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*Lying, Reciprocity, and Free Speech: A Reply to Eight Critics (of Speech Matters)*

*Introduction*

I am grateful to all the commentators for generously offering their critical reactions about the book.<sup>1</sup> These comments and replies grew out of a stimulating conference in 2016 convened by the editor, George Letsas, to whom special appreciation is owed for his organization and inspired choice of speakers. Thanks are also due to the staff at University College, London (in particular, Cat Balogun) who made that gathering and the exchange possible.

Although the book was published not so long ago, in the final days of 2014, it feels as though much time has passed. The book was written and these exchanges first took place when Brexit still seemed unlikely, when the world and (perhaps) Donald Trump himself believed he would not be elected, and before the rise of heightened awareness and anxiety about rampant lying and fake news. To some readers, my unease about the cultural and political threats posed by lying may have seemed exaggerated. Now that these events have accelerated an alarming crisis of trust, that unease may be more commonplace. More disputable may be whether and why *lying* poses distinctive threats to the conditions of joint cooperation, whether it poses them in all settings I worry about, and how to crawl out of our predicament. May lies be used against liars to disable their power or must we resist and rebuild (in part) by reaffirming the values and the

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<sup>1</sup> Thanks are also due to Barbara Herman, Gabrielle Johnson, Rowan Meredith, Nicole Miller, William Rubenstein, and the editors of *Law and Philosophy* for good counsel and careful edits.

discipline of a stricter sincerity? As we begin to worry more about our speech culture, some similar questions about how to understand and respect the value of freedom of speech will become more important and more contested. Our exchanges may reflect that heightened level of concern and uncertainty.

In what follows, I try to engage with, if not answer, some of the main points of the commentators. Largely, I answer each commentator in turn.

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### *I. Lying, Deception and the Murderer at the Door – Greasley and Mills*

#### *Structure, Discovery, and Resilience*

To address some of Kate Greasley's remarks, it will help to review, in outline, my deontological case for the prohibition against the lie and its non-empirical structure. The case begins by discussing why sincere communication is central to our moral relationships and our development as thinkers. All deontological approaches, if they are thorough and not merely declaratory, identify the values that underlie the rights and duties those approaches defend. Discussions of the relevant values and ends do not make an approach consequentialist, although I am happy to concede that the identification of such values may also inform some fellow-traveler consequentialist enterprises. My approach, however, is not consequentialist, as Greasley acknowledges: It does not aggregate across people, it does not counsel maximization, and as I discuss below, it is

not empirically dependent.<sup>2</sup> Instead, it asks about what motives could be publicly known and implemented such that their public implementation would be consistent with our mandatory end of ensuring *adequate* conditions for moral agency and healthy moral relationships. To act contrary to such motives is to act immorally and inconsistently with a mandatory end of preserving the conditions for moral agency. The liar's maxim affirms the ingredients of moral chaos and of conflicts resistant to peaceful resolution. In this way, it affirms conditions antithetical to reasoned communication and hence, to rational moral cooperation. For that reason, acting on it is wrong.

Hence, my approach does not turn on empirical predictions or consequences of particular agents' actions. If it did, it might turn in part on the chances of discovery. But, since it does not, I do not think it is subject to Greasley's worry that my argument is, at best, an argument to lie strategically and convincingly.<sup>3</sup> For, this worry is intimately linked to a case built on predicted consequences and a consequentialist methodology that she and I agree is not my own.

A more consequentialist approach might also have to grapple with the apparent phenomenon of a culture resilient to lying, raised by both Greasley and Hatzis. For what it's worth, I think that appearance is quickly fading. It is becoming more difficult to sustain optimism about our resilience. To take two examples almost at random, our failures at tackling climate change and nuclear armament testify to the fact that we do not trust one another as we would have to in order to make substantial moral

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<sup>2</sup> The contrast with consequentialism is pursued at greater length elsewhere in an exchange with Leslie Kendrick. L. Kendrick, 'How Much Does Speech Matter?', *Harvard Law Review* 129 (2016): 997-1022 and S.V. Shiffrin, 'Bedrock', *Harvard Law Review Forum* 129 (2016): 242-257.

<sup>3</sup> 'The Morality of Lying and the Murderer at the Door', p. 443.

progress on significant social problems. As is commonly lamented, there is an absence of trust among those with very different political views that impedes our ability to work together. It seems non-accidental that these impasses coincide both with charges of mendacity and with failures to listen, talk, and engage with people with other viewpoints. Still, these are simply passing observations. My argument does not hinge on any particular diagnosis of the culture or its fragile resilience in the way that a more consequentialist argument would. My argument is focused on the *rational* underpinnings of trust and what moral requirements they entail for speakers' motives and consequent behavior.

My argument is not that lies, whether discovered or not, deter the actual formation of trust. Instead, I contend that there is an inconsistency between the liar's motive and ensuing course of action, and her mandatory ends as a moral agent. Further, the liar's motive and ensuing course of action are inconsistent with the achievement of our mandatory ends as moral, rational agents. To elaborate: We need testimonial trust for moral relationships to succeed and to be rebuilt where they have faltered; in particular, we need to be able, rationally, to trust that what our adversaries say correctly represents what they think and we need this trust even and perhaps especially during the heat of conflict so as to have the opportunity to resolve that conflict without force or violence. But, the liar acts on a motive that is inconsistent with *rationally* investing trust in the liar. The liar's motive, if it were affirmed as a reason for acting, would be inconsistent with *rationally* investing trust in speakers as such. So, the liar acts for reasons that are inconsistent with the conditions necessary to meet our most basic moral needs and responsibilities, and with the conditions necessary to meet them *rationally*.

There are potential ramifications of the lie, but they are not the sort of consequences that submit to empirical prognostication and verification. The lie involves irrational, wrongful action in three senses: First, its maxim conflicts with the liar's own mandatory ends as a rational, moral agent; second, the lie itself compromises *rational* trust in the liar—thereby contaminating the moral health of the relationship between speaker and listener; and finally, the existence and circulation of lies compromise our ability, in general, to engage in *rational* and whole-hearted forms of testimonial trust with each other. None of these wrongmaking elements would be cured by effective concealment of lies or by agents who doggedly persisted in trusting all comers, including those who affirm maxims of sincerity.

#### *Justified Suspended Contexts*

I'll turn briefly to the issue of justified suspended contexts and whether they might have a wider circumference in the case of the murderer at the door than I contend. This issue understandably concerns both Greasley and Christopher Mills who wonder, more generally, about the distinctness and sharpness of the boundaries around these contexts.<sup>4</sup> Describing the justifications for these boundaries and seeing that they have limits (even if we only have certainty about the range, but not the exact point, at which a limit is reached) may help to mitigate, if not dispel, the concerns.

For example, I do not worry that the misrepresentations involved in etiquette are onramps to a slippery slope. Circumstances of hospitality are fairly well understood as important environments in which, absent special efforts to extract oneself, one's

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<sup>4</sup> Ibid., p. 448-51 and 'Lies Matter', p. 460-61.

communications are initially tasked with conveying hospitality and inclusion—especially in circumstances in which parties may feel vulnerable (such as the situations of guests or those who’ve just shared one’s work). The interactions’ preliminary purpose is to ameliorate the vulnerability, not to convey more fine-grained information directly, through testimony. In particular contexts, there may be uncertainty about when one has sufficiently signaled hospitality and when one has moved into a context demanding frankness, but this uncertainty is the situational sort that can be resolved through seeking clarifications, directly and indirectly, about the purpose of a communicative interaction and whether it has been achieved.

As for the murderer at the door, I should also clarify that my argument does not turn on the fact that the murderer is not owed this information. Indeed, as will arise later in response to Greene, my argument about lying is not that we owe all our thoughts to others and that we must adopt a default stance of complete forthcomingness at all times to all interested parties. The free thinker must have privacy and control over what to reveal. This is partly why the issue of when deception is wrong is more difficult and complex than the question of why lying is wrong; the latter centers only on how one represents once one has chosen to represent, whereas the former also concerns silence, omissions, and questions of foreseeable interpretation by the audience. The fact that the murderer is not owed the information about the victim’s whereabouts is just one piece of the fuller argument I make for identifying a justified suspended context which is not merely that one does not *owe* the information but, further, that one could not ethically provide this information. So, the presumption of truthfulness governing one’s representations could not govern here. Whereas, we are charged with acting in ways

compatible with the preservation of the conditions of moral agency for everyone. So, a *general* permission to misrepresent based on the status and aims of our interlocutor would contravene that broader commitment at least with respect to him. Further, with respect to information in particular about the mechanisms of remedy and reconciliation that directly involve the resolution of wrongs and the potential re-entry of a person into moral communion with others, the tension between misrepresenting and our moral obligation to preserve the conditions of the miscreant's moral agency is particularly stark.

### *Reciprocity*

Greasley, Mills, and Micah Schwartzman all pursue issues about reciprocity that are thematically related. In different ways, they suggest that it is unclear why my argument does not lend itself to the idea that if the murderer at the door has violated duties owed to us and especially if he has lied, then we may withdraw the respect that our compliance with our communicative duties would show to him. Because Greasley and Mills seem more focused on reciprocity and moral duties while Schwartzman's emphasis is more on political reciprocity, I will begin the discussion here and then return to the political issues Schwartzman raises further in.

I may seem to invite some versions of the reciprocity concern because my own content-based approach to misrepresentation to the murderer at the door emphasizes his criminal activity. I should reiterate, however, that my emphasis is not on what information the murderer has a right to or has forfeited a right to, but rather on information the voluntary provision of which would constitute complicity in the crime's commission. (Although my emphasis is not on forfeiture, I register some skepticism



about the idea that any person could forfeit a right to the truth or a right against deliberate misrepresentation about morally salient matters relevant to moral redemption and reconciliation—whether or not that information might deter her misbehavior.)

In addition, I do not regard truthfulness as akin to a tool or a resource that one may refuse to share with non-cooperators. Nor is my dominant concern about escalation or other empirical effects of lying.<sup>5</sup> Rather, it is on what the ramifications of a permission to lie are for rationally grounded relations of trust, mutual understanding, and mutual edification and support. Understanding the truth about oneself and about others is not a tool to achieve another moral end but is partly constitutive of being a moral agent and regarding and responding to other people as the individuals they are. So, to lie is directly to compromise the relationship one has with others by misrepresenting oneself and obstructing their ability to be in an authentic moral relationship with you.

Broad reciprocity-based accounts trouble me because they amount to saying that others' immoral action constitutes a reason to sever or partly curtail moral relations with them. That both strikes me as an unconscionable remedy, whether it is announced in advance or not, and one that conflicts with our general obligation to treat moral agents with respect. The qualities that merit that respect are their moral capacities and not their reliable exercise of them.

Moreover, reciprocity accounts suffer from a failure to advance a plausible moral psychology of rehabilitation. For most, rehabilitation and reintegration into the moral community depend on the help of others, grounded in authentic relationships of trust. Because reciprocity-based accounts endorse direct and deliberate misrepresentation to

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<sup>5</sup> 'Lies Matter', p. 463.

those who misrepresent and because the boundaries of the misrepresentations they would countenance are diffuse, their capaciousness seems like a liability that may compromise the achievement of a reliable, identifiable foundation of trust. Without an alternative moral psychology of rehabilitation, I fear it is only an empty stipulation to declare that one may misrepresent to a wrongdoer to ‘bring that individual back in line with the requirements of membership of the moral community’ or to return her ‘back to playing by the rules of the communal game.’<sup>6</sup> I am not at all confident that a permission to misrepresent directly and deliberately could light that path. Being a moral agent in good standing requires understanding of the relationships one is actually in, as a philosophical matter, and as a rational psychological matter, it requires a rational foundation of trust in other people.

### *Silencing*

Let me turn to Mills’ creative suggestions about silencing.<sup>7</sup> Mills’ analysis of the wrong of silencing and his analogy to the wrongs of insincerity are insightful and stimulating. Given the moral importance of communication, I agree that we must not only ensure that the channels of communication are not garbled and exercise due care to ensure we do not transmit inaccurate information, but we must also exercise due care to ensure we do not obstruct others’ efforts to express themselves and be heard.

I wonder, however, whether deception, rather than lying, is the better analog to silencing. First, like deception, silencing is assessed by effect and may occur without the

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<sup>6</sup> Ibid., pp. 462, 463.

<sup>7</sup> Ibid., pp. 457-59.

speaker aiming to silence.<sup>8</sup> Intentional silencing is a distinctive wrong but one need not intend to silence in order to silence. Whereas, the lie involves the intentional representation of a proposition as true that one does not believe. Second, like deception, the wrong of silencing also centers around the effect *on the recipient* of silencing behavior, whereas the wrong of the lie does not turn on the harm of the listener's belief in the lie's content.<sup>9</sup>

Third, like deception, the fault for the effect of silencing (as Mills defines it)<sup>10</sup> may not always rest, or rest exclusively, with the speaker. Sometimes, it may rest with

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<sup>8</sup> *Speech Matters*, pp. 19-20.

<sup>9</sup> *Ibid.*, pp. 19, 22. As I argue in the book, lies and their wrongfulness do not depend upon either the intent to deceive or the effect of deception. So, what I call 'pure lies,' that is, lies without deceptive effect or intent, are wrongful for the same primary reasons as lies that deceive, namely that all lies reflect an affirmation of a principle that, if public, render unreliable what should be a reliable and necessary channel of testimonial communication and undermine rational bases of trust. (Notice that Mills' description of my definition of 'pure lies,' p. 116, isn't quite accurate. Mill's characterization of them focuses solely on lies that could not deceive even if believed because their content happens to be true, owing to a core mistaken belief by the speaker about what is true.)

<sup>10</sup> 'Lies Matter,' pp. 457. I quibble with Mills' definition and his elaboration of the conditions under which silencing can occur. First, I am unclear what sort of behavior satisfies the third sufficient condition. What does it mean for B to make it more difficult "for A to voice A's opinion without risk of being deliberately misunderstood"? Should this be read as "deliberately misconstrued [by B]"? If not, who is doing the *deliberate* misunderstanding? The audience of A? That doesn't seem right. If B tells an audience in advance that A often speaks metaphorically and hyperbolically and this description is inaccurate, that audience may misunderstand A's factual allegations as metaphorical and hyperbolic. If B's aim is for A to be misunderstood, that might count as silencing but I don't think that the *audience* has *deliberately* misunderstood. Rather, the silencer has deliberately attempted to increase the likelihood that A will be misunderstood. I suspect that the agent who is deliberate here and the agent who misunderstands often come apart. Further, I am not sure the inaccuracy that primes the misunderstanding must be *deliberate*. Suppose B truly believes (inaccurately and culpably so) that A usually speaks metaphorically and hyperbolically; if B is sufficiently persuasive, B's priming may provoke misunderstanding by the audience, although B did not aim for A to be misunderstood. What may be more important than whether the provoked misunderstanding was deliberate is whether the misunderstanding is the (indirect) product

the audience. If Brian decisively persuades his audience, whose members already yearned to be given reason to affirm his position, it may make it more difficult for Alice's contrary opinion to receive a fair hearing; still, no fault may lie with Brian for the audience's overzealous response to being persuaded (especially where their predilection is reasonably unknown to him). Or, suppose Brian relevantly mentions Alice's race in his speech, but this triggers a bigoted audience to take her remarks less seriously. The fault here may be with the audience, not Brian. (It may depend. If Brian were aware or should have been aware of the bigoted audience's likely reaction and proceeded nonetheless to mention Alice's race, we might allocate partial moral responsibility to him for triggering a bigoted response; it might depend on whether Brian's relevant message could have been otherwise crafted.) Likewise, with deception, it may sometimes occur that a listener emerges with a false belief due to her own intellectual error in processing speech; whether or not preventing this error is partly the speaker's moral responsibility may be a complex question depending on the context at issue.<sup>11</sup>

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of an inaccurate attack on the credibility or sincerity of the speaker. Indeed, this possibility is suggested by Mill's subsequent appeal to the role of stereotypes in his elaboration of the conditions under which silencing may occur.

Second, Mills' immediate elaboration of the conditions under which silencing may occur seem overly narrow; although, of course, his examples may not have been intended to serve as a comprehensive list. For example, there are other means of silencing than through exclusion via formal rules or through the perpetuation of stereotypes or other undermining norms. Consider drowning out her speech with chants, subliminally instructing the audience not to listen, or discrediting the speaker specifically and personally in unfair ways, but not by way of a norm. The last case also illustrates that a speaker may be silenced even when her *sincerity* is not undermined; her credibility or her standing to speak might be undermined and that could constitute silencing.

<sup>11</sup> S.V. Shiffrin, 'Deceptive Advertising and Taking Responsibility for Others', in M. Budolfson, A. Barnhill, and T. Doggett (eds.), *Oxford Handbook of Food Ethics* (Oxford: OUP, 2018): 470-493, at pp. 478-479 and 488-490. *See also* S.V. Shiffrin, 'Learning

In these ways, silencing, as Mills defines it, more closely resembles deception than it does lying. So, I think the relevant moral questions to ask are similar to those surrounding deception. In the case of deception, we start with the value of having accurate mental contents and then must ask when the achievement and maintenance of that state is the responsibility of the speaker and when it is the responsibility of the listener, the one whose mental contents are at issue. In the case of silencing, we may start with the values that Mills articulates as integral to full participation in the moral community: having the opportunity to voice one's thoughts freely; being understood; and, having one's contributions evaluated fairly.<sup>12</sup> Where those values go unrealized because of the speech of others, we must ask whether the responsibility lies with the speech of others, with the audience, with both, or with neither. Because deception and silencing involve possible contributions from both speaker and audience in producing an effect, the ethical questions are, in some sense, more intricate than they may be with lying, where one's evaluation need only concern the speaker and whether her speech diverges from her beliefs.

In sum, difficult and fascinating questions arise with respect to deception and how broad ranging our responsibilities are to ensure that others do not draw mistaken inferences from our speech. So, too, difficult and fascinating questions arise with respect to silencing when considering how wide our sphere of responsibility is with respect to the effects of our speech on others' opportunities to speak and to receive a fair hearing. I entirely agree with Mills that it is illuminating to include silencing alongside wrongful

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From *Lawyers About Deception*, *forthcoming in Proceedings of the Aristotelian Society*, Supplementary Volume (2019).

<sup>12</sup> 'Lies Matter', p. 457.

deception and lying as another important way in which we may fail to achieve our communicative aspirations, we may fail in our communicative responsibilities to others, and we obstruct the realization of the conditions for full and effective participation in the moral community.

## *II. Promises Under Duress – Saprai*

Chapter Two pursues a theme introduced in Chapter One, namely that extenuating circumstances alter, but do not extinguish, the moral force of our communications toward those who culpably generate those conditions. In this chapter, I turn from the topic of the communicative responsibilities associated with assertion and take up the related topic of promising. In particular, I argue that we should reconsider the standard view that *all* promises given under duress are without moral force. I argue for a distinction between scripted promises and initiated promises and argue that initiated promises have some moral force.<sup>13</sup> Scripted promises are those promises dictated by the coercer (whether directly or indirectly) and extracted through coercion or its threat.<sup>14</sup> Think of the shakedown artist who demands that the shop-owner promise \$500 a week in ‘protection money’ or he will not be able to keep the local arsonist at bay. Initiated promises are promises that emanate from the creative enterprise of the victim of coercion, offered generally as part of a negotiated resolution of the conflict and the coercion.<sup>15</sup> Suppose in the face of the veiled threat, the shop-owner refuses to pay the sham fire insurance but

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<sup>13</sup> *Speech Matters*, pp. 56-65.

<sup>14</sup> *Ibid.*, pp. 53-54.

<sup>15</sup> *Ibid.*, p. 54.

instead volunteers that she needs a new shop clerk and promises to hire the racketeer's son and asks if that will keep her shop safe.

Scripted promises conform to the model presupposed by the standard view. The victim does not exercise the agency appropriate to promissory responsibility and the coercer gains no right to performance. I contend, however, that initiated promises are different. They involve some exercise of agency by the victim. Their moral force permits the rational facilitation of a more peaceful disposition of the crisis provoked by the coercion and, moreover, its form serves substantial moral values. Specifically, the generation and acceptance of an initiated promise resolves the crisis on terms partly authored by the victim. Their acceptance by the coercer signals the acknowledgment by the coercer of the victim's agency and perspective as such. The subsequent performance helps lay the foundation for trust between the parties and the reintegration of the coercer into moral society by signaling to him that his misbehavior does not render him ineligible as a moral beneficiary. For these reasons, although the exertion of coercion to extract the promise disqualifies the coercer from having the moral standing to demand performance, the promisor has moral reasons to regard her promise as exerting substantial moral force, even if it is not binding in the standard way. Nonetheless, I also argue that although promises that are initiated under duress may have substantial moral force, they should not be legally binding as contracts. For the community to lend its enforcement power to such promises would be to endorse and support the conditions giving rise to those promises or, in other words, to give succor and legitimacy to the coercer and his coercion.<sup>16</sup>

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<sup>16</sup> Ibid., pp. 68-71.

Prince Saprai questions the moral distinction I draw between scripted and initiated promises.<sup>17</sup> Surprisingly, he does not argue that both lack moral force. Rather, he aims to revive the Hobbesian position that the promisee, the coerced, has a *pro tanto* right to performance of both sorts of promises. His argument centers around the interesting legal detail that contracts made under duress are only voidable at the election of the promisor but are not void.<sup>18</sup> That is, courts will honor and respect contracts made under improper threat unless the party under duress objects to their enforcement and rescinds the contract.

Saprai and I agree that this nuance may give victims more power and flexibility when under duress because it gives them a greater ability to make promises, including scripted promises, with *some* legal force, and this ability may help them escape a situation of duress less scathed.<sup>19</sup> Still, whatever ability it affords them is slight since victims retain the ability to opt out of performance. To be effective as an escape pass, the coerced would either have to believe the victim would not later invoke her power to avoid or the coerced would have to extract a (binding) moral promise not to invoke that power.

Taking something akin to this latter stance, Saprai regards the legal stance as evidence of an underlying moral view with which he has sympathy, namely that even in the scripted cases, there is a *pro tanto* reason to regard the promise as binding and as generating a right to performance held by the promisee.<sup>20</sup> It's an interesting suggestion. Of course, if the promise were *pro tanto* binding, we would want to know what sorts of reasons the promisor would need to overcome that *pro tanto* default. This seems like a

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<sup>17</sup> 'Promising Under Duress', pp. 476-78.

<sup>18</sup> See, e.g., Restatement of Contracts, 2d, § 175 (a).

<sup>19</sup> 'Promising Under Duress', p. 469.

<sup>20</sup> *Ibid.*, p. 478.



challenge, *ex hypothesi*, since we are supposed to think that the fact that the promise was coerced and scripted is insufficient to resist that default in the first place; if those factors are insufficient, what could overcome this default?<sup>21</sup> The answer cannot be that the promisor has changed her mind, because then the promise would have no greater moral substance than a mere intention. If the answer is something like the *pro tanto* presumption could be overcome where performance would be costly to the promisor, then the *pro tanto* binding force would be minimal since most promises that would serve any function in situations of coercion would be ones that would be costly to the promisor. To say that it is binding unless the performance would be superbly costly to the promisor seems implausible; it seems like the moral equivalent of allowing the coercer to manufacture money by squeezing his victim just hard enough but no harder. I do not see why the victim should be (or should feel) morally bound to whatever the coercer forced her to say at knifepoint when, *ex hypothesi*, she exercised no agency of her own.

I don't see an attractive way to resolve this tension and, in any case, I interpret the moral underpinnings of the doctrine another way. Back to Saprai's datum. If the legal stance does not reflect a moral view that coerced, scripted promises have some moral force akin to coerced, initiated promises, then why are *all* promises under duress treated the same way and why are they all voidable rather than void *ab initio*? I will offer two thoughts. The first adverts to our shared view that the classification of contracts formed

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<sup>21</sup> And, if they are always sufficient, then how important is the difference between the standard view and Saprai's view? On such an understanding, the standard view would have it that coerced promises have no moral force because they were coerced and the alternative view would have it that they have some moral force, but it is always overcome by factors having to do with the circumstances of duress. Where the two views are completely co-extensive and the relevant factors driving the conclusions are the same, the significance of the distinction diminishes.

under duress as voidable gives the promisor more flexibility than would rendering them void. That the contract is voidable, not void, means that the victim may hold the coercer to whatever promise the coercer made in return for the coerced promise. Whereas, if the contract were void, the promisor-victim could not, for the contract would simply be invalid. This power has little significance in the scenarios where we imagine the coercer has already performed by letting the promisor-victim go. But, where the interactions are more nuanced and involve an exchange of executory promises, the promisor-victim may wish to be able to force the coercer to keep whatever agreement was made. Consider a case like *Austin Instrument v. Loral Corporation*.<sup>22</sup> Roughly speaking, very close to the time Austin's performance was due, Austin threatened to breach a contract with Loral, a Navy subcontractor, unless Loral offered to pay Austin more than negotiated; Austin also demanded that Loral offer Austin an additional contract on highly favorable terms. Loral acquiesced because it depended on Austin's performance and could not afford to find a substitute performer without losing money and suffering reputational harm with the Navy. If the second contract were void because it was extracted using an improper threat, then Loral would not be able to compel Austin's performance on the second contract. Whereas, if it is voidable at Loral's election, Loral may decide, at the time of performance, whether it is in Loral's interest to proceed and force Austin to perform or to invalidate the second contract. So, the voidability doctrine offers more power to the victim of duress and therefore, may be a more fitting legal response to the coercion. This explanation is entirely consistent with the idea that the coercer has no right to demand performance.

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<sup>22</sup> 324 N.Y.S.2d 22 (N.Y. 1971).

Second, the legal categorization of coerced promises as ‘voidable’ rather than ‘void’ may reflect a different moral judgment than the one Saprai has in mind. When the promise is voidable at the election of the promisor-victim, the promisor-victim is given asymmetrical power to disrupt the contract. This conveys that the promisor-victim has a special complaint with respect to the circumstances of formation that the promisee-coercer does not. Whereas, where a contract is void (such as with the illegality or immorality doctrines),<sup>23</sup> the court’s view is that both parties are equally enmeshed in and equally responsible for a relationship that is not worthy of respect and that either party may disrupt it.

For these reasons, I am not inspired by the legal doctrine to adopt Saprai’s broader view of the moral significance of the coerced, scripted promise. There may be, of course, other moral reasons the promisor has to perform the action promised under coercion. For example, in some circumstances, innocent third parties may be relying on the prospect of performance. But these reasons are ones that arise neither from any fidelity to the relationship between the promisor and the coercer at the time of the formation nor from any claim the coercer-promisee has to performance, or in other words, to the fruits of his malfeasance.

### *III. Lies and Freedom of Speech –Barendt, Kendrick, Hatzis, and Schwartzman*

#### *The Relationship Between Theory and Doctrine*

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<sup>23</sup> See, e.g., Restatement of Contracts (2d) §§ 178, 179.

Both Eric Barendt and Leslie Kendrick helpfully push me to clarify my methodology about freedom of speech and to clarify the relationship between my theoretical claims and some important doctrinal categories.

My accounts of lying and freedom of speech both take some inspiration from Kant but I do not attempt to do interpretative justice to his text. Likewise, I am inspired to some extent by legal doctrines about freedom of speech, but I do not attempt to do interpretative justice to the body of doctrine as it stands. In part, this is, as Barendt intimates, because my ambition ranges beyond the legal. I am attempting to flesh out the core values served by a free-speech culture, a culture that has both legal and social components.

It is also partly because I do not regard the U.S. doctrine nor the British doctrine as fully persuasive or coherent. I do not fault the judges and justices for the doctrines' holistic shortcomings; they take cases willy-nilly, as they come, and discharge dozens in a year. Moreover, I find it puzzling to think our job is to make theoretical sense of their efforts because building a theory, whether directly or indirectly, is not really within their expertise or a task for which they have adequate time.<sup>24</sup> Rather, I think it is the theorists'

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<sup>24</sup> Barendt rightly contrasts my method with Robert Post's method (p. 487), a method I regard as peculiar. See, e.g., Robert Post, 'Participatory Democracy and Free Speech', *Virginia Law Review* 97 (2011): 477-489. Not only is Post's unblinking focus on judicial understandings of freedom of speech incompatible with his own popular constitutional commitments, it is anti-democratic in another way. It reifies practice in a way that deprives theory of its power to operate as a critical source of reflection on practice, and it deprives judges and legislators of the resources to responsibly exercise their democratic powers to decide *now* what we should do and how to interpret our commitments. Although there is an important democratic role for respect for precedent, how great that respect should be also depends in substantial part upon how sound or unsound the precedent is. See also S.V. Shiffrin, 'Methodology in Free Speech Theory', *Virginia Law Review* 97 (2011): 549-559.

job to assist courts, legislators, and other political actors in their jobs as constitutional interpreters and as constitutional critics by identifying what theoretical assets already lurk within the doctrine and also by providing the building blocks that would render opinions more theoretically coherent. That task is pursued by critique—by identifying where legal opinions rest on theoretical errors to clarify and to avoid like mistakes in the future. It is also pursued through the positive articulation of what it is about free speech that is worth protecting as a foundational matter. So, theorists should explain where apt, justify where apt, and critique where apt.

Thus, I am untroubled by the fact that there are points of disparity between a thinker-based theory of freedom of speech and current doctrine. I am more concerned to investigate those challenges that point to clashes between the theory and those insights that the doctrine already captures. To address that concern, I'll tackle a handful of the substantive matters Barendt and Kendrick raise—about defamation, special protections for political dissenters and the press, the limits of freedom of speech, the role of pragmatic concerns in free-speech regulation, and content discrimination.

*Defamation and Other Doctrinal Divisions Between Political and Personal Speech*

I'll start with Barendt's questions about defamation.<sup>25</sup> Given my argument about the significance of personal as well as political speech, how could I account for what may seem to be a reasonable doctrinal distinction between the protections afforded to speech attacking public figures versus that speech attacking private figures? If, roughly speaking, speech about public figures might be thought, generally, to implicate matters of public

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<sup>25</sup> 'Thoughts on a Thinker-Based Approach to Freedom of Speech', pp. 488.

concern whereas speech about private figures, generally, does not, then the doctrinal distinction may seem to presuppose the very sort of hierarchy between political and personal that I disavow.

A thinker-based theory may account for this distinction without drawing any sort of categorical distinction between the value of political and personal speech. First, the central task of a free-speech theory is to identify the core cases for protection and promotion as well as the value of a free speech culture. How these commitments are realized in an institutional setting may also depend upon other sorts of institutional considerations and contingent facts. One may think an institution may reasonably design its doctrines to take into account where free speech is most likely to be threatened. One may, for instance, worry that critical, true speech about a public figure is more likely to be suppressed or chilled than critical, true speech about a private person because public figures often have greater access to resources and power that might be wielded to retaliate against a critic. To counteract the power of the position, the law might generate higher barriers to recovery for defamation about public figures. Something similar may be said about special protections for dissenters and for political dissent, in particular; the law may recognize that they are attractive targets and especially vulnerable to attack because the objects of their critique are very powerful. The underlying thought here need not be that politically relevant speech intrinsically deserves greater protection but rather that the law may be used to level the playing field and to disarm especially virulent threats.

A second motivation for the doctrinal difference may appeal to the importance of privacy and reputation as general human rights and as additional preconditions for the full development of the thinker. The justification for the distinctions made in defamation

doctrine does not arise from an analysis of the value of free speech alone but by considering how two fundamental needs of free thinkers may be reconciled. Personal and political speech may be equally fundamental to a free-speech culture but defamation doctrine involves an effort to strike a balance between free speech interests and interests in privacy and reputation. Given the differences in the reasonable expectations of privacy between public figures and private figures, that balance may differ depending upon who the speech is about. So, I think the interaction between speech and other values explains these judgments rather than a hierarchy that treats political speech as specially deserving of legal protection in light of its higher value.

Restrictions on sexual harassment may also draw on appeals to privacy given the invasions of privacy involved in unwelcome speech directed at particular people. Sexually discriminatory speech in the workplace may encompass more than harassment and may be regulated given the special connection between the workplace, access to the conditions for livelihood, and distributive justice. Again, the interaction between speech and other values explains these judgments rather than a hierarchy that treats political speech as special and uniquely deserving of legal protection.

### *Press vs. Corporate Speech*

Another issue raised by Barendt concerns whether a thinker-based theory can recognize the special importance of the press, while at the same time questioning the status of corporate speech.<sup>26</sup> My theory of speech and intellectual development is social and relational not individualist and libertarian. Much thought is developed in relational

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<sup>26</sup> *Ibid.*, pp. 489.

settings, all the more so as our intellectual sophistication heightens our dependence on epistemic divisions of labor. Hence, my theory of voluntary association is a corollary of the thinker-based theory. To develop as autonomous thinkers, we must have access to participation in free social relations to develop and express ideas together. The centrality of associations, coupled with our reliance on epistemic divisions of labor, also undergirds my theory of the significance of the press as one of the social institutions that makes free thought possible within our social circumstances. I regard the press clause of the First Amendment of the U.S. Constitution as a recognition of its special status that does some work to help us distinguish some outlets of the press, given their mission, from other commercial enterprises whose more limited mission, corporate status, and situated-ness within a competitive commercial setting render their status in a free-speech theory more peripheral. In other words, what drives my skepticism about corporate commercial speech is not simply that it is on behalf of an organization that does not itself have an identity as an autonomous individual thinker. It is further that commercial corporate speech is not formed and propelled by the contributions of autonomous members acting and deliberating autonomously on the full range of reasons that apply to them.<sup>27</sup> Instead, their aim is not to explore ideas or to investigate for the public good, but to make a profit for a discrete group of citizens. Given the demands of a competitive market, that focused and narrow aim produces rather profound structural considerations that limit and skew the speech corporate speakers can utter.<sup>28</sup> So, while the press and voluntary associations are not themselves thinkers, their speech and its production have an intimate connection

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<sup>27</sup> *Speech Matters*, pp. 98-102.

<sup>28</sup> *Ibid.*, pp. 99-101.



to the intellectual needs of free thinkers. The same cannot be said, generally, for corporate commercial speakers.

For those reasons, I do not regard corporate commercial speakers as partaking in the fundamental right to free speech, although some regulations of corporate commercial speakers may implicate free-speech values indirectly (such as when regulations are driven by an impermissible purpose, e.g., to suppress a viewpoint). As I argue in Chapter Four, I do not regard liars, insofar as they are lying, as partaking in that fundamental right either.<sup>29</sup>

Do other speakers also fall outside the core domain of protection? Barendt says: ‘Shiffrin surely does not contemplate the possibility of protection for the communications of, for example, terrorists and paedophiles, because they reveal how they are thinking.’<sup>30</sup> Here, I must disagree and admit, candidly, that I do contemplate the possibility of the protection of *some* speech by terrorists and pedophiles. Those varieties of thinkers, I take it, share the same fundamental interest in access to free speech as pacifists and poets and those without affiliation or label. All of them labor under some of the same limits as well. It is reasonable to restrict expressive activities: that are elements of independently defined criminal activity; that represent efforts to conspire to engage in criminal activity; that threaten, harass, or defraud particular people or invade their reasonable sphere of privacy; or that meet something like the test articulated in *Brandenburg v. Ohio*,<sup>31</sup> that is, those expressive efforts that aim at and are likely to *incite* (and not merely inspire) serious criminal activity. There may be other limits as well.

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<sup>29</sup> *Ibid.*, pp. 117, 153-154.

<sup>30</sup> ‘Thoughts on a Thinker-Based Approach to Freedom of Speech’, p. 490.

<sup>31</sup> 395 U.S. 444 (1969).

I am not aiming at a comprehensive list but rather underscoring my affirmation that terrorists, for example, should not enjoy protection in the use of communication directly to pursue and further any criminal activity. But, they should have a protected right to articulate their complaints, their convictions, and their ideological hypotheses, however misguided and loathsome, and to have access to others to explore ideas, critical reactions, disagreement, and agreement. The categorization of particular people, such as prisoners and terrorists, based on status or affiliation as ineligible candidates for speech and association has marked a disastrous turn in our free-speech practice. *Holder v. Humanitarian Law Project*,<sup>32</sup> which upheld the constitutionality on restrictions on speech with ‘terrorist organizations,’ even speech that was not even loosely associated with conspiratorial behaviors but instead gave advice about legal compliance, belongs on the list of one of the worst decisions of our Court. Isolating those with opinions we regard as poor or dangerous is cruel and anti-intellectual. It betrays a cynical stance of deep incorrigibility that is at fundamental odds with any plausible moral, relational psychology of moral growth and collective moral progress.<sup>33</sup>

### *Pragmatic Concerns*

Kendrick beautifully illuminates many important pragmatic concerns that arise when contemplating regulation of lies. I especially endorse her concerns about fair notice, the identification criteria of a solemn declaration, and the challenges of identifying the boundaries of some justified suspended contexts. I will not answer every question she

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<sup>32</sup> 561 U.S. 1 (2010).

<sup>33</sup> Cf. *Speech Matters*, pp. 37-38 and 75-78.

raises but I will tackle two: the role of pragmatic concerns in my free speech analysis of regulation and whether expert-centered regulations may avoid the label of content-discrimination.

In the book, I suggest that because lying can be a political wrong and its regulation does not intrinsically violate freedom of speech, the issues about its regulation are pragmatic.<sup>34</sup> That is not to say that they are trivial. Indeed, they may be insurmountable. To say they are pragmatic is not to deny that they raise free-speech issues or to point to some sorts of financial or personnel issues. The distinction I have in mind is not between free-speech issues and other sorts of issues. Rather, I am suggesting that we should follow a two stage-analysis, although as Kendrick notes,<sup>35</sup> the Court regularly elides these two stages.

Start with the question of whether a regulation on lying, however narrowly tailored and well-crafted, would *intrinsically* abridge freedom of speech. Imagine the government announced the prohibition, its scope and application were clear, the citizenry understood it just as the government did, and citizens simply voluntarily complied without any need to roll out the apparatus of enforcement. Would the regulation, voluntarily complied with, abridge freedom of speech? Certainly, regulations on criticizing the government, on criticizing one's doctor, or on expressing one's sexual attraction to a person of one's own gender would all intrinsically violate freedom of speech, but I claim that is not true of a regulation on lying.

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<sup>34</sup> Ibid., p. 118.

<sup>35</sup> 'Lies and Free Speech Values, p. 502.

But, then, regulatory articulation and compliance do not come as easily as they do in thought experiments. In designing regulations, one must confront the challenges of the institutional apparatus and the population one has. The challenges associated with institutional implementation I call ‘pragmatic concerns.’<sup>36</sup> Specifically, in addition to asking whether a regulation, by virtue of its aims and content, violates freedom of speech, we also must ask whether its institutional realization would compromise freedom of speech and an environment in which it flourishes. This latter question requires investigating whether the method of realization is respectful of free speech and whether its unintended consequences interfere with the establishment and maintenance of a free speech climate in which citizens not only enjoy freedom of speech under some technical description but also *feel* they have diverse opportunities to express their thoughts freely without repercussions. Where regulations are articulated in vague or esoteric terms, such craftsmanship may suffer pragmatic defects of more than one kind. It may create opportunities for government abuse and illicit discretion, and it may leave citizens unsure whether they have sufficient spaces to express themselves with impunity. The point of the distinction is not to mark a difference between free-speech values and some distinct sort of concern. Our reluctance to take such risks also sounds in free-speech values.

Where there is an intrinsic defect in the idea of regulation, we should give up on attempting to address the relevant social problem through state action aimed directly at quelling the speech through means other than persuasion. Where there are pragmatic defects, however, we might remain open to the idea that the barrier to regulation may be contingent and might lower in different social circumstances, or with better crafting, or if

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<sup>36</sup> *Speech Matters*, p. 118.

we used different forms of governmental intervention. For example, where there is an intrinsic defect with regulation, there is also (in my view) an intrinsic defect in government criticism of citizens for exercising their freedom of speech in that way. There is a subtlety here. Government speakers may legitimately criticize the position taken by speakers. If sincere and if not overbearing, they may reasonably defend the government (or another citizen or an organization) against a critic; but what they may not do is attack the critic as abusing her freedom of speech in offering such criticism. Whereas, although there may be many pragmatic obstacles to regulating lies, I think it is telling that it is perfectly legitimate for government speakers not only to refute the lie but to criticize the speaker for abusing freedom of speech by lying.

So, a commitment to freedom of speech requires we be alert to regulations that intrinsically are disrespectful of free speech and those that, as applied, are disrespectful of free speech. I suggest that regulations of lies only raise alarms of the latter sort. As Kendrick observes, regulating all lies would raise extraordinary free-speech concerns, whether or not they are pragmatic or intrinsic in nature.<sup>37</sup> I agree. Pushing for such regulation is not my aim; my primary aim is to better understand the nature of our vigilant resistance to regulation and to explore whether to relax it.

### *Expert Liars*

Still, I do claim that lies are a serious political wrong that we should consider tackling, rather than acquiescing to their prevalence as the intrinsic cost of freedom of speech. One way to navigate the pragmatic and doctrinal shoals of regulation would be to

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<sup>37</sup> 'Lies and Free Speech Values', p. 498.

regulate more narrowly. Picking out a subset of lies, however, risks a distinct free-speech concern—that one is selecting which lies to regulate based on their content. That concern should be taken seriously but its recognition should not end the discussion, for we might reasonably focus on other demarcations, such as lies used within commercial solicitations or lies by experts. The latter narrowing criteria is not content-based, but is speaker-based, and it is connected to a particularly egregious instance of lying by those who solicit the trust of those not in a position to verify what is said for themselves.<sup>38</sup>

Kendrick reasonably asks both why I care about avoiding content discrimination and whether a focus on speaker identity really does avoid it, at least as the U.S. courts understand what content discrimination is. I care about content discrimination mostly for principled reasons. The thinker-based stance I articulate prizes the freedom of each person (and voluntary collective) to have the opportunity, individually and collectively, to formulate and sift through ideas, whether mistaken or accurate, in order to identify which are worth affirming and which rejecting and why. Content discrimination may obstruct these opportunities. It may also be objectionable for suggesting to individuals that they lack this freedom and that entertaining particular ideas is not a valid exercise of freedom of speech. Whereas, identifying particular features of speakers that non-arbitrarily render them justifiably accountable for their sincerity would not single out the speech for its content but rather for the failure of this accountable speaker to fulfill her responsibility.

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<sup>38</sup> I discuss how an argument of this kind may support our regime of regulating deceptive advertising in Shiffrin, *supra* note 11, at pp. 478-490.

I also care about the stricture on content-discrimination because, although I don't think the theorist must track doctrinal categories, I think theory can be more useful when it interacts with doctrinal categories—whether cooperatively or critically. Kendrick then questions whether my speaker-based approach is cooperatively compatible with the U.S. Supreme Court's interpretation of content discrimination given the resistance to speaker-based carve-outs in *Mosley*,<sup>39</sup> *Citizens United*,<sup>40</sup> and *Sorrell v. IMS Health, Inc.*<sup>41</sup> Perhaps she is right and perhaps I offer more of a reformist suggestion that adheres to the spirit but not the Court's letter of the stricture. I'm not yet convinced, though, and think these cases can be distinguished, though I must admit they are not cases that I think show deep insight on the part of the U.S. Supreme Court.

The Supreme Court has been open to some speaker-based classifications. It's by no means a case to celebrate but *Meese v. Keene*,<sup>42</sup> for instance, seems to authorize distinctive treatment of speech on behalf of foreign powers. What's appalling about *Meese* is not the invocation of a speaker-based classification but the appalling idea that the speech of foreign powers is intrinsically suspect and the implicit denial of the interest of domestic thinkers in having access to the ideas of foreign powers.

Kendrick observes that despite the fact that *Mosley* carved out an exception for labor speakers in order to comply with a labor law, that speaker-based carve-out was nonetheless regarded as content-discriminatory.<sup>43</sup> I agree that the motive behind that carve-out was perfectly permissible, but I do not think the stricture against content-

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<sup>39</sup> *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972).

<sup>40</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

<sup>41</sup> 564 U.S. 552 (2011).

<sup>42</sup> 481 U.S. 465 (1987).

<sup>43</sup> 'Lies and Free Speech Values', p. 500.

discrimination must focus solely on motives. I can imagine a reasonable approach to content discrimination that looked not only at the content of a regulation and its motive but also its predicted communicative uptake. One might worry that despite the innocence of the motive, the carve-out might be understood by the public as privileging the likely viewpoint and content of labor speakers; concern about that inadvertent communicative effect might drive the classification of the carve-out as content-discriminatory in a problematic way.

With respect to *Citizens United* and *Sorrell*, one might read them as showing the Court's mistaken view that, in these contexts, corporate and commercial speakers do not compose a discrete category warranting distinctive treatment. Whatever the demerits of the Court's view of corporate speech, it is still compatible with the view that experts have special responsibility for sincerity given their exclusive skills and their cultivation of trust. Also at work in *Sorrell* was the suspicion that the commercial speakers were being targeted for the content of their brand-promoting message, whereas I think there is no plausible parallel positive concern that targeting experts who lie about the topic of their expertise is motivated by a concern to suppress the content or viewpoint of experts.

Kendrick is of course correct that it would be useful to do more to translate my moral recommendations into a workable legal account. It would be useful, especially in these times, but this isn't the occasion. My more modest aim is to argue that once we slough off the idea that regulating the lie represents an *intrinsic* assault on the free-speech interests of free thinkers, we are liberated to think more seriously and concretely about what the pragmatic concerns about such regulation are, whether they are entrenched, or whether they might be surmounted, in some cultural circumstances, to help restore a



culture of greater trust and stronger expectations of truthfulness.

### *Causal Inquiry*

To get to the core issues raised by Nicolas Hatzis, I first should identify and set aside some only apparent tensions between us. Some of Hatzis' remarks seem targeted at the regulation of reticence and at the regulation of *false* speech.<sup>44</sup> My arguments about the *potential* susceptibility of lying to regulation do not extend to either of these distinct categories. (I elaborate on reticence below in response to Amanda Greene.) My theses only touch upon the possible regulation of speech that the speaker deliberately advances as (believed to be) true despite the fact that the speaker knows she does not believe what she avows.<sup>45</sup>

To be sure, there is much overlap between regulating lies and regulating false speech, but they are not identical tasks for at least three reasons. First, not all lies articulate false propositions. Where the speaker's beliefs are true, the speaker's lies may be false; but, where the liar's own beliefs are false, what the liar says may (accidentally) be true. Second, there is a great deal of false speech that is not produced by lying and the production of false speech, unlike the production of lies, is not always wrong. A speaker may sincerely utter false propositions, after all. In some cases, the inaccuracy may be accidental, part of an encouraged process of learning, or otherwise faultless. In other

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<sup>44</sup> See, e.g., 'Lying, Speech and Impersonal Harm', pp. 518, 520, 524, 525, 526, 529.

<sup>45</sup> Hatzis' description (p. 518) that I take all discrepancies between what a speaker says and what a speaker thinks to be lies is also overbroad. Not all discrepancies between the assertion and the speaker's mental content involve lies. After all, some discrepancies may be attributable to misspeaking or inadvertent imprecision. The lie, in my view, involves a deliberate assertion of content the speaker knows she does not believe (*Speech Matters*, p. 12).

cases, the speaker may be culpable for her ignorance, for negligently crafting her speech, or for making assertions under conditions of ignorance. Third, the wrong of lying is grounded in the deliberate misrepresentation of *the speaker's beliefs*. The wrong of false speech, when it is wrong, has more in common with the wrong of deception—namely, it is grounded in the misrepresentation of *the world* in those situations in which accurate speech (or silence) may be expected. The cases for regulation likewise differ. The case for regulating lying, as such, rests upon the importance of being able to trust the sincerity of speakers. The case for regulating false speech, as such, rests upon the importance of representing the world accurately, the importance of being able to trust the accuracy of speakers in certain circumstances, and the importance of averting the proliferation of false beliefs. The philosophical questions raised by the prospect of regulation of each may also differ. As I argue in the book, the possible regulation of lies, as such, raises no *intrinsic* free-speech concerns. Whereas, from a free-speech perspective, the regulation of false speech, as such, must be more nuanced and contextually circumscribed given the role of making mistakes in the process of learning and discovery.

Moreover, I resist Hatzis' preliminary classification of my argument as a version of 'critical moralism,' at least as moralism is typically understood.<sup>46</sup> My primary aim is not to make a case for regulating lies but, more modestly, to observe that there is no intrinsic free-speech objection to the regulation of lies given that lies do not amount to an externalization of the speaker's mental contents. Further, there are reasons to consider regulations given the tension between the conditions of successful communication, a precondition for a functioning speech culture, and the implications of the lie for rational

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<sup>46</sup> 'Lying, Speech and Impersonal Harm', pp. 520-21.

testimonial reliance. I go to some pains to suggest that any regulations we might consider would have to be very carefully crafted; contrary to Hatzis' intimation, I do not suggest regulations that would involve censorship in the sense of prior restraint or criminal punishment.<sup>47</sup> I do not suggest that the state may regulate lies with the aim of making people better people or with the aim of encouraging people to say the right things and refrain from saying the wrong things.<sup>48</sup>

Nor is Hatzis' analogy between my tentative case for regulating (some) lies to the case for regulating hate speech straightforward. The case for regulating lies will differ from some versions of the case for regulating hate speech (whatever its ultimate merits) in at least two ways. Some arguments for regulating hate speech acknowledge there are free-speech interests on the part of the speaker in the sense that the speech expresses the speaker's feelings or judgments, but contend that they are outweighed by the terrific harm such speech inflicts collectively and on individual victims. By contrast, I argue there is no free-speech interest in lying because the speech is not an expression of the speaker's mental contents; so, whatever case there is for regulation is not one grounded in a balance of the speaker's interests against a compelling interest.

Second, the characterization of the harm hate speech inflicts often encompasses a wide array of harms, not all of which are concentrated on preconditions of a functioning communicative environment. True, some strong arguments about regulating hate speech point to its capacity to intimidate or otherwise silence the targets of hate speech and

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<sup>47</sup> Ibid., p. 529; *Speech Matters*, pp. 116-156.

<sup>48</sup> So, I do not see myself as defending a position sympathetic to *Muller* or to other standard forms of obscenity regulation. Graphic depictions displayed in ways that intrude on citizens' mental privacy or that are used to harass or subordinate may be a different matter, but the case for their regulation has nothing to do with 'sexual propriety.'

therefore disable a functional communicative environment. Usually, those arguments turn on the claims about how hate speech affects the listeners and the targets of the speech, sometimes through the effective transmission of hateful sentiments, via persuasion or more opaque means, and sometimes in the way threats operate.

In this way, the case against hate speech draws on empirical claims about how hate speech inflicts harm. Importantly, much of Hatzis' criticism of my view stems from his attribution to me of strong empirical claims. Whereas, as discussed above in the reply to Greasley, I dispute that the moral case I make against the lie rests on *empirical* claims about how lies affect us psychologically or sociologically. A practice of lying, the moral permission to lie, and the legal toleration of lying may foster damage to the communicative culture by undermining the *rationality* of trust.<sup>49</sup> Lies directly damage the rational basis of moral relationships and thereby explain and justify distrust, and other reactive emotions that are further destructive of healthy moral relationships. Because the case for legal regulation rests on the same arguments, I dispute that the primary case for legal regulation must rely on strong empirical claims. In pointing out these differences, I

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<sup>49</sup> Shiffrin, *supra* note 2, at pp. 245-248. Does my position in Chapter 5 undermine my position in Chapter 4, as Hatzis interestingly suggests? As his criticism goes: Either our toleration of pure autobiographical lies undermines the rationality of the communicative culture in which case toleration is hard to understand, or it does not, in which case we have less reason to worry about the prevalence of other lies. My answer in brief is that I do think pure autobiographical lies are morally wrong and that they inflict damage on relationships and on the reliability of testimony by isolating speakers and by offering rational grounds for doubt. Nevertheless, given the social meaning and symbolism of regulation and toleration, there are strong reasons associated with equality and fraternity not to regulate pure autobiographical lies. The distinctive applicability of those reasons to pure autobiographical lies generates a delineable boundary that works, rationally, in some of the ways that I claim the boundaries of justified suspended contexts do. In this case, those boundaries block the inference that the absence of regulation suggests the speech is innocuous or acceptable.

do not mean to suggest that they either impugn or lend support to the case for regulating some forms of hate speech. Rather, these differences suggest that the fault lines surrounding these questions may be somewhat different and the analogy may be more distracting than illuminating. Most significant, I dispute Hatzis' contention that there is an empirical argument at the core of my legal analysis for which there is no evidence.<sup>50</sup>

For this reason, the evaluation of the case for legal regulation of the lie also does not resemble the approach to incendiary speech. Cases like *Debs*,<sup>51</sup> *Frohwerk*,<sup>52</sup> and *Schenck*<sup>53</sup> involve the regulation of speech for its content (and its viewpoint), on the grounds that its content is dangerous for an audience to hear and would be dangerous for an audience to be persuaded of. This fact marks such regulations as *per se* illegitimate. It is *per se* illegitimate to ban speech on the grounds that it might persuade citizens to oppose a war, the draft, capitalist interests, or public interests, for that matter.

By stark contrast, as I argue in Chapter Four and discuss in the reply to Kendrick, regulating lies does not involve regulating speech on the basis of its viewpoint or its content more broadly but rather because the speaker represents it as sincere but does not affirm it.<sup>54</sup> The content of the speech is irrelevant to whether it is susceptible to regulation. In Chapters Three and Four, I offer a theory of freedom of speech that connects freedom from content regulation to the conditions for freedom of thought, a

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<sup>50</sup> 'Lying, Speech and Impersonal Harm', p. 524.

<sup>51</sup> *Debs v. United States*, 39 S. Ct. 252 (1919).

<sup>52</sup> *Frohwerk v. United States*, 249 U.S. 204 (1919).

<sup>53</sup> *Schenck v. United States*, 249 U.S. 47 (1919).

<sup>54</sup> *Speech Matters*, pp. 125-129.

theory that would underwrite the judgment that regulations like those at issue in *Debs* and *Schenck* are *per se* illegitimate.<sup>55</sup>

I do not think the only or even the primary defect of these cases was their failure to apply a sufficiently searching test of causal proof. Even if it could be shown that it was not a mere ‘possible tendency’ of the speech to alter citizens’ attitudes toward the war, but a certainty, that stronger showing should not validate the regulations. Some would allow such regulations when the consequences of voicing such speech were truly catastrophic (e.g., persuading a group to engage in a violent spree) and *outweighed* the infringement on free-speech interests. In that case, because of the appeal to sociological consequences, evidentiary proof of a causal chain would be essential to upholding such regulations. Others, like me, might only permit such regulations based not on the consequences of its articulation, generally put, but based on circumstances where the speech operated as a threat to particular recipients or where it incited an audience in the sense that it acted to manipulate an audience that had lost rational control of itself—a sort of group-based diminished-capacity argument.<sup>56</sup> These more agency-oriented justifications would also demand proof. But, whichever form the argument takes, because the speech to be regulated falls squarely into the scope of the free-speech protection, I am

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<sup>55</sup> *Ibid.*, pp. 79 ff. and pp. 120 ff., respectively.

<sup>56</sup> These represent two different ways of understanding the *Brandenburg* test and what should count as inciting or producing action through speech. I defend a more speech-protective interpretation of *Brandenburg* than many interpreters (including Hatzis), so it is ironic that Hatzis interprets my position as closer to ‘clear and present danger’ than even the less speech-protective interpretation of *Brandenburg* (‘Lying, Speech and Impersonal Harm’, p. 534). See also S.V. Shiffrin, *Speech, Death, and Double Effect*, 78 *NYU Law Review* (2003): 1135-1185, at pp. 1152-1153.

in happy agreement with Hatzis that high evidentiary standards of a causal connection between speech and consequences are crucial.

My point about lies is that they do not participate in the value of freedom of speech. They do not represent misguided or dangerous thoughts of the speaker. Because they are insincere, they do not represent the thoughts of the speaker at all. So the high evidentiary standards about causation or the likelihood of harm that appropriately apply to the regulation of speech which falls inside the core of the free speech protection are not activated here, except indirectly from concerns about the collateral effects of regulation (including the potential chilling of sincere speech) when those collateral concerns are themselves predicated upon empirical claims. Endorsement of my position about lying and freedom of speech thus poses no threat to the maintenance of extremely strict standards regarding the regulation of incendiary speech.

#### *Political Reciprocity – Schwartzman*

I am delighted at the opportunity Schwartzman's essay offers to discuss political reciprocity in more detail. As Schwartzman surmises, I think it important that, by contrast with snappishness toward one's neighbor or an unforgiving attitude toward one's colleagues or siblings, lying can be a political wrong and not exclusively a moral wrong.<sup>57</sup> (This distinction, in part, underwrites my resistance to the 'critical moralist' label discussed above in the reply to Hatzis.) Our ability to communicate reliably is, as I have argued, essential to our system of social, political, and economic cooperation. To lie

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<sup>57</sup> 'Lying as a Political Wrong', p. 513.

is to act on a maxim whose content is inconsistent with the maintenance and rational deployment of our joint resource of trustworthy communication and to risk contributing to its deterioration. I also endorse the conception of our political relations to one another as involving relations of reciprocity.<sup>58</sup>

These two points of agreement between us give rise to Schwartzman's core question. In Chapter Four, I argue that lying is a political and moral wrong and further, that well-crafted regulation of it would not intrinsically offend our commitments to freedom of speech.<sup>59</sup> Nonetheless, in Chapter Five, I urge that we should abstain from regulating what I call pure autobiographical lies, i.e., those offered without deceptive intent or effect, when they are supplied outside of heightened testimonial circumstances such as when under oath in court, on employment applications, or in fiduciary relationships.<sup>60</sup> Legal tolerance of such lies, I argue, is a way that we can demonstrate our commitment to a conception of equality that recognizes our equality as morally imperfect people and that affirms that good standing does not demand moral perfection.

Schwartzman does not contest the conclusion about pure autobiographical lies. Rather, he wonders whether the conception of politics as a scheme of reciprocity that I invoke while pursuing this conclusion is consistent with my argument for it and, whether, more generally, it poses a challenge to the qualified brand of absolutism about the

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<sup>58</sup> To be sure, the wrong of lying does not sound only in terms of reciprocity or hold only between those in reciprocal relations. Sincerity is a duty within relations of reciprocity but these relations of reciprocity layer on top of and reinforce a duty that also governs those who do not stand in rich reciprocal relations with each other.

<sup>59</sup> *Speech Matters*, pp. 120ff.

<sup>60</sup> *Ibid.*, p. 157, 162.



prohibition on lying that I defend.<sup>61</sup> Specifically, if lying involves a violation of the obligations of reciprocity because it abuses a common resource that we together must preserve, then why isn't the liar herself a fair target of the lie? If others lie, then haven't the requirements of reciprocity broken down? And, then, mightn't we allow that responsive lying is not a political wrong but what may be called for by a breach of reciprocity?

In most cases, we should conceive of the citizen who lies as a person who has the powers and capacities of a political equal but has failed to meet her responsibilities. We then must figure out what the appropriate remedy or response is for that failure. With respect to pure autobiographical lies, I have argued that, to manifest other significant values, the appropriate response should be limited to moral criticism and censure. What is the appropriate response for other sorts of lies, whether autobiographical lies that deceive or non-autobiographical lies? Should we judge, as Schwartzman wonders, that the citizen who lies has undermined her claim to the status of a political equal by violating the terms of reciprocity?<sup>62</sup> Should that render her ineligible for the terms of fair treatment offered by that scheme?

Rather than saying her political equality is undermined, I would say the citizen is a political equal in bad standing. Her behavior and her status, I agree, make her susceptible to some form of accountability measure. What I question is whether there is any default reason to think that the form of accountability in any way mirrors or

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<sup>61</sup> 'Lying as a Political Wrong', pp. 514-515.

<sup>62</sup> Ibid., p. 512.

resembles the duty she has failed to fulfill. That is, I am skeptical that the appropriate form of reciprocity licenses lying back to the liar.

The conception of reciprocity I work with is one that I developed with Barbara Herman in a seminar we jointly taught in 2015. We call it ‘generative reciprocity’ and it has four features. On our conception of generative reciprocity, a working relationship of reciprocity involves a relationship of cooperation in which:

1. Each member has a cooperative role to play, as an equal.
2. The public recognition of each member’s equal status is a part of the cooperative relationship that works as a mechanism by which members convey respect to each other as equals.
3. As an element of their practice of public, mutual recognition, members are expected to do their parts, which involves initiating cooperative activity where appropriate and responding with cooperative activity as appropriate.
4. To a significant extent, the expectations in (3) are met in practice.

My reply begins by noticing that not all relations of reciprocity take a tit-for-tat form. The roles members play and the cooperative activity they are expected to contribute need not be identical in content. Important, useful divisions of labor may assign us very different roles in our cooperative reciprocal activity. The core of my answer to Schwartzman, however, turns on the distinction between the content and source of a duty on one hand and the appropriate remedy for its violation on the other. This distinction holds even when we are in a relation of reciprocity with isomorphic duties. On the conception of reciprocity I just articulated, no particular remedy for failing to meet an

expectation is essential to the notion of reciprocity. Even where a duty is meant to be performed in tandem with others' like performance, so that everyone has a part and that part is the same for all, I am not convinced that the correct response to a failure to satisfy a duty of reciprocity is to withhold one's performance with respect to the shirker. (To put the point in contracts language, not all terms are also conditions on one's performance.) The appropriate response to someone who batters you is to call the police, not to strike back, *unless it is essential to preserving one's bodily integrity*. The appropriate response to a citizen who fails to purchase medical insurance may be to levy a fine, not to withhold medical treatment.

Of course, the appropriate response to a cooperator who fails to do her part may depend on how prevalent the failures are among other members. Where there are widespread failures to comply with a scheme's expectations, the reciprocal scheme may collapse. Where that happens, one's primary obligations as a reciprocator may wither. Absent full collapse, however, it is not clear why the default appropriate remedy for a failure to do one's part is to be shut out of the particular benefit that is the object or product of the enterprise of reciprocity.

Instead, two factors should determine a remedy. First, the remedy should express an appropriate recognition and denunciation of the wrong. Second, it should aim in some way to encourage, educate, or otherwise elicit future compliance through permissible means; those means should still embody and express respect for the shirker as a person and as a deliberative member of the polity. Sometimes exclusion from a benefit whose production depends upon reciprocal participation is an apt remedy for a shirker. It's particularly fitting for cases where the duty in question is one of supplying labor or funds,

the benefit in question is inessential or may be obtained through other means, and there are few third-party or community consequences for piecemeal exclusion. Exclusion here may both express disapproval and provide a fitting incentive for future participation.

On other occasions, withholding one's own performance of the reciprocal duty does not seem fitting. It may involve an immoral act (and not a mere discretionary behavior or omission), such as beating a batterer. Other withholdings have substantial third-party effects—think of the deprivation of medical care. In yet other cases, withholding one's own performance may obstruct the rehabilitative, educative aspect of the remedy; here, one might think of solitary confinement of the violent offender who in some sense has not observed the duties of reciprocity with respect to sociality.<sup>63</sup>

Lying to the liar has all three problems: it is an intrinsically immoral act; it has and risks third-party effects because it frays the rational basis of trust and it risks deterioration of the extant culture of sincerity; and, its failure to maintain lines of reliable sincere communication is at odds with the aim of rehabilitation and reintegration of the liar through modeling and generating a relation of trust, a foundation on which further moral growth may occur.

So, my answer is that lying in response to other liars who fail to recognize the duties of reciprocity remains a political wrong so long as the system of reciprocity, in general, holds. To misrepresent intentionally to a liar (except in a justified suspended context defined in terms other than a mere lapse in reciprocal performance) is to wield an inappropriate remedy. To apply an inappropriate remedy is itself a wrong that places one in bad standing as a political equal.

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<sup>63</sup> *Speech Matters*, pp. 90-92.

#### *IV. Institutional Sincerity – Greene*

Before proceeding to remark on the true points of contention between Greene and me, I will start by clarifying my position because some of Greene’s criticism targets theses that I do not hold. There are at least three important places where Greene and I disagree about what position I advanced in the text.

#### *Reticence, Institutional Contexts, and Responsible Speech*

First, many of Greene’s initial concerns address topics to which I commend theorists’ attention but that are not topics about which I take a specific position. For example, Greene reports my position about institutions as one about duties not to engage in deception,<sup>64</sup> whereas what I defend are duties not to lie. These obligations are not identical or interchangeable. As I argue in Chapter One, many forms of deception do not involve lying and lies need not involve deception. The book focuses on the prohibition against lying and distinguishes that prohibition from the more nuanced prohibition on deception. As I argue in Chapter One, when and why non-lying deception is wrong is a difficult question, one distinct from the arguments that render lying wrong.<sup>65</sup> In Chapter Six, when I discuss sincerity and truth-telling, my focus remains on the question of whether *lying* by public officials and by professors may be justified by the important aims they pursue in virtue of their institutional positions.<sup>66</sup>

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<sup>64</sup> ‘Is Sincerity the First Virtue of Social Institutions? Police, Universities, and the Regulation of Free Speech’, p. 538.

<sup>65</sup> *Speech Matters*, pp. 22-23.

<sup>66</sup> *Ibid.*, pp. 194 ff.

Further, some of Greene's arguments target a different topic altogether, critiquing a view I did not advance, namely, that government officials and the police in particular must engage in 'full disclosure.' For example, the arguments regarding Obama's representations about the economy and the ship pilot concern how comprehensively forthcoming they should be on a particular occasion.<sup>67</sup> They are not cases that show much about when affirmative, direct, and deliberate misrepresentation is permissible.

In the book, I do not argue for a duty of complete and comprehensive forthcomingness—whether in general or with respect to all relevant information, whether by individuals, institutions, or institutional actors. Rather, I focus my claims on the issue of whether, *when one does speak*, one must be truthful about what one says, in the sense that one should not solemnly declare something as true when one believes it to be false. Some of Greene's points pertain to the questions of: *whether* one should speak about a particular matter and reveal all relevant information to interested parties; whether one has a duty to correct others' ignorance or mistaken inferences; and, whether one must always ensure others are not deceived by one's truthful communications or omissions.

Reticence is often entirely permissible, even though it may generate misunderstanding in one's audience. Questions about how much one must reveal, when, and how much responsibility one must take for the accuracy and thoroughness of others' mental contents are fascinating. They are worthy of far greater study than we've devoted to them. I agree that in some cases, we have reason to accede to an organization of authority in which information is carefully managed, although I think we should have

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<sup>67</sup> 'Is Sincerity the First Virtue of Social Institutions? Police, Universities, and the Regulation of Free Speech', p. 541.

strong democratic reservations about interpreting that permission too widely. Further, when institutions husband information or have special epistemic roles, they may have heightened duties of accuracy and responsibility for others' understanding. For example, the exclusive access private companies enjoy to information about their products and their circumstances of production may underwrite the strong duties of ensuring accurate uptake of their communications about particulars that are embedded in the laws against deceptive advertising.<sup>68</sup>

In any case, answering these questions is, I think, an even more contextual inquiry than the ones I tackled that concern the ethics of affirmative, direct misrepresentation. Specifically, my remarks about the range of justified suspended contexts were not meant to offer an answer to these questions. My aims were more modest: By identifying the issues about lying as related but distinct from those about deception and reticence, I hoped to clear the way for a more focused investigation of these companion problems about epistemic ethics.

### *Responsible Speech and Harassment*

Second, contrary to Greene's representation, I neither argue nor believe that the legal protection of free speech should be extended only to those who exercise it 'responsibly.'<sup>69</sup> The special epistemic duties of those institutional actors who occupy epistemic roles explain my reference to 'responsible speech' by police officers and other public employees. On-duty speech by workers in epistemic institutions may be expected,

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<sup>68</sup> Shiffrin, *supra* note 11, at pp. 478-490.

<sup>69</sup> 'Is Sincerity the First Virtue of Social Institutions? Police, Universities, and the Regulation of Free Speech', p. 551.

by virtue of their roles, to meet standards of careful investigation as a part of their employment responsibilities. What I claim in the footnote to which Greene refers and in which the term ‘responsible’ arises is that academic freedom should not only protect the possession and articulation of unpopular views, but should also protect criticism of the positions of other members of the institution.<sup>70</sup> But, as I discuss, current U.S. free-speech doctrine permits state actors to punish and fire their employees merely for voicing, at work, dissenting views about internal policy and work-related matters, even if those opinions meet the legitimate epistemic standards of the position (i.e., even if they are in that special sense ‘responsible’).<sup>71</sup> I regard that doctrine as undemocratic and inconsistent with a commitment to freedom of speech.

Third, while criticizing my account at one point for allegedly extending freedom of speech only to ‘responsible’ speakers, at another point, Greene lumps me into a group of apologists for harassment who, on her description, regard the collateral damage of bullying and harassment as ‘redeemed by its necessity as part of the only decent form of popular self-government.’<sup>72</sup> It is not my position that harassment or its effects are redeemed, necessary, or part of a decent form of popular government.<sup>73</sup> Regulations that

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<sup>70</sup> *Speech Matters*, p. 213, fn. 42 (mentioning university governance and IRB oversight as well as research and teaching activities). See also, *ibid.*, p. 205, fn. 29 (detailing the cases and the sorts of criticisms about grant funding, handling of sexual harassment claims, and other governance matters, the voicing of which has been used to sanction professors who are critical of university administration).

<sup>71</sup> *Speech Matters*, pp. 206-211.

<sup>72</sup> ‘Is Sincerity the First Virtue of Social Institutions? Police, Universities, and the Regulation of Free Speech’, p. 547.

<sup>73</sup> See my discussions of the legitimacy of regulation to combat discrimination in workplaces and other branches of the commercial sphere in S.V. Shiffrin, ‘What is Really Wrong with Compelled Association?’, *Northwestern University Law Review* 99 (2004): 839-888, at pp. 877-879. See also S.V. Shiffrin, ‘Race, Labor, and the Fair Equality of



prohibit face-to-face harassment, unsolicited and persistent direct contact, workplace harassment, invasions of privacy, defamation, and threats seem perfectly compatible with a robust free-speech guarantee. To be sure, such regulations may not put an end to all forms of uncivil, distressing speech that constitute bullying or harassment. Perhaps other regulations on targeted, personalized speech may be defended to fill the gap. I am not sure, since Greene and I concur that a legal regime must make room for much ‘irresponsible’ speech.<sup>74</sup> So, we might also agree some such unwelcome speech can be the side-effect of a free-speech legal regime culture (although not its *necessary part*). Whether it is an *inevitable* part of a free speech culture depends, in part, on how hard and successfully we can work socially to develop, improve, and adhere to stronger mores of civility and mutual respect. Perhaps the true risk of the side-effect is sufficient for Greene’s criticism to exert its force. I’ll allow the reader to judge.

### *Justifying Suspended Contexts*

Not all of our differences arise from interpretative disagreements. With respect to affirmative, direct misrepresentation, I argue that there is a normative presumption of truthfulness in place outside of justified suspended contexts. I identify some justified suspended contexts, including those involving communicative spaces for creativity,

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Opportunity Principle’, *Fordham Law Review* 72 (2003): 1643-1675, at pp. 1651-1652 (discussing the relation between freedom of expression and anti-discrimination principles) and S.V. Shiffrin, ‘Inducing Moral Deliberation: On the Occasional Virtues of Fog’, *Harvard Law Review* 123 (2009): 1214-1246, at pp. 1244-1245 (discussing how sexual harassment regulations may induce important forms of democratic deliberation between citizens).

<sup>74</sup> ‘Is Sincerity the First Virtue of Social Institutions? Police, Universities, and the Regulation of Free Speech’, pp. 551-52.

including humor or sarcasm, that justifiably explore ideas and develop the mind through communicative methods that are not dedicated to transmitting testimony.<sup>75</sup> Chapter One discusses an institutional example—the theater—as an example of a justified suspended context.<sup>76</sup> Greene reasonably asks why other important institutional ends could not justify suspending the presumption of truthfulness in other contexts.<sup>77</sup>

They might; it depends on the specifics. My claim is simply that citing an important end is not a sufficient reason in itself, without regard to whether pursuing that end through suspension of the norm of truthfulness is consistent with our other commitments, including the other ends of that very institution as well as the maintenance of a general cultural default of expectations of truthfulness. It is difficult to generalize. Because there are contextual elements in my approach to lying and freedom of speech, it would only make sense to explore arguments whether *particular* institutions (and the associated roles they assign their members) are exempt from the moral requirements associated with these subjects by virtue of their structure or their aims on a case-by-case basis. In Chapter Six, I do just that with respect to public employers, police officers, and universities (and, in passing, newspapers).<sup>78</sup> I argue that their laudable aims do not underwrite exceptions on their behalf and, to the contrary, their aims suggest special reasons why their commitments and purposes would be undermined by an institutional exceptionalist approach. Some of these arguments or their analogs will apply to other

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<sup>75</sup> *Speech Matters*, pp. 16-19, 186-188.

<sup>76</sup> *Speech Matters*, pp. 16, 41.

<sup>77</sup> 'Is Sincerity the First Virtue of Social Institutions? Police, Universities, and the Regulation of Free Speech', p. 539.

<sup>78</sup> *Speech Matters*, pp. 194 ff., p. 199 ff., and p. 194, respectively.

institutions, but I do not undertake the project of assessing or generalizing about how such arguments will go.

Although I do not claim to offer a comprehensive account of justified suspended contexts, I will make a couple of observations about them. The ones I identify involve criteria of identification that are public in the sense that they are either culturally explicit and morally justified or justifiable according to moral arguments anyone could consider. Also, they are not internally inconsistent, self-defeating, or undermining of other commitments. They submit to fairly discrete, limited boundaries in which the value of the suspended context and a distinctive, valuable use for communication are closely bound. Because they are public and morally justified, a listener may understand, at the time or in retrospect, that speakers' insincere speech within that context does not reflect poorly on their integrity or their commitment to sincerity in unsuspending contexts. Further, the use of insincerity in that discrete context serves an important, but different sort of communication.<sup>79</sup>

Whereas the hazard of regarding, as a general matter, private ends or even important joint ends as reasons to suspend the presumption of truthfulness is that the occasions on which those ends may be pursued are both diffuse and not always obvious. This makes it difficult to know or to guess whether communication is being used to convey reliable warrants or to serve another purpose. This very uncertainty, I argued, works at cross purposes with the fundamental moral aims of communication.<sup>80</sup> Compounding this difficulty is that with respect to large, general ends, the relationship between

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<sup>79</sup> *Speech Matters*, pp. 16-19, 186-188.

<sup>80</sup> Shiffrin, *supra* note 2, at pp. 248-251.

misrepresentation and the furthering of another end may be attenuated and distant, again underscoring the opacity of whether warrants are offered and whether they may be taken as reliable indicators of the speakers' thoughts.

### *Markets and Puffery*

In the book, I criticized the puffery doctrine as a domain of communication in which speech has been rendered meaningless, although ascertainably so.<sup>81</sup> Advertisers are permitted to advance general claims about their wares insincerely, without evidence, and in all seriousness. Consumers are supposed to ignore them. The manufactured impotence of speech in this domain is a reason to be wary of the idea that if transparent and predictable, insincerity may be justified. I further argued that the only point of such speech can be to catch consumers off-guard to the advantage of speakers and to no advantage of consumers.<sup>82</sup> That is, no joint common interest is served by the epistemic suspended context created by the puffery doctrine—only the private interest of sellers is served.

Greene asks why this would trouble me since market transactions famously serve private interests anyway.<sup>83</sup> We are permitted to pursue our private interests in the market in competition with others and our gain may be their loss. So, why do I regard the fact that puffery solely serves the private interests of sellers as impugning the doctrine?

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<sup>81</sup> *Speech Matters*, pp. 188-191.

<sup>82</sup> *Ibid.*, pp. 190-191.

<sup>83</sup> "Is Sincerity the First Virtue of Social Institutions? Police, Universities, and the Regulation of Free Speech", p. 540, fn 3.

Unregulated and under-regulated markets do a famously poor job at serving human needs in a timely fashion and preventing unjustified inequality and exploitation. For that reason, we might be wary of treating market behavior as a moral touchstone. On its best interpretation, the market is a public mechanism designed to solve a distribution problem of public goods that uses competition and pricing methods to gather information in a decentralized fashion about needs, abilities, resources, and demand from a variety of sources. Its methods channel and control the use of private interests to serve an overarching public purpose. Its justification depends upon its rules being fair and on its design extruding information; when its rules benefit some parties to the disadvantage of others *for no moral purpose*, when its rules make nonconsensual activity more likely, or when the market behavior permitted by the rules suppresses rather than reveals information, there is a market failure and there is no justification for the rules' unreformed continuation. Allowing Standard & Poor's (S&P) to aver that they gave objective, independent financial evaluations of securities when they did not believe that to be true, rather than holding them accountable for their assertions, whether general or specific, is not a method of harnessing private interests to serve public aims. Instead, it eclipses a form of meaningful communication only for the service of discrete private interests.<sup>84</sup> The unjustifiability of this permission is made clearer by recalling that S&P has special access to information about their operations and may exclude consumer advocates from efforts at independent verification. This asymmetry of access to information relevant to seller and consumer underscores a special responsibility of S&P

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<sup>84</sup> *Speech Matters*, pp. 189-191.

not to misrepresent even through generalities and for the law not to pave the way for their haphazard communications.<sup>85</sup>

*Institutions of Epistemic Authority: The Police and The University*

In the book, I argue that a role of the police is to act as street ambassadors for the state and the law, that is, for all of us.<sup>86</sup> The police interact with citizens on a daily basis, translating some of the more abstract and abstruse demands and expectations of law into common parlance. Their service as epistemic repositories of the law and public morality is contained in the most quotidian, everyday activities on patrol—from explaining to the inebriated why they may not lie splayed out on the sidewalk, to listening to complaints between neighbors and attempting to mediate them, to halting an assault, or to making an arrest and explaining to a suspect what her rights are. In these activities and when they investigate through conversation, interviews, and interrogation, officers have to make representations about what has happened, what the law is, and where a legal violation may have been. These articulations of legal narratives and explanations intertwine their activities as epistemic resources about the law and its moral underpinnings and their activities as information gatherers. Even when they only ask questions, they cannot escape the meaning of their role as the human face, the messenger, of the law. So lying, even in the service of their other ends, stands in tension with the demands and commitments of that role.

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<sup>85</sup> Shiffrin, *supra* note 11, at pp. 478-490.

<sup>86</sup> *Speech Matters*, pp. 194-199.

Perhaps, as Greene argues, the epistemic role is only secondary to other primary responsibilities of the police.<sup>87</sup> I need not quarrel with that suggestion (although I am not sure I agree with it either). It may be that the bulk of time, training, and funds available for policing activities should be devoted to forms of crime deterrence and detection efforts that are distinct from its epistemic role. In that sense, other aims and duties may be primary. The fact that one aim is secondary to another does not, however, mean that it may be sacrificed or undermined in order to promote the primary aim further or that the duties associated with it may be violated. An aim may be secondary but also necessary. If violation of the duties associated with it would undermine its achievement, it may be wrong, even while that violation might promote the further achievements associated with the primary aim. Even if it is secondary in some sense like the one I just outlined, the epistemic role the police play is crucial to its legitimate status and to its other aims. A police force the citizenry cannot trust is a dysfunctional police force, operating mainly through force rather than through willing citizen cooperation.

As for universities, I like and embrace Greene's label of 'democratic romanticism,'<sup>88</sup> though I quarrel with some of Greene's characterizations of its commitments. I do not resist the appropriateness of time, place, and manner restrictions in the classroom, the implementation of decisions and commitments, or procedurally sound oversight of research that goes beyond speech exchanges. Of course, the university

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<sup>87</sup> 'Is Sincerity the First Virtue of Social Institutions? Police, Universities, and the Regulation of Free Speech', p. 543.

<sup>88</sup> Ibid., p. 547. It gives me particular pleasure to be thus affiliated with another free speech 'romantic,' albeit one with a more eclectic methodology. See Steven H. Shiffrin, *The First Amendment, Democracy, and Romance* (Cambridge: Harvard University Press, 1990).

must take positions and act on them. What it cannot do, consistent with its admirable ends, is demand that its members agree with those positions or demand they suppress their dissent. In this respect, universities are like governments, whose legitimacy demands that they act and that they take care to ensure that dissent may safely be expressed. If the respect for dissent is serious and sincere, there must be a possibility for change if the dissenters prove to be persuasive. This is one of the many reasons why both governments and universities must avoid relying on permanent forms of entrenched decisions more than is necessary for achieving core institutional goals. Respect for dissent and for the truth is reflected in plans for elections, reviews, and other forms of revisiting past decisions. That judgment is entirely compatible with the recognition that tenure, whether of judges or of academics, is a necessary means of securing safe perches for issuing candid and possibly unpopular opinions.

Thus, I am not defending an ideal of anarchy but rather the rejection of orthodoxies as the organizing principle of the university. I resist any conception of the university that permits mere disagreement, criticism, or questioning—even of the fundamentals—manifested through speech to be a reason for discipline, ostracism, or the marginalization of research. To the extent possible consistent with running an institution, anti-hierarchical and open methods of inquiry and knowledge acquisition should be the default. A successful anti-hierarchical institution depends on trust, the exercise of judgment, the reliability of one's word, and the willingness to be open and transparent. The tension between these ideals and the use of the lie in research seems palpable. It is not merely that I regard research done by psychologists as untrustworthy since they are willing to lie where they regard it as useful to achieve their ends. It is also that I regard



their work as unsuccessful because it defies the spirit of open cooperativeness to which the university is dedicated.

I will end with Greene's question about whether it matters to my argument whether the police and the university are private or public.<sup>89</sup> I don't believe that state outsourcing can defeat state action, and I take the functions of the police to be inherently state functions. Universities are more complicated matters. I focused on public universities because the First Amendment applies clearly to them and I was tracing out both a moral argument and a legal argument that draws on that moral argument. With respect to private universities, I would endorse the same moral conclusions, while acknowledging that some of the legal arguments about freedom of speech do not have the same purchase. More speculatively and controversially, I worry there is an inherent tension between the concept of the university and private, for-profit institutions. There is also a tension between the concept of the university and those private, learning-centered, non-profit associations that are message-based or mission-based where that mission or message is substantive and pre-determines the content of inquiry or the identity of contributors, rather than committing to its openness.<sup>90</sup> So, it's less that I believe the standards of sincerity and academic freedom differ or are lower for private universities. Rather, either they are the same or the label of 'university' is, in some sense, a partially false honorific. I argue at the end of the book that it is important that social institutions

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<sup>89</sup> 'Is Sincerity the First Virtue of Social Institutions? Police, Universities, and the Regulation of Free Speech', pp. 549-550.

<sup>90</sup> That tension and the betrayal of the values of the university was on display in Wheaton College's suspension of a tenured professor who announced her intention to wear a hijab as a symbol of Christian solidarity with members of the Muslim faith. See 'The Professor Who Wore a Hijab and then Lost Her Job', *New York Times Magazine*, October 13, 2016.

that serve as moral epistemic repositories recognize and conform to some special symbolic obligations to walk the line in a somewhat exaggerated way to model compliance and to celebrate the values of sincerity and academic freedom.<sup>91</sup> If it is important to cultivate beacons of this sort that embody these values, then we have all the more reason to be suspect and hostile of rival institutions that call themselves by similar labels and attempt to elicit similar forms of social respect and deference while they only comply with some standards and only perform some of the functions of these repositories. Their operations may not only fail to be trustworthy but (to stretch the metaphor further than it may go) they do something more like contributing to light pollution in a way that makes it harder to pick out the path the full-time dedicated beacon is meant to illuminate.

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<sup>91</sup> *Speech Matters*, pp. 213, 221-223.