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## HOW MUCH DOES SPEECH MATTER?

SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW. By Seana Valentine Shiffrin. Princeton, N.J.: Princeton University Press. 2014. Pp. xi, 223. \$35.00.

*Reviewed by Leslie Kendrick\**

Americans love their free speech. “Americans are freer to think what we will and say what we think than any other people,”<sup>1</sup> and we are not going to let anyone forget it. We are swift to accuse others of violating our First Amendment rights, even when the alleged infringers are not part of the government, the only entity actually constrained by the First Amendment.<sup>2</sup> We are eager to rest on free speech claims and, where they do not exist, to make them.<sup>3</sup> With a reliability approaching that of the laws of physics, we may set it down that whenever the First Amendment can be invoked, it will be invoked.

Despite our insistence on our right to speak our minds, we are also a society of liars. Our liars are on display in a regular public cycle of untruths, both flagrant and furtive, followed by gleeful exposures.<sup>4</sup>

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<sup>1</sup> ANTHONY LEWIS, FREEDOM FOR THE THOUGHT THAT WE HATE, at ix (2007).

<sup>2</sup> See, e.g., Hillary Busis, *Sarah Palin Continues to Love the First Amendment, Alludes to It in “Duck Dynasty” Defense*, ENT. WKLY. (Dec. 19, 2013, 12:17 PM), <http://www.ew.com/article/2013/12/19/sarah-palin-phil-robertson-duck-dynasty> [<http://perma.cc/ZU68-JYSU>] (cataloguing at least six instances in which Sarah Palin invoked the First Amendment to respond to a speech conflict between private parties).

<sup>3</sup> See Frederick Schauer, *First Amendment Opportunism*, in ETERNALLY VIGILANT 174, 176 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

<sup>4</sup> See, e.g., Matthew Chayes, *Eliot Spitzer Admits: I Lied, Broke the Law*, NEWSDAY (July 9, 2013, 10:33 PM), <http://www.newsday.com/news/new-york/eliot-spitzer-admits-i-lied-broke-the-law-1.5656203> [<http://perma.cc/A8MY-GV2V>]; David Epstein, *Web of Lies*, INSIDE HIGHER ED (Dec. 6, 2005), <https://www.insidehighered.com/news/2005/12/06/bradford> [<https://perma.cc/G4RG-36KT>]; Ashley Feinberg, *Donald Trump Lies to Little Boy: “I Am Batman.”*, GAWKER (Aug. 16, 2015, 8:25 PM), <http://gawker.com/donald-trump-lies-to-little-boy-i-am-batman-1724468255> [<http://perma.cc/B2RS-ZXU9>]; Neil A. Lewis, *Libby Guilty of Lying in C.I.A. Leak Case*, N.Y. TIMES (Mar. 7, 2007), <http://www.nytimes.com/2007/03/07/washington/07libby.html>; *South Carolina Gov. Sanford Admits Extramarital Affair*, CNN (June 24 2009, 9:29 PM), <http://www.cnn.com/2009/POLITICS/06/24/south.carolina.governor>; Barbara Starr, *US Intel Chief Admits Giving “Erroneous” Testimony, Apologizes*, CNN: SECURITY CLEARANCE (July 2, 2013, 6:56 PM), <http://security.blogs.cnn.com/2013/07/02/us-intel-chief-admits-giving-erroneous-testimony-apologizes> [<http://perma.cc/T9XS-YVG6>]; Antonio Tijerino, *Donald Trump Lied to Us*, POLITICO MAG. (July 10, 2015), <http://www.politico.com/magazine/story/2015/07/donald-trump>

We also have a thriving culture of concern about our culture of lying.<sup>5</sup> I do not claim that these features are novel. I merely observe that, for a nation that insists on its constitutional right to speak truth to power, we spend a lot of time not telling the truth.

What does seem novel is the recent strategy of combining these two proclivities into a First Amendment right to lie. In 2007, a local politician argued that the First Amendment protected his right to lie in public about being a decorated Marine, such that he could not be prosecuted under the Stolen Valor Act of 2005,<sup>6</sup> which punished lies about military honors.<sup>7</sup> The Supreme Court, in a fractured opinion, agreed with him that the First Amendment's protections extend to many false statements, including many lies.<sup>8</sup> In doing so, the Court repudiated earlier assertions that lies were outside the protection of the First Amendment.<sup>9</sup> It also aligned itself with a growing number of courts and scholars arguing that lying is sometimes — indeed, often enough to make it worth mentioning — protected activity.<sup>10</sup> Not only do we have a right to speak the truth, but we also claim a right to lie.

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-lied-to-us-119929 [http://perma.cc/TU6E-PBGE]; *Weiner Apologizes for Lying, "Terrible Mistakes," Refuses to Resign*, CNN (June 7, 2011, 6:54 AM), <http://www.cnn.com/2011/POLITICS/06/06/new.york.weiner>.

<sup>5</sup> See, e.g., ROBERT FELDMAN, *THE LIAR IN YOUR LIFE* (2009) (discussing pervasiveness of lying and arguing for efforts at sincerity); AL FRANKEN, *LIES (AND THE LYING LIARS WHO TELL THEM)* (2003) (accusing right-wing media outlets of routine dishonesty); Jessica Bennett, *The Truth Is, We're All Raging Liars*, NEWSWEEK (Aug. 25, 2009, 8:00 PM), <http://www.newsweek.com/truth-were-all-raging-liars-78965> [http://perma.cc/22TK-BSP2] (citing surveys of teenagers and young adults suggesting an increasingly widespread acceptance of lying).

<sup>6</sup> 18 U.S.C. § 704 (2006), *invalidated by* United States v. Alvarez, 132 S. Ct. 2537 (2012).

<sup>7</sup> *Alvarez*, 132 S. Ct. at 2542 (plurality opinion).

<sup>8</sup> See *id.* at 2546, 2549–50.

<sup>9</sup> See, e.g., *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) (“Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity.”); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (allowing tort liability for false statement about public officials where speaker knew statement was false or was reckless regarding that risk); see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (“[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society’s interest in ‘uninhibited, robust, and wide-open’ debate on public issues.” (quoting *Sullivan*, 376 U.S. at 270)).

<sup>10</sup> See, e.g., 281 Care Comm. v. Arneson, 766 F.3d 774 (8th Cir. 2014) (striking down Minnesota law prohibiting knowing or reckless false statements about a ballot initiative); *United States v. Alvarez*, 617 F.3d 1198 (9th Cir. 2010); *Susan B. Anthony List v. Ohio Elections Comm’n*, 45 F. Supp. 3d 765 (S.D. Ohio 2014) (permanently enjoining Ohio law prohibiting knowing or reckless false statements about political candidates); *United States v. Strandlof*, 746 F. Supp. 2d 1183 (D. Colo. 2010), *rev’d*, 667 F.3d 1146 (10th Cir. 2012), *vacated and aff’d*, 684 F.3d 962 (10th Cir. 2012); *Rickert v. State Pub. Disclosure Comm’n*, 168 P.3d 826 (Wash. 2007); *State ex rel. Pub. Disclosure Comm’n v. 119 Vote No! Comm.*, 957 P.2d 691 (Wash. 1998) (striking down prohibition on knowingly false speech about ballot issues); cf. *United States v. Hinkson*, 585 F.3d 1247, 1251 (9th Cir. 2009) (en banc) (upholding denial of new trial where star prosecution witness lied about being a war hero). For scholarly examples, see David S. Han, *Autobiographical Lies and the First Amendment’s Protection of Self-Defining Speech*, 87 N.Y.U. L. REV. 70 (2012); Helen Norton, *Lies*

Professor Seana Shiffrin rejects this turn, as well as facile claims about either lying or free speech. In *Speech Matters: On Lying, Morality, and the Law*, Shiffrin presents a theory of the morality of communication. On Shiffrin's view, communication is the best, and often the only, way to share the contents of our minds with each other. This process of sharing is necessary to our identity and development as moral agents. This singular function of communication justifies the special protection known as freedom of speech. It also explains what is wrong about lying: when we lie, we pervert communication's role as the primary vehicle for sharing our sincere beliefs. Lying is impermissible, in Shiffrin's words, because it "transforms a mechanism for exclusively conveying the truth into a mechanism for conveying both the false and the true" (p. 23). Moreover, because the freedom of speech is founded on the moral function of communication, its protections do not extend to lies, which erode the moral functions that make communication important in the first place. Shiffrin's moral vision explains why lying is wrong, why freedom of speech is right, and why those two views are compatible.

As is apparent from this synopsis, Shiffrin believes communication is serious and should be taken seriously. While she identifies a limited set of contexts in which insincerity is permissible,<sup>11</sup> telling the truth should be approached as "an essential, nonnegotiable activity" (p. 188). Shiffrin deplores a world in which "truth-telling stops being reflexive or agents often find themselves in reasonable and serious doubt about whether assertions are presented to be trusted" (p. 188). Sincere communication is so important that, although we do not owe the murderer at the door the truth about his victim's whereabouts, we do owe him the truth about other matters — such as the penalty for murder or his personal legal situation — even if lying would deter him from murdering the victim (p. 31).<sup>12</sup> Sincere communication is so important that Shiffrin criticizes the methods of police and negotiators who lie to hostage takers to encourage them to release their victims (p. 31). Sincere communication is so important that, while fiction and other entertainments are valuable, "constant immersion in them is a personal vice as well as a cultural liability" (p. 188). "Similarly dangerous," Shiffrin warns, "is overindulgence in the postmodern penchant for constant

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*and the Constitution*, 2012 SUP. CT. REV. 161; and Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107 (2006). But see Mark Tushnet, "Telling Me Lies": *The Constitutionality of Regulating False Statements of Fact* (Harvard L. Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 11-02, 2011), <http://ssrn.com/abstract=1737930> [<http://perma.cc/XLV7-9ZYD>].

<sup>11</sup> See *infra* section I.B, pp. 1007–14.

<sup>12</sup> The author discusses IMMANUEL KANT, ON A SUPPOSED RIGHT TO LIE FROM PHILANTHROPY 8:425 (1797), reprinted in PRACTICAL PHILOSOPHY 605 (Mary J. Gregor ed. & trans., 1996).

cynicism and wordplay” (p. 188). Sarcasm, irony, parody, and engagements in fictions must all be clearly signaled to the listener through culturally accepted methods (pp. 133–34), and they must be used sparingly, so as not to “threaten the dominance or availability of the presumption of sincerity” (p. 188).

As Shiffrin recognizes, this view is not fashionable. She places a responsibility on us as speakers that many modern communicative gambits seem designed to evade. But hers is not a superficial or knee-jerk moralism. Her view has a coherence that is both creative and philosophically exacting. At its root is a hopeful, and deeply humane, celebration of the role of communication in our knowledge of ourselves, our understanding of others, and our individual and collective moral deliberation. Sincere communication is the lifeblood of our moral identities, she argues, and it is vulnerable to death by a thousand cuts.

As a compelling defense of sincere communication, Shiffrin’s book deserves to be read and contemplated not just by academics interested in the morality of communication, not just by lawyers concerned with the bounds of free speech, but by anyone struggling to define her duties to herself and others in a world awash in lies. At the same time, Shiffrin’s arguments deserve to be approached with the same rigor and sincerity that she recommends for all communication. In this regard, I have one central question: even if we accept Shiffrin’s claims about the singular role of communication, must we accept her claims about the impermissibility of lying and the privileged position of free speech? To put it another way, if we accept her account of how speech matters, is there not still a question of how much?

This question gestures toward a difference in methodologies. Shiffrin’s approach to lying belongs to a Kantian tradition that rejects value tradeoffs and would resist the transition from how speech matters to questions about how much. In what follows, I offer some challenges to that approach, mainly by suggesting the appeal of a view that recognizes and attempts to accommodate moral conflict. More importantly, however, I suggest a certain symmetry between the Kantian view of lying and claims often made on behalf of free speech. This symmetry makes Shiffrin’s approach coherent and compelling. It also contributes to a sense that, with both lying and free speech in such sharp focus, other important values tend to fall into the periphery. I explore this phenomenon, first, with Shiffrin’s strict stance against lying and, next, with her protective stance toward freedom of speech.

## I. THE WRONGFULNESS OF LYING

Shiffrin's argument, in a few words, is that the moral functions of communication make lying wrong and its regulation compatible with freedom of speech.<sup>13</sup> Lying is wrong because it corrupts communication as a medium for sincere representations (pp. 22–23). Although insincere representations are permissible in a narrow set of circumstances,<sup>14</sup> lying is otherwise morally impermissible (p. 16).

Legal regulation of lying is compatible with fundamental free speech values, because these values rest upon the moral functions that communication allows and lying subverts (pp. 80–81). Regulation of lying is also compatible with First Amendment legal doctrine as it currently exists. Such regulation is not content discriminatory, Shiffrin argues, because it neither targets nor is motivated by particular speech content (pp. 125–26). The basis for regulating lying is not its content but the speaker's attitude — his presenting something as if he believes it, when he does not (p. 126). Shiffrin also argues that regulation of lying could be framed as a form of compelled disclosure, which requires the speaker to make clear that he disbelieves his speech (p. 134). Despite the compatibility of regulation with free speech values and doctrine, lies are not always good candidates for regulation. Institutional concerns — such as concerns about regulating evenhandedly, or not chilling sincere speech — may make regulation a bad idea (pp. 123–24). In addition, Shiffrin argues that autobiographical lies that do not deceive should not be punished, because we should try to accommodate this degree of moral imperfection in others (pp. 157–58). But we should expect ourselves and others to adhere to a duty of sincerity in communication. Truth telling, as Shiffrin says, should be nonnegotiable (p. 188). It should define our attitudes as speakers and as listeners.

This Part examines Shiffrin's claims about the wrongfulness of lying. I ask, first, whether Shiffrin's description of the wrong of lying treats sincere communication as too fragile. I then ask whether her view of the obligation of sincerity treats communication as too privileged.

### A. *The Fragility of Communication*

Shiffrin defines a lie as:

An intentional assertion by A to B of a proposition P such that

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<sup>13</sup> Shiffrin also considers the morality of statements made under duress (see Chapter Two). Here, too, she argues for strong duties of sincerity, particularly with regard to commitments voluntarily undertaken to a person causing duress and statements claiming that one's other statements to that person are sincere (see pp. 61–65).

<sup>14</sup> See *infra* section I.B, pp. 1007–14.

1. A does not believe P, and
2. A is aware that A does not believe P, and
3. A intentionally presents P in a manner or context that objectively manifests A's intention that B is to take and treat P as an accurate representation of A's belief. (p. 12)<sup>15</sup>

This definition is notable for making the crucial feature of a lie the assertion of a proposition one does not really believe. It does not matter whether the proposition is, in fact, actually true. If I say my neighbor has serious gambling debts, and I do not believe this to be the case, I have still lied even if it turns out that he does. It also is not crucial for the speaker to think the proposition is false. She may be agnostic or indifferent about it.<sup>16</sup> If I say the Yankees are winning, and I have no earthly idea and could not care less, I have lied (pp. 12–13). Finally, it does not matter whether the lie fools anyone. For Shiffrin, deception and lying are distinct phenomena (pp. 13–14). A lie may deceive, but it need not: the pathological liar may convince no one, but he lies nonetheless. Meanwhile, deception may take the form of lies, but it need not. Unlike lying, deception need not involve the assertion of a proposition: one can deceive by taking action,<sup>17</sup> by omitting to correct a misimpression, or by offering accurate but incomplete information (p. 20).<sup>18</sup>

Lying and deception are distinct not only as phenomena but also in the wrongs they perpetrate. For Shiffrin, wrongful deception involves disrespect for others' rational processes by violating a duty to take care not to generate false beliefs in others (p. 22). By contrast, the central feature of lying is not the engendering of false beliefs in others but the false representation of the *speaker's* beliefs. Shiffrin identifies three wrongs that arise from this false representation. First, lying wrongs the listener by failing to treat her "as an equal moral partner and as a rational agent who deserves to receive warrants that she may accept as representing the listener's beliefs" (p. 24). Second, the liar wrongs himself by cutting himself off from the moral relationships surrounding

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<sup>15</sup> Footnotes have been omitted.

<sup>16</sup> In this regard, Shiffrin's definition overlaps with Professor Harry Frankfurt's definition of bullshit as a statement by a speaker who is indifferent to its truth or falsity, in a situation in which truth or falsity matters. See HARRY G. FRANKFURT, ON BULLSHIT 33 (2005). Frankfurt, however, distinguishes bullshit from lying. As Shiffrin notes, Frankfurt, unlike herself, argues that lying requires an intent to deceive (p. 13 n.17) (citing Harry Frankfurt, *The Faintest Passion*, PROC. & ADDRESSES AM. PHIL. ASS'N, Nov. 1992, at 5, 6 (1992)).

<sup>17</sup> Shiffrin gives Kant's example of packing a suitcase and thereby giving the misimpression that one is leaving on a trip (p. 20).

<sup>18</sup> On the last possibility, there is the story of W.S. Gilbert, who, going backstage after watching a friend give a terrible performance, reportedly said, "My dear chap! Good isn't the word!" BARTLETT'S BOOK OF ANECDOTES 237 (Clifton Fadiman & André Bernard eds., rev. ed. 2000).

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sincere communication (p. 24). Third, lying is wrong because “it operates on a maxim that, if it were universalized and constituted a public rule of permissible action, would deprive us of reliable access to a crucial set of truths and a reliable way to sort the true from the false” (p. 23).

It is this last wrong that is a major emphasis of Shiffrin’s discussion, and it rests on her view of the moral significance of communication. Shiffrin describes communication as the only reliable way to access other people’s minds with accuracy or precision (p. 1). This access, for Shiffrin, has deep and pervasive moral significance. Through communication of the contents of our minds, we develop understandings of our moral and political duties; we understand others’ motivations and assess them as moral agents; we recognize others as individuals and are so recognized ourselves; we form the close relationships necessary for self-development and flourishing; and we develop our personal ideas and commitments (pp. 9–10). Sincere communication is thus central to our status and development as moral agents. Because communication plays this important moral role, its subversion would be devastating. If the liar’s maxim were universalized, our one trustworthy channel of understanding would be corrupted (p. 23).<sup>19</sup> For this reason, lying is not just a wrong to the parties involved. It also systematically undermines sincere communication.

To make this point, Shiffrin invokes as a metaphor the white flag in battle (pp. 24–25). Warring parties use the white flag to signal a sincere desire to negotiate or otherwise communicate. Even if parties otherwise use any means possible to destroy one another, they keep the white flag sacrosanct so that, no matter how bad relations become, they have a means to propose some repair or respite. In this way, the white flag allows for moral progress in even the worst of situations (pp. 25, 37). Like the white flag, Shiffrin argues, sincere communication allows us to make moral progress. Even where relations are badly broken, the ability to trust each other’s words makes repair possible. Communication should thus be treated like the white flag: held inviolate, untouched by the conflicts that can engulf us (p. 25).

The problem with this metaphor is that there is a great deal of space between the preservation of one symbol and the preservation of all communication. The importance of the white flag rests on the premise that every other form of interaction and communication between enemies is potentially corrupt. Outside of the white flag, the enemies lie to each other, deceive each other, and otherwise use com-

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<sup>19</sup> Shiffrin writes: “[T]here are no alternative, precise, and authoritative avenues into the contents of each other’s minds; there is only testimony. To use this avenue of knowledge for a contrary purpose is to render it unreliable and to taint it” (p. 23).

munication to defeat each other. To require all communication to be authentic by analogy to a white flag is to go far beyond having one potential exit from inimical relations to mandating only one form of relations in the first place.

Shiffrin might respond that the analogy holds because if the liar's maxim were made universal, there would be no white flag left: all communication would be corrupt. But is this correct? Even if everyone adopted the liar's maxim, would communication as a whole be corrupted by distrust? To answer this question first requires some interpretation of Shiffrin's argument. Shiffrin could be making one of two claims. She could be arguing that treating lying as permissible does wrong to the concept of communication. It takes a channel that is meant for sincere expressions and treats it as though it is also meant for insincere expressions. On this interpretation, the wrong has a dignitary flavor: treating lying as permissible shows inadequate respect for communication. This, I think, is not the best interpretation of Shiffrin's claim, but if I am mistaken, we then have to ask why, in some circumstances, showing proper respect for communication is more important than other, conflicting moral aims, such as protecting a life.<sup>20</sup>

Alternatively, Shiffrin could be arguing that treating lying as permissible has actual consequences for the credibility of communication. This, it appears, is the better interpretation. Shiffrin does not frame her argument as one about showing improper respect for the medium of communication. She instead warns about the damage lying does to the *function* communication performs — the function of enabling us to share our thoughts with each other. As Shiffrin puts it, the universalization of the liar's maxim "would deprive us of reliable access to a crucial set of truths and a reliable way to sort the true from the false" (p. 23). It is this access which is important. Communication provides it, and lying corrupts it.

Although Shiffrin's argument is a deontological one, the primary wrong she identifies in lying turns on a particular assertion about consequences — the consequences of lying for our access to the contents of each other's minds. She is asserting that treating lying as permissible would make it difficult for people to assess the sincerity of claims offered to them. We therefore might ask whether treating lying as permissible seems likely to corrupt communication as Shiffrin claims.

One puzzle about this claim is that a particular lie affects listeners' trust only if they actually detect it as a lie. Undetected lies do not lower listeners' trust levels because they do not realize they are being lied to. In order truly to assess the effects of lying, one might want to

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<sup>20</sup> See *infra* section I.B, pp. 1007–14.

know both the rate of lying and the relative proportion of detected and undetected lies, because only detected lies will play into listeners' doubts about the claims presented to them.<sup>21</sup> But perhaps it seems truer to Shiffrin's claims to step back and take a larger view: It is not the effect of any given lie that is at issue. It is the effect of the universal treatment of lying as permissible. If lying were treated as permissible, the risk of insincerity would attach to every statement. People would live under the risk of being lied to, and this risk would corrupt sincere interactions.

In order to evaluate this risk, let me observe first that the world Shiffrin envisions does not seem to be one in which everyone lies to everyone all the time. Shiffrin expressly contemplates that people would still be sincere in some instances because the entire problem is that sincere and insincere speech would be impossible to distinguish.<sup>22</sup> She envisions a world in which everyone treats lying as *permissible*.<sup>23</sup> This appears to be a world in which everything remains the same, except that speakers regard lying as morally and legally permitted.

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<sup>21</sup> There is also a tension here in that detected lies are the ones that affect trust levels, but lies that are immediately recognized as such do not subject the listener to epistemic uncertainty. They may thus be poor indicators of when and to what extent the listener should regard other statements with doubt. Of course, this tension lessens when one considers lies that go undetected at the outset but are later discovered. This class of lies causes epistemic uncertainty while ultimately being detected. This class of lies seems to cause the most trouble, as opposed to immediately detected lies (which may not seriously affect trust of other types of statements) or undetected lies (which ought not to affect trust levels at all).

These concerns are mostly mine rather than Shiffrin's, but they seem to apply to her discussion of "pure autobiographical lies," which she defines as autobiographical lies that do not deceive others (p. 162). Shiffrin thinks these should not be subject to legal penalty, in order to show our toleration of moral imperfection in others. I have questions about the timeline in which she envisions this regime working. Autobiographical lies that never deceive anyone — which are perceived as lies from the moment they are spoken — are clearly within the class she envisions. And of course lies that are never detected are not candidates for accommodation, because, although they are wrongful, they are never identified as lies. But lies can be believed for a time before being discovered. It is unclear how Shiffrin would handle this category. She invokes *United States v. Alvarez* as a case involving "pure autobiographical lies" (p. 157), but Alvarez's false statements about military service, while ultimately uncovered, were not uncovered immediately (p. 121). It does not seem accurate to say these statements did not deceive others. They were ultimately exposed, and we are stipulating they did not induce any tangible reliance interests to anyone's detriment. But in the meantime, the statements were trusted — they were greeted with the level of epistemic reliance that people give to sincere statements. I believe Shiffrin is saying that we ought to tolerate some level of temporary false epistemic reliance. But is it accurate to call such lies "pure" lies? And is there a point at which the epistemic reliance went on too long, even if the lie is ultimately exposed?

<sup>22</sup> "If universalized, one's maxim transforms a mechanism for exclusively conveying the truth into a mechanism for conveying both the false and the true" (p. 123).

<sup>23</sup> For example, "the wrong of lying is that it operates on a maxim that, if it were universalized and constituted a public rule of permissible action, would deprive us of reliable access to a crucial set of truths and a reliable way to sort the true from the false" (p. 123).

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People have many reasons not to lie, however, besides moral and legal prohibitions on lying. Some of these are self-regarding reasons. People tell the truth so that others will want to work with them or do business with them, or because they genuinely want to connect with other people. Some are other-regarding reasons, such as helping loved ones with sincere discussion and offering them the benefits that come with trustworthy relationships. Some of these reasons are purely strategic, while others sound in morality. I take it that all these reasons for not lying still exist in Shiffrin's alternative world (minus any reasons hinging on the costs of being judged as not complying with moral or legal prohibitions). The only difference is that there is not a direct moral or legal prohibition on lying.

This interpretation seems necessary, because otherwise we are stipulating not only that lying is universally viewed as permissible, but also that people in this alternative world do not view other reasons for sincerity as important. This would mean that they have little regard for other aspects of moral relations that provide reasons for not lying. It seems quite likely that communication would become corrupt in such a world, and with it moral relations. But the claim seems essentially circular. It is unsurprising to say that moral relations would deteriorate in a world in which no one valued moral relations. To consider the role of the prohibition on lying, it must be the only thing that changes.

So long as people retain all the other components that constitute moral identity, they may treat lying as permissible, but they will often have reasons to choose an alternative.<sup>24</sup> The strength of those reasons will vary over the span of a person's relationships. Therefore the effect of universalizing the liar's maxim is likely to be distributed unevenly. Trust would accrue in certain relationships despite there being no independent moral reason for individuals to cultivate it. It is not clear why communication as a whole would bear the brunt of the liar's maxim.

Perhaps Shiffrin thinks that strong relationships would essentially be impossible to build in such a world. I doubt this. The reasons people have for engaging authentically with each other will often be strong enough to overcome the distrust engendered by a free-floating risk of insincerity. We already live in a world with some risk that others will lie to us. Nevertheless, one natural response to catching someone in a lie is to think, "This *person* is unreliable," rather than, "This *medium* is unreliable." A casual lie told by an acquaintance has no

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<sup>24</sup> Professor Fred Schauer makes a similar point that it is possible to overstate the force of law by not recognizing that people have other reasons to act consistently with the law aside from a perceived duty to comply with the law. See FREDERICK SCHAUER, *THE FORCE OF LAW* 48–52 (2015).

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bearing on my expectations that my family members will speak sincerely to me. I am not certain that it even has an effect on my expectations regarding other acquaintances. The moral of *The Boy Who Cried “Wolf”* is not that the boy’s lies eroded communication as a means of authentic expression. It is that everyone concluded *he* was a liar and did not believe him when he told the truth. The fact that the liar thus isolates himself is another wrong of lying, as Shiffrin notes (p. 24). But this particularized wrong need not bring with it the wholesale devaluing of the communicative endeavor.

Even if the effect of the maxim is distributed unevenly across relationships, it may be strong in important arenas. Moral and legal prohibitions against lying may be more important when we have fewer other reasons to be sincere — perhaps, for example, when we are dealing with strangers. In a society as large as ours, many interactions involve strangers, including a large part of civil discourse. Even if communication survived as a reliable medium in many domains, it would be tragedy enough if it degenerated within the public sphere.

Even here, however, it seems that we can tolerate some degree of lying while maintaining working channels of communication. That is arguably the state in which we live right now. Indeed, Shiffrin herself contemplates that communication can withstand some level of lying. For one thing, she argues that we ought to tolerate autobiographical lies that do not deceive. For another, she argues that institutional reasons will often weigh against regulating other kinds of lies, even where they are otherwise appropriate subjects of regulation (pp. 118–19). Although the moral prohibition remains in force with regard to these lies, it is reasonable to anticipate that not outlawing them will increase their number, and Shiffrin’s argument seems to be that such a risk is less weighty than the institutional arguments against regulation (pp. 118–19). If our communication channels can tolerate some lying, it becomes an open question how much they can tolerate. The white flag metaphor here seems to cut against Shiffrin’s argument: even within a system that is predominantly hostile, people can develop specific mechanisms to signal sincerity, or they can develop particular relationships that foster it. We need not maintain the purity of all communication in order to have an exit from bad relations and a path to moral progress. In this regard, communication may be less fragile than Shiffrin suggests.

### *B. Lying and Moral Conflicts*

One might also ask whether communication should be as privileged as Shiffrin claims. The one major qualification in Shiffrin’s argument against lying is that insincere statements in certain contexts do not count as lies. Shiffrin uses the term “suspended context” for a situation in which, descriptively speaking, a listener is not warranted in believ-

ing the speaker (p. 16). The contents of a novel, the activities of an improvisational comedy troupe, and the statements of a habitual liar are all examples of suspended contexts (pp. 16–17, 19). Some suspended contexts are “justified suspended contexts,” meaning that, normatively speaking, “the speaker’s (potential) insincerity is reasonable and justifiable” (p. 16). Both novels and improvisational comedy create justified suspended contexts. The habitual liar does not. His insincerity may be predictable, but it is not justifiable.

For Shiffrin, insincere statements in a justified suspended context are not lies (p. 18). She defines a lie as a statement the speaker objectively intends to be taken as her belief (p. 12). A justified suspended context is one “in which the speaker’s utterance does not, objectively, manifest that intention” (p. 18). Statements in this context are “falsifications but not lies” (p. 19). Novels, plays, and other fictions are examples of justified suspended contexts. “White lies” said out of politeness are, for Shiffrin, not lies at all but statements made in a justified suspended context (p. 19).

Most importantly, Shiffrin argues that false statements to the murderer at the door about the location of his would-be victim are not lies (p. 19). They are falsifications made in a justified suspended context. Though he may subjectively want and expect the truth, the murderer cannot objectively expect his interlocutor to respond to him sincerely. He is asking his interlocutor to use communication to expose the victim and directly facilitate murder, and he cannot reasonably expect his interlocutor to communicate in service of this evil end.<sup>25</sup>

One difficulty with this kind of exception is defining when it applies. To take a mundane example, while Shiffrin treats white lies as exempt from duties of sincerity, determining where a justified suspended context exists is a challenge. “Do I have food in my teeth?” requires a truthful answer. “Do you think that [third party] noticed I had food in my teeth?” might not. “How does this dress look?” might seem the textbook example of a justified suspended context, the requisite answer always being, “Great.” But if someone is trying to choose a dress for an important event, a sincere answer of “Not great,” might be required. And even if the dress has already been purchased and is currently being worn, if the sincere answer is, “The front buttons are gaping, follow me to the bathroom pronto,” then sincerity is mandato-

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<sup>25</sup> Shiffrin states:

Given the compulsory ends morality supplies us, we could not reasonably use communication to further an evil end, and we cannot reasonably expect others to supply us with the reliable warrants necessary to do so . . . . One in hot pursuit of an evil end should have no reasonable expectation that the world or other people cooperate with her evil enterprise. She has no entitlements to those warrants about the world that would materially further those ends. (pp. 33–34)

ry. Or at least so I would argue. I am not certain that others would agree.

Shiffrin tries to offer guidance on what counts as a justified suspended context and what does not. Justified suspended contexts do not arise from the subjective intentions of the speaker or from the subjective expectations of the listener (pp. 41, 119, 188).<sup>26</sup> Neither party can create them unilaterally. Instead, Shiffrin argues, they arise from the objective features of a situation (p. 16). But exactly what about the situation creates a justified suspended context remains somewhat mysterious, and Shiffrin does not purport to give a comprehensive definition. Shiffrin says that speakers in a justified suspended context do not objectively manifest an intention that their words be taken as sincere (p. 18). In cases of plays, novels, and the like, this seems accurate. But it is difficult to understand how it applies to other examples. In the case of the murderer at the door, in what sense does the speaker not intend her false claim about the victim's location to be taken as her belief? Certainly she subjectively intends for the murderer to believe it: someone's life may depend on his doing so. In what way does she not objectively intend to be taken as sincere? Even in the case of white lies, it seems inaccurate to say that the speaker does not objectively manifest an intention to be taken at her word. If someone asks you, "Do I look fat?" your "No" should be swift and unequivocal. A white lie that manifestly signals its insincerity is failing in the very function it is supposed to perform.

What does seem true about both the murderer and white lies is that in both situations the listener cannot reasonably expect a sincere answer. But the listener's expectations were not a part of Shiffrin's definition of lying (p. 12). It is unclear how a lack of reasonable expectations on the listener's part translates into a lack of intention by the speaker to be taken at her word.

It is possible that I am missing a piece of Shiffrin's argument regarding speaker intention, but what seems to unify her examples of justified suspended contexts is that they are situations in which, objectively speaking, the speaker does not owe the listener a sincere answer. The important contention is that no one thinks "How are you?" in a social setting deserves a sincere answer. Actors and writers should not expect audiences to engage with them as though they were sincere. And, on Shiffrin's view, the murderer's evil end, his use of communication to further that end, and his demand that his conversant communi-

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<sup>26</sup> On the first count, according to Shiffrin, one cannot unilaterally declare a justified suspended context: the duty of sincerity cannot be removed by pronouncement (pp. 188–89). On the second, people may have unreasonable expectations of sincerity, and objective criteria will govern what they actually ought to expect.

cate back to him in furtherance of his end, all mean that he is not owed a sincere response.

Indeed, we can go further. Shiffrin's examples are all situations in which the listener has *no* claim to, and the speaker *no* duty of, sincerity. Murderers have absolutely no claim to sincere answers about victims' whereabouts. Purveyors of fiction have no legitimate claim to be taken as sincere. Small talkers have no reason to expect people to bare their souls in social settings.

What Shiffrin seems not to leave room for are situations in which there is a duty to speak sincerely, but, all things considered, that duty is overcome. Lying is only permitted in particular, exceptional contexts — in which, it seems, there is no duty to the listener. If the duty of sincerity is only one moral duty among many, it seems reasonable to expect that they might sometimes conflict.<sup>27</sup> Shiffrin implies that whenever the duty of sincerity exists, it prevails.

Yet in many situations the duty of sincerity might exist but not prevail on an all-things-considered view. Our mundane dress may again be of service. Even in many trivial social contexts, it does not seem accurate to say that the listener has no claim to a sincere answer. Perhaps this is the case with strangers making small talk, but many social interactions involve loved ones. If a friend asks, "How do I look in this dress?" and the dress is not flattering, then I am caught between (1) a felt obligation to affirm my friend's confidence in her appearance and (2) felt obligations to offer whatever help a sincere answer would provide and to honor our relationship by avoiding insincerity. These obligations may resolve in one direction when we're at a cocktail party, and in another at the dress store, or when the dress is gaping. But even in situations in which I ultimately am working in a justified suspended context, it seems odd to say that I have no duty to be sincere to someone I love, or that she has no reasonable expectation of sincerity on my part. She is, after all, my friend. It seems more accurate to say that I do have a duty of sincerity to my friend, and in some cases it is overridden by other friendly duties.

With her admirably unsparing approach to her own claims, Shiffrin herself has raised a more portentous and more compelling example. In Shiffrin's view, it would be wrong to lie to the murderer at the door about the penalty for murder or the likely disposition of his case, even if those lies would prevent harm to the victim (pp. 30–31). While the murderer who asks for whereabouts turns communication to an evil end and thus is not owed a sincere answer, the murderer who asks for

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<sup>27</sup> See, e.g., SISSELA BOK, LYING 39 (1978) (discussing Kant's ruling out of conflicts of duty); WALTER SINNOTT-ARMSTRONG, MORAL DILEMMAS 12 (1988) (arguing that moral duties may conflict and that some conflicts may be irresolvable).

legal information is not abusing communication in the same way and is therefore entitled to a sincere answer. Shiffrin notes that this line is difficult to draw and suggests the justified suspended context extends only to statements that, if willingly offered, would count as accomplice liability (p. 34). In any case, she is clear that there are some things about which the murderer is owed a sincere response, even if it will facilitate his evil ends (pp. 31–32).

Potential responses are that the murderer is no more entitled to one form of assistance with his killing spree than another, or that his interlocutor is no more obligated to facilitate a murder as unwilling consigliere than to do so by abusing communication. But taking Shiffrin as correct that the murderer does have a claim to a sincere answer, could not this claim be defeated by those of others, particularly the claim of the victim not to be murdered? The murderer's interlocutor may have a duty to the murderer, but she may have an even more pressing duty to assist in preserving another person's life. This duty only becomes stronger if we imagine that the potential victim is not an adult neighbor but the interlocutor's infant child, her young sibling, or her frail parent. It is difficult to say that such duties of protection by definition do not extend to lying to murderers. It seems more accurate to say that the interlocutor labors under conflicting duties — to protect her dependent and to tell the murderer the truth. It seems incredible that, all things considered, the duty to the murderer must prevail.<sup>28</sup>

Nor are these conflicts as exceptional as a murderer at the door. They may arise in personal, professional, and political contexts. Personal conflicts about truth-telling are the engines that drive advice columns everywhere<sup>29</sup>: My partner asks if I ever had an affair, and I did, but it's long over and done — must I say yes? My friend asks what she should do about her boyfriend Furio, and I can't stand Furio — what do I say? These questions arise precisely because people want to live up to their moral obligations but feel those obligations pulling them in different directions. Perhaps not all of these felt conflicts are actual moral conflicts, and if people turned to philosophers rather than advice columnists, perhaps they would receive better guidance.<sup>30</sup> But many philosophers perceive some such conflicts to be ac-

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<sup>28</sup> See, e.g., BOK, *supra* note 27, at 40–41 (arguing that many reject Kant's view of the murderer out of a sense that "where innocent lives are at stake, lies are morally justified, if indeed they are lies in the first place," *id.* at 40).

<sup>29</sup> See, e.g., Kwame Anthony Appiah, Amy Bloom & Kenji Yoshino, *Can I Lie to My Father About Being Gay So He Will Pay for My College Education?*, N.Y. TIMES MAG. (Sept. 2, 2015), <http://www.nytimes.com/2015/09/06/magazine/can-i-lie-to-my-father-about-being-gay-so-he-will-pay-for-my-college-education.html>.

<sup>30</sup> Compare *id.*, with Kwame Anthony Appiah, *What Should an Ethicist Tell His Readers?*, N.Y. TIMES MAG. (Sept. 30, 2015), <http://www.nytimes.com/2015/10/04/magazine/what-should-an-ethicist-tell-his-readers.html>.

tual, and those who oppose rigid, Kantian approaches to lying traffic in all sorts of examples. May a doctor never lie to a woman in labor if she has stated that she wishes to be assisted in avoiding pain medication by any means necessary?<sup>31</sup> May politicians never lie to protect citizens from national security risks?<sup>32</sup> Given the location of our commitment to sincere communication within a larger constellation of moral commitments, it is hard to feel certain that it deserves so privileged a place.

Finally, Shiffrin's moral arguments against lying sit uneasily alongside her claims about its legality. Shiffrin argues that freedom of speech does not shield lying from regulation, but she stops short of saying that the moral status of lying *requires* it to be regulated. Regulation is optional. This suggests that, on a legal level, other considerations can outweigh the wrongness of lying in the determination of what conduct should be permissible. This implication is in tension with Shiffrin's argument that, on a moral level, few if any countervailing considerations work to make lying permissible.

The contrast grows starker in light of Shiffrin's argument that, in some circumstances, a prohibition on lying might be, all things considered, impermissible under free-speech values, because institutional concerns should be taken into account. Here, Shiffrin primarily means that, when the government regulates lies, it risks (1) creating a system of discriminatory or arbitrary enforcement and (2) chilling sincere speech. Although regulation of lying is not inconsistent with the moral foundations of the First Amendment, these institutional concerns also have a role to play in First Amendment law, and they may block regulation of lying in some cases. Thus, it is better to permit lying than to risk the harms to communication posed by chilling or by discriminatory or arbitrary enforcement. This suggests that it is permissible to trade off the wrong of lying against other wrongs to communication

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<sup>31</sup> Some physicians and bioethicists recognize that there are occasions on which obligations of sincerity conflict with other obligations to patients. See, e.g., TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 33 (4th ed. 1994); Sandeep Jauhar, *When Doctors Need to Lie*, N.Y. TIMES (Feb. 22, 2014), <http://www.nytimes.com/2014/02/23/opinion/sunday/when-doctors-need-to-lie.html>.

<sup>32</sup> The literature on lying in the political realm is extensive. For examples, see JUDITH N. SHKLAR, *ORDINARY VICES* 77–78, 86 (1984) (suggesting that the “politics of unreconciled political neighbors . . . could hardly survive without hypocrisy,” *id.* at 86); Jason Brennan, *Murderers at the Ballot Box: When Politicians May Lie to Bad Voters*, in *POLITICAL ETHICS* (David Killoren ed., forthcoming 2016) (reasoning that lying to misinformed, ignorant, and irrational voters is justified in order to prevent them from inflicting unjustifiable harm on innocent people); and John M. Kang, *The Case for Insincerity*, in 29 *STUDIES IN LAW, POLITICS, AND SOCIETY* 143 (Austin Sarat & Patricia Ewick eds., 2003) (“[I]nsincerity, under certain circumstances is enormously useful for diffusing tense situations where parties are wont to express their sincere contempt for each other,” *id.* at 159–60).

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and to allow lying if these other wrongs are more pressing. But if the wrong of lying may be traded off against these other risks to communicative interests, why not against risks to conflicting moral interests? Is communication so important that it is permissible to prioritize various communicative interests, but not to subject them to other moral claims?

I have argued that (1) it is not clear that the permissibility of lying would damage communication as Shiffrin claims and (2) her view seems not to allow for all-things-considered judgments that other duties take priority over the duty of sincerity. These arguments may be placed in tandem. If the moral functions of communication can sustain some degree of lying, then the duty of sincerity might even more readily trade off with other moral duties whose breach will cause clearer and more definite harms. Even if we accept Shiffrin's claims about the damage that lying does to communication, we still have problems of moral conflict. Shiffrin can tell us why some false statements in some circumstances are consistent with the importance of communication: the lie about the victim's whereabouts is one. And she compellingly explains the wrong that lying does to communication outside such circumstances.<sup>33</sup> But one may recognize the importance of communication and the harms of lying without concluding that lying is never justified.

Standing in rebuke to this skepticism is Shiffrin's powerful depiction of the importance of sincerity and the injury that lying does to it. Faced with a particular moral conflict, it is perhaps easy to conclude that sincerity should give way, but this view does not take the whole picture into account. An all-things-considered view opens the door to a system of balancing that has risks for sincere communication even when done appropriately and of course carries an additional risk of inappropriate tradeoffs. Shiffrin's effort to head off that route is reminiscent of Professor David Luban's argument against allowing torture in the case of the ticking time bomb: by allowing torture in hard cases, we create an avenue for torture which, once it exists, becomes part of our institutions and affects the culture as a whole.<sup>34</sup> The murderer seeking legal advice is Shiffrin's ticking time bomb. An all-things-considered approach that trades sincerity off against other values creates an avenue through which lying is permissible. This avenue becomes part of the culture, with the result that lying becomes part of the culture. Moreover, once admitted as part of the culture, it may

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<sup>33</sup> Professor Barbara Herman is likewise compelling in both these regards. See Barbara Herman, *A Mismatch of Methods*, in 2 DEREK PARFIT, ON WHAT MATTERS 83, 106–15 (Samuel Scheffler ed., 2011).

<sup>34</sup> David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1427, 1440–60 (2005).

grow to characterize the culture more and more. Once we develop these avenues, we are tempted to use them.

I appreciate the elegance and power of Shiffrin's argument. It is a striking corrective to a society overly comfortable with compromising sincerity, even in the absence of real moral conflict. But it demands a high degree of certainty that both communication and lying are significant enough to justify such a categorical approach.

## II. THE PROTECTION OF FREE SPEECH

Shiffrin's account of morality and free speech invites a similar question. On Shiffrin's view, the same features of communication that make lying wrongful also warrant special protections for communication. Speech — or, more precisely, free and sincere communication — plays an important and distinctive role in individual moral agency and moral relations (p. 80).<sup>35</sup> Communication is, as described above, the sole vehicle for precise and accurate renderings of our mental contents, and this feature makes it central to our moral identity and development. The right we call “freedom of speech” — which for Shiffrin embraces freedom of thought and freedom of communication (p. 86) — arises from the importance of speech to our status and development as moral agents. Because Shiffrin locates the importance of free speech in individual status and development, her theory may be described as autonomy based.

One central question is how much protection for free speech is necessary to our moral status. Shiffrin suggests that it is a great deal. To exist and grow as moral agents, we must be able to articulate our thoughts to ourselves and others in an authentic way, receive others' thoughts, and pursue our mental processes without unwanted interference (p. 91). These requirements place the government under a duty to refrain from, as Shiffrin puts it:

- (1) banning or attempting to ban the free development and operation of a person's mind or those activities or materials necessary for its free development and operation;
- (2) promulgating legal materials or otherwise acting in ways that by intention or effect objectionably interfere with the free development and operation of a person's mind; and
- (3) acting on any rationales that are inconsistent with valuing this protection. (p. 92)

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<sup>35</sup> Shiffrin argues that (1) sincere free expression has a “special, though not exclusive” role in developing our minds and personalities and (2) “the opportunity to engage in free-ranging, sincere communication is an essential condition for the revelation of the information necessary to fully execute our duties to one another (including supporting the full development of one another as thinkers) and to enable us to govern in concert as equals” (p. 80).

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These duties are geared toward protecting the communicative processes that support moral agency. They prevent the state from passing laws that “objectionably interfere” with an individual’s mental processes, free and authentic articulations of thought, and receipt of thoughts from others.

But some speakers’ free and authentic thoughts harm other people. Threats cause fear. Incitement causes violence. Hate speech both rejects the idea of equal status and deeply injures its targets. Casual racism, sexism, and other insensitive speech can cause people to feel degraded simply by virtue of being present in a certain context, such as in the workplace, on the street, or online. Deliberately offensive speech can intrude on individuals’ most sacred beliefs, spaces, or relationships. Uncivil or impolite speech has psychological effects on its targets, deters others from speaking, and interferes with collective deliberation. Expressions of morally repugnant ideas can attract more followers to those ideas. Discussions of harmful life choices can encourage others to make the same harmful choices. And of course, lying can damage the people being lied to, the people being lied about, the people doing the lying, and society as a whole.

In fact, the very features that make speech distinctive in its contributions to moral agency also make it distinctive in its capacity for harm. Shiffrin celebrates speech as specially related to moral agency because communication is by far the most effective way to share ideas and information, make ourselves known to others, and engage in moral deliberation. But precisely 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. Hate crimes, for example, are virtually always deemed hate crimes by virtue of some accompanying speech, such as a symbol of hatred or an epithet uttered by a perpetrator. In the absence of speech, it is very difficult to impute motive to an act of violence with the precision necessary to deem it a hate crime.

Speech is also distinctive in its low barrier to entry. While many people will think twice about assaulting another physically, speech-related harm can be casual and unreflective. People may not anticipate that their words will harm others in quite the same way they do when they engage in some physically harmful activities. Or they may deliberately decide to cause harm through words rather than actions, on the theory that doing so poses fewer costs to them, whether in penalties or in risk to their own personal safety. For these reasons, as well as possibly others, people may refrain from imposing physical harms better than they hold their tongues. One could argue that speech’s special features warrant special protection. But one could also argue

that the same special features make it an especially strong candidate for regulation.

*A. Free Speech as a Special Right*

This issue fits within larger debates about the “specialness” of free speech. Freedom of speech is often framed as a special right — roughly speaking, as a freestanding right rather than an indistinguishable component of a more general right, such as a liberty right. Some commentators have argued that many theories of free speech — particularly autonomy theories like Shiffrin’s — fail to explain what is “special” about speech and why it deserves to be singled out and treated differently from other activities.<sup>36</sup> If, for example, a theorist claims that speech fosters autonomy-related values of self-expression or self-development, but buying a car or doing gymnastics also contributes to self-expression or self-development, then the theorist has not explained why speech is special.<sup>37</sup>

How “special” speech must be, and what theories make it sufficiently special, are matters of debate within free speech theory. I have argued that the debate actually comprises two questions: how *distinct* free speech must be from other rights, and how *robust* its protection should be.<sup>38</sup> Implicit in many discussions is the premise that a successful free speech theory must provide a reason that free speech (1) is distinct from *all* other activities and (2) should receive *highly* robust protection.<sup>39</sup> If free speech contributes to autonomy in the same way and to roughly the same degree as buying a car or doing gymnastics, then it is not *distinct* from these activities, and it should not receive more *robust* protection than they do.

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<sup>36</sup> See, e.g., LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? (2005); KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE (1989); FREDERICK SCHAUER, FREE SPEECH (1982); Lawrence Alexander & Paul Horton, *The Impossibility of a Free Speech Principle*, 78 NW. U. L. REV. 1319 (1983) (reviewing SCHAUER, FREE SPEECH, *supra*); Frederick Schauer, *Free Speech on Tuesdays*, 34 L. & PHIL. 119 (2015); Frederick Schauer, *Must Speech Be Special?*, 78 NW. U. L. REV. 1284 (1983).

<sup>37</sup> See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 25 (1971) (“An individual may develop his faculties or derive pleasure from trading on the stock market, following his profession as a river port pilot, working as a barmaid, engaging in sexual activity, playing tennis, rigging prices or in any of thousands of other endeavors. Speech with only the [above-mentioned] two benefits can be preferred to other activities only by ranking forms of personal gratification. These functions or benefits of speech are, therefore, to the principled judge, indistinguishable from the functions or benefits of all other human activity. He cannot, on neutral grounds, choose to protect speech that has only these functions more than he protects any other claimed freedom.”).

<sup>38</sup> Leslie Kendrick, *Free Speech as a Special Right* (Sept. 5, 2015) (unpublished manuscript) (on file with the Harvard Law School Library).

<sup>39</sup> See, e.g., Alexander & Horton, *supra* note 36; Bork, *supra* note 37; Schauer, *Must Speech Be Special?*, *supra* note 36. *But see* Schauer, *Free Speech on Tuesdays*, *supra* note 36.

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While how distinct free speech must be is a matter for debate,<sup>40</sup> Shiffrin provides a reason to regard speech as distinct from *all* other activities. In essence, Shiffrin argues that speech is special because nothing communicates like communication. Speech is by far the best way, and sometimes the only way, for individuals to convey ideas and information to each other. In this, speech is descriptively distinct from all other activities. And communication, Shiffrin argues, contributes uniquely to our status as thinkers, including our moral identities. In this regard, speech is normatively distinct from all other activities.

Moreover, on Shiffrin's view, the normative distinctiveness of speech warrants robust protection. The endeavor to which speech uniquely contributes — the development and maintenance of our moral identities — is so important that speech itself must receive robust protection from interference. Freedom of speech is thus both quite distinctive (indeed singular) and demanding of robust protection.

The difficulty arrives in the fact that the descriptive distinctiveness of speech — its particular ability to convey information and ideas — may make it normatively distinctive in a bad way as well as a good way. Shiffrin must make a case that the normative distinctiveness she sees in speech demands the robust protection she envisions.

### B. *Lying as a Special Case*

It is important to note that Shiffrin does not address the problem of speech-related harms directly, let alone comprehensively. This is understandable: Shiffrin has written a book about lying, morality, and freedom of speech, not morality and freedom of speech writ large. And yet by writing a book focusing on lying, she implies that lying, too, is special — both in its categorical exclusion from freedom of speech and in the reasons for that exclusion.

First, Shiffrin would likely exempt some other forms of speech from protection, such as some threats or the most dangerous forms of incitement.<sup>41</sup> But whatever exceptions Shiffrin might make for some speech harms, they are likely to be small and narrow. Her view of freedom of speech rests on the importance of free and authentic communication.

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<sup>40</sup> Some autonomy theorists expressly frame free speech as but one aspect of some larger value. See, e.g., C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (1989); TIMOTHY MACKLEM, *INDEPENDENCE OF MIND* (2006). Shiffrin herself suggests that it is a virtue, not a vice, that her theory puts freedom of speech in close relation to other rights, such as expressive association, intimate association, sexual intimacy, reproductive freedom, and end-of-life decisions (pp. 111–12). Nevertheless, Shiffrin claims that speech is different from all these other activities in the particular way in which it contributes to our status as thinkers (pp. 79–82). Thus, in her view, free speech has a family resemblance to some other important rights, but they are not analytically identical.

<sup>41</sup> See Seana Valentine Shiffrin, *Speech, Death, and Double Effect*, 78 N.Y.U. L. REV. 1135 (2003).

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Governmental intervention in speech, even to prevent harm, certainly makes speech less free. It also makes speech less authentic in that some speakers will not be able to express themselves fully on certain topics.<sup>42</sup> Shiffrin's vision of free speech therefore depends upon a minimum of restrictions. Its robust protection arises out of necessity, for without robust protection, communication will fail to serve the purposes that make it normatively important in the first place.

Second, whatever exceptions Shiffrin would make for some speech harms, they would have to rest on a different ground from her stated view that lying is unprotected. Lying is unprotected because it breaks with what Shiffrin sees as the basic premises of freedom of speech. Communication is only protected because of the functions it serves when used sincerely. Lying uses communication insincerely. Lying is thus at odds with the reasons that speech deserves robust protection. By contrast, hate speech, threats, incitement, offensiveness, incivility, and the like can all be quite sincere.<sup>43</sup> When undertaken sincerely, they are simply forms of free and authentic speech that cause harm to others. They do not pervert the premises of free and authentic communication in the same way as lying. It is tempting to say that lying uses communication as a means in a way that other speech harms do not. Lying trades on the premises of sincerity in order to pervert them. Other types of harms may abuse other people. But they do not abuse communication itself.

These two extrapolations yield a view in which lying is at odds with the premises of freedom of speech and therefore entirely outside its protection, while other speech harms are not at odds with the premises of free speech and are therefore the subjects of narrower, perhaps more fact-sensitive exceptions.

And yet these other speech harms also seem at odds with the premises of free communication. Intentional threats, incitement, hate speech, and so on contravene the equal respect for individuals as moral agents that underlies Shiffrin's moral view of communication. Even unintentional speech harms may evince an unacceptable disregard for other individuals. If lying contravenes the moral premises of communication, these other actions seem to contravene the moral premises that underlie the moral premises of communication. Descriptively speaking, only lying directly assaults the mechanisms of communica-

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<sup>42</sup> In this regard, Shiffrin's vision of free and authentic communication goes beyond a minimum requirement of sincerity to demand an atmosphere conducive to candor. On the distinction between sincerity and candor, see Micah Schwartzman, Essay, *Judicial Sincerity*, 94 VA. L. REV. 987, 992–98 (2008).

<sup>43</sup> Of course, they can also be insincere. On Shiffrin's view, it seems insincere incendiary speech should count as doubly wrong. For instance, trolling should be unacceptable, to the extent the term connotes insincere inflammatory statements deployed in order to get a reaction.

tion. But normatively, it seems it should make little difference that lying assaults sincere communication while these other forms of speech assault the premises underlying sincere communication.

Shiffrin could accept this normative equivalence and hold that these other forms of speech harms are just as much outside the scope of freedom of speech as lying is. This position has two drawbacks. One is that lying would not have the status that the book impliedly bestows upon it, as a singular wrong to communication that is specially outside the scope of freedom of speech. Instead, lying would be one of many forms of communication that are outside of freedom of speech, for fairly similar reasons.

The second drawback is that this position seems overinclusive. American interpretations of freedom of speech take for granted that a great deal of harmful speech must receive protection. The First Amendment protects many statements that listeners would take to be threatening.<sup>44</sup> Incendiary speech is protected unless it is intended to cause imminent violence and is likely to do so.<sup>45</sup> Hate speech and offensive speech receive very robust protection.<sup>46</sup> If Shiffrin were to treat these forms of speech the same way she does lies, they would receive much less protection. She excludes “pure lies” — that is, lies that do not deceive — from protection because, even if no one believes the speaker, he still advances insincere speech with the warrants of truthfulness, and this is at odds with the premises of free and authentic communication (pp. 118–20).<sup>47</sup> If other speech harms were open for regulation regardless of the danger posed, simply because the speaker’s attitude was at odds with the premises of moral agency and equality, then a great deal of currently protected speech would go unprotected.

A similar idea was considered and rejected early in the development of First Amendment jurisprudence, when some judges, particularly Judge Learned Hand, argued that subversive speech should be unprotected because it was at odds with the very premises of First Amendment protection. Speech seeking to overthrow the Constitution, Judge Hand argued, does not find refuge in the Constitution.<sup>48</sup> Though the argument was rejected by the courts in the early days, it

<sup>44</sup> See, e.g., *Virginia v. Black*, 538 U.S. 343, 359–60 (2003) (defining unprotected “true threats”).

<sup>45</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

<sup>46</sup> See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Nat’l Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43 (1977); *Cohen v. California*, 403 U.S. 15 (1971).

<sup>47</sup> Shiffrin argues that we should tolerate some pure lies but holds that they are outside free speech protection (p. 118).

<sup>48</sup> See *Masses Publ’g Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y.), *rev’d*, 246 F. 24 (2d Cir. 1917) (“Yet there has always been a recognized limit to such expressions, incident indeed to the existence of any compulsive power of the state itself. One may not counsel or advise others to violate the law as it stands.”); Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 *STAN. L. REV.* 719, 752–54 (1975).

has recurred in the scholarly literature, usually with the acknowledgment that it would lead to a reduction in speech protection.<sup>49</sup> Shiffrin's argument has the same structure: speech at odds with the premises of free and authentic communication does not find refuge in the protections of free and authentic communication. One could argue, by extension, that speech at odds with the premises of moral agency and equality does not find refuge in protections afforded on the basis of moral agency and equality. Shiffrin, however, seems committed to robust speech protection that is roughly in line with what current jurisprudence provides. It thus seems unlikely that this is the vision of freedom of speech that she has in mind.

If, however, Shiffrin rejects the equivalence of lying with other speech harms, she must justify placing lying entirely and uniquely outside the scope of freedom of speech, when other speech harms arise from equally rotten premises but receive more robust protection. It would seem odd to say we are not permitted to use speech to lie to other people, but we may use it to abuse them, threaten them, or risk causing others to harm them. If free and authentic communication is necessary for moral development, but free and authentic communication either disrespects the moral status of others or outright interferes with their lives and well-being, what stance toward speech should society take? How robust must speech protection be?

One possible societal approach is to limit the protection for speech. As Professor Robert Amdur put it in response to a different autonomy theory of freedom of speech:

[A]utonomous citizens, deciding whether to grant the state authority to regulate thought and discussion, would not only think of themselves as potential speakers and listeners, examining different views and deciding what to believe and when to obey the law. They would also think of themselves as potential *victims* of harms brought about by acts of expression. They would almost certainly settle on some sort of compromise: prohibiting the state from interfering with expression because of its content, but permitting an exception for acts of expression that result in serious harms.<sup>50</sup>

Those who engage in free and authentic communication may value it while having other moral commitments that argue for limits on speech. Shiffrin no doubt would conclude that certain speech harms

<sup>49</sup> See, e.g., Bork, *supra* note 37, at 30–32.

<sup>50</sup> Robert Amdur, *Scanlon on Freedom of Expression*, 9 PHIL. & PUB. AFF. 287, 299 (1980). Amdur was responding to the free speech theory of Professor Thomas Scanlon, which demanded that the government not regulate speech on the basis of (1) its promoting false beliefs or (2) its helping to convince listeners to commit bad acts. See Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972). Incidentally, Scanlon's view of lying and deception would allow for special justifications for both in what appears to be a broader set of cases than Shiffrin contemplates. T.M. SCANLON, WHAT WE OWE TO EACH OTHER 318–20 (1998).

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are unprotected. But the implication of her approach is that free and authentic communication is so important that society must accept a great deal of harm that comes with it. The question is why free and authentic communication is important enough to justify that.

To be clear, most free speech theories, not to mention all of American free speech jurisprudence, face the same question. If it is more urgent in Shiffrin's case, it is because she has placed her moral vision at the heart of her theory of free speech, and this approach sharpens the question of how to balance the moral imperatives of free speech against other important interests of moral agents. Shiffrin has undoubtedly advanced an important view of the foundations of freedom of speech. It is precisely because her theory is such an important contribution that further elaboration will be so welcome.

### III. CONCLUSION

There is a pleasing symmetry to Shiffrin's major claims. She argues that communication plays a distinctive role in moral agency and moral relations. Communication is thus especially important and deserves special protection. Lying imposes a distinctive wrong on communication, by subverting its moral purposes. Lying is thus wrongful and is a candidate for legal regulation. Communication must be preserved against the degradation threatened by a culture of lying.

Communication must also be protected against unwarranted governmental interference. Although it remains unclear what counts as unwarranted interference, the special status of communication rests on its being free and authentic, and thus interference with its freedom and authenticity should presumably be kept to a minimum. Communication is so important that many of its attendant harms must be accepted in order to keep it free and authentic.

Thus, preservation of free and authentic communication is so important that (1) lying is nearly always wrong and (2) other harms must sometimes be accepted. I have suggested that perhaps communication does not require such robust solicitude in either of these ways. Its functions may be able to withstand a certain amount of insincerity, at least to the extent that the duty of sincerity could trade off against other moral duties in certain contexts. And while some thresholds of free inquiry and authenticity must exist in a free society, the freedom of speech may conflict with other aspects of moral agency and moral relations.

Shiffrin makes a strong case that the integrity of communication is vitally important to moral agency and moral relations. She gives compelling reasons for us to take a stronger stance against lying, both legally and culturally. She develops an original and provocative theory of the freedom of speech. Her vision of moral communication is quite demanding, but it is also hopeful: she emphasizes the possibilities of

communication and the progress it allows for both individuals and moral relations. I merely wonder if communication is either as fragile or as privileged as her vision suggests.