
Political correctness and the right to free speech: *the case of preferred pronouns*

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ABSTRACT

In this paper I argue for the general duty to refer to transgender people by their preferred pronouns when they are conventional. In the case of non-conventional, tailor-made pronouns, there is no such duty because those so-called “designated pronouns” are not actually functional pronouns. Last, but not least, even though there is a duty of civility to use the designated name and conventional pronoun of trans-people, individuals retain the right to speak out their belief in that sex and gender are biological facts, and thus, the right to state in reference to a transwoman: “She is not a woman”.

KEYWORDS

Transgender; Pronouns; Sexual dimorphism; Compelled Speech; Free speech; Freedom of conscience.

I. Introduction:

Limitations on free speech might be justified for various reasons. In the iconic example of Judge Oliver Wendell Holmes Jr., someone yelling “fire!” inside a packed theater may cause a stampede and thereby harm individuals (*Schenck v. United States* 1919). Freedom of speech does not license insults, offences, blatant lies that affect the respectability of others, or the public spread of intimate details of the private lives of individuals, to name just a

few of the plausible and justifiable restrictions that most of our legal systems impose on the right to free of speech.

Political correctness (hereafter PC), understood as the use of non-derogatory terms, mostly euphemistic, in public discussion or the avoidance of behavior considered “offensive”, also sets boundaries on what is permissible to say and do, although, in my view, the nature of PC rules is more akin to social norms rather than legal standards. Using “mentally disabled” instead of “neuro-diverse”, or “immigrant” instead of “newcomer”, or black-facing at a party, may gather social reproach but it does not generally prompt legal consequences¹. The use of PC utterances or terms is seen as the discharging of a duty to respect minorities, vulnerable or less-empowered people. It has been argued that, for particular individuals, the use of derogatory labels might trigger past or present traumatic or damaging experiences.

In this short paper my focus will be on the mandatory use of “preferred pronouns” to refer to transgender people. More specifically, I will deal with the question of whether that obligation conflicts with the right to free speech. In section II, I will review the underlying reasons behind the request to be referred to by non-conventional pronouns. In Section III I will describe the basic facts of the case of Professor Nicholas K. Meriwether (Shawnee State University in Ohio) which aptly illuminates this discussion, and in section IV I will review the constitutional doctrine of so-called “compelled speech” to test whether the duty to use preferred pronouns might fall into the category of those utterances or expressions that we have good reasons to impose. In Section V I will defend that the duty to use non-conventional pronouns that do not correlate with biological sex might be construed as a “duty of civility”, and yet, as I will argue in Section VI, there are exceptions to such duties based on the freedom of conscience. This exception generates an interesting – albeit paradoxical- consequence: even though there is a duty to use the preferred conventional pronoun that does not correspond to the biological sex of the requesting individual, the right to free expression and thought should allow the spread of discourses that deny transgenderism. Thus, as I will conclude in Section VI, the statement “Mrs. Smith is a man” should be admitted as a justified exercise of the right to free speech.

¹ Certainly, in certain settings it might prompt disciplinary consequences.

II. In the beginning was the name... and the sex

With marginal exceptions, the vast majority of the scientific community considers that sexual dimorphism is a pervasive feature of our species and many other animal species. By sexual dimorphism we generally understand the existence of significant morphological – primary and secondary sexual characteristics-, physiological – hormonal make-up- and genetic differences between individuals labeled as “male” and individuals labeled as “female”. Ultimately males produce one kind of sexual cells or gametes (sperm) and females a different kind (ova).

Yet, as in other biological phenomena, we cannot give individually necessary conditions that are jointly sufficient to identify who is male and female, or in other words, there are “deviations” from the norm², namely genetic malfunctions in the development of the embryo that cause the well-known phenomenon of “intersexuality”³. Yet, the marginal existence of intersexual individuals does not imply that sexual dimorphism is a social, institutional or cultural construction, even though historically the sexualization of individuals has varied. Thus, what is to be taken as biologically determinant of one sex or the other is not given by nature. The specific political, social and legal relevance that such differentiation should have is a wholly different matter (Fausto-Sterling 2018, 2000).

In contrast to intersexuality, transgenderism is a different phenomenon. Transgender individuals live, for a variety of reasons, in a state of non-conformity with their assigned biological sex. Initially transgenderism was institutionally categorized under clinical standards – gender dysphoria⁴– and legally regulated for the sake of channeling a problem deemed as fundamentally psychiatric.

Currently, however, the LGTBIQ+ community demands the “depathologization” of gender identity and thus its understanding as the exercise of personal autonomy which includes the demand to be referred to by the chosen pronoun that best suits the self-perceived gender identity of the individual.

² Consider bipedalism as a human feature, for instance.

³ According to the WHO, syndromes such as the Klinefester, SRY and other syndromes cause 1 out of 2.000 newborns to be intersex (<http://www.who.int/genomics/gender/en/index1.html#Gender%20Assignment%20of%20Intersex%20Infants%20and%20Children>).

⁴ The term is included in the latest version of the famous and controversial *Diagnostic and Statistics Manual of Mental Disorders* issued by the American Psychiatric Association.

These demands are underlined by a cluster of philosophical thesis. First and foremost the iconic distinction made by Simone de Beauvoir between “sex” and “gender”. When the acclaimed French philosopher argued in *The Second Sex* that “one is not born but rather becomes a woman” she was implying that biology (namely female biology) was not to be the fate of individuals (namely women). Thus, a certain array of material conditions ought not to be determinant of women’s expectations, roles, social positions, efforts, and, ultimately citizenship. This set of traits and attributes is to be taken as “gender” – a social and cultural construction- as opposed to “sex”.

Since the phenomenal spread of de Beauvoir’s book, a certain interpretation of her ideas has been increasingly influential in some quarters of academe – mainly philosophy and social sciences departments – and political activism. To wit: that biological sex is a spectrum and that the primal reality of biological sex is not even required to, paraphrasing de Beauvoir, become a woman (or man). This is one of the central tenets of the so-called “queer theory”. One of its most conspicuous champions, Judith Butler, has stated:

If being a woman is one cultural interpretation of being female, and if that interpretation is in no way necessitated by being female, then it appears that the female body is the arbitrary locus of the gender ‘woman’, and there is no reason to preclude the possibility of that body becoming the locus of other constructions of gender... Not only is gender no longer dictated by anatomy, but anatomy does not seem to pose any necessary limits to the possibilities of gender (1986, 35-36, 45).

Within the transgender community, the basic request has been to be named and identified according to this understanding of self-perception.

In a strictly logical sense, naming is a technique for individuation (Laporta 2013, 24-25). Our first steps in logic were given understanding conditionality (“given any X, if X is a man then X is mortal”) and, in the minor premise, the name of an individual - a unique combination of gametes, a coincidence among billions of possibilities.

Thus, naming a human being is a way to distinguish him from the grey. Naming comes along with civilization and is its product. Proper names signal our intimate conviction that we live “biographical” lives and not only a “biological” existence. Thus, we have a basic right to be given a proper name as stated in article 24.2 of the International Covenant on Civil and Political

Rights. In a case that affected the Kurdish minority settled in Turkey, the European Court of Human Rights has claimed that the Government has the duty to respect the Kurdish characters of their proper names as an expression of the right to respect for private and family life (*Taskin and others, v. Turkey* 2010). And yet, as happens with every other human right, the scope of the right to be named or officially registered using our designated name is not unlimited. It seems obvious that the Government, public officials and civil servants at large ought to use our officially registered proper name, but when we consider our private interactions things look quite different. We certainly have a duty not to refer to individuals using derogatory terms or insults, but it does not seem that there is a universal duty to refer to them using their proper names even though the refusal to do so is not the best tactic to befriend them. On the other hand, in our private legal dealings properly naming the parties is a necessary condition for the validity of the contract.

Trans individuals are particularly prone to be referred to by their preferred names, those who match their gender identity. They censor particularly the practice labelled as “dead-naming”, that is, the use of their given name at birth once they have transitioned to their new identity. But there are other forms of offensive mis-gendering that have to do with their preferred pronouns. To those forms I turn now.

Which pronouns and ways of treatment are requested by trans people? According to the Center of Resources for the LGBTQ+ community run by the University of Wisconsin (Milwaukee), people whose self-perceived gender identity does not align with the sex ascribed at birth on the basis of biology, or that challenge that sex is dichotomist (intersex, non-binary, etc.) are circulating pronouns of their own when their language (as is the case of English or Spanish) does not include a third neutral gender. Thus, conventional pronouns such as “he” or “she” are replaced by expressions such as “zie”, “sie” or “ey” among others (see University of Wisconsin 2020). To give just one example, in his presentation card in Twitter, Robin Dembroff, a philosopher at Yale University, self-identifies as “non-binary” and states that the pronoun to be referred to is “they” thus making the sentence “they (Robin Dembroff) is professor at Yale” is a well-formed sentence in English. “They”, as the singular pronoun widely chosen for people as Robin Dembroff was actually selected as the “Word of the Year 2015” by the *American Dialect Society* (Bennet 2016).

In order to protect interests such as Professor Dembroff’s, on January 25th 2019 the State of New York enacted the Gender Expression Non-Discrimina-

tion Act (GENDA) including, as one of the forms of banned discrimination, the refusal to use the requested name or pronoun. Regardless of the biological sex of the individual, employers, leasers, and other professionals have the duty to use the name and sex indicated by their employees or clients. Institutions such as the Kennedy School of Government (Harvard University) and many other Universities have followed suit and enable their students to designate their preferred pronouns and make it compulsory for all personnel, namely professors, to use them in their academic exchanges (see Hartocollis 2020 and Campus Pride n.d.).

III. The case of Nicholas K. Meriwether:

However, this growing tendency to abide by the linguistic usage requested by trans people is not immune to controversy and resistance. One of the most well-known episodes took place in 2016 at the University of Toronto when the acclaimed psychologist Jordan Peterson, the author of the best-selling book *Twelve rules for life*, publicly declared that he would not follow statutory proposition C-16 which included “gender identity or gender expression” as one of the traits susceptible of protection by criminal law as a hate crime. Peterson argued that such legal provision would compel him to speak in a way which is incompatible with his conscience and against the linguistic conventions that enable peaceful coexistence.

In a similar vein, in 2019 Nicholas K. Meriwether, a Professor at Shawnee State University (Ohio) filed suit against the authorities of his University claiming that freedom of religion and speech under the First Amendment were undermined when he was forced to express himself as if sexual identity is not fixed by nature. That was implied, according to Meriwether, when, under the threat of being sanctioned, he was obliged to use the preferred pronouns of his gender non-conforming students. Interestingly enough, he was not even authorized to designate his student using his proper name or by the title of “Mr.” – instead of the chosen female pronoun- because singling her out was a form of heinous discrimination.

It was Professor Meriwether’s contention that words are never innocent and that the use of mandatory “new” pronouns is a way to express a specific vision of reality. By forcing individuals to use unconventional pronouns designated by others, their basic freedoms are compromised. From a dif-

ferent perspective some voices coming from the feminist camp denounce the “silencing effect” that preferred pronouns have on the reality of women. The reason should be clear: once you conceal the correlation between sex and gender that is evinced by the use of pronouns or gendered expressions, we lose sight on the dimension of women’s achievements as well as their pervasive oppression (Kerr 2019).

Is Professor Meriwether right in his claim? Are higher education institutions infringing on the right to free speech or conscience when compelling us to use designated, non-conventional pronouns for trans people?⁵

Above I mentioned the practice of “dead-naming” as one of the ways in which trans individuals might be mis-gendered. Three other forms of mis-gendering merit our attention: (1) the sheer rejection of gender self-identification when it does not correlate with sex; (2) the rejection of the use of the non-conventional pronoun designated by the individual and (3) the rejection of the use of the conventional pronoun designated by the individual when it does not correlate with its sex. Take for instance the non-conforming individual Mary Smith who self-identifies as a woman albeit she is biologically male and has “xie” as her preferred pronoun. In the first case we would incur mis-gendering when stating: “Mrs. Smith is not a woman”. In the second case, because we reject the use of the non-conventional pronoun “xie”, we incur mis-gendering if we address Mary Smith saying: “She is a woman” instead of “Xie is a woman”. In the third case, we misgender Mary Smith if we say: “He is now a woman”.

Does free speech cover any of those statements? According to Professor Meriwether and many others, the answer should be affirmative and the reason is that in our liberal democracies “compelled speech” is generally banned.

We might be legally compelled to discharge certain formalities that include the use of specific expressions, namely for the sake of acquiring certain powers or enjoy certain rights. A very significant example in point is Barack Obama’s oath in his first term as President of the United States in 2008. The person in charge of administering the oath, the Supreme Court Chief Justice John Roberts, inadvertently changed the order of the words in the oath and made him say: “I will execute the office of president to the United States faithfully,” instead of “I will faithfully execute the office of president

⁵ Not for Cossman (2018).

of the United States”. Barack Obama had to repeat the oath on the next day and pronounce the sentence in its proper order.

For the lay citizen the mandatory use of certain expressions is less abundant precisely because freedom of speech and thought ought to prevail. In a number of iconic decisions, the US Supreme Court has declared that the First Amendment not only protects speech as an immunity-right that correlates with a duty of “non-interference” – banning censorship, for instance – but also the liberty-interest in “not saying” with the correlated banning of compelled speech⁶. In the landmark decision of *West Virginia State Bd. of Educ. v. Barnette* (1943) the Supreme Court considered that the duty of students to make the pledge of allegiance was a form of “compelled speech” repugnant to freedom of expression and religion insofar the authorities force individuals to say what they might not think or embrace (*West Virginia State Bd. of Educ. v. Barnette* 1943, 634). In a similar vein the Supreme Court decided that forcing the drivers of New Hampshire to use the sticker “To live free or die” in their cars was against the free exercise of religion by Jehovah’s Witness (*Wooley v. Maynard* 1977). More specifically, the Court so argued, it was unconstitutional to force any individual who deems it unacceptable to be a tool in the fostering of an ideological creed (*Wooley v. Maynard* 1977, 715). Similarly, it is unconstitutional to compel a private agent the inclusion of a float sponsored by a LGTBIQ+ association in a Saint Patrick’s Day parade (*Hurley v. Irish American Gay* 1995), or to force pro-life organizations whose goal is to give medical attention to pregnant women to provide them with information about public subsidies to abortion (*NIFLA v. Becerra* 2018).

IV. Pronouns and linguistic conventions: freedom of conscience and duties of respect

In the case of Professor Meriwether, the Court decided that, since the duty to use the preferred pronouns and treatment demanded by the student pertains to the domain of his professional duties as a Professor and not as a common citizen, his avoiding the compelled speech is not guaranteed by the First Amendment (*Meriwether v. Trs. of Shawnee State Univ.* 2019). It

⁶ See Eugene Volokh (2018).

has been also argued that this is a question of respect, a duty of civility that, as in many other cases, we believe should trump over our intimate beliefs. In that vein goes the famous adagio by La Rochefoucauld: “hypocrisy is a tribute that vice pays to virtue”.

Consider, for instance, the very plausible and admissible belief that paternity is a strictly natural or biological phenomenon. Thus, adoptive parents or individuals who resorted to artificial reproductive technologies and bear no genetic link to the offspring are not “fathers” or “mothers”. It seems reasonable to argue that holding such belief should be compatible with not unveiling the sons or daughters of those not taken as “parents” that they are not their offspring. The reason for such a form of “compelled speech” lies in the fact that the unbridled expression of my intimate belief about the ethically correct form of human reproduction very likely harms those individuals, particularly if they are underage. Teachers, for example, are not entitled to the exercise of their right to free speech in the classroom if that implies this form of evincing their rejection of family diversity. In these contexts, a professional or social courtesy duty may trump freedom of conscience.

Similarly, it may be argued that accepting the consequences of gender identity or sexual orientation is similar and equally non-violent to our intimate convictions. By using “mother” to refer to the woman who hired a gestational surrogate mother to bear a child, we don’t refrain from believing that motherhood is essentially a biological fact; by using “partner” or “spouse” to refer to someone who is legally married to a person of the same sex, one still may intimately think that homosexuality is a sin, and by the same token, by using preferred pronouns one may stick to the conviction that gender self-identification is nonsensical (Schauer 1982).

And yet there might be cases in which forcing us to say something out of respect of others’ self-assumed identity truly violates our conscience and freedom of thought. There are, for example, individuals who self-identify as not belonging to the human species (“otherkin” or “trans-animals”). Suppose someone identifies with the species *canis lupus familiaris* and requests to be greeted with the sound “whoof”. Could it be sensible to impose a universal duty to bark at him? Could it be sensibly affirmed that by not doing so we would be offensive to him? Could our refusal be considered a form of discrimination based on species-identity? It seems preposterous.

But back to our discussion on preferred non-conventional pronouns by trans people, actually, if you think carefully, in our daily social interactions

speakers do not use the pronouns that correlate with biological sex but with the physical appearance as male or female (McNamarah 2020). So we may conform ourselves with such a rough approach, and that shows that our commitment with the biological fact of sexual dimorphism and its relevant correlation with several linguistic and social institutions does not compel us to any degree with a thorough biological scrutiny of the individual before we address him or her with the corresponding pronoun.

And yet the use of non-conventional, tailor-made pronouns such as “xie” or similar made-up words, suffers from a fatal flaw: they cannot function properly as pronouns. An ordinary tale may suffice to prove my point: we are always excused from our inability to refer to someone by his or her proper name. These slips of memory are part of the fabric of our routine coexistence. This is precisely the reason why pronouns are useful, but if every individual is entitled to a personalized or non-conventional pronoun, the pronominal function is lost. No one could be required to remember everyone’s preferred pronoun in the same way in which everyone is excused for having forgotten any other’s proper names.

To sum up, from my previous analysis it follows that the right to free speech is not violated when we are compelled to treat non-conforming people according to their gender identity and to use their preferred pronouns insofar as they are conventional pronouns and irrespective of whether they correlate with their biology or not. For instrumental reasons, though, it is justified to refuse to use non-conventional pronouns until a neutral pronoun to be used to refer to non-conforming or trans people is conventionally agreed upon. The consequence should be that, regarding the forms of mis-gendering that I identified previously it is not acceptable to say in reference to Mary Smith: “He is now a woman”. A duty of respect or civility that do not impinge on our freedom of conscience compels us to say: “She is now a woman”.

V. Conscience, expression and the value of diversity

From what I have just said, it should not be concluded that we have a duty to respect gender self-identification itself, even when claiming that our sexual condition is not at our disposal and such statement causes grievances or discomfort to trans people. Here comes, then, the paradox: although freedom of expression or thought does not allow the misgendering of statement (3)

“He is now a woman” referred to Mary Smith, those very same basic rights should make the statement “She is not a woman” in reference to Mary Smith as a justified manifestation of the right to free speech. Similarly the broader claim: “trans women are not women”⁷.

As a matter of fact, PC speech confirms that there is a discordance between sex and gender and that the self-proclaimed gender of trans or non-conforming individuals is somehow different from so-called cis or conforming individuals. The best proof comes from the realization that the statement “trans women are women” is not an obvious platitude but a meaningful, debatable statement whose sensible interpretation might be: “even though trans women are not biological females they ought to be treated as women”. Thus, we cannot possibly curtail the expression of those who bluntly consider gender non-conformity as nonsensical, equivocal, misleading or plainly false.

Banning the possibility of speaking out loud an altogether rejection of transgender ideology erodes the marketplace of ideas causing overall damage, as John Stuart Mill defended in *On liberty*. We benefit from the right to free speech even when we don’t say what is true, or what is correct: in Mill’s own words:

... the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error (1856, Chapter 2).

A form of compelled speech that erases criticism of mainstream political ideologies short-circuits the diversity of discourses at hand for the public, and thus undermines the rights and interests of individuals who are willing to develop as self-autonomous agents by the promotion of their capabilities for criticism and suspicion from revealed dogmas. That includes LGTBIQ+ dogmas (Scanlon 1972, 215; Sacharoff 2008, 362).

⁷ An opposite opinion was issued by the British judge J. Taylor in the case of the firing of Maya Forstater by CGD Europe/Centre for Global Development (*Maya Forstater v. CGD Europe and Others*, 2019).

VI. Concluding remarks

Whatever the gender identity or sexual orientation of individuals might be, whatever their accidental, non-voluntary traits, all individuals are entitled to equal concern and respect by public authorities.

In the previous pages I attempted to argue that a basic duty of civility or courtesy trumps the right to freedom of speech so that it is reasonable to require that we address trans people according to their gender identity as self-proclaimed, and also the names and conventional pronouns of their choosing. But it is not reasonable to compel the use of non-conventional pronouns.

Yet freedom of thought or conscience entitles individuals to be permitted to respectfully affirm the cluster of philosophical, religious, scientific and political ideas that are implied in propositions such as “Mary Smith is not a woman” or more broadly “Trans women or trans men are not women or men”. Even more so in academic settings where it is particularly necessary to maintain an environment of non-coercive exchange of ideas, perspectives and values.

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