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# BEDROCK

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I appreciate the opportunity to think further about lying and freedom of speech alongside Professor Leslie Kendrick, who legitimately presses me on a number of important issues. In particular, I'm grateful for the occasion to expand and clarify my position in response to three of her insightful and constructive criticisms: first, that I overestimate the fragility of our moral practices of trust,[1] second, that I overvalue both sincere speech and free speech,[2] and third, that given the high value I attribute to sincere speech, it is perplexing and perhaps revealing of a latent ambivalence about my methodology that I do not advocate for stronger, more comprehensive legal regulations on lying.[3]

I start in Part I by describing the dilemma Kendrick poses for my argument against lying: namely either that it depends on empirically dubious premises and underestimates the resilience of our moral culture of trust in each other's word, or that it normatively places inordinate value on the symbolic value of sincere speech. This second horn corresponds directly to her related criticism that I overvalue freedom of speech. In Part II, I clarify that my argument does not depend on the empirical predictions of which she is skeptical. Rather, my concerns about lying relate primarily to the way in which lies affect the *rationality* of testimonial trust. In Part III, I resist the characterization of my argument as a symbolic argument and explain why a commitment to preserve the rational reliability of testimonial practices escapes both horns of Kendrick's dilemma. In Part IV, I respond to Kendrick's complaint that I overvalue freedom of speech, and I argue against crafting exceptions to freedom of speech protections based on the repellant content contained in sincere speech or the unwelcome consequences that follow from its contemplation by audiences. In Part V, I address one concrete challenge Kendrick raises about how a moral theory intersects with law: if, as I maintain, lying threatens public values and should fall outside the scope of First Amendment protection, then shouldn't it always be illegal?

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[1] *See* Leslie Kendrick, *How Much Does Speech Matter?*, 129 HARV. L. REV. 997, 1001–07 (2016) (reviewing SEANA VALENTINE SHIFFRIN, SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW (2014)).

[2] *See id.* at 1007–14.

[3] *See id.* at 1012–13.

## I. KENDRICK'S DILEMMA

In *Speech Matters: On Lying, Morality, and the Law*, I offer a deontological argument for strong requirements of sincerity and for the prohibition against lying, an argument that draws on the same values about protecting the conditions for deliberative moral agency that underpin a thinker-centered defense of freedom of speech. The core of my arguments about sincerity and lying are as follows: First, the duty of sincerity does not only protect the particular ends agents may hope to achieve through reliable information. It also undergirds the foundational conditions of moral agency and the moral relationships that make moral agency possible by enabling mutual understanding and trust despite the opacity of our minds to each other. Second, the maintenance of these foundations depends upon reliable patterns of adherence, compliance with which is not always observable in the instant case. Third and finally, the ability to rely on another's word figures not only in healthy relationships but also, essentially, in the maintenance of the skeletal structure of moral relationships to one another under conditions of strain, alienation, misbehavior, and emergency.[4] When the other indices of moral health and reliability afforded by actions, behavior, and demonstrable goodwill are absent, all that may remain is the ability to rely on each other's word. Given these features and functions of the duty of sincerity and, in particular, its role in affording us moral resources to cope with adverse moral conditions and relations, ad hoc balancing in the instant case seems inappropriate. When the costs pointed to in that balancing are those associated with strain, alienation, misbehavior, and emergency, the inappropriateness seems reinforced, not diminished.

The function that sincerity plays in grounding and enabling moral agency and moral relationships illuminates the wrong of lying. Apart from any prospect of deception or its consequences, three substantial moral objections may be lodged against lying. First, the lie isolates the liar from meaningful moral relations with listeners by misrepresenting the liar's mental contents, contents that are not fully accessible in their particularity from any other vantage point.[5] Second, the lie deprives listeners of access to meaningful relations with the liar for the same reason.[6] Finally, by affirming the misuse of channels of communication, the liar's maxim gives all listeners reasons to discount and distrust the sincerity of warrants offered by all speakers.[7]

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[4] *See* SHIFFRIN, *supra* note 1, at 37–39, 44–46, 152.

[5] *Id.* at 24.

[6] *Id.* at 23–24.

[7] *Id.* at 24.

The ability to receive reliable warrants about each other's mental contents (our thoughts, beliefs, intentions, emotions, and so forth) and the ability to communicate effectively are essential criteria not only of everyday moral life but especially of moral life in exigent circumstances created by moral misbehavior.[8] When the behavioral components of trust have frayed, we need reliable mechanisms of communication to rebuild relationships and accomplish the tasks of personal diplomacy, collective diplomacy, rehabilitation, and reconciliation. Without the rational ability to rely on each other's word as accurate reports of each other's beliefs and intentions — that is, to engage in practices of testimonial reliance about our mental contents — we lack the full panoply of resources needed to rebuild other forms of trust and avoid the mechanisms of isolation and violence that are antithetical to full, healthy, and inclusive moral relations.[9] After all, there are no reliable, precise, and authoritative means of access to information about each other's minds other than testimonial reports.

The liar's maxim thus affirms the ingredients of moral chaos and of conflicts resistant to peaceful resolution. In this way, it affirms conditions antithetical to moral cooperation. For that reason, acting on it is wrong.

In her review, Kendrick first queries whether my moral condemnation of the lie depends on an overprotective stance toward the communicative powers of speech. She suggests that my argument faces a dilemma: either (1) my argument should be interpreted empirically (lying will and does cause breakdowns in trust), in which case I may overestimate the fragility of our relations of trust, or (2) it should be interpreted in a dignitary way (the liar's actions show disrespect to the values of mutual understanding and the fundamentals of trust), in which case I may be charged with overvaluing symbols.[10]

If it's the former, she might have observed that I offer absolutely no evidence of the effect lying has on our empirical tendencies to trust each other's word. Unfailingly polite, she instead points to counterevidence: lies seem prevalent but yet we persist in talking to one another, learning from each other, and taking each other's word.[11] Our practice seems resilient to recurrent failures. Understandably, then, she queries whether I have flagged a danger but overestimated its dimensions.

If the argument does not turn on an empirical prognostication, however, then she wonders how the symbolic insult to the values of

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[8] *Id.* at 9–12, 24–26.

[9] *Id.*; *see also id.* at 39–40, 75 (discussing how lying may isolate moral agents from wrongdoers and impede reconciliation and joint moral progress).

[10] *See* Kendrick, *supra* note 1, at 1004.

[11] *Id.* at 1004–07.

cooperation, reconciliation, and moral progress could possibly matter *that much*.[12] Symbols may matter a lot, but could an action of solely symbolic value justify the loss of a life? After all, I contend one may not engage in legal misrepresentation to the murderer at the door.[13] Yet suppose a legal misrepresentation could save the life of the murderer's intended victim by falsely convincing him that another murder would subject him to the death penalty, although, in fact, he is in an abolitionist state. Wouldn't that intentional misrepresentation, however symbolically offensive to the values of truthfulness and legal transparency, be justified to save a life?

I resist the dichotomy suggested by the dilemma. My argument is neither predominantly empirical nor symbolic, at least not in the standard sense of those terms.

## II. IS TRUST SO FRAGILE?

I will start with the claim about the fragility of trust and the empirical interpretation of my argument. As a prefatory matter, I should note that Kendrick's resilience argument does not cast doubt on the contentions that the lie does direct damage to the relationship of mutual understanding between the liar and listeners. Those contentions do not depend on observational data. Instead, they appeal to the nature of strong, healthy moral relationships; where liars misrepresent their beliefs, intentions, and emotions, they directly obstruct relationships of mutual understanding with their interlocutors.

Kendrick's criticism of the "empirical" interpretation, then, seems mostly directed toward the third difficulty I mention — that of our rational willingness to participate in practices of testimonial reliance about each other's thoughts, beliefs, attitudes, and intentions. The success or failure of that argument, however, may seem crucial. One might think that only considerations about the health of our larger moral culture of trust could ground the sort of strong prohibition against lying that I defend — a prohibition that morally counsels against lying even when great goods could be accomplished through the well-placed lie. After all, why should we act from respect for the moral relationship between the speaker and listener when the welfare of third parties is threatened, especially when the listener is the threat? When my lie would corrode my moral relationship with the listener but might prevent the listener from inflicting serious harm on a third party, one might insist that only the interests and needs of third parties — such as in fostering the conditions of a healthy moral culture — could give me moral reason to refrain from lying. If these

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[12] *Id.* at 1004.

[13] SHIFFRIN, *supra* note 1, at 29–37.

are the stakes of the argument, then it may seem that I must defuse Kendrick's skepticism that the lie, or its permissibility, does in fact pose a severe threat to the larger cultural environment of trust.

I am less sure that I must. The thought that the argument against lying must revolve around the effect on the larger culture already harbors an implicit balancing of the moral importance of treating the listener respectfully and of preserving the conditions of particular moral relationships against the particular, episodic goods that may come from forsaking them. It should come as no surprise that a deontologist like myself balks at a model under which we weigh the goods to be achieved from observing a moral restriction, in the particular case at issue, against the goods to be achieved by abridging it. Still, while marking the difference may remind readers of their bearings, this may not be the right forum to rehearse all the moves in that familiar dispute.

So, I will use this occasion to respond to Kendrick more directly. Is my argument that lying, in fact, desiccates the social, moral culture of trust? Yes and no. Anecdotally, I would observe that we do not trust one another enough to make substantial moral progress on significant social problems. In particular, there is an absence of trust among those with very different political views that impedes our ability to work together. I think it is not an accident that these impasses coincide both with charges of mendacity and with failures to listen, talk, and engage with people with other viewpoints.[14]

But, despite my sympathy for the concern that lies inhibit trusting attitudes and behaviors, that is not the argument that I advance in the book. My arguments are neither consequentialist nor empirical in form. Instead, I contend there is an inconsistency between the liar's motive and ensuing course of action and her mandatory ends as a (flawed) 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.[15] 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

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[14] *See, e.g.*, PEW RESEARCH CTR., POLITICAL POLARIZATION & MEDIA HABITS 1–2 (2014), http://www.journalism.org/files/2014/10/Political-Polarization-and-Media-Habits-FINAL-REPORT-7-27-15.pdf [http://perma.cc/G65E-BUEM] (documenting that conservatives and liberals read different media sources and harbor high levels of mistrust toward alternate media sources); PEW RESEARCH CTR., POLITICAL POLARIZATION IN THE AMERICAN PUBLIC 12 (2014), http://www.people-press.org/files/2014/06/6-12-2014-Political-Polarization-Release.pdf [http://perma.cc/BL73-UZ6W] (arguing that Americans are increasingly found in "ideological echo chambers," affiliating with people primarily of similar ideological persuasions).

[15] SHIFFRIN, *supra* note 1, at 26, 116.

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 inconsistent with the conditions necessary to meet our most basic moral needs and responsibilities and inconsistent with the conditions necessary to meet them *rationally*.

While I agree with Kendrick that testimonial reliance can be widespread even when it is known that liars circulate amongst us, I disagree that this shows that healthy and rational testimonial reliance is resilient either to the lie or to a judgment that it is sometimes permissible. Where this persistent reliance is traceable to the repudiation of the acceptability of the lie by the liar, whether by apology or because other speakers convincingly reject the acceptability of lying, this phenomenon does not do much to vindicate the idea that lying is permissible. For in that case, the resilience of the culture would then reasonably stem from the lie's repudiation.

Where, instead, this reliance is based on listeners taking a risk in the veracity of speakers, or on listeners being able to verify their veracity through independent means, the difficulties are either (1) that our reliance is spotty and dependent on what specific information we have about the speaker or (2) that this reliance is rationally unsupported but rests on hope, denial, or a failure of alternatives. In these ways, lies will desiccate the *rational* quality and nature of our practices of trust, even if their form persists.

In the former case, although we can verify some of what people say by observing their external behavior and double-checking facts to which they attest, we cannot form strong and responsive moral relationships with them unless much of the time we can simply take their word about their thoughts, feelings, beliefs, doubts, and needs. Much of this information is cumbersome or impossible to verify — all the more so with respect to strangers and others with whom we do not share commonalities. When we must depend on measures of empirical verification to ground trust, we will have reason to lean toward clubbishness and insularity, rather than taking a posture that is democratic, ecumenical, and open to newcomers. Further, our relationships will not be suited to bypassing moral escalation and moral tragedy. For they will lack an essential tool for handling emergency situations or misbehavior in a calm and measured way because (I posit but will not try to defend here) calm, measured conflict resolution usually depends on the believable invocation of trust. Without testimonial reliance funded by the currency of a person's word alone, what we are able to glean through observation is insufficient for relationships of full moral responsiveness, and it is insufficient to handle the strains imposed by emergencies and moral misbehavior.

On the other hand, where we invest our testimonial reliance in ways that are not rationally supported, we are no longer acting as moral agents who direct and guide our own moral relationships in deliberate, considered ways. Although predictable and persistent patterns of irrational trust may be a way we muddle through, they do not vindicate the claim that a rational moral culture can be resilient to, and therefore tolerant of, lying while achieving our moral ends through rational means.

## III. IS SINCERE SPEECH SO VALUABLE?

What of the other horn of Kendrick's dilemma? Is my argument a symbolic one and could the symbolic importance of sincerity bear the weight I allocate to it?

I resist the symbolic characterization. As framed, my argument does not take a primarily symbolic cast about the meaning of showing respect for the values of sincerity and truthfulness. Rather, the liar's behavior weakens the rational basis we have for testimonial reliance on him because he is willing to attest to things he does not believe for his own purposes. Further, regarding the liar's maxim as acceptable would fray the rational basis we have for testimonial reliance in anyone because, if it is acceptable to lie, then we have no reason to accept the moral agent's word just on her say-so. More contentiously, the existence of unknown liars places pressures on the rationality of our accepting the warrants of those whose veracity is unknown to us; that some agents lie complicates the reasonableness of taking the word of anyone as reason enough to believe her. Finally, the situations in which we are tempted to permit the lie — where we are dealing with emergency situations in which some of the parties flout other moral norms — are the very situations in which it is especially important to preserve the ability to exchange messages that will be taken as sincere. Because in such situations we have little other basis upon which to forge cooperative relations, it is incumbent that we adhere to an unwavering position of sincerity. In strained circumstances, our word is all we have to offer.

It may be difficult to swallow these abstract ideas in particular cases when a life is pitted against the purity of a mere utterance. Let's return to Kendrick's question: why not countenance one small exception when faced with the dire prospect of a murder and the opportunity to prevent it through a single lie about the law?[16]

First, the law is our collective social mechanism through which we attempt, among other things, to manage potential and actual conflicts fairly, peaceably, and articulately and otherwise to govern ourselves

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[16] *See* Kendrick, *supra* note 1, at 1011.

through rational, transparent means. To be willing to misrepresent about the law is to deprive ourselves of the ability to represent it as a resource we consistently invoke to serve those functions and to convince those engaged in or headed toward conflict that there is an alternative method of fair resolution.

Second, to craft exceptions to the bar on intentional misrepresentation that are based on the circumstances — rather than on the content of what is represented — contributes to the way in which the lie frays the rational basis of accepting testimonial warrants by casting a wide, unbounded array of warrants into reasonable doubt.[17] That is, I contend that one may misrepresent *the location* of the victim to the murderer at the door because offering *that* truthful content would constitute a form of complicity. That permission, even when publicly known, does not undermine the rational practice of accepting testimonial warrants generally because the listener has reason to know what information would constitute collaboration with an intended crime and that such information would be wrongful to provide to a criminal; hence, he has reason to know that with respect to such content, he is in what I label a *justified suspended context*.[18] A justified suspended context is a context of communication in which the presumption of sincerity is justifiably suspended because we are using speech for other valuable purposes within a discrete environment. For example, devil's advocacy, plays, novels, and many exchanges within etiquette represent justified suspended contexts because we require some environments to explore arguments fully whether we endorse them (yet) or not, to play and to exercise the imagination, and to demonstrate hospitality and inclusion.[19] It is important for the presumption of truthfulness to be able to fulfill its crucial function and to continue to serve as our forceful and reliable default that the justificatory reasons that make for a justified suspended context are publicly accessible. Further, the boundaries of such contexts must also be discrete, relatively narrow, and publicly accessible.[20] With respect to communication *about* the location of a potential victim to the murderer at the door, the presumption of truthfulness is suspended. For it would be morally and legally criminal to provide that information. Each party has reason to know the context is suspended with respect to *that information* — the murderer knows his own evil end, and so he has reason to know that communications that would directly assist its achievement would be wrongful. So communication about this subject by the murderer's interlocutor cannot be presumed to convey truthful information; instead,

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[17] *See* SHIFFRIN, *supra* note 1, at 32–37, 46.

[18] *See id.* at 16–18, 32–35, 186.

[19] *Id.* at 17, 32, 186.

[20] *See id.* at 16–18, 32, 186–88.

it may be offered to further the justified ends of delay, avoidance of cooperation, obstruction of his evil end, defense of the interlocutor from harm, or defense of the interlocutor from pressure to convey a truth she is barred, morally, from offering voluntarily.

The content-based argument locates a justified suspended context with respect to information that would constitute complicity in the crime. This standard offers a publicly accessible, discrete, and contained boundary to the suspension of the presumption of truthfulness. By contrast, a blanket permission to misrepresent in exigent circumstances in order to prevent tragedy would undermine the function of the presumption of truthfulness. It would overly blur the boundary of a suspended context. The listener may not have access to the information that renders the circumstances exigent nor know which causal paths will result from what communication. So were that blanket permission in force, listeners then would have reason to doubt all claims made in what appear to be, what might be, or what could be exigent circumstances. Cultivating that wide swath of doubt would confound a fundamental moral function of speech. Content-based exceptions in exigent circumstances that show why speech about a particular matter falls into a justified suspended context offer principled limits in ways that consequence-driven exceptions do not.

Those without deontological sympathies may find these remarks unpersuasive. Nonetheless, I hope to have clarified that my primary argument against lying takes neither the empirical nor the symbolic form.[21] My argument is not based on predictions about how people will behave; nor is it about the symbolic disrespect the liar shows to sincerity. My argument concerns the way in which the liar, even the well-meaning liar, destructively alters the field of reasons available to us.[22] Thereby, he renders general forms of epistemic trust less rational and hinders access to the sort of collaborative, rationally based, testi-

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[21] Elsewhere in the book, I advance some distinct symbolic arguments for *institutional* sincerity, specifically that the police and the university are supposed, inter alia, to serve as symbols of moral rectitude on the one hand and to protect the values of free discussion and truth on the other. Such institutions, given their symbolic missions, may have special reasons for abstaining from misrepresentation or its appearance and for abstaining from the suppression of dissent or its appearance. *Id.* at 221–23.

[22] The empirical argument depends upon the lie's exposure (or the public's perception of a lie). *Cf.* Kendrick, *supra* note 1, at 1004–05 (questioning the claim that treating lying as permissible will tend to corrupt communication). My argument, by contrast, does not. The liar's affirmation of the lie as choiceworthy undercuts the rational basis of accepting *his* testimonial warrants, whether the listener is aware of this or not. Our affirming that some lies are acceptable frays the rational basis of accepting testimonial warrants generally or, at least, accepting them in situations like those whose features purportedly render the lie acceptable. Where those features (for example, exigent circumstances) are ones in which rational testimonial reliance is an important moral resource to draw upon, the affirmation of the lie's acceptability conflicts with our preservation and use of this resource; so the lie may be understood as a self-defeating maneuver.

monial relations with anyone and everyone that we need to discharge our moral responsibilities and to tackle moral crises in a deliberate, rational manner. Even an exception for exigent circumstances would sit uncomfortably with our commitment to crafting a rational moral culture that can function outside of insular enclaves and that attempts to resolve conflicts through reasoned measures.

## IV. IS THE PROTECTION OF FREE SPEECH SO IMPORTANT?

These arguments about the moral importance of speech and testimonial relations also ground the protection of free speech. The opportunity to express one's actual thoughts — whatever their content and however rigid or tentative — is a necessary condition for developing and maintaining sincere moral agency. To understand ourselves and others and to arrive at convictions we understand and freely endorse, we must have the freedom to entertain all manner of ideas, voice them, hear what others think, and gain from others' critical and supportive reactive influence. Free contemplation, with others, is necessary to develop as a thinker and therefore, in particular, to have the mental content necessary for conscious and complete moral action. If correct moral behavior requires requisite acts performed from conscious understanding, a free speech culture plays an essential role in our identifying the requisite acts and in each of us developing the correct understanding of why they are requisite. As with most learning, moral development frequently and predictably operates by starting with the wrong impulses and working through one's mistakes with others.[23] As with the injunction of sincerity, the stakes of free speech protection are the foundations of our moral practice and the rational resources to cope with and transcend uncertainty, error, and moral crisis through peaceful, deliberative, and collaborative means.

Protecting and preserving these resources are not without costs. Kendrick is unquestionably right in her observation that:

> [T]he very features that make speech distinctive in its contributions to moral agency also make it distinctive in its capacity for harm. . . . [P]recisely because speech can convey information with such precision and nuance, it has distinctive capacities for harm.
>
> While people find many physical and material ways to injure each other, speech is unique in its ability to convey hatred, contempt, derision, threats of future violence, false information, and so on.[24]

Nevertheless, if I am right about the stakes for the protection of free speech, these distinctive features do not give us reason to make excep-

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[23] *See* SHIFFRIN, *supra* note 1, at 75, 105, 114.

[24] Kendrick, *supra* note 1, at 1015.

tions to that protection on the grounds of the distinctive harm that vile speech can occasion.

Even hate speech (to address one specific challenge posed by Kendrick)[25] should not present itself as a potential exception to our free speech guarantees. Hate speech harbors exactly the sort of mistakes and errors that a free speech culture aims to address by providing those prone to such errors the opportunity, through engagement and dialogue, to learn from the sort of corrective responses such speech elicits.

Hate speech thus differs substantially from deliberately insincere speech. Insincere speech does not forward the speaker's genuine but mistaken thoughts. For this reason, it does not participate in the core values that the First Amendment protects: it does not share the thoughts of others and it does not forward a proposition the content of which the speaker thinks *merits* consideration.[26] Our regulation of it need not violate strictures against content-based regulation, because regulations against lying do not discriminate on the basis of the speech's content. Instead, they pick out speech that lacks the relationship of endorsement to the speaker's mind.[27] Our contemplation of and engagement with the contents of insincere speech does not represent any sort of true engagement with the speaker's mind or any real attempt to help the speaker refine, affirm, or reject her ideas. By contrast, sincere speech, even the most offensive hate speech, does forward thoughts that a speaker actively entertains. Our engagement with these ideas and sentiments represents a real engagement between people — unlike the sham encounters provoked by insincere speech. Sincere speech affords the speaker and listeners the opportunity, together, to examine those thoughts. Thereby, free sincere expression enables mutual understanding (though not necessarily amiable mutual understanding) as well as a mutual examination of the merits and demerits of what is under consideration.

Of course, this educative arena has and must have boundaries to contain the substantial harms associated with wrong-headed ideas and venomous sentiments. The bigot must be prohibited from enacting his bigoted thoughts into those forms of action that go beyond mere expression.[28] Further, unwilling listeners may not be dragooned into

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[25] *Id.*

[26] SHIFFRIN, *supra* note 1, at 116–17.

[27] *Id.* at 125–29.

[28] I agree that line drawing here is a challenging, nonobvious task. *Id.* at 115. It requires normative sensitivity to the aim to protect a robust forum for expression and the exploration of even repugnant ideas as well as to the imperative to provide a safe environment for those targeted by hate speech. The freedom to issue credible threats directed at *particular* people seems unrelated to the former and I think falls squarely outside free speech protection. A similar argument

participating in the educative enterprise; so hate speech directed at particular people may be restricted to protect against invasions of their privacy.[29] These boundaries should be widely drawn, but yet they may still leave room for coming to a deliberative understanding of the errors of bigotry. Although wider-ranging prohibitions on hate speech may install forms of correct action, they do so by depriving speakers and the culture more broadly of the opportunity to come to an understanding by working through the ideas for themselves. For this reason, I worry that wide-ranging prohibitions are self-undermining. Such prohibitions can only force behavior and hence can only elicit a partial approximation of correct action. At the same time, they deprive their subjects of the resources necessary to realize the other component of correct action: a deliberatively derived understanding of why equality figures among our deepest commitments and should figure among theirs. By suppressing the (repugnant) articulation of the wrongful but sincerely entertained idea, prohibitions deprive the misguided thinker and the culture more generally of the ingredients of sustainable, collaborative, and fully meaningful equality.

Thus, I resist the idea that we should conceptualize the issue as a tradeoff between free speech and equality, one in which I regard free speech as the weightier value. A free speech culture, including one that affords some space for the articulation of even the most hateful ideas, is instead better understood as a precondition for lasting, meaningful, deliberative equality.

I appreciate that, in the indefinite interim, freedom may be exercised in highly damaging, painful ways that effectuate regress. The question may be put why, in our highly nonideal circumstances, we should hold out for the possibility of fully meaningful equality when its achievement may seem like an unattainable fantasy. Perhaps for the sake of those wounded and traumatized by hate speech, we should elect for modest, but imperfect, gains in achieving the behaviors of equality — even if those gains are not fully deliberate and shared.

This is a hard issue. Even when coerced, the behavioral components of equality often are of greater value to the potential victims of hate speech than is the distant prospect of a community that shares the felt, sincere mental components of equal treatment. Moreover, a culture that tolerates articulations of hate speech may skew the cultural conversation for some time, delaying and distracting us from making real positive progress toward achieving equal, mutually respectful rela-

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might be made to support restrictions on discriminatory speech that creates a hostile environment in the workplace.

[29] *Id.* at 147–51. The interests of thinkers more generally to protect the privacy of their minds and to enjoy security from invasion of this privacy may further extend this protection to include protections against harassment, whether in the workplace or outside it.

tions. These are anguishing costs associated with the conception of freedom of speech that I defend.

Nonetheless, I think these effects must be combated through policing those discriminatory behaviors that go beyond advocacy and through education about, confrontation with, and persistent rebuttal of, discriminatory impulses and ideas. If we retain a conception of ourselves as a collective of freethinking moral agents, attempting to organize ourselves democratically, I see no alternative. To police expression and advocacy is to police thought and thereby betray our self-understanding and our aspiration of ourselves as freethinkers.

## V. SHOULD WE REGULATE ALL LIES?

Given the unyielding stance I take about the prohibition on lying and the value of sincerity, Kendrick understandably inquires why this stance would not imply a more full-throated advocacy of the illegality of lying.[30] While I argue that regulation of lies does not, per se, violate the First Amendment and further that the evidentiary standards for proving a lie should be lowered, I do not take the further step of arguing for the universal regulation of lies. Politically, I claim we should proceed with caution given the institutional risks associated with expansive regulation of insincere speech. For "pure," nondeceptive autobiographical lies, abstaining from regulation may convey some strong political values of solidarity and signal mutual understanding.[31]

Kendrick wonders whether this stance "sit[s] uneasily" alongside my arguments about lying[32] and suggests that my stance perhaps betrays an ambivalent commitment to a deontological methodology.[33] If the wrong of lying implicates public values and if lying is wrong even when the consequences of a lie would serve the public good, then why should institutional values, such as the risks of enacting an abusive legal structure, play any role in the determination that, at least in some circumstances, the lie should not be regulated?

I agree the point needs more argument. As I argue in the book, plenty of legal implications follow from the fact that lying is wrong and that lying encroaches on public values as well as on interpersonal moral relations. First, I contend there is no principled reason why legal regulation of lies should require any showing that the recipient was *deceived*.[34] Even when it is disbelieved or ignored, the lie nevertheless corrodes a culture of meaningful communication and future testimoni-

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[30] Kendrick, *supra* note 1, at 1012.

[31] SHIFFRIN, *supra* note 1, at 158–62.

[32] Kendrick, *supra* note 1, at 1012.

[33] *Id.* at 1012–13.

[34] SHIFFRIN, *supra* note 1, at 118, 155; *see also id.* at 12–15, 19–21, 135 n.37 (showing the wrongness and harmfulness of lying even in the absence of deception).

al dependence, the sort of culture necessary for our full cooperation as moral equals. We have reason, therefore, to relax the evidentiary requirements associated with those lies we do regulate, to expand the range of lies under regulation, and to be chary about the law's role in promoting arenas of insincerity and mutual distrust. Hence, to cite a few examples, I am critical of the wide scope of the puffery doctrine,[35] the now-historical requirements that children recite the Pledge of Allegiance,[36] and the ongoing, if legally optional, government-sponsored installation and ritualization of expectations that children and other citizens recite the Pledge of Allegiance.[37]

Moreover, if lying is absolutely wrong for reasons that implicate public values, it follows, I claim, that the state and its officials may not lie and they may not adopt policies on grounds that affirm or assume the permissibility of lying. For this reason and others, I condemn the use of lying in police interrogation methods.[38] It is generally an illegitimate technique for the state to achieve its ends, but in particular, its use by the police conflicts with the fundamental institutional role the police play as a moral epistemic authority.[39] When they act well, police officers keep the peace by acting as moral epistemic authorities — as street ambassadors of public values and the law — and their diplomatic success depends on their trustworthiness.[40]

Moreover, given that the same arguments explain the wrong of lying and the right of freedom of speech, it is not a far step to affirm that the freedom of speech protection ensures, as well, that the state may not require its officials or its citizens to lie. You know the free speech doctrine regarding public employees is in disarray when convoluted judicial acrobatics were required to arrive at the simple conclusion that the First Amendment could not countenance a police sergeant firing a subordinate officer for refusing to lie about police misconduct.[41]

Still, although the wrongfulness of lying has many substantive legal implications, I stop short of advocating for the general illegality of the

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[35] *Id.* at 188–91.

[36] *Id.* at 94–96.

[37] Vincent Blasi & Seana V. Shiffrin, *The Story of* West Virginia State Board of Education v. Barnette*: The Pledge of Allegiance and Freedom of Thought*, *in* CONSTITUTIONAL LAW STORIES 409, 440–42 (Michael C. Dorf ed., 2d ed. 2009).

[38] SHIFFRIN, *supra* note 1, at 194–99.

[39] *Id.*

[40] *Id.* at 221–22.

[41] *Id.* at 206–11, 209 n.35 (discussing *Lane v. Franks*, 134 S. Ct. 2369 (2014); *Jackler v. Byrne*, 658 F.3d 225 (2d Cir. 2011); and *Dahlia v. Rodriguez*, 735 F.3d 1060 (9th Cir. 2013) (en banc)). These opinions all struggle to save the misguided position of *Garcetti v. Ceballos*, 547 U.S. 410 (2006), holding that free speech protections do not apply to public employees in the course of duty. Hence, they had to resort to the strained view that the truthful police officer spoke *qua* citizen, and that is why the First Amendment protected him from retaliatory discharge for refusing to lie.

lie. Because lying implicates public values, my hesitation is not prompted by a concern about illiberality. I would not object to a legal proposal to declare a legal duty of sincerity or to declare lying is illegal. Most laws, however, do not consist in mere declarations but are accompanied by an apparatus of implementation and also by remedial mechanisms.

The moral judgment that lying is always wrong does not alone imply that we must always invest every available effort in preventing it or punishing it. As a private citizen, I may affirm that lying is wrong but, yet, not take it as a mandatory project that I must prevent or sanction the lies of my fellows; it is primarily their responsibility to speak sincerely. Not only might devoting my efforts to ensuring their sincerity detract from my ability to pursue other important aims, but also I may be keenly aware that my efforts may embroil me in vicious behavior. As a private citizen, I might avoid comprehensive efforts to police others' sincerity because I might also reasonably worry that my efforts would not serve as an effective moral lesson but would rather be understood as failing to appreciate that moral failures of this sort are widespread and are failures about which I should demonstrate some humility. Similar thoughts sometimes propel the impulse to demonstrate mercy in individual and judicial contexts.[42]

The state might have analogous concerns on both fronts. Even if its default stance is to uphold values of public importance, it may hesitate before regulating the lie because of a concern about its ability to control its own excesses. Although there is no intrinsic conflict between free speech and legal regulation of the lie, it is legitimate to be concerned about whether and when we have the institutional capacity and savvy to enforce such laws well while keeping our other commitments. Still, these concerns are contingent. Well-designed institutions and safeguards might address them.[43]

Less contingently, for expressive reasons of solidarity, although the First Amendment should not impede a well-crafted regulation barring pure, nondeceptive autobiographical lies, the state might reasonably exercise its discretion to decline to penalize pure autobiographical lies.[44] Abstaining from such regulation may be particularly apt where that lie occurs outside of official, economic, and other contexts where particular third-party interests may be implicated. To be sure, the pure autobiographical lie is wrongful and does damage to our rational culture. At the same time, it also represents the sort of common moral failure often borne of insecurity that affords us as a polity the oppor-

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[42] SHIFFRIN, *supra* note 1, at 165–67.

[43] *Id.* at 123–24.

[44] *See generally id.* at 162–81 (discussing accommodation of moral failures).

tunity, through legal restraint, to demonstrate understanding that our equality and membership in good standing is consistent with our moral imperfection.

To take these considerations seriously in deciding how to erect an institutional response to lying does not amount to suggesting that lying is morally permissible or of de minimis concern. It is rather to distinguish between the actions of the liar and our own actions.

This final distinction about agency and, so, about responsibility also figures in my reply to Kendrick's concern that I overvalue freedom of speech. Although I do regard sincere and free speech as the bedrock of our moral relations and, hence, of inestimable value, the issues between us cannot be reduced to questions of consequences and tradeoffs between them: whether the harms of lying outweigh the benefits of its judicious use or whether the harms of speech regulation outweigh the benefits of judicious regulation. In responding to the bad actions, the bad plans, and the misguided thoughts of others, our actions should not be conceived only in terms of reacting to, containing, and preventing bad consequences without attending to whether we cause, or someone else causes, them. In taking primary responsibility for our own actions, we must ask how we may encourage and foster rational, deliberate moral agency in a principled way, one that is compatible with maintaining our moral identity and integrity and with satisfying our other moral obligations. My argument has been that affirming obligations of sincerity and of respect for freedom of speech and thought provides crucial, principled structure to an environment enabling moral agency. Carving exceptions to them based upon circumstance-dependent, consequential gains threatens both the ability of those principles to function properly and, in turn, our moral identity.