conviction of Walter Chaplinsky for “cursing” at a police officer and calling him a “damned Fascist” and “God damned racketeer.” *Id.* at 569. In affirming Chaplinsky’s conviction, the Court admonished that “the right of free speech is not absolute at all times and under all circumstances” and that certain speech is of “such slight social value . . . that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality.” *Id.* at 571–72. The Court shifted away from this early propensity to paternalistically evaluate the harms caused by certain speech to societal interests and morality over time.

¹⁸ See, e.g., *R.A.V.*, 505 U.S. at 384–91.

¹⁹ *Id.* at 391.

²⁰ Press Release, Laurel Powell, Hum. Rts. Campaign, 2021 Becomes Deadliest Year on Record for Transgender and Non-Binary People (Nov. 9, 2021), <https://www.hrc.org/press-releases/2021-becomes-deadliest-year-on-record-for-transgender-and-non-binary-people> [<https://perma.cc/SC4B-QLZG>].

²¹ *FBI Releases 2021 Hate Crime Statistics*, U.S. DEP’T OF JUST., <https://www.justice.gov/hatecrimes/hate-crime-statistics> [<https://perma.cc/C9HH-FPN4>].

stigmatizes and violence towards those individuals targeted by that speech.²² The current legal treatment of hate speech minimizes this connection between speech and harms and embodies a judicial philosophy of “sticks and stones may break my bones, but words shall never hurt me.”²³ Doing so places a greater emphasis on preserving the liberty of the speaker, and the Court has often relied on the underlying free-speech values—democracy, truth, and autonomy—as a basis for resisting regulating hate speech.²⁴

This Note offers a different approach that seeks to balance the values served by free speech against the harms caused to individual targets of hate speech. The Court frequently invokes the traditional values served by free speech when assessing free-speech claims. As such, understanding the traditional free-speech values can provide some help in navigating contemporary challenges related to hate speech. While each of the “core” free-speech values can assist in different ways, this Note will focus primarily on the value of autonomy. Autonomy is frequently invoked by those who use hate speech as a shield for their speech,²⁵ and hate-speech doctrine has traditionally favored the autonomy interests of speakers over the autonomy interests of listeners.²⁶ However, accounting for the competing autonomy claims of target-listeners as well as the effect of the speaker’s speech on the listener’s subsequent speech creates a fuller understanding of the impact of such speech on all parties.

This Note develops an autonomy-centric framework derived from an understanding of the relationship between an individual’s identity and speech as a means for evaluating free-speech claims.²⁷ This Note focuses on reconciling claims involving competing claims of autonomy that are rooted in conflicting social identities.²⁸ Beginning with a brief survey of the three dominant values—truth, democracy, and autonomy—will provide a foundation for understanding how these values are applied in free-speech cases.²⁹ While other values have been invoked to understand free speech, such as dignity³⁰ or tolerance,³¹ none have achieved the same status in free-

²² See Mark Lee, *Dismantling a Culture of Violence: Understanding Anti-Transgender Violence and Ending the Crisis*, HUM. RTS. CAMPAIGN (Dec. 2020), <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/files/assets/resources/Dismantling-a-Culture-of-Violence-010721.pdf> [<https://perma.cc/2QZM-3R9X>].

²³ See, e.g., *R.A.V.*, 505 U.S. at 396 (discussing that burning a cross in a Black family’s yard is “reprehensible” but protected by the First Amendment).

²⁴ *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (“Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’” (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting))).

²⁵ E.g., Dennis Baron, *The Right’s New Slogan: My Free Speech, Not Yours*, WEB OF LANGUAGE, (Mar. 30, 2021, 11:00 AM), <https://blogs.illinois.edu/view/25/113415650> [<https://perma.cc/NU39-GXQ6>].

²⁶ See, e.g., *R.A.V.*, 505 U.S. at 391.

²⁷ See *infra* Section III.A.

²⁸ See *infra* Section IV.A.

²⁹ These three values have been consistently identified as the three basic free speech values. See generally Thomas I. Emerson, *The System of Freedom of Expression* 6–7 (1970); Frederick Schauer, *Free Speech: A Philosophical Enquiry* (1982); Mark v. Tushnet, Alan K. Chen & Joseph Blocher, *Free Speech Beyond Words: The Surprising Reach of the First Amendment* (2017); Kent Greenawalt, *Free Speech Justifications*, 89 Colum. L. Rev. 119 (1989); Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. Ill. L. Rev. 1015 (2015).

³⁰ See, e.g., Steven J. Heyman, *Free Speech and Human Dignity* (2008).

³¹ See, e.g., Lee C. Bollinger, *The Tolerant Society* (1986).

speech theory as these three values.³² The third part of this Note provides a working definition of autonomy that situates the role of speech in identity development. The fourth part continues to examine the role of others in identity development, specifically looking at social-identity development. In the fifth part, this Note discusses one of the ways autonomy interests should be limited as relates to hate speech and will examine how misgendering—the “assignment of a gender with which a party does not identify”³³—should be considered a form of hate speech. The final part of this Note examines the intersection of autonomy, identity, and speech using a case recently decided in the Sixth Circuit Court of Appeals that is centered on gender-identity expression.

II. TRADITIONAL FREE-SPEECH VALUES

Freedom of speech was almost left out of the Constitution.³⁴ While it was seemingly viewed by the Founders as a “natural right,”³⁵ even at the time of its adoption there was disagreement about what that right guaranteed under the law.³⁶ The Founders may have viewed speech as a “natural right . . . retained,”³⁷ but at the time the Constitution was adopted, every state had laws regulating free speech to some extent.³⁸ The words themselves—“Congress shall make no law . . . abridging the freedom of speech, or of the press”³⁹—provide little insight into what the authors believed of either the strength or scope of this right.⁴⁰

In light of this “remarkably hazy” history of the First Amendment,⁴¹ free-speech theory scholars have alternatively looked to the values that underlie the right to understand what exactly freedom of speech is meant to guarantee.⁴² While some scholars argue for theories based on a central value, others take a broader view and believe that some combination of values must underlie a right as sweeping but conflicting as free speech.⁴³ Using a values-

³² Cf. Tsesis, *supra* note 29, at 7–8 (discussing the three “most influential schools of free speech theory”).

³³ Chan Tov McNamara, *Misgendering*, 109 CALIF. L. REV. 2227, 2232 (2021).

³⁴ See Amendments to the Constitution, 1 ANNALS OF CONG. 729–33, 767–68 (1789) (discussing the necessity of inclusion of free speech in the First Amendment) [hereinafter Debate on Speech].

³⁵ See Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246 (2017) (discussing the practice of using natural law to inform positive law in early American legal history); see also Debate on Speech, *supra* note 34 (describing free speech as an “essential right”).

³⁶ See Campbell, *supra* note 35, at 254 (discussing the disagreements in applying the natural right of free speech as a legal guarantee in early American history).

³⁷ James Madison, *Notes for Speech in Congress* (June 8, 1789), in 12 THE PAPERS OF JAMES MADISON 193, 194 (Charles F. Hobson & Robert A. Rutland eds., 1979).

³⁸ See *Roth v. United States*, 354 U.S. 476, 482 (1957) (explaining that thirteen states had laws prohibiting libel and all fourteen states at the time had laws that made “blasphemy or profanity, or both, statutory crimes”).

³⁹ U.S. CONST. amend. I.

⁴⁰ Facially, the language of the First Amendment is direct and bold. However, relying on the words themselves is even more misleading than looking to historical records. For example, over time the First Amendment has been held to apply not just to Congress, but the executive branch and federal courts as well as state governments. See *Shrum v. City of Coweta*, 449 F.3d 1132, 1142 (10th Cir. 2006) (finding that “there was no intention to confine the reach of the First Amendment to the legislative branch”); see also Daniel J. Hemel, *Executive Action and the First Amendment’s First Word*, 40 PEPP. L. REV. 601 (2013).

⁴¹ Campbell, *supra* note 35, at 249.

⁴² Jay, *supra* note 4, at 775.

⁴³ Compare Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 595 (1982) (arguing that “individual self-realization is the sole value furthered by free speech”), with C. Edwin Baker, *Scope*

based approach to understanding free speech avoids the problem of superimposing the realities of modern society on a legal and historical framework that was “vastly less libertarian than modern judicial interpretations.”⁴⁴ However, using such a framework presents its own set of challenges.⁴⁵ While a theory of free speech that has any practical relevance must be able to sit within established free-speech doctrine, that task is becoming increasingly frustrated by a “hodgepodge” of conflicting Supreme Court cases with “no unifying framework.”⁴⁶ Further, invoking free speech has become a tool used by both major political parties with both sides frequently making values-based arguments to advance their claims.⁴⁷ Nevertheless, applying a values-based framework to modern free-speech problems presents a principled way for approaching and resolving these conflicting claims.⁴⁸

There are three dominant values in free-speech theory—truth, democracy, and autonomy. Philosophers, sociologists, legal scholars, and judges, among others, have contributed to understanding these values in relation to free speech. Throughout American legal history, some of these values have been at times more favored than others. Additionally, there are certain types of free-speech cases that more clearly align with each of these values. Given the rich history behind each value, the next section provides only a brief summary of each value and highlights areas of overlap and tension between the values.

A. THE SEARCH FOR TRUTH

The discovery of truth, often referred to as the “marketplace of ideas,” is one of the longest standing justifications for free-speech doctrine.⁴⁹ “Truth” is rarely defined, and, if it is, it is often done so rather ambiguously.⁵⁰ In one of the cornerstone treatises on truth and free speech, John Stuart Mill’s *On Liberty*, Mill describes the truth as something that can be discovered and “rediscover[ed]” over time until it is able to “withstand all subsequent attempts to suppress it.”⁵¹ The discovery of the truth is thus a long-game; as

of the First Amendment Freedom of Speech, 25 U.C.L.A. L. REV. 964, 990 (1978) (discussing the four values served by protected speech in a “particular, humanly acceptable manner”).

⁴⁴ Jay, *supra* note 4, at 775.

⁴⁵ *Id.* at 776.

⁴⁶ Alexander Tsesis, *Balancing Free Speech*, 96 B.U. L. REV. 1, 2 (2016); see also RANDALL P. BEZANSON, TOO MUCH FREE SPEECH? 237 (2012) (discussing how the Supreme Court has interpreted the First Amendment to “mean very little . . . and to mean a great deal”).

⁴⁷ Compare Callie Patteson, *Trump Pledges to ‘Restore’ Free Speech Through New Media Company*, N.Y. POST (Oct. 26, 2021), <https://nypost.com/2021/10/26/donald-trump-pledges-to-restore-free-speech-through-media-company/> [<https://perma.cc/U4M7-B3CF>], with Joseph R. Biden, President, Remarks by President Biden at the Summit for Democracy Opening Session (Dec. 9, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/12/09/remarks-by-president-biden-at-the-summit-for-democracy-opening-session/> [<https://perma.cc/97JM-5Z3L>].

⁴⁸ Tsesis, *supra* note 46, at 25–26.

⁴⁹ *Id.* at 8. The “marketplace of ideas” analogy comes from *Abrams v. United States*, 250 U.S. 616 (1919), in which the Court upheld convictions of individuals who published pamphlets for the purpose of “aid the cause of the Russian Revolution.” *Id.* at 621. In his dissent, Justice Oliver Wendell Holmes stated 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.” *Id.* at 630 (Holmes, J., dissenting).

⁵⁰ *Abrams*, 250 U.S. at 630.

⁵¹ John Stuart Mill, *On Liberty* 97 (1859).

Mill says, “[T]he dictum that truth always triumphs over persecution is one of those pleasant falsehoods . . . which all experience refutes.”⁵² This discovery requires the “opportunity of exchanging” ideas in order to provide “complete liberty of contradicting and disproving our opinion” in order to discover the truth through dialogue.⁵³ Mill describes the process through which every “wise man ever acquired his wisdom”—“[t]he steady habit of correcting and completing his own opinion by collating it with those of others.”⁵⁴ Thus, speech plays an essential role in the discovery of truth.

But the truth, or even the mere discovery of it, has seemingly little to do with what is protected, let alone litigated, today related to free speech.⁵⁵ That is not to say that truth-based theories, such as Mill’s, disallow or discourage speech that is not objectively true.⁵⁶ As Mill points out, to refuse to hear an opinion because it is believed to be false is to assume certainty.⁵⁷ To assume certainty is “an assumption of infallibility.”⁵⁸ This type of argument provides a strong basis for allowing speech that may be “deplorable” and “reprehensible” but is nonetheless expressing a viewpoint about a topic or idea.⁵⁹ A truth-based approach to free-speech theory may even lend support for corporate speech.⁶⁰ On the other hand, the Court has also held that certain restrictions on factual speech can stand⁶¹ and has protected certain forms of “untruths” such as parody.⁶²

B. PROMOTING DEMOCRACY

A second family of free-speech theories is united around the idea that the First Amendment protects the right of citizens to engage in debates on questions and issues of self-government.⁶³ In this paradigm, the Government must “make adequate provision for self-criticism and self-restraint.”⁶⁴ At its core, the First Amendment is concerned with speech focused on “governmental behavior, policy or personnel . . . speech about how we are governed . . . [including] a wide range of evaluation, criticism, electioneering and propaganda.”⁶⁵ More directly, “the voters . . . must be made as wise as possible.”⁶⁶

⁵² *Id.*

⁵³ *Id.* at 87, 89.

⁵⁴ *Id.* at 90.

⁵⁵ Tesis, *supra* note 46, at 8.

⁵⁶ MILL, *supra* note 51, at 88.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *See, e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391, 396 (1992).

⁶⁰ *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 340–41 (2010) (“Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others.”).

⁶¹ *See, e.g.*, *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (upholding a city ban limiting paid political advertising for public office candidates on transit cars).

⁶² *See Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (holding that parody was protected under the First Amendment).

⁶³ Tesis, *supra* note 46, at 11; *see also* ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1979).

⁶⁴ ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE RULERS AND THE RULED* 17 (1960).

⁶⁵ Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 *STAN. L. REV.* 299, 309 (1978).

⁶⁶ MEIKLEJOHN, *supra* note 64, at 26.

A central concern is preserving speech in service of public discourse.⁶⁷ In Professor Robert Post’s discussion of democratic self-governance, he stipulates that “speakers participating in public discourse are constitutionally presumed to be engaged in the formulation of public opinion.”⁶⁸ Public discourse in turn requires the maintenance of a “public sphere,” a function that the media performs.⁶⁹ In addition to serving as the keepers of this public sphere, the media may also perform a “checking” function against government abuse.⁷⁰ While many theories based on democratic self-realization are focused on political speech, some include “nonpolitical” speech that concerns “one’s ability to make life-affecting decisions” in the private sphere as well.⁷¹

Democratic theories can be viewed as protecting the interests of speakers, listeners, or both.⁷² Theories primarily concerned with the interests of listeners tend to focus on the collective benefit of free speech—“the point of ultimate interest is not the words of the speaker, but the minds of the hearer”—rather than the individual interest of the speaker.⁷³ Democratic theories, particularly those based on the point of view of the speaker, may help provide some understanding for the Court’s tolerance of hate speech. Post, for example, states that “[a]ll citizens within public discourse . . . have equal autonomy . . . which reflects the political equality that all citizens enjoy within a democracy.”⁷⁴ This equality “underwrites the First Amendment doctrine’s refusal to distinguish between good and bad ideas . . . harmful or beneficial ideas.”⁷⁵

While democracy-based theories may seem somewhat outdated in their justification, recent U.S. and world events have reignited defenses of the essential role of the press in preserving democracy.⁷⁶ These recent controversies also highlight the relationship between democracy and truth. Governments frequently invoke concerns about the spread of factual or truthful information when imposing restrictions or regulations on the dissemination of information.⁷⁷ A pure Millian response to this invocation of

⁶⁷ See Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477 (2011).

⁶⁸ *Id.* at 484.

⁶⁹ *Id.* at 486.

⁷⁰ Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. BAR FOUND. RSCH. J. 521, 527 (1977).

⁷¹ Redish, *supra* note 43, at 604.

⁷² Compare Post, *supra* note 67, at 484 (focusing on the role of speakers), with MEIKLEJOHN, *supra* note 64, at 26 (discussing the focus on listeners).

⁷³ MEIKLEJOHN, *supra* note 64, at 26.

⁷⁴ Post, *supra* note 67, at 484.

⁷⁵ *Id.*

⁷⁶ See Bill Goodykoontz, *This Heartbreaking Image from Ukraine Is a Wakeup Call: A Free Press Is Essential to Freedom*, USA TODAY (Mar. 8, 2022), <https://ca.finance.yahoo.com/finance/news/heartbreaking-image-ukraine-wakeup-call-220904066.html> [<https://perma.cc/3C4M-D5V5>] (discussing how the press is “essential to our understanding of what’s going on in Ukraine” and comparing the Russian censorship of media covering the war within the country); see also David A. Graham, *Trump Wants to Censor the Media*, ATLANTIC (Oct. 5, 2017), <https://www.theatlantic.com/politics/archive/2017/10/trump-wants-to-censor-the-press/542142/> [<https://perma.cc/7K23-FD3W>] (discussing President Trump’s “interest in censoring the American free press”).

⁷⁷ See Goodykoontz, *supra* note 76 (discussing Russia’s stated policy objective of minimizing publication of “false information—‘fake news’”). One need not look abroad though to find examples of the government regulating speech while claiming a fear of spreading falsehoods during wartime. In *Abrams v. United States*, 250 U.S. 616 (1919), the Court affirmed the convictions of five individuals under the Espionage Act for circulating publications that the Government claimed were “an attempt to defeat the war plans of the Government of the United States by bringing upon the country the paralysis

protecting “the truth,” however, would strongly rebuff the government for acting as an arbiter of the truth when deciding what to censor.

C. ADVANCING INDIVIDUAL AUTONOMY

The third value served by free speech, and the one that this Note continues to explore, is autonomy. This value focuses on self-fulfillment or self-realization.⁷⁸ A quick survey of some of the leading autonomy theories reveals some common themes about autonomy that are particularly relevant to the topic of this Note.⁷⁹ In American philosopher Thomas Scanlon’s discussion of what he calls the “Millian Principle,”⁸⁰ Scanlon presents a traditional understanding of autonomy that is focused on the individual’s ability to apply “his own canons of rationality” in deciding and defending his “beliefs and decisions.”⁸¹ The ability to control one’s mental functions and thought processes is at the core of Scanlon’s theory.⁸² Being able to apply one’s rational capacities to the world is fundamental to promoting individual autonomy, even when doing so may weaken one’s autonomy.⁸³

Likewise, Professor Martin Redish described autonomy as “individual self-realization.”⁸⁴ In defining autonomy this way, Redish noted its relative ambiguity: “[I]t can be interpreted to refer either to development of the individual’s powers and abilities . . . or to the individual’s control of his or her own destiny through making life-affecting decisions.”⁸⁵ Professor Seana Shiffrin’s thinker-based approach is perhaps even more expansive than the values described by Scanlon and Redish.⁸⁶ Shiffrin argues that freedom of speech is best understood as “centrally[] protecting freedom of thought.”⁸⁷ Individuals have an “interest in being known by others” that helps set the boundaries of what should be covered by a free-speech right.⁸⁸ Tying autonomy to freedom of thought and the ability to “be known by others”

of a general strike.” *Id.* at 622. In his dissent, Justice Holmes reframed the relationship between truth and democracy stating that “the best test of truth is the power of the thought to get itself accepted in the competition of the market” and that the Court should be “eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death.” *Id.* at 630.

⁷⁸ See, e.g., THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6–7 (1971).

⁷⁹ One leading autonomy scholar not discussed in this note is C. Edwin Baker. See C. Edwin Baker, *Symposium: Individual Autonomy and Free Speech: Autonomy and Free Speech*, 27 *CONST. COMMENT.* 251 (2011) for a summary of Baker’s theory of autonomy as applied to free speech.

⁸⁰ Scanlon specifically cites John Stuart Mill’s seminal text, *On Liberty*, Chapter II, to articulate the “Millian Principle.” Thomas Scanlon, *A Theory of Freedom of Expression*, 1 *PHIL. & PUB. AFFS.* 204, 221 (1972). The most relevant passage of this text describes the limiting principles of free speech:

- (a) [H]arms to certain individuals which consist in their coming to have false beliefs as a result of those acts of expression;
- (b) harmful consequences of acts performed as a result of those acts of expression and the subsequent harmful acts consists merely in the fact that the act of expression led the agents to believe . . . these acts to be worth performing.

Id. at 213.

⁸¹ *Id.* at 215.

⁸² *Id.*

⁸³ *Id.* at 216.

⁸⁴ Redish, *supra* note 43, at 593.

⁸⁵ *Id.*

⁸⁶ See Seana V. Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 *CONST. COMMENT.* 283 (2010).

⁸⁷ *Id.* at 283.

⁸⁸ *Id.* at 291.

creates very broad protection for almost all types of speech.⁸⁹ The Supreme Court has previously endorsed such a view that freedom of thought may underlie the First Amendment as a fundamental guarantee.⁹⁰

Shiffrin's thinker-based theory also highlights a few other aspects of speech that are essential in autonomy theories. Speech, and to a lesser extent other types of expressive conduct, "are the only precise avenues by which one can be known *as the individual one is* by others."⁹¹ Shiffrin acknowledges that some information can be "gleaned" from observation alone, but speech "uniquely furthers the interest in being known by others."⁹² In a society devoid of speech or expressive conduct people may still be able to appreciate individuality or uniqueness to a certain degree; speech is one of the key means of doing so.⁹³

Relatedly, an individual's ability to "fully develop a complex mental world" is tied to the "ability to externalize bits of one's mind."⁹⁴ Shiffrin suggests that the mere act of vocalizing one's thoughts is necessary to "identify them completely . . . a prerequisite to evaluating their contents."⁹⁵ The value of speech in externalizing "bits of one's mind" reveals a piece of why free speech holds an elevated place as a fundamental right.⁹⁶ While individuals can be autonomous without speech, the act of verbalizing or communicating thoughts makes those thoughts exist in the world.⁹⁷ Speech enables speakers to better conceive of their own thoughts and to articulate them concretely.⁹⁸ As Shiffrin states, this process of articulating and "identifying" one's thoughts is fundamental to being able to fully engage with those thoughts and evaluate their contents.⁹⁹ This perhaps can be restated as a justification both for protecting hate speech. This can perhaps also be restated from the perspective of individuals who are "identifying" their thoughts on issues of identity through the act of verbalizing those thoughts.

Concepts of dialogue and conversation partners can be important in some autonomy theories.¹⁰⁰ Shiffrin describes the need for "access to other thinkers" as fundamental for "rational human thinkers."¹⁰¹ Thus, while

⁸⁹ Shiffrin's thinker-based theory does not create many, if any, boundaries on individual speech that would be protected. Under Shiffrin's regime, "pictorial representations and music . . . should also gain foundational protection because they also represent the externalization of mental contents." *Id.* at 295. However, since the central figure in Shiffrin's theory is the thinker, only natural persons capable of rational thought are owed de facto free speech protection. "[N]on-press, business corporate and commercial speech may be different" and their speech "may assume a weaker form" depending on the interest of thinkers in engaging or accessing such speech. *Id.* at 296.

⁹⁰ See *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("[t]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all").

⁹¹ Shiffrin, *supra* note 86, at 291.

⁹² *Id.*

⁹³ *Id.* at 292.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 293.

⁹⁹ *Id.*

¹⁰⁰ See, e.g., *id.*

¹⁰¹ *Id.*

autonomy-based theories focus heavily on the individual, social and relational elements are important as well.¹⁰²

Autonomy-based theories are often critiqued for failing to present a compelling justification for why speech is protected but other forms of self-expression that arguably contribute to self-realization are not.¹⁰³ Another common critique of autonomy is that humans are not the rational beings they are hypothesized to be and thus incapable of the intellectual agency required by autonomy.¹⁰⁴ While these critiques may be valid, they often misinterpret what autonomy requires in terms of rationality. Critics of autonomy point to the “involuntarism” of “acquired beliefs and attitudes” as a reason to discount the value of such theories.¹⁰⁵ However, this focus on socially-determined beliefs and attitudes fails to account for the fact that thought and speech development is an iterative process, susceptible to “praise, blame, reward, [and] punishment” that force individuals to “take on the attendant liabilities” for their beliefs.¹⁰⁶ Further, these socially-acquired beliefs and attitudes relate heavily to the autonomy of individuals to form their identities.¹⁰⁷

III. REDEFINING AUTONOMY

While traditional autonomy theories focus on an individual’s ability to control one’s life, it is also important to understand the role of speech in identity development on a more fundamental level. Speech is integral to identity formation and development, specifically as speech relates to social-identity development. While individuals are comprised of more than just social identities, social identities involve choice and recognition, and thus require speech, in a way that other forms of identity, such as one’s personal identity, do not necessarily require. Understanding autonomy as a means of controlling identity formation is important when assessing free-speech claims from the perspective of both speakers and listeners.

A. UNDERSTANDING IDENTITY IN RELATION TO THE “INNER SELF”

Every person has an inner self, which is largely reflective of one’s identity.¹⁰⁸ Identity, in turn, is a composite of multiple social and personal identities.¹⁰⁹ From a young age, we learn to converse with our self through

¹⁰² *Id.* at 294.

¹⁰³ *See, e.g.*, R. George Wright, *Freedom of Speech as a Cultural Holdover*, 40 *PACE L. REV.* 234, 252 (“[P]opular notions of an autonomous self cannot justify distinctive constitutional protection for speech.”).

¹⁰⁴ *Cf.* Brian Lieter, *The Case Against Free Speech*, 38 *SYDNEY L. REV.* 407 (2016).

¹⁰⁵ *Cf.* Robert Mark Simpson, *Intellectual Agency and Responsibility for Belief in Free-Speech Theory*, 19 *LEGAL THEORY* 307 (2013).

¹⁰⁶ *Id.* at 321–22.

¹⁰⁷ *See* NORBERT WILEY, *INNER SPEECH AND THE DIALOGICAL SELF* (2016).

¹⁰⁸ *See id.* at 43–45. The inner self is not comprised solely of identity however. *See infra* note 114. Other aspects of an individual, such as character traits, habits, and interests may also contribute to an individual’s inner self. These non-identity components of our inner self, though, do relate to our identities. For example, an area of expertise may not be understood as an identity, but it likely relates to an individual’s role identity in a particular field or even one of their social identities.

¹⁰⁹ *See generally* DAVID HUME, *A TREATISE OF HUMAN NATURE* 261 (1888) (comparing individual identity to “a republic or commonwealth, in which the several members are united by the reciprocal ties of government and subordination”); Paul V. Kroskity, *Identity*, 9 *J. LINGUISTIC ANTHROPOLOGY* 111 (1999) (defining identity as “the linguistic construction of membership in one or more social groups or categories”).

“inner speech.”¹¹⁰ Professor of Sociology Norbert Wiley defines inner speech as “the self speaking to another aspect of itself.”¹¹¹ In order to have inner speech, it is necessary to have an “inner duality”—that is, a speaker and a listener within oneself.¹¹² Thus, inner speech reflects the same dialogical dynamic present in external speech.¹¹³

An individual’s identity makes up the largest portion of what Wiley calls the “tripartite self” composed of three “levels”—Generic, Identity, and Quotidian.¹¹⁴ The Identity level is fundamentally tied to speech and language.¹¹⁵ Speech is the primary, though not exclusive, method of identifying oneself with a particular identity.¹¹⁶ There are multiple types of identities that compose the inner self.¹¹⁷ Social identities are the “quasi-demographic traits” that individuals are largely born into, such as ethnicity, although some may be acquired over time, such as religion.¹¹⁸ Social identity is both the knowledge that one belongs to a given social category or group as well as the acknowledgement by others of such categorization.¹¹⁹ Personal identities are those that “we build into ourselves as our lives go on.”¹²⁰ While distinct, personal and social identities are connected and coalesce to form a singular self-identity.¹²¹ In contrast to social and personal identities, role identity relates to the different “roles” an individual holds and the relation to others in “counterroles.”¹²² Role identities, unlike social identities, are usually voluntarily assumed and require negotiating with others to define the role and thus the identity.¹²³ Role identities may also feed up and coalesce into social identities.¹²⁴ For example, being a teacher is a role identity that someone holds as an individual in a classroom. At the same time, being a teacher gives an individual a social identity as an educator. Role identities are held at the individual level and are about an individual’s relationship to others in a given context—they do not need to be formal or job-related, however.¹²⁵ Holding a certain role also creates a social identity with others

¹¹⁰ WILEY, *supra* note 107, at 22–23.

¹¹¹ *Id.* at 9.

¹¹² *Id.* at 26.

¹¹³ See, e.g., Melville B. Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. REV. 29, 36 (1973) (discussing that “as an irreducible minimum,” speech requires “both a communicator and a communicatee—a speaker and an audience”).

¹¹⁴ WILEY, *supra* note 107, at 44. The three “levels” of the tripartite self are (1) the Generic level, comprised of traits “that all selves have, beginning when we split from the chimpanzees”; (2) the Identity level, comprised of social and personal identities as well as self-concept; and (3) the Quotidian level, comprised of habits and idiosyncrasies.

¹¹⁵ Kroskrity, *supra* note 109, at 111.

¹¹⁶ *Id.*

¹¹⁷ WILEY, *supra* note 107, at 43.

¹¹⁸ *Id.* at 47; see also Henri Tajfel, *Social Identity and Intergroup Behavior*, 13 SOC. SCI. INFO. 65 (1974).

¹¹⁹ Jan E. Stets & Peter J. Burke, *Identity Theory and Social Identity Theory*, 63 SOC. PSYCH. Q. 224, 225 (2000).

¹²⁰ WILEY, *supra* note 107, at 47.

¹²¹ *Id.* at 45–46.

¹²² Stets & Burke, *supra* note 119, at 226.

¹²³ *Id.* at 227.

¹²⁴ *Id.* at 228.

¹²⁵ *Id.*

who hold that role.¹²⁶ It is the unique composition of these different types of identities that largely form an individual's inner self.

B. THE INNER SELF, CONTROL & THE ROLE OF SPEECH

Understanding the component identities that form the inner self makes it clear that the self is inherently relational—"it neither preexists society and culture nor stands as a sovereign and independent source of power."¹²⁷ Identity development is thus dependent on "dialogical relations with others"—individual identities are negotiated "through dialogue, partly overt, partly internal, with others."¹²⁸ The inner self directly relates to principles of autonomy, such as agency and control.¹²⁹ The process of developing an inner self is "creative and dynamic" precisely because all individuals control their own life choices.¹³⁰ Agency, as defined by Wiley, is the "process of conscious and purposive human action."¹³¹ This process involves three steps: (1) construction of possible action, (2) choosing an action, and (3) carrying out the action.¹³² This process is premised on dialogue, both inner and external, that "steers the self, acting as our compass through life."¹³³ Wiley's definition of agency and the process he describes map closely to the traditional free-speech notion of self-realization.

As previously discussed, the inner self is both a composite and reflection of different types of identities—personal, social, and role.¹³⁴ Autonomy in this sense exists only "in the context of social relationships."¹³⁵ Because all relationships are "partly empowering and partly limiting," autonomy is always on a spectrum, measured as "a matter of degree"¹³⁶ and thus can be neither absolute nor non-existent. Further, since autonomy is always relational it requires "intersubjective communication and interaction."¹³⁷ As a result, speech plays a critical role in advancing autonomy interests as realized through developing one's inner self.¹³⁸ Thus, speech that is concerned with the development of one's inner self or the society "in which the self emerges" should be the focus of free-speech protections.¹³⁹ In contrast, speech that either does not serve to advance one's own autonomy interest or that detracts from the autonomy of another should not be protected.¹⁴⁰ While this characterization may seem broad, it largely aligns with how free-speech protections have traditionally played out, such as an

¹²⁶ *Id.* As an example, an individual may be a teacher—a specific role identity in relation to a student—however, at the same time being a teacher puts one in a social group, giving one a social identity as well.

¹²⁷ Stephen M. Feldman, *Postmodern Free Expression: A Philosophical Rationale for the Digital Age*, 100 MARQ. L. REV. 1123, 1162 (2017).

¹²⁸ Charles Taylor, *The Politics of Recognition*, in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25, 34 (Amy Gutmann ed., 1994).

¹²⁹ WILEY, *supra* note 107, at 75–76.

¹³⁰ Feldman, *supra* note 127, at 1163.

¹³¹ WILEY, *supra* note 107, at 76.

¹³² *Id.*

¹³³ *Id.* at 89.

¹³⁴ See WILEY, *supra* note 107.

¹³⁵ Feldman, *supra* note 127, at 1165.

¹³⁶ *Id.*

¹³⁷ *Id.* at 1168.

¹³⁸ *Id.* at 1171.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 1172.

aversion to protect coercive speech while protecting political speech that relates to societal concerns.¹⁴¹ At times, though, this can lead to conflict if one person's identity is premised on the subordination of another's identity. This conflict in autonomy interests requires both further examination into the harms caused to both the speaker's and the listener's identities by the speech as well as weighing those interests against one another.

IV. RELATIONAL AUTONOMY

As previously discussed, autonomy is inherently relational and requires communication and speech in order to advance one's own autonomy.¹⁴² In order to be in control of one's inner self, it is necessary that individuals have control of the terms under which they speak—primarily to whom and when one speaks—largely aligning with traditional justifications against compelled speech.¹⁴³ In discussing the notion of rationality that underpins descriptive autonomy, constitutional-law scholar Richard Fallon states that individuals are “largely constituted by the societies in which we live and the histories of which we are a part,”¹⁴⁴ mirroring the concept of social and role identities by Wiley and Jan Stets. While acknowledging that every individual is a “creature in and of the world,” rational capacity implies that individuals are “at least partially transforming [themselves] through thought, criticism, and self-interpretation.”¹⁴⁵ This iterative process of speaking, interacting, listening, internalizing, and rationalizing is the process through which individuals develop their inner selves.¹⁴⁶

A. RELATIONAL AUTONOMY & SOCIAL IDENTITIES

No one's thoughts are immune from the speech and thus the influence of others. In fact, the very point of speech may be to influence the thoughts or actions of others.¹⁴⁷ Recognizing this, an individual's speech can be understood as the product of someone else's speech, directly or indirectly. Because of this causal relationship, autonomy requires that individuals be able to curate, to the fullest extent possible, the “networks of relationships of which they are a part.”¹⁴⁸

As previously discussed, social identities are a central component of one's inner self.¹⁴⁹ As a result, much of an individual's inner self can be understood as socially constructed.¹⁵⁰ An individual's social identities are a deeply engrained part of an individual's personal identity. Participation in

¹⁴¹ *Id.*

¹⁴² See *supra* note 90.

¹⁴³ See, e.g., Vikram David Amar & Alan Brownstein, *Toward a More Explicit, Independent, Consistent, and Nuanced Compelled Speech Doctrine*, 2020 U. ILL. L. REV. 1, 20–25 (2020) (arguing that concerns of dignity and autonomy are the “foundational First Amendment values” underlying review of compelled speech).

¹⁴⁴ Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 887 (1994).

¹⁴⁵ *Id.* at 888.

¹⁴⁶ WILEY, *supra* note 107, at 17–21.

¹⁴⁷ See David Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 346 (1991) for a discussion on the “persuasion principle” underlying First Amendment free speech doctrine.

¹⁴⁸ Feldman, *supra* note 127, at 1162.

¹⁴⁹ See *supra* note 73.

¹⁵⁰ Feldman, *supra* note 127, at 1162.

these social identities impacts an individual's cognitive processes and directly transforms an individual's inner self.¹⁵¹ Some social identities are "inherited," such as ethnicity, others may be discovered over time, and yet others may be the result of voluntary associations.¹⁵² An individual's inner self is a reflection of these identities, and through speech, individuals are continually contributing to the development of their own social identities, and thus the identities of others.¹⁵³

B. CONFLICTS IN SOCIAL IDENTITIES

Social identities are uniquely situated to be rife with conflict since almost all social identities require not only self-identification with a given group, but also external validation, or recognition, of group membership.¹⁵⁴ Conflict in social identities can come from multiple places. Internally, individuals may struggle to reconcile competing social identities.¹⁵⁵ Externally, conflict can arise from multiple places, such as when someone fails to correctly recognize or acknowledge another person's social identity or when people have oppositional social identities.¹⁵⁶ This can be the case when physical or non-verbal markers of social identity are not aligned with the speech or expressive conduct of a social identity, such as with gender identity. Failing to correctly recognize someone's social identity can be "psychologically disruptive" and reflects a failure to have one's identity "accurately verified by others."¹⁵⁷ This in turn has the potential to shape how individuals "feel and how they evaluate themselves and their social identities."¹⁵⁸ It is also possible that individuals' particular social identities (for example, as devout Christians) so strongly informs their inner selves that they interpret others' social identities (for example, their gender identities) entirely within the context of their own social identities as devout Christians, thereby leading to conflict.¹⁵⁹ These tensions between identities arise uniquely out of speech since speech is the primary method for accepting or rejecting someone's social identity.¹⁶⁰

¹⁵¹ See generally WILEY, *supra* note 107.

¹⁵² *Id.* at 47.

¹⁵³ Stets & Burke, *supra* note 119, at 226. Social identities are inherently dependent on speech for "self-categorization"—the process of naming and classifying the world and "being at one with a certain group." Underlying this speech related to self-categorization is a connection to the cognitive processes of "depersonalization" and "self-verification." *Id.* at 231–32. Depersonalization is the process of "seeing the self as an embodiment of the 'in-group prototype' . . . rather than as a unique individual." *Id.* at 231. Self-verification is the process of "seeing the self in terms of the role as embodied in the identity standard." *Id.* at 232.

¹⁵⁴ *Id.* at 231–32.

¹⁵⁵ See, e.g., Clara Kulich, Soledad de Lemus, Natasza Kosakowska-Berezecka & Fabio Lorenzi-Cioldi, *Multiple Identities Management: Effects on (of) Identification, Attitudes, Behavior and Well-Being*, 8 FRONTIERS PSYCH., Dec. 2017, at 1 (discussing the ways that individuals handle conflicting identities).

¹⁵⁶ Kevin A. McLemore, *Experiences with Misgendering: Identity Misclassification of Transgender Spectrum Individuals*, 14 SELF & IDENTITY 51 (2015).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 53.

¹⁵⁹ See Katie Reilly, "This Isn't Just About a Pronoun." *Teachers and Trans Students Are Clashing Over Whose Rights Come First*, TIME (Nov. 15, 2019), <https://time.com/5721482/transgender-students-pronouns-teacher-lawsuits/> [<https://perma.cc/3C8A-7BNK>] (discussing three cases where teachers say "they were forced to choose between keeping their jobs or acting a way that conflicted with their religious views").

¹⁶⁰ See Stets & Burke, *supra* note 119, at 225.

Speech enables individuals to express their social identities and construct those identities.¹⁶¹ Speech is also how individuals can primarily engage or critique other social identities.¹⁶² Interpersonal conflict arises in the space of engaging with others' social identities.¹⁶³ There is a very thin line between critically engaging with an issue of social identity and attacking the social identity of another. There is a similarly ambiguous line between speech that is offensive, profane, or disrespectful and speech that causes direct harm to another based on an issue of social identity.¹⁶⁴ Assigning any relative priority to these different identities (for example, religious over cultural) is difficult because individuals rationalize and prioritize their social identities uniquely, an additional source of conflict.¹⁶⁵ Current free-speech theory typically privileges the speaker's rights when dealing with conflicts of social identity. However, recognizing conflicts of social identity and the role of speech in contributing to and resolving these conflicts is essential to creating a more inclusive autonomy-based free-speech theory.

V. UNDERSTANDING HATE SPEECH IN TERMS OF AUTONOMY

Not all speech that serves to develop someone's inner self should be protected or protected to the same extent, especially when it creates a conflict with another person's autonomy interest and that other person's ability to develop an inner self.¹⁶⁶ As previously discussed, speech is particularly suited to advance one's autonomy; however, it can be just as effective at detracting from someone else's autonomy interest.¹⁶⁷

A. A CATEGORICAL APPROACH TO HATE SPEECH

Hate speech¹⁶⁸ presents a clear example of speech that presents seemingly little value to either the individual speaker or society more broadly at great expense to the individual listener.¹⁶⁹ As an undefined legal term, hate speech may be better understood along categorical lines, distinguishing between "mere hate speech" and "harming hate speech."¹⁷⁰ "Mere hate speech" is expressive of "just" hate and is "not likely to result in particular

¹⁶¹ Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1718 (1993). *See also* Kroskrity, *supra* note 109, at 112.

¹⁶² Stets & Burke, *supra* note 119, at 225.

¹⁶³ *See* Kulich et al., *supra* note 155, at 2.

¹⁶⁴ This is one of the questions that courts grapple with when reviewing hate speech cases. *See, e.g.,* Taking Offense v. State, 281 Cal. Rptr. 3d 298 (Ct. App. 2021).

¹⁶⁵ Kulich, *supra* note 155, at 6.

¹⁶⁶ Feldman, *supra* note 127, at 1171.

¹⁶⁷ *Id.*

¹⁶⁸ "Hate speech" is a nebulous term that is at once both easy to identify and yet hard to define. As noted by the United Nations, "[t]here is no international legal definition of hate speech, and the characterization of what is 'hateful' is controversial and disputed." United Nations, United Nations Strategy and Plan of Action on Hate Speech (2019) <https://www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20Plan%20of%20Action%20on%20Hate%20Speech%2018%20une%20SYNOPSIS.pdf> [<https://perma.cc/3BJ6-DJMX>].

¹⁶⁹ *See, e.g.,* Kamatali, *supra* note 8, at 166–68 (discussing the harms that hate speech causes); *see also* Turner, *supra* note 16, at 318 ("Hate speech can lead to violence directed against the targets of such speech and result in harms and injuries in the form of the loss of reputation, humiliation, and emotional torment.").

¹⁷⁰ *See* Nadine Strossen, *Hate: Why We Should Resist It with Free Speech, Not Censorship* (Geoffrey R. Stone ed., 2018).

accompanying harms.”¹⁷¹ By contrast, “harming hate speech” is likely to “result in particular accompanying harms,” such as causing violence, “breach[ing] of the peace,” or leading to “permanent and irremediable harm.”¹⁷² This distinction can be restated as distinguishing between speech that causes “offense” and speech that results in harmful or violent consequences, including indignity.¹⁷³ This second category of harming hate speech is closely tied to the target of hate speech’s identity and relates to the “objective or social aspects of a person’s standing in society.”¹⁷⁴

In the few cases where the Court has specifically addressed hate speech, the Court has characterized the speech at issue as mere hate speech.¹⁷⁵ In doing so, the Court has adopted the position that victims of hate speech must also shoulder the responsibility of bearing the cost of free speech.¹⁷⁶ At the same time, the Court has prioritized the autonomy interests of speakers without providing full consideration of the autonomy interests of the listeners.¹⁷⁷ Seemingly, the Court has affirmed that “there is no ‘hate speech’ exception to the First Amendment.”¹⁷⁸ However, it may be more accurate to characterize the Court’s holdings as rebuffing a “mere hate speech” exception as the Court has not yet addressed “harming hate speech.”

B. MISGENDERING AS HATE SPEECH

Recent case law casts misgendering as “mere hate speech” and thus has protected the rights of speakers.¹⁷⁹ The term “misgendering,” though, is deceptively broad and inclusive of a range of speech, behavior, and intent.¹⁸⁰ While all forms of misgendering are offensive, a quick typology is helpful to be specific about the forms of misgendering and a way to map the categories of hate speech.¹⁸¹ Negligent misgendering is the result of failure to take proper care and may involve making assumptions based on physical appearance when referring to individuals.¹⁸² Negligent misgendering involves sufficient time for an individual to ask a person how she or he would like to be addressed. On the other hand, accidental misgendering is “inadvertent or unconscious.”¹⁸³ Accidental misgendering may be facially similar to negligent misgendering but varies as a function of time. Intentional

¹⁷¹ Kamatali, *supra* note 8, at 166.

¹⁷² *Id.* at 168–71.

¹⁷³ See JEREMY WALDRON, *THE HARM IN HATE SPEECH* 106–07 (2012). Waldron defines offense as “inherently a subjective reaction” that protects people from “a certain sort of effect on their feelings.” In contrast, indignity relates to “how things are with respect to them in society, not with how things feel to them.” *Id.* at 106.

¹⁷⁴ *Id.* at 106.

¹⁷⁵ *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (discussing the government’s interest as primarily concerned with “preventing speech expressing ideas that offend”); *R.A.V. v. City of St. Paul.*, 505 U.S. 377, 382 (1992).

¹⁷⁶ Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1322 (1992).

¹⁷⁷ See *Matal*, 137 S. Ct. at 1764.

¹⁷⁸ Eugene Volokh, *Supreme Court Unanimously Reaffirms: There Is No ‘Hate Speech’ Exception to the First Amendment*, WASH. POST (June 19, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/19/supreme-court-unanimously-reaffirms-there-is-no-hate-speech-exception-to-the-first-amendment/> [https://perma.cc/4EAU-Y8T2].

¹⁷⁹ See *Taking Offense v. State*, 281 Cal. Rptr. 3d 298 (Ct. App. 2021); *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021).

¹⁸⁰ See McNamarah, *supra* note 33, at 2261.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 2262.

misgendering involves the “conscious refusal to use the correct gendered language or designations.”¹⁸⁴ With intentional misgendering, the speaker deliberately chooses to use language “at odds” with the social identity of the listener.¹⁸⁵

Intentional misgendering most clearly veers into harming hate speech. Speech that intentionally misgenders directly harms the target-listener in a number of ways and does so on the basis of causing harm to an individual because of the individual’s social identity.¹⁸⁶ While the Court has characterized these harms as merely offensive, disrespectful, and humiliating, the actual harms of misgendering go much further.¹⁸⁷ Social subordination results from the failure to use the “ordinary signs of social equality,” signaling that the target-listener is of less social standing than the speaker.¹⁸⁸ Misgendering, especially in a public setting, undermines the autonomy of the target-listener by undercutting the “control of intimate information.”¹⁸⁹

Intentional misgendering also dehumanizes the target-listener.¹⁹⁰ By refusing to acknowledge an individual’s gender identity, the speaker “otherizes” the target-listener precisely by denying the target-listener autonomy over their identity.¹⁹¹ Like all forms of misrecognition of a social identity, misgendering relates directly to dynamics of power and oppression.¹⁹² The dehumanization that misgendering results in is also related to anti-trans stigmatization.¹⁹³ According to one study, feeling stigmatized when misgendered was associated with “more hostility and anxiety” among other impacts.¹⁹⁴ Charles Taylor describes the impact of misrecognition as leading to “crippling self-hatred.”¹⁹⁵

Finally, intentional misgendering reinforces a “binary, discrete, stable notion of gender” that “punish[es] and censor[s] those who challenge it.”¹⁹⁶ While much of the focus of free-speech cases involving misgendering has been on “forced speech,” the inverse problem of “forced silence” is equally at play.¹⁹⁷ If speaking someone’s correct gender pronoun conveys an idea, then the “selective silencing of certain identities” has the effect of “enforcing conformity.”¹⁹⁸ The impact of this forced silence is to directly override the autonomy of the target-listener as a would-be speaker.

Understanding the ways that intentional misgendering harms beyond just “mere” hate speech is critical for reframing the balance between autonomy

¹⁸⁴ *Id.* at 2263.

¹⁸⁵ *Id.*

¹⁸⁶ *See id.* at 2265–78; *see also* McLemore, *supra* note 156, at 52; Taylor, *supra* note 128. Taylor discusses how misrecognition or nonrecognition can “inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being.” Taylor, *supra* note 128.

¹⁸⁷ *See* McLemore, *supra* note 156.

¹⁸⁸ McNamarah, *supra* note 33, at 2271.

¹⁸⁹ *Id.* at 2272.

¹⁹⁰ *Id.* at 2273.

¹⁹¹ *Id.*

¹⁹² Taylor, *supra* note 128, at 25.

¹⁹³ *See* Lee, *supra* note 22, at 3.

¹⁹⁴ McLemore, *supra* note 156, at 60.

¹⁹⁵ Taylor, *supra* note 128, at 26.

¹⁹⁶ McNamarah, *supra* note 33, at 2276.

¹⁹⁷ Hunter, *supra* note 161, at 1719.

¹⁹⁸ *Id.*

rights in conflict in such cases. Even when misgendering does not rise to the level of repeated and intentional speech, it can cause lasting and devastating harm to transgender individuals. Given the high likelihood and extent of harm caused by intentional misgendering, the Court should shift its treatment of such cases and related hate-speech cases.

VI. AUTONOMY, GENDER IDENTITY & EXPRESSION

As a social identity, gender identity plays a varying role in an individual's inner self.¹⁹⁹ For some, gender identity is a social identity that one is “born into” and thus may be foundational, but is seldom challenged by the speech of others.²⁰⁰ For others, gender identity is something that is discovered over time and can be fundamental to expression of their inner selves.²⁰¹ Gender identity is particularly complex because it is a social identity that is both internally and externally defined.²⁰² Schools and universities have become frequent grounds for controversies centered on the tension between freedom of speech and gender-identity expression.²⁰³ Layered on top of the issue of the already complex social identity of gender identity are other social and role identities—often framed as teacher versus student or transgender advocacy versus religious beliefs.²⁰⁴ One recent lawsuit in Ohio typifies many of these tensions and conflicts and provides a paradigmatic case for examining these issues.

A. MERIWETHER V. HARTOP: IDENTITIES IN CONFLICT IN CONTEXT

In *Meriwether v. Hartop*,²⁰⁵ the Sixth Circuit Court of Appeals was faced with competing autonomy claims complicated by an institutional policy that required certain speech related to gender identity. A professor, Nicholas Meriwether, sued his employer, a small public college, Shawnee State University, after he was disciplined for refusing to use a student's preferred gender pronoun that did not align with the student's sex at birth.²⁰⁶

Meriwether, “a devout Christian,” strongly believed that sex is fixed and gender “cannot be changed.”²⁰⁷ Further, Meriwether also believed that the use of gendered titles is an “important pedagogical tool” in his teaching that cannot be sacrificed.²⁰⁸ At the beginning of the school year, the university implemented a new policy requiring that professors use students' preferred gender pronouns.²⁰⁹ Meriwether voiced his objection to the new policy on

¹⁹⁹ WILEY, *supra* note 107, at 45.

²⁰⁰ See Laurel Wamsley, *A Guide to Gender Identity Terms*, NPR (June 2, 2021, 6:01 AM), <https://www.npr.org/2021/06/02/996319297/gender-identity-pronouns-expression-guide-lgbtq> [<https://perma.cc/CS3Y-TWDV>] (“[F]or cisgender people, sharing their pronouns is generally pretty easy—so long as they recognize that they have pronouns and know what they are.”).

²⁰¹ See *id.*

²⁰² McLemore, *supra* note 156, at 52.

²⁰³ See, e.g., Reilly, *supra* note 159.

²⁰⁴ See *id.*

²⁰⁵ *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021).

²⁰⁶ *Id.* at 498.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 499.

²⁰⁹ *Id.* at 498. The university's policy was to discipline professors who “refused to use a pronoun that reflects a student's self-asserted gender identity.” *Id.* Further, when Meriwether asked to see the documented policy, the university provided the “school's existing policy prohibiting discrimination ‘because of . . . gender identity.’”

religious and moral grounds, asked to see the policy, and approached his department chair to discuss the policy to no avail.²¹⁰

In one of Meriwether's classes that semester, Meriwether called on a student, Doe, who identified as a woman.²¹¹ Meriwether responded to Doe's question by saying, "Yes, sir."²¹² After Doe approached Meriwether and "demanded" that Meriwether comply with the university's policy and use Doe's preferred gender pronouns, Meriwether attempted to "compromise" by using only the student's last name without a gendered title.²¹³ While Doe initially continued to complain to university administrators about Meriwether's tactics, eventually Doe seemed to accept this compromise.²¹⁴ However, the university continued to pursue discipline against Meriwether for his refusal to comply with the university's policies.²¹⁵ After an internal university investigation, the university brought a "formal charge" against Meriwether for refusing to use Doe's preferred gender pronoun and placed a formal warning in his file.²¹⁶ After a grievance filed on behalf of Meriwether was resolved against his interest, Meriwether filed a lawsuit alleging, among other claims, that the university violated his First Amendment free-speech rights.²¹⁷ In reviewing the lower court's order to dismiss Meriwether's free-speech claim, the Sixth Circuit reversed on the free-speech claim and remanded the case.²¹⁸

This case highlights the conflicts of autonomy that can arise when speech that is deeply reflective of an individual's inner self is at odds with the expression of another person's inner self. Where other traditional free-speech values are invoked or implicated, they will also be discussed. Further, this case presents an opportunity to distinguish between "mere hate speech" and "harming hate speech" as applied to misgendering.²¹⁹ By looking at the autonomy interests implicated in this case overlaid with a categorization of the speech at play, it becomes clearer whether Meriwether's free-speech claim should be upheld. While current hate-speech doctrine would likely view Meriwether's speech as "mere hate speech," vindicating his autonomy interests in expressing his views on gender identity, applying the framework previously discussed leads to a different outcome.

1. The Professor

Meriwether asserted two claims—one that is related to his role identity as a professor and the other related to his social identity as a Christian.²²⁰ First, Meriwether asserted that his speech should be protected to preserve academic freedom—his constitutionally protected "right to lecture."²²¹

²¹⁰ *Id.* at 499.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ The court comes to this conclusion based on the fact that the student "displayed no anxiety, fear, or intimidation" for the remainder of the class and received a high grade in the course. *Id.* at 500.

²¹⁵ *Id.*

²¹⁶ *Id.* at 501.

²¹⁷ *Id.* at 502.

²¹⁸ *Id.* at 518.

²¹⁹ See *supra* Part V.

²²⁰ Meriwether, 992 F.3d at 502–04.

²²¹ *Id.* at 504.

Meriwether's assertion was grounded in the reasoning that the pedagogical choices he employed, specifically the use of gendered titles when referring to students, were an integral part of his teaching method and thus reflective of his role identity as a professor.²²² By claiming that his choice of speech related to his role identity as a professor, Meriwether's assertion was closely tied to his autonomy interest.²²³

However, pedagogical choices are typically employed out of the belief that those methods will contribute to students' learning.²²⁴ The emphasis of good pedagogy is typically on what benefits the students of the classroom and are adapted to the students' needs—not the teacher's needs.²²⁵ Meriwether claimed that his use of gendered titles was an essential part of his teaching method; however, in the class that Doe was in, this approach led to the very kind of disruption that Meriwether sought to avoid.²²⁶ The use of gendered titles was intended to create an environment of respect and seriousness among the students given the weight of the topics they discussed in the class.²²⁷ On the one hand, the harm caused by not allowing Meriwether to use gendered titles or requiring him to use a student's preferred gender pronoun is external to Meriwether. The harm, if any, would be to the classroom *generally* if the absence of gendered titles or the use of requested gendered titles resulted in a decline in decorum or in the quality of discussion. It seems unlikely that the use of gendered titles is the only way to preserve decorum in the classroom. While Meriwether may have to give up one of his former pedagogical choices, there are alternative methods to ensure classroom discussion remains respectful that do not require the use of gendered titles.

The court's analysis of the harm to Meriwether reflects the traditional and current application of free-speech doctrine to claims such as Meriwether's. The court cast Meriwether's refusal to address Doe as she requested as "advanc[ing] a viewpoint on gender identity."²²⁸ This characterization of Meriwether's speech effectively removes the impact to Doe of Meriwether's speech from consideration, relegating Meriwether's intentional misgendering as lower than even "mere hate speech." Instead, Meriwether's choice to use gendered pronouns for all students except for Doe was merely Meriwether expressing his opinion on a "hot issue" of "public concern."²²⁹

²²² *Id.* at 499.

²²³ Pedagogical choices may be somewhat nebulous to construe as directly related to personal identity; however, it is analogous to understanding the focus of one's research as a reflection of individual identity as well as contributing to the continued development of an individual's identity. See Maria Savva, *Understanding the Personal Significance of Our Academic Choices*, in *BECOMING A SCHOLAR* 89 (Maria Savva & Lynn P. Nygaard eds., 2021) (discussing the relationship between research focus areas and personal identity for doctoral students).

²²⁴ LINDA DARLING-HAMMOND, *THE RIGHT TO LEARN: A BLUEPRINT FOR CREATING SCHOOLS THAT WORK* 294–96 (1997). Successful pedagogy accounts for differences—not negates them—and requires that teachers be "able to inquire sensitively and productively into [students'] experiences and their understanding." *Id.* at 295.

²²⁵ *Id.*

²²⁶ *Meriwether*, 992 F.3d at 499. Meriwether in fact stated that he found the use of "Mr." and "Mrs." to be especially important when "students discuss many of the most controversial issues of public concern."

²²⁷ *Id.*

²²⁸ *Id.* at 509.

²²⁹ *Id.*

Basing its holding in language reminiscent of the marketplace of ideas, the court noted that the First Amendment “does not tolerate laws that cast a pall of orthodoxy over the classroom.”²³⁰ Further, professors retain First Amendment protections “when engaged in core academic functions, such as teaching and scholarship.”²³¹ While the court takes the stance that the use of gendered titles is integral to allowing Meriwether to “shape the *content* of the instruction,”²³² it is not clear that this is actually Meriwether’s intent in doing so. Certainly, Meriwether claims that his use of gender pronouns contributes to classroom decorum and to creating an environment of respect when discussing “hotly contested” matters of public debate.²³³ However, this is separate from leading a discussion on the topic of gender identity itself or expressly integrating the use of gendered titles into the actual content of the class for the purpose of critical inquiry.

The court also briefly justifies its decision using democracy-based arguments, stating that “students’ interest in hearing even contrarian views is also at stake.”²³⁴ This argument is also similar to an argument against compelled speech broadly—that “[l]isteners, namely the public, have social and political interests in hearing information from many sources, free from government distortion.”²³⁵ But casting Meriwether’s refusal to use Doe’s preferred gender pronouns misstates the nature of both the message and the harm. To support its conclusion, the court looked to one of its earlier decisions in *Hardy v. Jefferson Community College*.²³⁶ In *Hardy*, the Sixth Circuit held that a professor’s use of the words like the “n-word” and “bitch” during a classroom discussion on language and social constructivism was protected under the First Amendment.²³⁷ The speech at issue in *Hardy* was facially similar to the speech at issue in *Meriwether*. The “n-word” has a long history of being used specifically to refer “derogatorily, contemptuously, and often menacingly to blacks.”²³⁸ Unlike *Meriwether*, however, the offensive words used were “suggestions” from students participating in a classroom discussion as examples of “words that have historically served the interests of the dominant culture in which they arise.”²³⁹ It should be noted that of the twenty-two students in the class, nine were African Americans.²⁴⁰

While the distinction may seem inconsequential, the difference in the way that the professors in *Hardy* and *Meriwether* handled addressing “matter[s] of public concern” in the classroom is important. In *Hardy*, the professor’s use of offensive words was “designed to analyze the impacts of these words upon societal relations.”²⁴¹ No individual student was the target of the professor’s speech for the purpose of expressing his view on the topic.

²³⁰ *Id.* at 504–09 (citing *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

²³¹ *Id.* at 505.

²³² *Id.* at 506.

²³³ *Id.* at 498–99.

²³⁴ *Id.* at 510.

²³⁵ Laurent Sacharoff, *Listener Interests in Compelled Speech Cases*, 44 CAL. W. L. REV. 329, 333 (2008).

²³⁶ *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671 (6th Cir. 2001).

²³⁷ *Id.* at 674–75.

²³⁸ Randall L. Kennedy, *Who Can Say “Nigger”? And Other Considerations*, 26 J. BLACKS HIGHER EDUC. 86, 87 (1999).

²³⁹ *Hardy*, 260 F.3d at 674–75.

²⁴⁰ *Id.* at 674.

²⁴¹ *Id.* at 678.

The class discussion that day was also explicitly focused on the topic that elicited the offensive language.²⁴² In contrast, Meriwether's use of gendered pronouns was not limited to a single class, as was the case in *Hardy*,²⁴³ and the focus of the class was not related to the issue of gender identity.²⁴⁴ Instead, Meriwether's use of gender pronouns was a general classroom policy and his approach to misgendering Doe was specific to her. Thus, the facts of *Hardy* are sufficiently distinguishable from those in *Meriwether*, and the Sixth Circuit erred in analogizing the two cases.

The more apt comparison to *Meriwether* is another Sixth Circuit decision—*Bonnell v. Lorenzo*—where the court held that a professor's use of vulgar sexual terms during an English class was not protected by the First Amendment.²⁴⁵ In *Bonnell*, the court stressed that it was “not the content of [the professor's] speech itself . . . ; rather, it was the context and form in which [the professor] used the speech—[that is], in the course of his teaching where the language was not germane to the course content.”²⁴⁶ Distinguishing between objections to content versus context is relevant in *Meriwether* as well. As the Sixth Circuit stated in *Bonnell*, a professor's right to free speech should not form the basis for “compromising a student's right to learn in a hostile-free environment.”²⁴⁷ This line between speech that serves an academic function and speech that harms students directly can be difficult to determine, but distinguishing the context of the speech is one helpful way to do so.²⁴⁸

Meriwether also asserted that it was his “sincerely held religious beliefs” that prevented him from “communicating messages about gender identity that he believe[d] are false.”²⁴⁹ This claim is more clearly rooted in autonomy as a manifestation of one of Meriwether's seemingly most salient social identities. From an individual autonomy perspective, forcing Meriwether to use preferred gender pronouns that he disagrees with for religious reasons creates a conflict with his ability to align his speech with his inner self, leading to the type of “psychologically disruptive” effects discussed previously.²⁵⁰ If Meriwether is compelled to engage in speech that is in conflict with one of his social identities, he would be losing some amount of control over his inner self. Because of the central role that religion appears to hold in Meriwether's social-identity hierarchy, there is harm—psychological or otherwise—caused to him by using language that goes against his deeply held beliefs.

By maintaining his current practice of using gendered titles, Meriwether effectively externalized the conflict on to Doe. Meriwether largely framed the issue as one of compelled speech given the university's policy.²⁵¹ However, the university's policy only required professors use students'

²⁴² *Id.* at 674.

²⁴³ *Id.* at 681.

²⁴⁴ *Meriwether v. Hartop*, 992 F.3d 492, 499 (6th Cir. 2021). The course was Political Philosophy, but the exact nature of the class discussion is unclear in the opinion.

²⁴⁵ *Bonnell v. Lorenzo*, 241 F.3d 800, 824 (6th Cir. 2001).

²⁴⁶ *Id.* at 819.

²⁴⁷ *Id.* at 823–24.

²⁴⁸ The court itself stated that these decisions should be made on a “case by case basis” given the balancing required. *Id.* at 824.

²⁴⁹ *Meriwether*, 922 F.3d at 499.

²⁵⁰ See *supra* Section IV.B.

²⁵¹ *Meriwether*, 922 F.3d at 502.

preferred gender pronouns, not that they use gendered titles at all.²⁵² One seemingly feasible option Meriwether could have employed that would not sacrifice his religious social identity while largely preserving his autonomy would have been to call all students by their names without the use of gendered titles. Unlike Meriwether's proposal to not call Doe by any gender pronoun but continue doing so for the rest of the class, implementing such a policy would not continue to "otherize" Doe in the process.

2. The Student

The autonomy interest of the student, Doe, is directly implicated by Meriwether's speech. As the object of Meriwether's speech, Doe's interests in developing and advancing her inner self are equally significant in this case. Doe's gender identity and the expression of that identity is undoubtedly reflective of her inner self.²⁵³ As this case highlights, gender identity is simultaneously a deeply personal matter related to a "person's innermost concept of self" as well as one of "profound value and concern to the public."²⁵⁴ The autonomy interest of Doe also shows the power that speech has to harm others related to their inner selves and their social identities when speech negates or diminishes those identities.

Meriwether's speech directly undermines one of Doe's social identities in a way that is specific to her. By refusing to use Doe's preferred gender pronoun that reflects her gender expression, Meriwether stripped Doe of autonomy over her own social identity and thus an aspect of her inner self. Meriwether's attempted compromise of not using any gender pronoun when referring to Doe still has the effect of "othering" Doe while not actually acknowledging her gender identity.²⁵⁵ Nonrecognition still has the effect of undermining Doe's control over her inner self by refusing to engage in the "open dialogue" required for social-identity development.²⁵⁶ This is especially true when considering Meriwether's continued use of gender pronouns and titles for cis-gendered students. Meriwether may have intended his speech to "carry a message" that he does not agree with the university's policy related to preferred gender pronouns;²⁵⁷ however, he did so at the direct expense of Doe's autonomy and identity. Again, it is the context of Meriwether's speech that matters—his insistence on treating Doe differently from her cis-gendered peers. While Meriwether may have strong feelings about gender identity as a "matter of public concern," the context in which he chooses to express those ideas directly harms Doe.

Unlike Meriwether, who has alternative paths for pursuing the expression of his inner self and beliefs on the topic, such as by focusing a class discussion on the topic, Doe is the object of Meriwether's speech and

²⁵² *Id.* at 498–99.

²⁵³ Gender identity is undeniably a core social identity. *See supra* Section III.A.

²⁵⁴ *Meriwether*, 992 F.3d at 501 (citing the university's nondiscrimination policies); *id.* at 506 (citing *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2476 (2018)).

²⁵⁵ "Nonrecognition," failing to recognize someone's identity altogether, can inflict the same harms as misrecognition. *See Taylor, supra* note 128, at 25.

²⁵⁶ *Id.* at 36.

²⁵⁷ *Meriwether*, 992 F.3d at 507.

subject to the classroom power dynamics.²⁵⁸ While Doe can protest, as she repeatedly did to both Meriwether and the university,²⁵⁹ she has relatively few other options to assert her autonomy and preserve her identity in this case outside of withdrawing from the class.

Even still, the Sixth Circuit held that the harms to Doe were minimal in comparison to the threat to Meriwether's free speech.²⁶⁰ The court rightly focused on the harm to Doe as one of recognition of her identity—"Never before have titles and pronouns been scrutinized as closely as they are today for their power to validate—or invalidate—someone's perceived sex or gender identity."²⁶¹ While the court was right to frame the issue as one of acknowledging identity, by choosing the word "validate" instead of "recognize," the court misstated what Doe was asserting when asking to be called by her preferred gender pronoun by Meriwether.²⁶² Further, the court framed Meriwether's decision to misgender and ultimately fail to recognize Doe's gender at all as taking "a side in [a] debate."²⁶³ As *Bonnell* made clear, the context of a professor's speech matters. By directing his speech, or his "view" on the topic, at Doe, Meriwether targeted Doe and harmed her based on her gender identity. This is different from merely taking a side on a debate.

3. The University

As a public university, Shawnee State's function is to advance the "public's interest in exposing . . . future leaders to different viewpoints."²⁶⁴ This mission to provide a public forum for dissenting ideas and opinions can be understood as serving to advance a democratic self-governance value as well as a marketplace-of-ideas or truth value. In its opinion, the court frames the classroom as a microcosm of democracy and a place for the pursuit of truth.²⁶⁵ The university classroom functions as a part of broader public discourse in this way and there is value in sharing ideas and thoughts, no

²⁵⁸ Equal recognition is always related to power dynamics; however, the classroom setting presents additional power dynamics related to role as well. See NELLY P. STROMQUIST, *THE GENDER SOCIALIZATION PROCESS IN SCHOOLS: A CROSS-NATIONAL COMPARISON* (2007) <https://unesdoc.unesco.org/ark:/48223/pf0000155587> [<https://perma.cc/J3BB-X7LJ>].

²⁵⁹ *Id.* at 499–500.

²⁶⁰ *Meriwether*, 992 F.3d at 509–11. Prior Supreme Court decisions on hate speech cases have set an equally high bar for distinguishing between the harms of "mere" hate speech from those caused by "harming" hate speech. See *supra* Section V.A.

²⁶¹ *Meriwether*, 992 F.3d at 509.

²⁶² According to Merriam-Webster, to "validate" is "to support or corroborate on a sound or authoritative basis" or "to recognize, establish, or illustrate the worthiness or legitimacy of." *Validate*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/validate> [<https://perma.cc/G22L-WFG2>]. Validation is thus inherently about conferring judgement on something and presenting a positive overall opinion of that thing. To "recognize," however, is "to acknowledge formally" or "to acknowledge or take notice of in some definite way." *Recognize*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/recognize> [<https://perma.cc/GP6Y-55UW>]. Recognition does not require conferring approval in the same way that validating does.

²⁶³ *Meriwether*, 992 F.3d at 509.

²⁶⁴ *Id.* at 507.

²⁶⁵ *Id.* at 503, 505:

[F]ree speech is 'essential to our democratic form of government.' Without genuine freedom of speech, the search for truth is stymied, and the ideas and debates necessary for the continuous improvement of our republic cannot flourish. (citations omitted). The court made an even more grandiose statement that "[o]ur nation's future 'depends upon leaders trained through wide exposure to [the] robust exchange of ideas'—not through the 'authoritative' compulsion of orthodox speech.

matter the validity or harm they may cause.²⁶⁶ This ensures that students can “remain free to inquire, to study and to evaluate, [and] to gain new maturity and understanding.”²⁶⁷ But by privileging the interests of the student population generally in this way, transgender students are forced to bear all of the harms caused by such speech.

Perhaps in an attempt to mitigate this harm, the university adopted gender-identity and nondiscrimination policies that emphasize respect for students’ autonomy in defining themselves.²⁶⁸ In this way, the university’s policies serve to advance the autonomy of individuals whose gender identities do not conform with their sex at birth. While the university policies are focused on eliminating discrimination against transgender students, such policies can be equally understood as preserving the ability of transgender students to control their own identities and exercise autonomy through the expression of one of their social identities. The policy is focused on speech that is directed at students specific to one of their social identities; however, it does nothing to stymie debate or critique of different viewpoints on the topic of gender identity broadly.²⁶⁹ Professors and students remain free to engage in the kind of public discourse on the topic of gender identity that is closer to the concern of preserving academic freedom and democratic self-governance, in line with the classroom discussion in *Hardy*. The policy’s focus is to mitigate the specific harm to students by minimizing the speech that can be directed at them related to one of their social identities. In this way, the university policy both enables student autonomy while preserving space for the discovery of truth and the development of norms necessary for self-governance.

Given all this, the Court should rule that Meriwether’s speech is not protected by the First Amendment. While Meriwether has the right to express his views on “matters of public concern” and does not lose this right when he teaches, his speech at issue is not directly related to such a matter. Rather, his repeated misgendering of Doe is more akin to vulgar sexual language used during an English class lecture that has no contextual basis. While the Sixth Circuit focused heavily on the autonomy interests of Meriwether, a fuller analysis would have considered the autonomy interests of Doe as well as the ways that Meriwether’s speech directly undermines Doe’s identity and autonomy. Until the harms of hate speech, including intentional misgendering, are understood to go beyond invective, courts will likely continue to put their thumbs on the scale on the side of speakers of such speech.

VII. CONCLUSION

Freedom of speech has justifiably been one of the most guarded rights since the founding of the country. Since the First Amendment was codified,

²⁶⁶ See *id.* at 504 (discussing how the government should protect academic freedom in order for education to “flourish”).

²⁶⁷ *Id.* at 510 (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)).

²⁶⁸ *Id.* at 498.

²⁶⁹ *Id.* The policy is focused on professors and staff calling students by their “self-asserted” gender pronouns. The policy does not limit the discussion that professors may have on the topic of gender identity in the classroom more broadly.

however, the threats to freedom of speech have changed as the technological, sociological, and cultural dimensions of modern life have evolved. Speech has always been a critical part of advancing individual autonomy interests while at the same time has always had the ability to limit the autonomy of others. As society has advanced and societal and cultural norms continue to change, it is necessary to examine if free speech doctrine is in need of change as well. Speech has the ability to propel or hold back the speed of that change. At the individual level, speech provides a unique means of recognizing and affirming the humanity, and autonomy, of others. This foundational step of recognition is critical for broader social change. Conversely, when freedom of speech is used to protect individuals who intentionally harm others with their speech, it sits as a right stubbornly opposed to the broader social good it is supposed to protect.

Better understanding the connection between speech, identity development, and autonomy interests can help in determining where free-speech doctrine may be in need of change. Our identities—personal, social, and role—are intimately connected to our speech development. Through both inner and externalized speech, we are able to develop and affirm our own and others' identities. This identity formation process is inherently about autonomy, control, and agency. When speech is used to negate or diminish the identity of another, it causes real harm to that individual. Understanding that the harms of hate speech extend beyond offensive or vulgar language and lead to “real” harms can help reframe the impact of this speech and perhaps rebalance the scale when courts decide whether such speech merits protection.

When considering how far the First Amendment right to freedom of speech should extend, it is critical that the analysis be rooted in the impact to autonomy interests at stake as a way to balance not only the needs of speaker versus listener, but also those of individual versus society. Much of traditional free-speech doctrine, particularly as it relates to hate speech, has focused heavily on the right of the speaker. In a world where every individual can now be a speaker with an audience and can amplify his or her hate speech, it may be time to shift the focus to the impact of such speech on the listeners and those who are the targets of such speech.