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given by

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Unfit to Print:
Government Speech and the 1st Amendment

I. Introduction

A. Our Speech Environment Has Significantly Changed.

Many fundamental First Amendment doctrines and free speech intuitions were crafted when speakers had smaller audiences or their speech was mediated by others' judgments.

Now, speakers can communicate directly and instantly with millions if not billions of people without mediation.

The former natural limits on distribution and immediacy and more widespread observation of moral norms may have, in the past, indirectly mitigated and contained some of the dangers of misinformation, incendiary speech, and hate speech. This background mitigation may have influenced what threats caught our attention and how we evaluated arguments.

To what extent do our free speech doctrines and free speech intuitions implicitly presuppose or otherwise depend upon antiquated ideas about the natural limitations on distribution and influence?

B. Tackling These Methodological Challenges is a Fraught Enterprise

Many of these principles have served us well. A piecemeal approach to the methodological challenges may be prudent.

There are persistent reasons to doubt that government officials can engage in more intrusive speech regulation with respect to new communicative technologies without discrimination or illicit suppression.

With respect to the pressing issue of the mass distribution of misinformation, the problem and the (partial) solution to government misinformation may differ from the problem and solutions of private misinformation.

It's essential to a free speech legal regime and a free speech culture that individual citizens have ample intellectual breathing room and this includes ample room for inaccurate and misguided communication.

Government speakers are, however, special. They have distinctive obligations, including distinctive First Amendment obligations.

C. Rethinking One Aspect of the Government Speech Doctrine

In light of technological and cultural developments, we should reconsider the traditional view that the circumstances in which government speech may violate the First Amendment are rare, limited to cases of targeted speech that harm specific individuals.

A wider range of government speech violates the First Amendment than we have previously acknowledged, including some opinion speech.

Government speakers have distinctive First Amendment obligations to refrain from telling lies, issuing culpable misrepresentations, and denouncing their critics.

But, because these First Amendment issues may be nonjusticiable, they require *private actors* to develop First Amendment law in uncharted territory.

The media should refuse to provide unmediated platforms to government speakers to disseminate lies, culpable misrepresentations, and denunciations of critical speech on the grounds that these forms of government speech are illegal.

A principled legal approach circumscribes the free speech issues raised by government speech. It offers a way to respond to problematic government speech without resolving harder issues about how much private, misguided speech a free speech culture should tolerate.

II. Unconstitutional Government Speech

A. Motivating Examples

The press as the "enemy of the American people."[1]

Labeling unwanted reporting, anonymous editorials, and the failure to applaud as forms of "treason."[2]

Lies: "Biggest Electoral College Win"; "Tremendous numbers" of fraudulent voters;[3] "99% [of Covid-19 cases are] totally harmless"; "We now have the Lowest Fatality Rate in the World"[4]

B. Does the First Amendment Apply to Government Speech?

Traditional answer: No. The government must discriminate between viewpoints in producing its own speech.

But, government threats of illegal violence, defamation, and the use of speech to commit a crime fall outside First Amendment protection.

Further, the First Amendment disallows the government to engage in speech-based intimidation to chill others' speech.

Extant judicial cases require proof the speech had deleterious *effects* (or intended effects) on *specific* victims.

Much of the President's problematic speech did not meet these standards.

These standards are more an artifact of requirements for judicial review than inherent First Amendment limitations.

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[1] Michael M. Grynbaum, *Trump Calls the News Media the 'Enemy of the American People'*, N.Y. TIMES (Feb. 17, 2017). https://www.nytimes.com/2017/02/17/business/trump-calls-the-news-media-the-enemy-of-the-people.html?smid=em-share

[2] Ryan Teague Beckwith, *What Makes Trump's Treason Talk Different*, TIME, June 3, (2019).

[3] David Leonhardt & Stuart A. Thompson, *Trump's Lies,* N.Y.TIMES (updated December 14, 2017) https://www.nytimes.com/interactive/2017/06/23/opinion/trumps-lies.html

[4] Christian Paz, *All of Trump's Lies about the Coronavirus,* THE ATLANTIC (updated Nov. 20, 2020), https://www.theatlantic.com/politics/archive/2020/11/trumps-lies-about-coronavirus/608647/

We should recognize a further category of government speech that abridges the First Amendment, a category of illicit speech characterized by what it says, independent of its purpose, effect, or intended effect and irrespective of whether the speech is directed at a particular person.

C. Three "Easy" Cases

1. "In light of my enemies' unfair attacks and their false news *hoaxes*, the First Amendment has been suspended. Sad! ☹"

2. 'Criticism of POTUS is treason.'

3. 'The Constitution provides no refuge for Communist speech.'

The content of C(1)-(C)3 deny the freedoms protected by the First Amendment either by denying the First Amendment's continued livelihood or by denying its settled, clear applications.

D. Why Are Such Denials Unconstitutional?

1. The First Amendment's duties for government officials should be understood in terms of the oath of office: "to preserve, protect, and defend the Constitution" (President) or "to support and defend the Constitution" (other officials).

2. The oath underscores an obligation inherent in the rule of law.

3. Such denials subvert the specific accountability and abuse containment purposes of the First Amendment.

> Official denial of the law is particularly concerning where the function of the law depends on its public recognition (as contrasted with Botts' dots).

E. These Denials are Illegal Irrespective of Episodic Effect.

These arguments do not turn on the actual or predicted effects of the speech on an audience. The speech offers a rational warrant to an audience to believe their free speech is not respected.

The speech in question thus fails to *uphold* the law.

G. A First Amendment Objection to the Supposed "Easy Cases": Legitimate Governmental Criticism

All laws, including the Constitution and its interpretation must be open to criticism by government officials who have special expertise on the Constitution's operation.

Officials must also be empowered to criticize how citizens elect to exercise their rights. The justification for the protection of a right may not be that its exercise has value. Many rights should be exercised with judgment and criticism hones that judgment.

Mightn't Trump's speech fall in this category?

H. Answering the Objection

The problem isn't his criticism but how it is delivered – too much and too little.

Government officials must adhere to a clear statement rule and their adherence must be credible.

I. A Rejoinder: But, this is Opinion Speech!

J. Responding to the Rejoinder (A Surrejoinder!)

Many of these statements of opinion either presuppose or connote false factual claims about the legal status of citizens' speech activities.

It isn't obvious that the First Amendment's coverage extends to the opinion of government officials in the same way that it does to individual citizens.

Riffing on one of Mel Nimmer's great achievements; an example inspired by *Cohen v. California.*[5]

Garcetti v. Ceballos[6] and *Connick v. Myers*[7] – wrongly decided cases but that captured an important insight: government officials have no First Amendment right to garble the government's message.

The Constitution embodies governmental messages, commitments, and opinions that officials have no First Amendment right to garble, whether or not those officials have a superior who orders them not to speak.

Dealing with contested cases.

III. Lies and Culpable Misrepresentations by Government Officials

A. Pure Lies

U.S. v. Alvarez[8] got it wrong: Why pure lies fall outside the First Amendment.

In any case, *Alvarez* did not consider whether government lies about matters of public concern violate the First Amendment.

B. A Further Step: Why *Government* Lies Violate the First Amendment.

1. They subvert self-governance and democratic accountability.

2. They introduce noise into communicative channels.

3. They deteriorate the *rational* basis for communication and epistemic trust.

C. Culpable Factual Misrepresentations

Definition: falsehoods and other deceptive misleading speech about content with respect to which the speaker has a special responsibility to speak accurately and nondeceptively but which the speaker culpably issues in dereliction of their responsibility.

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[5] 403 U.S.15 (1971).
[6] 547 U.S. 410 (2006).
[7] 461 U.S. 138 (1983).
[8] 567 U.S. 709 (2012).

They may be believed by the speaker but only due to culpable failures to review evidence responsibly (such as when experts make declarations without reading relevant studies that contradict their declarations).

Culpable factual misrepresentations by government officials also violate duties to support the First Amendment and the conditions for its meaningful exercise.

Recognizing that culpable factual misrepresentations by government officials violate the First Amendment relieves evidentiary pressure to prove what a government speaker's mental state was.

IV. Non-justiciability and Private Actors

Non-justiciability entails that private actors must interpret the Constitution for themselves.

Social media companies' terms all dictate that their platforms should not be used for illegal activity. Thus, they should decline to host unconstitutional speech by government officials.

Private media companies (the press and social media) engaging in First Amendment interpretation for purposes of determining what government speech is illegal raises distinct advantages and hazards.

A. Some Advantages of Private Constitutional Interpretation and Enforcement

1. Serving the First Amendment serves media's professed free speech values (by contrast with private interpretation of laws meant to police private behavior).

2. Articulating under-enforced constitutional norms may stimulate public discussion.

3. With respect to speech, private remedies are more flexible than judicial remedies.

4. The denial of a private platform leaves other outlets for the speech, so falls short of a comprehensive ban.

B. Some Hazards of Private Constitutional Interpretation and Enforcement

1. Private companies have no structural allegiance to the public interest. Corporate needs may influence their legal interpretation.

2. Because it is not binding, private interpretation lacks stability and continuity and may change as corporate interests, political winds, or corporate values shift.

3. There may be rival interpretations between media companies and a race to the bottom.

4. Robust private enforcement risks public concerns about illicit censorship.

C. Potential Mitigating Factors and Proposals

1. The availability of standard government channels for speech.

2. The articulation of a principled line (such as illegality) that distinguishes excluded speech from distasteful, unpopular, challenging, or critical speech.

3. A binding commitment to articulating and implementing that line through *independent* deliberative bodies that use *transparent* mechanisms of deliberation and implementation.

V. Conclusion

A. What I Have Argued

Government speech that denies the legitimacy of criticism violates the First Amendment, independent of intent or effect.

Lying government speech violates the First Amendment, independent of intent or effect.

Private parties may vindicate constitutional norms by refusing to disseminate unmediated illegal government speech, but this raises distinct free speech hazards that require care and integrity to manage.

Such private stewardship is precarious in a market environment. It's regrettable that we may need it.

B. Why Only Government Speech?

Why focus on government speech? Why not advocate for broader private policies that restrict all misinformation issued by any speaker?

Denying access on the grounds of unconstitutionality acknowledges the special dereliction of duty these violations involve as violations of law and calls attention to under-enforced constitutional norms.

Government officials offer a straightforward case in otherwise complicated terrain that calls for nuance. Despite the profound dangers of our new communicative powers and reach, we should have strong free speech reservations about a blanket approach, even a blanket private approach, that would remove or label all insincere factual speech as such.

A free speech culture must preserve the space for errors, growth, and self-wrought evolution; individual thinkers learn at different paces.

Blanket policies may chill tentative speech and may fuel suspicions of illicit censorship.

There may be good grounds for private companies to deny access to other, private speakers access based on their expertise, their perceived expertise, their sphere of influence, their institutional status, and the nature of the misrepresentations they make. There are nuanced and difficult judgments to make here that need not be resolved to make judgments about the case of government speakers.

SPEECH MATTERS

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Lying and Freedom of Speech

In Chapter One, I argued that a lie is an assertion that the speaker knows she does not believe, but nevertheless deliberately asserts, in a context that, objectively interpreted, represents that assertion as to be taken by the listener as true and as believed by the speaker. Given that understanding, I argued that the primary, distinctive wrong of lies as such does not inhere in their deceptive effect, if any, on listeners, but instead in their abuse of the mechanism by which we provide reliable testimonial warrants, a mechanism we must safeguard if we are to understand and cooperate with one another and to achieve our mandatory moral ends. Of course, many lies also cause or attempt wrongful deception, by violating the speaker's duty of care toward the listener not to cause or risk the formation (or confirmation) in her of a false belief. On many occasions, when lies are deceptive, the deceptive components may reasonably represent the most salient part of the wrong done to their victims. But, what I call "pure lies" need not involve deception or the intent to deceive. They need not even be false; a speaker may lie by asserting what she believes to be false yet, unbeknownst to her, happens to be true.[1] Yet pure lies, like deceptive lies, abuse the mechanism of direct communication and threaten the basis of our testimonial trust with one another.

In Chapter Three, I argued that similar considerations about the significance of speech to our personal intellectual development and to our moral agency undergird the view that legal regimes must offer strong protections for individual freedom of speech. Freedom of speech is an essential social condition for the development, maintenance, and full value of freedom of thought, and for the full and proper exercise of our

[1] For instance, Betsy lies when she fabricates and solemnly asserts, for her private amusement, that it snowed yesterday in Phoenix even if, against her belief to the contrary and unbeknownst to her, Phoenix had a fluke flurry. She lies even if no one comes to believe it snowed in Phoenix and even if no one believes that Betsy believes it.

moral faculties. For these reasons, I argued that freedom of speech is a fundamental human right and an indispensable precondition of a just social and political scheme.

Together, these two positions—the strong condemnation of lies as such and the derivation of freedom of speech from similar argumentative foundations—prompt questions about the legal regulation of lies. Does a strong commitment to freedom of speech preclude regulation of lies *as such*, as many have thought? *Prima facie*, the philosophical case I have sketched for freedom of speech suggests, to the contrary, that freedom of speech may not extend to deliberate misrepresentations of the speakers' beliefs. That case stresses the significance of opportunities to speak and hear *sincere* speech (as well as speech transparently used to pursue our other nontestimonial uses of communication). Deliberately insincere speech should not garner the same sort of respect because it does not participate, even at the fringe, in the same values as sincere or transparent speech. Moreover, if deliberate misrepresentations undercut the warrants we have to accept each other's testimonial speech, then we have reason to think that deliberate misrepresentations interfere with the aims of free speech culture.[2] They not only demonstrate a culpable indifference to the validity of the warrants offered to the particular listener, but they damage the rational basis supporting our testimonial practices, which are crucial elements of a thriving free speech culture and fundamental components of a social environment that supports the moral agency of thinkers. If the wrong of the lie is as insidious as I have argued, that wrong supports a strong *prima facie* case for identifying and marking that wrong through the signal of legal regulation and for using some of the powers of legal regulation to rebuke (and perhaps deter) its occurrence.[3]

Many commentators, as well as a majority of the Justices of the Supreme Court, however, judge that freedom of speech may pose a general

[2] Although my topic is speakers' deliberate misrepresentation of their beliefs and not false positions as such, related considerations lead me to endorse Frederick Schauer's dismay at the prevalence of factual falsity in the culture, but I resist his skepticism that autonomy theories of freedom of speech have "little to say" about the problem or our legal options. Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. Rev. 897, 916–19 (2010).

[3] *See also* Mark Tushnet, "*Telling Me Lies*": *The Constitutionality of Regulating False Statements of Fact* 24–25 (Harv. L. Sch. Pub. L. & Legal Theory, Working Paper Series, Paper No. 11–02), *available at* http://ssrn.com/abstract=1737930 (arguing that "[p]ublic regulation can be understood as expressing a distinctively *public* judgment that certain lies are quite bad, supplementing . . . private condemnation . . . .").

and fundamental obstacle to the legal regulation of lies as such. This position, I will argue, is mistaken.

In identifying that mistake, however, my aim is not to advocate for the comprehensive legal regulation of lies. Rather, my more modest objective is to show that, theoretically, legal regulation of lies need not offend the important values protected by freedom of speech and, in particular, by the free speech traditions articulated within First Amendment jurisprudence. The theoretical point seems worth making both because of the seriousness of the wrong of lying and because our discussion of the moral complexities of its regulation seems stunted by a preoccupation with free speech worries.

Still, I stop short of direct advocacy of general legal regulation of lies for two reasons. First, although I am unconvinced that there is any *intrinsic* free speech problem with the legal regulation of lying, there are important pragmatic concerns about the potential for governmental abuse that might, in some circumstances, be unleashed by such regulation. These concerns are serious ones, although, as I will suggest, they may have been overstated. Nonetheless, that assessment is better made on a case-by-case basis and not on the basis of sweeping legal or philosophical arguments. Second, as I will argue in Chapter Five, I have strong reservations about the legal regulation of the pure lie with respect to personal, autobiographical speech. These reservations emanate from considerations about equality, fraternity, and toleration, however, and not from freedom of speech. Attention to these sorts of considerations has been missing from cultural and legal discussions, I suggest, because misplaced free speech concerns have dominated the conversation. Thus, showing the compatibility of free speech values with legal regulation of lies may not, on its own, make a comprehensive case for its constitutionality or desirability.

Clarifying the scope and limitations of free speech arguments would not only counsel greater attention to other values, but also has specific practical implications. It would suggest that our constitutional scrutiny of legal regulations of lies should be far more focused on the specifics of their design, namely whether the particular factual circumstances of their application raise credible concerns about government abuse. In addition, the argument I offer also suggests that the evidentiary standard for regulating lies, whether pure or deceptive, may permissibly be lowered. As I will argue, free speech concerns do not require, as a condition of regulation, any showing of actual deception, the risk of a deception of the audience, or the intention to deceive; that is, the defendant's lie need not have implanted or reinforced false beliefs in the audience (or risked doing so).

Hence, where legal regulation of lies is apt, it may suffice, without triggering constitutional alarms, to show that the defendant deliberately asserted what the defendant did not believe. This simpler standard could ease the burden of regulating lies by commercial actors and corporate entities, among others.

In what follows, I focus on deliberately advanced misrepresentations of the speakers' beliefs, excluding ambiguous cases such as spontaneous utterances that may be insufficiently considered to count as deliberate. I will also cordon off defensive misrepresentations offered only in response to intrusive or unreasonable inquiries or demands, ones that threaten reasonable privacy interests. I bracket these cases in part because as defensive acts, they may be insufficiently deliberate, but also because they may represent justified cases of misrepresentation. To put it in the terms introduced in Chapter One, intrusive, unreasonable (even if inadvertent) demands for private information may generate a suspended context in which listeners have no objective warrant to take the speaker's assertion to be sincere or true; more weakly, such circumstances may give rise to excuses. In any case, I want to start with clear cases of unprovoked, deliberate statements that a speaker offers to be taken as true and represents as her belief, but that, in fact, she believes are false.

While considering these issues, it may help to have specific examples in mind. Consider these: First, the regulation of the clearly deliberate, nonspontaneous, "autobiographical lie"—e.g., lies about one's personal characteristics or accomplishments in public, in private conversation, or on a website such as match.com or, as in the case of Lance Armstrong, in one's autobiography.[4] Second, the regulation of the expert lie outside the fiduciary context—e.g., a lie by an expert about matters falling within her expertise that may turn into a pure lie that violates no code of conduct when told outside an employment or fiduciary context such as a lie told by a doctor, lawyer, food professional, or plumber about a matter within her expertise in a book, an article, or party conversation. Suppose a chef opines at a dinner party that food safety regulations have become overly rigid and falsely insists that one can safely leave potato salad out all day

[4] *See, e.g.*, Amended Class Action Complaint and Demand for Jury Trial, Stutzman v. Armstrong, No. 13–00116 (E.D. Cal. Mar. 7, 2013), 2013 WL 1178749 (class action seeking damages and injunctive relief against Armstrong and his books' publishers for fraud and for negligently misrepresenting Armstrong's two purported autobiographies as fact, not fiction). The District Court judge dismissed the claims against the publishers and some claims against Armstrong, but not the fraud, deceit, and negligent misrepresentation claims against Armstrong. Stutzman v. Armstrong, 2013 WL 4853333 (E.D. Cal 2013). The entire case was voluntarily dismissed with prejudice on October 18, 2013.

or a plumber falsely declares her conviction that organic products work just as well as harsh chemicals at dissolving clogs. Their audiences may not believe what is said and may not believe that their speakers believe them, although the context is not a joking one. If these lies are somberly offered yet not believed, they may serve as examples of pure lies that would not fall under standard regulations of deceptive speech.

Of course, such lies, as well as lies told in professional or commercial contexts, may often deceive listeners. They may also, therefore, be subject to regulation on the grounds that, when deceptive, lies may materially harm particular listeners. I put aside that possibility to focus on the pure lie as such, independent of any deceptive effects. My contention is that well-crafted regulation of such lies need not raise any First Amendment difficulties even absent evidence of deception or its likelihood. The pure lie may be a rare specimen, but establishing the consistency of regulating the pure lie with freedom of speech would thereby show that from a First Amendment perspective, deceptive lies could be regulated *qua* lie, even when evidence of their deceptive impact proves elusive.

Freedom of Speech

Perhaps the best place to begin is with the U.S. Supreme Court's recent decision about free speech and autobiographical lies. *United States* v. *Alvarez* invalidated the Stolen Valor Act, a federal statute that attached criminal liability to falsehoods about one's service and awards in military service,[5] on First Amendment grounds.[6] I have no wish to defend the Stolen Valor Act or its constitutionality, in particular. I focus on the case because it airs some of the most prominent free speech arguments against legal regulation. Also, by offering a concrete case, *Alvarez* helps to highlight which objections to legal regulation are more contingent, attaching to a specific method of regulating lies.

The case arose from the following event. At a water district board meeting in Claremont, California, Xavier Alvarez, a board member, falsely bragged that he was a retired Marine and a recipient of the Congressional Medal of Honor. These claims were neither approximations of the truth nor understandable spontaneous exaggerations. They were fabrications from whole cloth. Indeed, Mr. Alvarez notoriously misrepresented himself, falsely claiming on other occasions to be a Vietnam veteran, a wounded member of the team that successfully freed [*sic*] the American ambassador during the hostage crisis in Iran, a police officer, and a professional hockey player. He was indicted under the Stolen Valor Act and pled guilty, while reserving his right to mount a constitutional challenge to the Act. His sentence included approximately $5,000 in fines, 400 hours of community service, three years of probation, and routine drug testing.[7] Alvarez challenged his conviction on the grounds that the Stolen Valor Act violated the First Amendment, and he persuaded both the Ninth Circuit Court of Appeals and the Supreme Court.[8]

Although the Act did not specifically require the defendant to have a particular mental state as an element of liability (and some of the plurality opinion of the Supreme Court directed its criticism at legal regulation of falsehoods *per se*),[9] principles of charitable construction and constitutional avoidance would suggest the Act should be interpreted to attach liability only to deliberate falsehoods and not to accidental, unknowing, or good-faith mistakes of fact.[10] So interpreted, what made the Act interesting is that it did not tailor the regulation to contexts in which deception would be likely or the topic especially germane. Although it homed in on lies that were also factually false and bore on the speaker's military distinction, the Act did not restrict its coverage to particular fora of speech, such as representations to government officials, to the public, or within employment or commercial contexts. Thus, factors that might be significant to a duty against deception, such as the locale in which Mr. Alvarez spoke and his status as a board member were, strictly speaking, irrelevant to his liability to prosecution under the Act.

[5] Stolen Valor Act of 2005, 18 U.S.C. § 704 (2006).

[6] United States v. Alvarez, 132 S. Ct. 2537, 2542–47 (2012). Prior to the *Alvarez* ruling, lower courts divided over the Act's constitutionality. *Contrast, e.g.*, United States v. Robbins, 759 F. Supp. 2d 815 (W.D. Va. 2011) (upholding, against a First Amendment challenge, the conviction of a defendant who lied about receiving the Vietnam Service Medal when running for political office), *with* United States v. Strandlof, 667 F.3d 1146 (10th Cir. 2012) (overturning the conviction of a defendant charged with falsely representing himself as the recipient of the Purple Heart).

[7] Judgment and Probation/Commitment Order, United States v. Alvarez, No. 07–1035 (C.D. Cal. Jul. 21, 2008), 2008 WL 8683050.

[8] United States v. Alvarez, 617 F.3d 1198 (9th Cir. 2010), *denied reh'g*, 638 F.3d 666 (9th Cir. 2011); *Alvarez*, 132 S. Ct. 2537 (2012).

[9] 18 U.S.C. § 704(b). "Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States, any of the service medals or badges awarded to the members of such forces, the ribbon, button, or rosette of any such badge, decoration, or medal, or any colorable imitation of such item shall be fined under this title, imprisoned not more than six months, or both." *See Alvarez*, 132 S. Ct. at 2539–40.

[10] *See Alvarez*, 132 S. Ct. at 2552–53 (Breyer, J., concurring); *id.* at 2558 (Alito, J., dissenting); *see also Robbins*, 759 F. Supp. 2d at 818–19.

Thus, the Act took seriously what the Court had suggested in passing dicta multiple times over the years; namely, it endorsed the broad position that false (factual) speech as such has no First Amendment value and so may be regulated for a legitimate purpose.[11] Despite the Court's extended flirtation with this broad position, when confronted with a statute predicated on this position, the *Alvarez* Court flatly rejected it as inconsistent with freedom of speech.[12] As I will argue, the Court stumbled here with respect to its analysis of lies.

Contingent Defects

Some of the Court's concerns in *Alvarez* revolved around serious defects in the Stolen Valor Act that, while important, do not represent intrinsic features of the legal regulation of lies. The Stolen Valor Act did not represent the epitome of well-crafted legislation. By attaching criminal penalties to pure lies, authorizing up to a *year* of imprisonment if the lie concerned certain distinguished medals, such as the Purple Heart,[13] the statute offended for its disproportionate remedy.[14] That charge, however,

[11] *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974); Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 504, n. 22 (1984); BE & K Constr. Co. v. NLRB, 536 U.S. 516, 530–31 (2002); Hustler v. Falwell, 485 U.S. 46, 52 (1988).

[12] *Alvarez*, 132 S. Ct. at 2551.

[13] 18 U.S.C. § 704 (d) (2006).

[14] The prospects for finding disproportionality under current judicial doctrine, however, are grim for two reasons: the Court's general unwillingness to recognize disproportionality in criminal sentencing and its general failure to regard criminal penalties as excessive in the speech domain. *See* Harmelin v. Michigan, 501 U.S. 957 (1991) (endorsing the constitutionality of a life sentence without possibility of parole given to a person without prior felony convictions, found to have possessed 650 grams of cocaine); Lockyer v. Andrade, 538 U.S. 63 (2003) (upholding the constitutionality of two consecutive twenty-five year to life sentences for a previously convicted felon in a three strikes regime who stole $150 worth of videotapes); Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 26–27 (1981) (noting the Court's reluctance to police the severity of criminal sanctions on speech); Margot Kaminski, *Copyright Crime and Punishment: The First Amendment's Proportionality Problem*, 73 MD. L. REV. 587 (2014) (decrying failure to use proportionality analysis in copyright sentencing); Michael Coenen, *Of Speech and Sanctions: Toward a Penalty-Sensitive Approach to the First Amendment*, 112 COLUM. L. REV. 991, 994 (2012) (noting that a "penalty-neutral" approach largely governs First Amendment cases, with some small pockets of penalty-sensitivity). More recent cases have found it unconstitutional to sentence juveniles to life sentences without the possibility of parole. Perhaps they offer reason to hope that meaningful review of disproportionate sentencing has been rekindled, although their heavy emphasis on the juvenile status of the offender suggests a more limited reading. *See* Miller v. Alabama, 132 S. Ct. 2455 (2012) (overturning a mandatory life sentence for juvenile homicide under the cruel and unusual punishment clause of the Eighth Amendment); Graham v. Florida, 560 U.S. 48 (2010) (overturning the life sentence for a juvenile convicted of non-homicidal felony).

would not impugn a more carefully drafted statute with moderate civil penalties or other civil remedies for its violation.

Moreover, the use of criminal penalties, even if proportionate, may exacerbate genuine concerns about selective prosecution and the self-censorship associated with regulating the lie.[15] There is no question that it is troubling to enable the police, and the government more broadly, with a legal avenue to prosecute activity that, it is alleged, most of the population has intimate familiarity with.[16] The concern is not, realistically, that mass prosecutions would transpire. Rather, the concern is with enabling government officials to threaten individuals who have garnered the government's disapproval with prosecution, a threat that could intimidate dissidents.[17] This is an important worry, and it suggests the wisdom of designing the legal regulation of lies with the primary motive of conveying a standard of conduct rather than deterring misconduct through powerful threats, regularly prosecuted. Using moderate civil regulations rather than criminal penalties might go some distance to address these concerns.

Of course, it is possible that civil regulations, too, may chill sincere speech. Crafting further safeguards might be required to arrest the potential for government abuse or its perception. This might be achieved by limiting the statute's applicability to repeat offenders, requiring multiple complainants, requiring strong proof that the defendant actively believed her statement was false (rather than showing an inference of what the defendant must have believed in the circumstances or a showing of recklessness),[18] allowing the defense that the misrepresentation was necessary

[15] *See, e.g.*, Brief of Professor Jonathan D. Varat as Amicus Curiae in Support of Respondent at 21, United States v. Alvarez, 132 S. Ct. 2537 (2012) (No. 11–210), 2012 WL 195302.

[16] The familiarity of all with lying seems unquestionable, but further precision about frequency is hard to come by, as I discuss in Chapter One, note 28.

[17] *See* United States v. Alvarez, 132 S. Ct. 2537, 2547–48 (2012). *See also* Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, 1109 (2007). For strong caution about the casualness with which chilling arguments are deployed absent strong evidence, see Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633 (2013). Kendrick's call for greater precision and data about the chilling effect is well taken. Still, sensitivity to the likely impact on concerned citizens should not be stifled (nor does Kendrick so advocate) while we await a stronger evidentiary basis for making finer doctrinal distinctions.

[18] Some speakers may speak or act in ways that strongly suggest they do not believe a prior statement. Although that evidence may indeed be probative, in this domain it is important to rule out the possibility that the speaker harbored a contradiction in her beliefs of which she was unaware. The argument I am advancing for the regulation of lies does not

to protect a reasonable expectation of privacy, allowing proof of government harassment to constitute a complete defense, instituting independent avenues for relief upon showings of illicit governmental motive, and incorporating sanctions for irresponsible accusations by civilians to forestall private harassment.[19] Such protections may be cumbersome, but I am not here exploring the administrability of a permissible regulation of lying. I am just exploring whether regulations could be crafted without violating freedom of speech protections.

Another defect of the Stolen Valor Act was that, as crafted, it was not viewpoint-neutral, because it did not regulate all deliberately false speech or even all deliberately false speech relating to public service or one's wartime activities. The Act penalized misrepresentations about honored military service but, through omission, immunized misrepresentations about dishonorable military service, honorable diplomatic or Peace Corps service, activism protesting the war, or conscientious objection. This narrow focus of concern is in tension with the principle of *R.A.V. v. St. Paul* that the First Amendment demands that even unprotected speech may not be regulated for an impermissible purpose, namely a governmental determination that some viewpoints as such are privileged over others.[20]

Important as the issues about abusive enforcement practices and clumsy drafting are, I want to put them aside. Largely, they are contingent objections to the particular version of legal regulation of lies embodied in the Stolen Valor Act and to its criminalization. To pursue the intrinsic free speech problems (if any) with the regulation of lies, we should turn our

directly extend to include the legal regulation of self-deception, even culpable self-deception, a category that raises further issues about freedom of thought.

[19] Greater creativity with agents of implementation and with the form of remedies might further alleviate anxiety. Regulation of insincere political advertising, for example, might be implemented through nonpartisan review boards, empowered to require that, for a specified period, offenders fund disclosures that their prior advertisements were found deliberately misleading.

[20] In *R.A.V.*, a hate speech statute was overturned on the grounds that although it could be construed to regulate unprotected "fighting words," it discriminated between different viewpoint-based categories of fighting words, penalizing discriminatory fighting words but immunizing antidiscriminatory fighting words. R.A.V. v. City of St. Paul, 505 U.S. 377, 383–84, 388–89, 391 (1992). That interpretation of the statute at issue in *R.A.V.* was questionable, but the basic principle that a speech-discriminatory motive may not be deployed as the engine of regulation, even if it is targeted at otherwise regulable speech, has merit. *See also* Chaker v. Crogan, 428 F.3d 1215, 1228 (9th Cir. 2005) (holding a California penal code section unconstitutional because it criminalized deliberate misrepresentations criticizing peace officers but not deliberate misrepresentations supporting peace officers); Varat, *supra* note 17, at 1118 (2007) (discussing *Chaker* and the application of *R.A.V.* to regulations of false speech).

attention to a fair, well-designed civil statute that addresses a viewpoint-neutral range of deliberate misrepresentations offered in contexts that are clearly serious and nonfictional in presentation, and nonintrusive on reasonable domains of privacy. Imagine that this scheme imposed high evidentiary standards, modest remedies, and safeguards to reduce the potential and the fear of government abuse.

Would *that (imagined) statute* be consistent with freedom of speech? Do the Court's opinions in *Alvarez* give us reason to think not? Although the Court's majority divided between two opinions,[21] those two opinions convened on a number of putative free speech defects besetting the regulation of lies: first, regulations of lies are forms of content-discrimination, a First Amendment anathema that provokes skepticism and the highest standard of review; second, there is insufficient evidence that lying causes the sort of harm that could surmount free speech concerns; and, third, even deliberate falsehoods have free speech value. These arguments are all unpersuasive.

Content-discrimination

MUST REGULATION OF LIES BE CONTENT-DISCRIMINATORY?

To many free speech advocates, the prospect of regulating lies has seemed an immediate nonstarter because it is often framed as the regulation of speech on the basis of its content, a posture highly suspect and usually lethal from a freedom of speech perspective.[22] My contention is that this preliminary objection, though ubiquitous, is mistaken. When framed in a general way, the regulation of lies as such is not clearly a content-based regulation in the sense in which that pejorative classification is typically

[21] Justice Kennedy wrote a plurality opinion that garnered three additional votes; Justice Breyer wrote a concurring opinion, also signed by Justice Kagan.

[22] *See, e.g., Alvarez*, 132 S. Ct. at 2543–44 ("[T]he Constitution 'demands that content-based restrictions on speech be presumed invalid . . . '" (quoting Ashcroft v. ACLU, 542 U.S. 656, 660 (2004))). For a recent sustained analysis of the constitutional hostility to content regulation, see Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231 (2012). The proponent of these regulations may object to this discussion on the grounds that the prohibition on content-based regulation generally applies to speech falling *within* the scope of First Amendment protection. Part of the issue here is whether deliberate misrepresentations fall within or outside that umbrella in the first place. I propose to lay that chicken-and-egg issue aside because, however accurate, the contention that they fall outside the First Amendment's protection requires an explanation. That explanation, to be persuasive, will have to engage with the concerns that drive the classification of regulations on deliberate misrepresentations as content-based, even if at the end of the argument one concludes that the prohibition does not strictly apply to this speech.

meant. To regulate the lie is to regulate deliberate misrepresentation by a speaker: that is, it is to prohibit (or otherwise regulate) a speaker from presenting something *she believes to be false* as though she believed it to be true. The predicate of regulation is not that the content of the speech is false. Recall, as I argued earlier, a statement may be true but still be a lie when the speaker disbelieves it. Rather, the predicate of the regulation is the conjunction of the speaker's mental state toward the content, namely that the speaker believes it to be false, and her presentation of that content, nevertheless, as though it were true and believed by her to be true.

One tip-off that this regulation is not really content-based is that if the same speaker or someone else uttered the same statement yet believed it (and that utterance possessed the same meaning), that speech would not fall afoul of the regulation. This suggests we are rather far from the standard stomping grounds of content-regulation.

Moreover, were we to regulate, our reason for regulating need not be content-based. The *prima facie* argument offered above is that the lie interferes with the aims and function of a free speech culture not through its content or through the reactions of the audience to its content, but rather because its serious utterance falsely represents itself as presenting the thoughts of the speaker and thereby misuses the exclusive tools we have to share our sincere beliefs with one another; in so doing, it scrambles and distorts the channels of communication deployed by the sincere. This impetus for regulation does not stem from disagreement with the content of the speech or from a worry about how others react to its content, but rather from the fact that insincere, but seriously presented, representations interfere with our ready, reliable ability to transmit our mental contents, whatever they may be, and have them taken as testimonial warrants of our beliefs.

So, both our motives as well as the target of regulation seem compatible with valuing freedom of speech. Neither seems content-based. Indeed, such regulation may be partly motivated by an interest in protecting the reliability and the perceived reliability of speech; so understood, such regulations advance free speech values in ways analogous to time, place, and manner restrictions that aim to ensure that speakers can be heard and are not drowned out by competitors or hostile audience members. If lies interfere with the successful transmission of recognizable testimonial warrants and therefore with effective communication, regulations on lies may serve the values that underpin freedom of speech. Further, legal regulations of the lie need not have a content-discriminatory

impact. As I go on to argue, regulating the lie need not chill, preclude, or burden valuable speech.

That's my general argument. To unpack it a bit, it may help to make some preliminary distinctions between the speaker, the proposition she utters (the meaning of the utterance), its truth-value, her attitudes and beliefs toward the proposition she utters, her motivation for producing the utterance, and the attitudes and beliefs she has toward her utterance. So, for example, Abby, the speaker, declares that "The brown dress no longer fits Sally," and thereby expresses that the brown dress once did but does not now fit Sally, Abby's daughter. Abby utters a true proposition, believes the proposition she utters, is unhappy about its content because its truth means a shopping venture is in her future, says it because a new outfit needs to be purchased, but is unhappy about *uttering* the proposition to Kristin, Sally's other mother, because Abby knows that airing this fact will bring some stressful financial pressures to the forefront of Kristin's consciousness. Without looking at Sally, Kristin insincerely replies, "The dress still fits her perfectly." She utters this insincere statement in order to deflect the social pressure to set a time for a shopping expedition and to repress the bubbling financial stress. Abby is angered by Kristin's utterance, both because of Kristin's insincerity and because Abby understands that Kristin is attempting to weasel out of mall duty.

Abby's anger toward Kristin's insincerity is a personal analog of a legal reaction to insincere speech. Abby is not deceived by Kristin's reply. She neither believes the dress fits nor that Kristin believes the dress fits. Abby reacts to Kristin's misrepresentation of her belief *about* the proposition she has uttered and to the reasons that give rise to the insincerity. Abby is not, however, upset about the content of Kristin's proposition *per se*. Abby would be thrilled were the dress to fit Sally. Further, were Kristin sincere (but incorrect), Abby might be bemused by Kristin's failure to notice the height of the hem or, in a darker mood, annoyed by her sartorial negligence. In these cases, Abby's reaction is to Kristin's motivations for her utterance and Kristin's beliefs about the truth-value of what Kristin utters, not to the uttered proposition's meaning. And, though some of her reaction is to Kristin's motive, it isn't entirely to Kristin's effort to avoid an unpleasant task. Had Kristin been forthcoming and said, "The dress is tight but I don't feel like being part of the solution," they could have had a direct, open conversation about the division and importance of their respective duties. Had Kristin been silent, Abby could have pressed her to engage the subject. But, by addressing the subject insincerely, Kristin engages and represents herself as engaged, but this repre-

sentation is false. Thereby, Kristin keeps herself and her beliefs at an unacknowledged distance with which Abby cannot directly engage.

Attending to these distinctions may help to clarify that regulations of lies do not target the meaning of the utterance but rather the speaker and her relation to her utterance. Because regulation triggered by the speaker's belief or disbelief in the uttered proposition's content need not include elements relating to its content, its truth value, or the reactions of an audience to the substance of the proposition, regulating insincere speech need not constitute content-discrimination.[23]

This argument demands some refinement. Sometimes the identity of the speaker bears on the content of the speech. This is obvious, of course, where the first-person pronoun is invoked. "I am hard at work," has a different meaning and refers to different occupations and persons depending on the identity of the speaker. Even where demonstratives are not used, the identity of the speaker (and other contextual features) may make a difference to content, as well as to the sort of speech act that is engaged in. The rabbi who, looking at a sloppily presented plate of food, pronounces, "That is not kosher," conveys that the food does not meet certain religious strictures. The secular supervising chef who says, "That is not kosher," uses "kosher" in a more colloquial sense and conveys that it is unacceptable to serve food in such a slapdash way. The CEO of an automobile company who declares publicly, "The 2015 model meets the highest safety standards," issues a warranty or guarantee. The blog reviewer who writes the same sentence does not issue a warranty but merely reports on the claims of the manufacturer and the National Highway Traffic Safety Administration.

Although who the speaker is may have some bearing on the content of what is expressed because the speaker's identity forms part of the (public) context that determines the utterance's meaning, still, the speaker's private, unexpressed belief, disbelief, and attitudes toward her utterance do

[23] Interestingly, regulating deceptive speech as such inches closer toward content-regulation because such regulation is motivated partly by a concern that the audience will be misled by the *false substantive content* of the utterance. Nonetheless, regulation of deceptive speech does not transgress the *values* associated with the aversion to content-regulation because it is primarily justified by the content-neutral grounds that the speaker has (and should have) a particular responsibility to ensure accuracy in this domain and that the listener is not a free, willing participant in the communicative relationship but is wrongly manipulated into accepting the content. *See also* David Strauss, *Persuasion, Autonomy and Freedom of Expression*, 91 COLUM. L. REV. 334, 335, 365–68 (1991) (arguing both that deception involves objectionable manipulation and that "a rational person never wants to act on the basis of false information").

not form part of that context. Whether an utterance is a lie is determined by the speaker's mental stance toward the content, that is, by her conscious disbelief of the utterance's content coupled with her deliberate intention to present that utterance to be taken as true. Those mental stances may be, and typically are, private and opaque at the time of utterance. Given that communication is essentially a public, shared activity, the meaning of an utterance within communicative activity could not sensibly vary from the private contents of the speaker's (or listener's) mind. So, whether an utterance is a lie or not should (generally) be irrelevant to the public meaning of the proposition uttered; hence, regulation of lies is not inherently content-discriminatory.

WHY WE CARE ABOUT CONTENT-DISCRIMINATION

The classic forms of content-discrimination about which we rightfully worry, however, regulate speech because of the meaning of the utterance. Canonical content-discrimination responds to the meaning of an utterance, by, for example, showing hostility to criticism of authority, hostility to an advocacy of Communism, or a sense that certain matters (e.g., sexuality) should not be public topics of discourse. The content-discriminatory regulation thus hinges on the meaning of what is said, but not on the beliefs of the speaker about that meaning. Indeed, where a regulation discriminates based on the content of the speech, whether the speaker mentally endorses or rejects the proposition uttered is irrelevant to the cause of action and to the utterance's regulability or nonregulability.

Sometimes, as with child pornography statutes and hostile audience regulation, the content-discrimination is indirect. The government regulates because it objects to the audience's (perceived) response to the content of the message. In *New York v. Ferber*, a child pornography case, the state objected to the audience's anticipated enjoyment of the materials and the effects that reaction to content had on the market, spurring production of more child pornography.[24] In the hostile audience cases, the government's objection was that the audience's hatred of the speaker's

[24] That content-based regulation was upheld because of the compelling interest in protecting children in *New York v. Ferber*, 458 U.S. 747, 756–74 (1982). The Court has since retreated from that content-based rationale and aligned behind a rationale focusing on the use of children in the *actual* production process of the regulated materials and not merely its stimulation of demand for child pornography. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 249–51, 253–54 (2002) (striking down a child pornography regulation to the extent that it applied to images that only appeared to be of actual children, even though its circulation and sales may have stimulated the market for the production of actual child pornography).

message generated excited reactions of an unwelcome sort.[25] *Snyder v. Phelps*,[26] the recent case holding that protestors near a military funeral engaging in offensive speech could not be held liable for causing the intentional infliction of emotional distress, involved both sorts of content-discrimination, direct and indirect. Oversimplifying a bit, through the application of the emotional distress cause of action, the government was regulating speech both on the grounds that its message (at a particular venue and time) was outrageously offensive and that the audience of the speech would experience a devastating emotional reaction to the deliberately cruel message and its presentation at that time and place. Although the cause of action requires showing that the protestors intended to cause distress or were reckless with respect to that effect, the protestors' own attitudes toward and beliefs *toward* the messages they carried, i.e., whether they endorsed, reviled, or were skeptical of those messages, would not serve as evidence that the elements of the cause of action were met, nor would they serve as defenses.

These examples reinforce my contention that classic forms of content-discrimination involve regulation in reaction to the substantive content of the proposition uttered and the reception of that substantive content by its audience. They do not single out the speech on the basis of the speaker's belief or attitude toward its content; content-discriminatory statutes are indifferent to these facts.

Nonetheless, although I am arguing that legal regulation of lies need not involve content-discrimination, one might think that the Stolen Valor Act involves content-discrimination, as must any plausible form of legal regulation of lies. The Stolen Valor Act, for instance, focuses on speech with a particular content: misrepresentations *about* extraordinary military service. Even if the arguably viewpoint discriminatory aspect of the Act were remedied, so that it focused more broadly on misrepresentations about one's participation or lack of participation in military service or public service, that revised act's requirements about sincerity would

[25] Putting aside the so-called "fighting words" doctrine, the Court, largely, has refused to allow the prospect of hostile audiences' negative reaction to a speaker's message to constitute a reason for regulation. *See, e.g.*, Terminiello v. Chicago, 337 U.S. 1 (1949) (invalidating application of a breach-of-peace ordinance to speakers whose speech created crowd antagonism); Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123, 134 (1992) (invalidating a municipal fee mechanism that varied fees for parades depending on the level of predicted hostile reaction by others). *But see* Feiner v. New York, 340 U.S. 315, 319–21 (1951) (upholding conviction for disorderly conduct against a speaker because his provocative political speech caused restlessness and threats of violence).

[26] 131 S. Ct. 1207 (2011).

still be triggered only by certain sorts of content—those about public service, but not donuts, political parties, or medical care. The dilemma is this: while comprehensive regulation of all lies might not constitute a form of content-discrimination, any tailored statute triggered by subject matter would; but, such tailoring seems essential to avoid granting the government an unthinkably vast amount of power, power that would, in turn, re-ignite valid concerns about government abuse. So, any plausible form of legal regulation of lies would concentrate on lies about certain subject areas. That focus, in turn, would again return us to the realm of content-regulation.

I am less certain that the path to content-discrimination is inexorable in light of the content-independent reasons that should motivate governmental regulation. If the legally relevant objection to lying is that the lie threatens the basis for trust and reliance on others' testimony, this objection renders especially salient those circumstances under which others' testimony concerns especially important matters or those circumstances under which listeners are especially reliant on others' testimony. Although the former category may hone in on content-oriented topics, the latter category need not. Instead, it may be characterized as involving those circumstances in which speakers have special access to (or special authority about) information, rendering listeners reliant on speakers' testimony because they cannot easily or readily verify what is said in another way. Such a focus corresponds to a salient, content-independent method of determining the scope of legal regulation by fixing on the relationship between the speaker (or the conditions of her speech) and the utterance. Perjury laws do this by restricting their scope to the utterances of speakers who testify under oath. The federal False Statements Accountability Act may be understood to do something analogous, to regulate false statements on the basis of a content-neutral identification of the recipient of the transmission: lies *to government officials* are regulable.[27]

A more ambitious, speaker-oriented regulation might regulate lies by experts about the topics of their expertise, whether they are certified as experts on a topic, e.g., board-certified lawyers, accountants, and medical professionals, or, casting more broadly, they have or claim to have expertise about a topic, whether certified or not, such as manufacturers about their products, real estate developers about their plans, and even indi-

[27] 18 U.S.C. § 1001 (2006). I say "may" because the language of the federal False Statements Accountability Act is also susceptible of a content-based reading—that lies *about* matters within the jurisdiction of the federal government are regulable.

viduals about themselves.[28] Regulating lies by experts about the contents of their actual, certified, or claimed expertise does not single out content. Rather, it attaches to a feature of the speaker and the relationship between the speaker and the utterance. This relationship is singled out as meriting regulation for content-independent reasons, namely that listeners should be able to rely upon the sincerity of experts because they have or claim special access to information that listeners either do not have, or reasonably should not be expected to cultivate on their own.

This understanding of the purpose of regulating lies might also support a "secondary effects" analysis of topic-specific regulation. Although the Court has sometimes been overly keen to identify secondary effects,[29] the secondary effects doctrine, properly understood, permits topic-specific regulation where the effects of speech merit regulation for reasons independent of its particular content or its reception. Suppose, for example, the reputation and trustworthiness of drug manufacturers fell to a low because of a spate of contaminations at factories, coupled with a lack of transparency about the problems. The government might then decide to regulate lies about pharmaceuticals specifically from a concern that misrepresentations would hobble the trustworthiness of future claims important to assisting people making decisions about their medications. Here, the regulation would be targeted to expert lies about a particular topic, but the grounds for the regulation would be that the strength of testimonial trust in utterances about that topic, whatever their content, was particularly vulnerable for reasons that were content-independent. Hence, regulation of lies and even some topic-specific regulation of lies may be framed and justified in ways that are at some remove from the territory of content-regulation.

[28] Singling out the special responsibilities of experts making pronouncements within their area of expertise may offer a different rationale for asymmetrical liability in situations like *Kasky v. Nike*, in which Nike's advertisement touting sound labor conditions in its factories, which turned out to be untrue, was subject to different standards of accuracy than statements by its critics. *See* Kasky v. Nike Inc., 45 P.3d 243 (Cal. 2002), *cert. denied*, 539 U.S. 654 (2003). Although the discussion of this case has focused on Nike's status as a commercial speaker (and a corporate, nonindividual speaker), it may be independently relevant that Nike is an expert on conditions in its own factories, and this fact may subject it to special requirements of accuracy about facts within its expertise. A related argument is that Nike had special access to information about its own factories and the legal ability to exclude others who wished to visit to verify or disconfirm Nike's allegations, giving Nike a special obligation of accuracy.

[29] As I discuss elsewhere in Seana Valentine Shiffrin, *Speech, Death, and Double Effect*, 78 N.Y.U. L. Rev. 1135, 1165–71 (2003).

Compelled Disclosure

Perhaps a better way to categorize regulation of lies is as a form of compelled disclosure intended to facilitate a relationship of transparency, on equal footing between the speaker and listener, and thus to protect our relationships of epistemic cooperation. The case might be so framed as follows. As a default, we should be warranted in taking a person's freely volunteered speech to be sincere.[30] Prudentially, our complex social lives, involving the division of labor at every turn, depend on our ability to rely upon others' conveyed beliefs on a regular basis. Our moral lives likewise depend on our accurate knowledge of others' beliefs, feelings, and situations if we are to respond well to them, and our democratic lives depend upon respectful and, often, responsive engagement with the positions and concerns of others. Indeed, given these normative purposes, we may have some obligation to treat their speech as sincere, absent evidence to the contrary. To adopt a posture of epistemic remove or doubt toward them would involve distrust. That distrust would hinder our ability to engage with and respond to them fully, as equals; and without evidence of untrustworthiness, distrust seems unfair.

Where someone is, or represents herself to be, an expert on a topic, that warrant is heightened and justifiably so. Identifying and epistemically relying on experts in some areas of knowledge, allows us to engage in epistemic divisions of labor that make possible the complex forms of social life that facilitate sophisticated understanding of our environment, richer and healthier lives, lives that may manifest greater independence from the vagaries of the physical environment and from dependence on particular individuals, and the development of diverse sets of opportunities that are tailored to individuals' diverse abilities and interests. Our epistemic reliance on experts only functions well when we are warranted in our default epistemic dependence on their testimony.

Offering insincere speech under the guise of sincerity threatens the rational warrant to engage in these salutary forms of epistemic dependence. Because we have strong reasons to protect these environments of warranted dependence, disclosure rules are justified. Should one wish to volunteer insincere speech, one must disclose this, whether through direct discourse or by taking advantage of culturally well-understood mechanisms of disclosure, such as deploying a sarcastic tone, evidently exag-

[30] *See, e.g.*, Tyler Burge, *Content Preservation*, 102 Phil. Rev. 457, *passim* and especially 466–68 (1993). *See also* C.A.J. Coady, Testimony (1992).

gerating in ways that indicate parody or irony, publishing under the rubric of fiction, performing in a play or other theatrical setting, or otherwise speaking in a context that is culturally understood not to call for somber testimonial speech (e.g., certain contexts in which demands of etiquette are understood to drive content).[31]

So understood, legal regulation would not react to the liar for the content of what she said but for violating rules of compelled disclosure.[32] Such rules of compelled disclosure would be importantly less demanding than most rules of compelled disclosure, because most rules demand disclosure of the identity of the speaker or the articulation of specific messages.[33] This rule would require neither. I suggest we regard legal regulation of lies as a content-independent form of compelled disclosure that is compatible even with anonymous speech. All this form of regulation requires is that the speaker (who may remain anonymous) disclose, whether through explicit or through customary means,[34] that she does not believe her speech if it otherwise is presented in a way that would support an objective interpretation that the speech is presented as somber, testimonial speech. Properly framed, I think the question of the legal regulation of lies is whether freedom of speech is inconsistent with requiring disclosure of the modality of the speech, so understood, or whether other important values counsel against such requirements.

To summarize, because the aim of the regulation is to facilitate the ability of speakers to convey, and listeners to understand, that the speaker transmits her sincere belief, this aim seems far afield from the standard

[31] I am here describing, in a different way, the idea of suspended contexts, discussed in Chapter One. A related form of disclosure is one in which the speaker reveals that she serves as the spokesperson or translator for another party. In such cases, the speaker places herself in a justified, epistemic suspended context with respect to whether her utterances represent her beliefs, *but* the presumption of truthfulness may still hold with respect to whether the spokesperson's utterances accurately represent the person or entity that she represents.

[32] *See, e.g.*, Milavetz, Gallop & Milavetz v. United States, 559 U.S. 229, 236 (2010) (contrasting disclosure requirements to combat otherwise misleading speech and affirmative limitations on speech and holding that, at least for commercial speech, the former calls for a less exacting form of scrutiny than the latter).

[33] *See, e.g.*, Riley v. Nat'l Fed'n of the Blind of N.C. Inc., 487 U.S. 781, 799 & n.11 (1988) (invalidating a requirement that a fundraiser immediately disclose what percentage of donations are passed on to the charity, but indicating that a disclosure requirement that a professional fundraiser merely identify herself as such would pass First Amendment muster).

[34] The "customary" means employed to signal that the content is not intended to be taken as true may be tailored to shared understandings with particular audience members and need not conform to a widespread social custom. Here, we might borrow from what is necessary to fulfill the objective intention test in contracts.

concerns about content-regulation, namely that the government is attempting to control or suppress speech with particular contents. To the contrary, this sort of regulation merely aims to ensure that whatever is being sincerely conveyed can be successfully conveyed and recognized as sincere without distortion. Such distortion is generated when insincere speakers fail to constrain their insincerity to a justified and identifiable context. In this way, regulation of lies closely resembles noise regulation that aims to confine the side effects of noise within one speech domain from seeping into another in ways that obstruct the ability of participants in the latter to hear and understand one another.

Of course, the ultimate issue is not whether legal regulation of lies is content-discriminatory. Whether this regulation constitutes content-discrimination or not, what matters is whether this speech regulation intrudes upon, restricts, or otherwise inhibits valuable forms of speech or whether, in other ways, it manifests an unacceptable hostility or presents unreasonable burdens to speakers and listeners. So, let's turn to the other arguments offered for wariness about the legal regulation of lies.

Harm, Particularized Victims, and Freedom of Speech

A prominent refrain in both Justice Kennedy's and Justice Breyer's opinions in *Alvarez* is that there was an insufficient showing of relevant harm.[35] In Justice Kennedy's opinion, this complaint had a causal flavor: there was insufficient evidence that lying directly and irreparably *caused* the honor of veterans to diminish.[36] Justice Breyer's opinion echoed this concern but emphasized that there was no particularized harm because Mr. Alvarez deceived no one.[37] Their complaints dovetailed with their gen-

[35] United States v. Alvarez, 132 S. Ct. 2537, 2545, 2547–49 (2012); *id.* at 2554–56 (Breyer, J., concurring). *See also* United States v. Alvarez, 617 F.3d 1198, 1212 (9th Cir. 2010). *See generally*, Larry Alexander & Emily Sherwin, *Deception in Morality and Law*, 22 Law & Phil. 393, 408–09, 433 (discussing the general requirement of harm [or, in contract, induced agreement] as an element in the legal regulation of deception). *See also* David Han, *Autobiographical Lies and the First Amendment*, 87 N.Y.U. L. Rev. 70, 117 (2012) (emphasizing that either a particularized effort to gain material advantage over the listener or the infliction of "colorable material harm" should be preconditions of regulation).

[36] *Alvarez*, 132 S. Ct. at 2549 (plurality opinion).

[37] *Id.* at 2554, 2556 (Breyer, J., concurring). *See also* Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. Chi. L. Rev. 225, 238 (1992); Varat, *supra* note 17, at 1120–21; State v. 119 Vote No! Comm., 957 P.2d 691, 696–97 (Wash. 1998); Brief of Professor Varat, *supra* note 15, at 2. The related claim—that no specific person was adversely affected—should be disputed. When the transparent or suspected liar presents himself as other than he is, he immediately initiates a relationship with his audience while simultaneously conveying that he resists participation in that relationship in good

eral concern with government overreach: a demand that there be a tight connection to relevant harm would set limits to what might otherwise be a rather broad grant of government power.

Although these concerns complement each other, as I argued above, there are other ways to address the concern about over-enabling the government. Does the purportedly loose connection between lying and legally cognizable harm to specific people raise independent free speech concerns? As a general matter, neither version of the complaint that there is an insufficiently tight connection between lying and legally cognizable harm seems tenable as an independent objection. Justice Kennedy may well be right that the administration failed to demonstrate that the lies of Mr. Alvarez and others like him diminished the esteem in which actual veterans and service-members were held by the public. But, as I have stressed, there are other harms to consider. As I have been arguing, deliberately false speech does damage to our collective testimonial framework by giving us reasons to doubt that a person's word is reliable as such and that somber testimonial speech provides us with warrants to take what is offered as representing what is believed. That is, deliberately insincere speech does collective harm by ambiguating signals that function well only when fairly clear, signals whose preservation and use are crucial for sustaining a functional moral and political culture.

Lies directed at particular individuals also do particularized harm by corroding the foundation of justified testimonial trust between the liar and her audience members. Thus, Justice Breyer shows shocking insensitivity when he blithely suggests that ". . . in family, social, or other private contexts . . . lies will often cause little harm."[38] To the contrary, in relationships that regularly draw upon such trust and may gain some of their special significance by the ongoing vindication and exercise of such trust, betrayals of that trust would seem to wreak special damage on the relationship and its meaning.[39]

Notably, these arguments appeal to the *reasons* for belief that are supported or undermined by people's testimonial practices. The diminishment of the listener's warrant to believe the speaker merely on her say-so is a rational entailment from the speaker's lie. The diminishment of the

faith. Being invited or drawn into a bad-faith relationship that one cannot exit is arguably harmful; it is certainly a poor way to be treated.

[38] *Alvarez*, 132 S. Ct. at 2555.

[39] We may shrink from direct regulation of much intimate communication, but surely it is not on the grounds that intimate lies are innocuous.

warrant is not an empirical event to be observed or measured. Consequently, because this is not primarily an empirical argument, the demand for empirical causal proof is inapposite.

To be sure, this nonempirical problem has important empirical counterparts. When people appreciate that their reasons to accept others' testimony have been diminished, the culture of trust will noticeably deteriorate. (Some of us fret we have already reached this point; others, I find, are more sanguine about the current culture.) But, we need not wait for this consequence to appear for the public interest to be adversely affected. I am not merely making the point that a reasonable prediction of the consequence would be enough, just as the government may preemptively adopt noise regulations that preclude the operation of gas compressors in a residential neighborhood rather than having to wait for a cacophony before addressing its predictable cause. My further point is that we are already adversely affected when our reasons to believe others are threatened, whether we realize, acknowledge, and internalize that threat or not. So too we are adversely affected when lies introduce an epistemic need to investigate and confirm the particular reliability of individual speakers or their reliability about specific topics, e.g., when we must garner particular evidence of their truthfulness as individuals or about specific topics before we may take their speech to offer acceptable warrants. Again, we may have this need before we recognize it.

To demand not only empirical evidence of harm but also a showing of particularized harm to specific people as a constitutional prerequisite for governmental regulation is a rather perverse idea, especially in light of "standing" doctrines that preclude private suits to vindicate diffuse collective harms. That is, requirements of particularized harm usually figure in "standing" requirements that identify which parties are eligible to pursue *private* actions on their own behalf.[40] One of the justifications for the standing doctrine is that governmental regulation, rather than private suits, represents the more appropriate way to handle diffuse threats to the collective interest.[41] Hence, it is rather jarring to encounter the undif-

[40] *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (requiring an actual or imminent, concrete and particularized "injury in fact" for an individual to have constitutional standing to sue).

[41] *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 500 (1975) (arguing that one reason for the prudential standing doctrine is to prevent courts from "decid[ing] questions of wide public significance even [when] other government institutions may be more competent to address the questions . . . ."); United States v. Richardson, 418 U.S. 166, 179–80 (1974) (arguing that generalized grievances are meant to be addressed through the political process); *see*

ferentiated impact of pure lies as a rationale for invalidating governmental regulation. Given our strong standing doctrines, governmental regulation becomes the only mechanism to vindicate diffuse, collective interests. To demand a showing of particularized harm as a condition for government regulation in this domain, then, seems, confusedly, to extend standing requirements to state action, an extension that conflicts with a leading justification of the standing doctrine and the responsibility it assigns to government to vindicate collective interests.

We can lay bare the peculiarity of Justice Breyer's demand that particularized harm must be shown by drawing a limited comparison to regulations on excessive noise, or time, place, and manner restrictions that levy specific ceilings on noise (think of requirements that audiences use whispers rather than megaphones for side-commentary at a lecture). One legitimate aim of noise regulations is to enable others to speak and be heard without distortion, strain, or intermittent interruption. Preserving the ability of all to speak and be heard is a constitutionally legitimate aim, even if no particular parties are singled out or injured by violations of the ordinance (suppose that in the face of such noise, all parties declined to try to speak or listen, so no one's speech in particular was disrupted). The point of demanding a showing of harm is to ensure that speech is not regulated merely because many find it distasteful or to ensure that the regulation pursues a legally appropriate interest and does not regulate immoral behavior as such. These are legitimate aims, but they do not entail a requirement of *particularized* harm. These constraints are satisfied if the motivation for regulation is to preserve the scheme of reliable communication or to adopt a public stance that reliability is a communal good.

I have been arguing that a stress on particularized harm through deceptive impact reflects an overly restrictive understanding of the wrong of the lie. Correcting this myopic view would also impugn the common invocation of "counter-speech" as a preferable response over regulation. The Court, for example, argued that the dangers associated with misrepresentations could be sufficiently addressed through the remedy of counter-speech, a less restrictive alternative than legal regulation.[42]

also Lujan, 504 U.S. at 576–77 ("Vindicating the *public* interest . . . is the function of Congress and the Chief Executive."); Allen v. Wright, 468 U.S. 737, 751 (1984) (reviewing that the standing doctrine "embraces . . . the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches").

[42] *Alvarez*, 132 S. Ct. at 2549–51.

Counter-speech can be an effective remedy where the putative harm of speech flows from its content and counter-speech can expose the reasons to reject that content. Hence, counter-speech can expose the false content of a deceptive representation and thereby guard against the risk of the audience gaining false beliefs. Of course, where the information is not widely known or is exclusively possessed by the speaker, this option may be unavailable or delayed, rendering it only partially effective.

Counter-speech does not, however, speak to the damage from the lie itself, independent of its likely deceptive impact. The lie itself indicates a willingness on the part of its issuer to use speech to misrepresent while presenting that speech as veridical. This willingness undermines the reliability of that speaker's testimonial warrants. It gives us *reason* to reduce our confidence in testimonial warrants from the speaker. Counter-speech by others cannot restore *those* warrants. Only an apology and a demonstrable commitment to change by the liar could do that, but that is neither something we can rely on nor what the "counter-speech" advocates have in mind.

The demonstration that our fellow citizens are willing to lie may also give us reason to doubt testimonial warrants as such even more generally. Should members of the public come to believe that such willingness may be widespread, socially tolerated, or that our own obligations to truthfulness wane when the conditions of reciprocity are flouted, the consequent reduction may be severe. Although our obligations to truthfulness do not, as I have argued earlier, diminish just because others contravene them, the state may reasonably take an interest in forestalling or responding to currents in the culture that in fact reduce compliance with politically relevant forms of moral behavior, even if those currents represent unjustified reactions to others' malfeasance.

Whether by government or by individuals, counter-speech castigating lying may help dispel the impression that deliberate misrepresentation is acceptable and help keep moral morale and resolve high. But, counter-speech cannot dispel the impression that it is legally discretionary whether to misrepresent (and so acceptable in that way). More importantly, it cannot work against the unreliability of the speaker that the speaker's own misrepresentation introduces. Whereas, if legal regulation were effective in motivating (some) speakers not to misrepresent and in establishing public recognition of a collective interest in truthful speech, in these ways it would be qualitatively more effective than counter-speech.

Distinguishing the Value of False Speech from the Disvalue of Misrepresentation

THE MILLIAN ARGUMENT

A complementary argument, made alongside the appeal to counter-speech, is that even false speech has value, for the Millian reason that entertaining the false provokes exposition and exposure of the truth and sharpens our understanding of it.[43] That venerable idea is misapplied here and does not discredit legal regulation of the *lie*. The Millian argument concerns propositions expressed by an utterance and the value of the expression of those propositions, even if they turn out to be false. It does not purport to justify the *disbelieved utterance* (whether it is true or false).

Notably, in the passage in *On Liberty* where Mill advances his argument for the value of false speech, he is discussing the merits of the suppression of opinions, arguing that people should be allowed to express *their actual opinions*, even if their opinions are false in the sense of being wrongheaded.[44] That is, he stresses the importance of having the opportunity to say what one believes or what one thinks one *might* believe, even if these believed propositions are false. This opportunity connects directly to the needs of the thinker to externalize her (actual) mental content to garner the reactions of others and to assess whether she in fact wishes to continue to endorse it. Once we distinguish between sincere opinions that happen to be false or incorrect and insincerely expressed opinions, Mill's argument makes sense only if we consider the former; it lacks clear application to the latter.[45]

I will elaborate. First, Mill's argument makes little sense in the case of lies on matters about which the speaker has special or exclusive access to relevant information. A false statement can only provoke exposure of the truth when others have timely access to evidence relevant to justifying or challenging the relevant proposition. Where the speaker has special or exclusive access to relevant information and functions epistemically as an expert, the checking function Mill imagines is blocked and this argument falls flat. Hence, it seems difficult to celebrate the value of false speech on Millian grounds if one has in mind expert speech about

[43] *See id.* at 2553 (Breyer, J., concurring).

[44] JOHN STUART MILL, *On Liberty*, *in* ON LIBERTY AND OTHER ESSAYS 20 (John Gray ed., 1988) (1859).

[45] *See also* Schauer, *supra* note 2, at 905 (observing that Mill was discussing opinions and not factual assertions).

factual matters for which there is limited public access (e.g., expert speech about company policy, the contents of a secret formula, or what transpired at a private meeting), and the same is true of many forms of autobiographical speech, the foundations of which the speaker has special access to.[46]

Second, Mill's own discussion imagines sincere opponents, both attempting to express and make progress on discerning what is true. He is not extolling the virtues of false statements *per se*, and certainly not of *deliberate* misrepresentation. Rather, the argument aims to vindicate the rights of sincere minorities to make their case, even when the consensus is against them. The argument imagines a vigorous debate between parties who both have access to what relevant information exists on a topic, such as the existence of God, both advancing their best understandings of how to interpret the evidence. It is difficult to extrapolate from the right of the sincere to attempt to persuade others of what they believe, to a right of the insincere to engage in deliberate misrepresentation.

There are strong reasons to resist that extrapolation. Our respect for others demands that we permit them to lay bare their beliefs and that we grapple with their sincere takes on the world. Moreover, given the fallibility Mill rightly emphasizes, we should be open to the possibility that we are incorrect and others are right. That idea, however, is a far cry from the idea that among the myriad of logically possible positions for us to entertain, we should be indifferent about which propositions we consider, paying equal attention to those actually believed by speakers and those disbelieved by the speakers who forward them as true.

Mill's argument from fallibility, while stressing open-mindedness as a reaction to the possibility of error, is not a component of a larger cynicism or nihilism. Rather, it serves as counsel to assist in the discovery of truth. It assumes that we stand some chance in doing so. In our efforts to advance the project of discovering the truth, we have to focus our inquiries. Our time and attention are limited. If we aim to identify and appreciate the truth, it is beyond foolhardy to devote those limited resources by launching off from random starting points. It makes sense to take seriously the sincere hypotheses (and doubts) of those also seeking to advance the truth who have considered the matter in good faith, and it makes sense not to assess that good faith in terms of our sense of the

[46] David Han makes this point about the autobiographical lie as well. *See* Han, *supra* note 35, at 93. Of course, not all autobiographical speech emanates from an expert foundation. Some of one's autobiographical details are better known and more directly known by others, e.g., information about one's early childhood and one's parentage.

validity of the hypotheses themselves. But, none of these considerations suggest that we should be equally open to hypotheses that are actively, though not transparently, rejected as unworthy by those advancing them.

I do not dispute the importance of a vigorous presentation and a careful consideration of *important* counterarguments, even those that are both false and believed by no one, as a method of fully appreciating the case for the correct position and ensuring that it is in fact correct. The issue is whether it is a central aspect of their value that such arguments be presented not just vigorously, but represented as *believed* by the advocate *even when* that representation is false. It may be true that the presentation of a counterargument is less powerful and easier to dismiss when it is presented as merely a counterargument and not backed by the full weight of the speaker's conviction. That surely gives a reason, as Mill himself argued, for hearing contrary opinions "from persons who actually believe them; who defend them in earnest, and do their very utmost for them" rather than from lackluster reporters who immediately discredit the contrary opinion they dutifully recount.[47] The centrality of vigorous advocacy also supports the importance of establishing contexts of argument in which competing advocates advance contrary positions, but where the advocates on all sides are understood to serve as the representatives of positions, while leaving their personal convictions ambiguous and obscured. Thereby, the arguments stand for themselves and do not depend upon the authority of their articulators. This is, I take it, the posture of advocates in the courtroom, who are meant to represent their positions with ferocity but are barred from representing their positions as their personal conclusions.[48] Unbridled advocacy for false views may be important, but its purposes may be achieved without protecting deliberate misrepresentation.

Thus, Mill's real but often mischaracterized point that sincere advocacy is superior to patently insincere advocacy does not vindicate equating the sincere, but misled, advocate's speech with the liar's speech. It gives us no reason to think that we would lose valuable speech if the law required insincere advocates either to divulge their disbelief *or* refrain from unambiguously representing their position as their sincere, personal

[47] MILL, *supra* note 44, at 42.

[48] *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.4(e) (2002). "A lawyer shall not . . . assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused . . . ." Nearly every U.S. state has either adopted this language or some version of its content.

conviction.[49] Mill's argument provides no reason to believe that the insincere speech of the liar will add something essential that the zealous, but ambiguously committed, advocate lacks. Both lack sincere conviction, but the former misrepresents himself and the latter does not.

Deliberate misrepresentation should give us pause, and not merely because the liar devalues his testimony and contributes to a broader culture of unreliability. It also conflicts with our political obligations to compromise. As I remarked earlier, part of the respect we owe to others is to listen and grapple with their good-faith beliefs about the world and how we should live together. Often, politically, we should do more than listen and engage. Healthy political life demands some degree of compromise and adjustment to others' points of view, even when one has the political power to ignore the positions of the out-voted. Put aside controversies about *how much* one should compromise and whether one should ever compromise about matters of justice. On nearly any view of the social foundations of legitimacy, stability, and mutual respect, according some weight to the genuine convictions and preferences of competing political sides is an important aspect of governance.[50] But this posture and the willingness to forgo insistence on what one believes best only makes sense if citizens do not misrepresent those convictions.

Deliberate, unambiguous misrepresentation not only eviscerates the point of compromise, it fuels its cynical opposition. It justifies the suspicion that parties do not negotiate and compromise from genuine positions of conviction, but rather that they advance false positions to gain leverage and advantage. Misrepresentation undermines the crucial sense of reciprocity—of mutual commitment to acting and arguing in good faith—that is essential to sustaining a culture of well-considered compromise.[51] Thus, the proffering of insincere opinions does not sharpen our

[49] To provide a safe cushion for spontaneity and emotional expressions of zealousness, it may be prudent to adopt strict standards about what counts as unambiguous affirmation and, as a default, assume that advocacy may be (implicitly) uncertain, hypothetical, or contingent.

[50] *See* AVISHAI MARGALIT, ON COMPROMISE AND ROTTEN COMPROMISES (2010). For a Republican's concern that this approach to governance is waning within the Republican party, see David Brooks, *The Mother of All No-Brainers*, N.Y. TIMES, Jul. 5, 2011 at A21.

[51] See also the related argument of Micah Schwartzman that strategic, insincere political arguments diminish the epistemic value of deliberation in Micah Schwartzman, *The Sincerity of Public Reason*, 19 J. POL. PHIL. 375, 378, 392 (2011). Schwartzman's argument operates within the ideal of public reason in which citizens are expected to support policies and offer political arguments on grounds others could reasonably accept. My argument hinges on a weaker premise about the conditions for achieving reasonable compromise,

political convictions in the way that merely false but sincere opinions do.[52] Instead, their recital either threatens the legitimacy of the content of our compromises or threatens our willingness to engage in them, that is, it jeopardizes our willingness to discharge a political duty.[53]

SELF-DEFINITION

Let me turn to the argument that regulation of lies would interfere with an individual's interest in "self-definition."[54] An individual's privacy interests and her interests in control over the presentation of her persona can be protected by her selective choice of what true things to reveal and whether to reveal information at all. But, it is rather hard, I think, to classify lies as elements of the project of self-definition: saying something false about oneself does not make it true or thereby render the voiced characteristic a true aspect of oneself. Advocates of this position leave it unclear how the protection of the lie contributes to the project of self-definition and, concomitantly, why the ability to present edited and partial (but sincere) accounts of oneself is insufficient to satisfy the interest in self-definition.[55] The ability to decide what to reveal and to what

conditions that must be present in both ideal and nonideal conditions. Indeed, protecting the conditions of fair compromise may be especially important if we do not adhere to the requirements of public reason and if citizens advocate positions that rely on comprehensive theories of the good (and/or factual theories) that others may reasonably reject.

[52] In extolling the necessity of truthfulness to furthering legitimate political compromise, I do not mean to diminish the importance of irony, rhetoric, storytelling, humor, or self-discovery through communication within public discourse. *See* Elizabeth Markovits, *The Trouble with Being Earnest: Deliberative Democracy and the Sincerity Norm*, 14 J. POL. PHIL. 249, 250, 260–66 (2006) (worrying that an ethic of sincerity excludes other forms of discourse). My claim is only that the uses of nontruthful discourse should be transparent to interlocutors (although the signal of its invocation need not be so clunky as to interfere with its effectiveness).

[53] For these reasons, I am less convinced than my esteemed colleague that the admittedly powerful instrumental arguments against regulating deliberate dishonesty in political advertising carry the day. *See* Varat, *supra* note 17, at 1108, 1120–22.

[54] *See* Han, *supra* note 35, at 104–08, 127–28; United States v. Alvarez, 638 F.3d 666, 674–75 (9th Cir. 2011) (Kozinski, C.J., concurring).

[55] Han does not confront this question, but rather emphasizes that one's partial revelations about oneself run the risk of deceiving listeners into thinking that the partial story is more representative of the whole than it is. *See* Han, *supra* note 35, at 101–02. He then attempts to leverage this argument to suggest that direct misrepresentations are no more disturbing than the partial, true revelations whose potential for deception we already tolerate. *See id.* This argument fails, I think, for two main reasons: first, there are independent objections to direct misrepresentation apart from the risk of deception and second, listeners exposed to partial revelations are capable of assessing that what they hear is partial and may both adjust their conclusions accordingly and ask further follow-up questions to gauge the extent and content of the absent information.

propositions to commit are indeed fundamental components of autonomy, components that undergird much of the protection against compelled speech. Yet, protection of those abilities does not preclude moral or legal prohibitions on lies. Moreover, if an aspect of one's self-definition consists of one's relations to others, that project is stymied when others misrepresent themselves. The relationships one thereby forms are not based on a mutual and commonly understood foundation and the responses to one's speech that one receives do not help one hone one's self-understanding, because they are not responses to sincere, if tentative, representations of oneself.

By way of rejoinder, it could be insisted that an aspect of self-definition involves making up one's mind and figuring out what one thinks. That process, as I argued in the last chapter, may reasonably require communicative interaction with others in which one articulates propositions to see if they ring true, much as one might try on a dress to see if it fits. Testing the proposition for this purpose may involve asserting it in a definitive, rather than a tentative register, much as assessing a true fit demands zipping up the back and not merely holding up the garment in front of the mirror. Although, as I maintained when discussing the Millian arguments about the value of false speech, tentative or qualified pronouncements may be sufficient to allow audiences of contested propositions to assess the arguments in and against their favor, for some people and some issues, matters may differ when they attempt to identify their core commitments. In such cases, determining whether something "fits" oneself may require a more wholehearted assumption of the mantle.

This argument has greater purchase with respect to the articulation of opinions, e.g., about immigration reform and the legitimacy of the death penalty, or about one's intentions, e.g., to seek a new career or to alter one's religious practice, than it does with respect to other sorts of facts, including the kind of historical autobiographical facts uttered by Mr. Alvarez about his actual military service. Still, one might make a credible case that, in some instances, the assertion of autobiographical fact, even about a past event, can play a role in assessing whether that assertion is true; for example, some people in emotional distress may, in reaction to a therapist's hypothesis, assert they were victims of past abuse to see if, once said aloud, it resonates as true.

This version of the self-definition argument speaks more to how regulation should be crafted than to the constitutionality of all such regulation. The lie encompasses assertions made without qualification that the speaker does not believe but presents to be taken as true and as believed.

Arguably, the sorts of exploratory assertions discussed above need not be presented to be taken as true but may be presented in a more experimental mode (even if unqualified), so they need not involve lies in this sense at all. But, given the likelihood of exuberance and exaggeration in matters of self-presentation, such efforts may not always be carefully constructed and may involve the use of lies so understood.

Even so, the self-definition argument only has strong purchase where the speaker is uncertain. It does not really apply when the speaker makes repeated, confident assertions over time of propositions that she definitively rejects as false. Such utterances are not credibly understood as central to self-discovery, but they do threaten our testimonial relations. These observations suggest a distinction between the moral conception of a lie and the legal conception of the lie. Morally, one may lie when one confidently asserts propositions about which one knows one is agnostic or lacks sufficient evidence to support a belief (and one's assertion happens outside a justified suspended context). But, to ensure breathing room for the process of self-discovery, in autobiographical cases, the legal definition of the lie should be more restricted, applying to the somber, unqualified assertion of propositions that one actively *disbelieves*.[56] Thus crafted, the regulation would ensure that the agnostic struggling to locate her position is not accidentally captured. Adopting this narrower definition of the lie for legal purposes seems appropriately sensitive to the self-definition interest.

Perhaps the threat posed by legal regulation to self-definition is that legal regulation muddies the public expression of one's sincerity. Some worry that if lies are subject to legal penalties, then truthful claims may be interpreted as the product of legal coercion and legal compliance rather than emanating from an individual speaker's moral earnestness.[57] Further, given the backdrop of legal regulation, listeners will be unsure whether a sincere speaker spoke from the motive of legal compliance or from moral earnestness.

This complaint that well-crafted, non-draconian legal regulation will objectionably crowd out sincerity or its perception seems far-fetched. In most cases that would fall under legal regulation, agents need not speak on the matter at all, and their voluntary decision to communicate and

[56] I advocate this restriction only for the autobiographical lies of individuals. In my discussion of "puffery" in Chapter Six, I criticize the legal regime for permitting businesses to issue strongly worded opinions about their products when they are insincere or lack reasonable evidence that would support a sincere belief in those opinions.

[57] *Alvarez*, 638 F.3d at 675 (Kozinski, C.J., concurring).

reveal information in the first place would convey their good will, even if the law required that such communications be sincere. A speaker interested in conveying her motivations for speaking sincerely could clarify why she was revealing what she was revealing and could, through her other actions and through other speech, reinforce that her sincerity was not primarily determined by the threat of legal regulation. The insecure listener could ask questions to prompt further revelations about the reasons for the speech and the nature of the relationship. This is, roughly, how we manage the present latent uncertainty about whether truth-tellers are motivated by the value of sincerity or by the prospect of facing extra-legal, social sanctions for insincerity.

Moreover, it is unclear why legal regulation would alter the dominant motive for sincerity. Most moral agents will engage in sincere utterances (or remain silent) for the general reason that sincerity is morally and usually prudentially required (whether that be concern for the audience, for the communicative relationship, for the integrity of communication, or for some other reason unrelated to its legal status). We do not worry that legal regulation of assault, theft, or littering undermines the meaning of safe relationships and conscientious environmental behavior. Rather than replacing our moral motivations, a well-designed law regulating pure lies would more likely supplement them. It would provide a public articulation of our collective interest in sincerity and establish a set of background expectations that might serve as a sort of backstop motivation for moral compliance for the good-but-tempted moral agent, and perhaps as the primary motivation for the more compromised moral agent. With respect to the latter, if the law does make the dispositive difference to whether the agent tells the truth or not, the law will not have undermined the meaning of his sincerity, because it will not have converted an instance of well-motivated sincerity into a coerced utterance.

HARD CASES OF INTEGRITY AND CONTESTED CONCEPTS

Before leaving issues of self-definition and identity, let me address some related hard cases, all of which involve contested concepts that in turn propel misrepresentations motivated by sincerity and considerations of personal integrity. Consider these three cases:

Transgender resistance: Kris, a transgender woman who is chromosomally male, somberly and sincerely declares, "I am a woman," but knows that she speaks to an audience who will reasonably understand her to mean her chromosomal sex is female. Kris sincerely

believes that chromosomal and other sex-based criteria of gender are inappropriate, and so she speaks using her own criteria, although she is aware that her audience deploys chromosomal and other sex-based criteria.

Resisting bigotry: A local bigot asks Kim whether a newcomer to the local bar is a "such-and-such," where the actual term deployed is a derogatory label; although Kim knows the newcomer may meet all of the factual criteria embedded within the concept "such-and-such," Kim issues a denial, "No, she's not," because she refuses to acquiesce to the bigotry embedded in the particular term.

Political resistance: In Freedonia, Max's friend Bailey is convicted of the felony of seditious libel for publishing a truthful story that detailed a public official's embezzlements. Max regards the seditious libel law as an offense to democratic principles and a core violation of basic human rights. Consequently, he regards Bailey as a hero, not a criminal. In Max's view, to be a criminal requires the violation of a serious and fundamentally just law. When Max is subsequently interviewed for a position with the government, he is asked a series of yes or no questions, one of which is whether he associates with any criminals. Max knows that according to the government's criteria, which seem to govern the context of an official interview by the state, Bailey qualifies as a criminal in virtue of her conviction. Max believes, however, that these criteria are seriously morally defective and that it would be wrong to acquiesce in them. So, he answers "no."

In all of these cases, the speaker's beliefs and opinions place her sincerity in conflict with the conceptual presuppositions of the context (or at least of the known understandings of the audience).[58] Cases like these raise (at least) two questions: First, are these misrepresentations lies? Second, are they protected by freedom of speech as forms of sincerity and identity formation or identity performance?

[58] I am grateful to Netta Barak-Corren for raising the transgender case, and to Mark Richard for raising questions about the related issue of how to view communications between speakers and listeners who disagree over the standards of precision appropriate to the use of a particular concept in a particular communicative context, e.g., what level of wealth constitutes being "rich." For like examples and a discussion of the relevance of such disagreements to other disputes in epistemology and the philosophy of language, see Mark Richard, *Contextualism and Relativism*, 119 PHIL. STUD. 215 (2004).

It may seem peculiar to say that these speakers lied because they all sincerely applied the standards they endorse and, in light of those standards, said what they believed to be true. Yet, epistemically, the audience would reasonably, or at least predictably, misunderstand the speaker. The speaker would have misrepresented his or her beliefs, assessed under the criteria of the concepts that the speaker is aware are operating in the context, but without revealing that she deploys different criteria.

One fairly straightforward way to resist classifying the first two cases as lies is to regard them as falling into one of the categories of justified suspended contexts. The first speaker resists an invasion of privacy that threatens to transform into a form of bigotry. This misrepresentation, thus, may fall into the categories of the suspended contexts of reasonable privacy protection or reasonable self-protection and defense. So, for my purposes, her statement is not a lie. (Or, as others may see it, it is not a wrongful lie.) So, too, the second case resembles a milder version of the cases discussed in Chapter One, in which misrepresentations offered to avoid directly contributing to a wrongful end were justified. Here, we might understand the request to confirm a bigoted classification, especially one that might have repercussions for the target's safety, as creating a suspended context, so that the listener should not expect answers to be sincere or to convey reliable information.

The details may matter. The suggestion of danger may do some work in how we think about the first two examples. When that suggestion is removed, we may edge closer to regarding these misrepresentations as lies. This seems clearer in the third case, *Political Resistance*, which lacks this feature. Bailey is in no new danger if Max agrees that Bailey is a criminal. Although Max's motives for denying that Bailey is a criminal are admirable and Max speaks sincerely by his own lights, the brevity of his answer is morally troubling. Were he presented with the opportunity to say more than "yes" or "no," something would be morally amiss if he did not elaborate by indicating his disagreement with the presuppositions of the context. Moreover, whether Max can elaborate or not, a spare "no" may risk deception. Additionally, the conscientious but undisclosed, private use of different conceptions of the same concept or different standards of precision frustrates the purposes of communication.

In light of these complexities, what should we say? On the one hand, given his sincerity, it feels awkward to declare that Max lies, because his declaration is driven by his conscientious objection to the presuppositions embedded in the question. On the other hand, liars do not always have venal motives; the fact that Max is morally motivated does not itself

seem like a reason to deny that he has lied. We might be tempted by the more refined idea that one does not lie if one speaks sincerely with reference to one's own conception of relevant standards and concepts or perhaps, even more narrowly, if one speaks sincerely with reference to morally correct standards and concepts. Although these suggestions have some plausibility, ultimately, it seems that merely private sincerity is insufficient to insulate one from the charge of lying. Merely private sincerity still subverts the communicative relationship in a nontransparent way. To privilege merely private sincerity risks some of the familiar pitfalls associated with the doctrine and practice of "mental reservation"[59] by confusing the ethics of a bilateral communicative relationship with the ethics of purely personal virtue.

We may better capture our sympathy for Max, on some versions of the story, by focusing on the constrained nature of the colloquy—the demand for an unadorned "yes or no" answer. When the constraints of a colloquy prohibit explanatory clarifications and thereby do not permit the speaker to convey her thoughts with the precision necessary for a modicum of accurate self-presentation, those constraints themselves thereby subvert the purposes of the truth presumption and of non-suspended contexts. It is, therefore, no surprise that we feel that some freedom of speech values are at play, although I suspect the free speech concerns attach not to Max's answer but to the artificially stunted nature of the communicative exchange.

My tentative suggestion, then, is that otherwise reasonable demands for information that take the form of requiring a simple "yes or no" answer, when combined with significant (unjustified) obstacles to clarification,[60] generate a justified suspended context with respect to their answers. The obstacles to clarification create a *pro tanto* normative permission for the questioned party to refuse to adhere to those embedded standards and presuppositions within the communicative context when adherence to them would place her sincerity and beliefs in tension; where clarification is significantly constrained, the recipient of the communication has reason to doubt that he has received an accurate account of the contents of the speaker's mind and has no basis for complaint about *that fact*.[61] Where the speaker has an opportunity to expand upon his answer and clarify the disagreement about the applicable criteria, but forgoes that opportunity, then I think it is fair to say that he has (wrongfully) lied. Further, even though the speaker's misrepresentations may be driven by motives of sincerity and personal integrity, they do not seem to be protected by freedom of speech. Freedom of speech would protect the speaker's full explanatory answer, and, often, her right to give a full explanatory answer or a refusal to answer, but not the middle ground occupied by the deliberate misrepresentation.[62]

[59] The doctrine of mental reservation emerged in Catholic theological circles in the sixteenth century. According to this doctrine, if a speaker voiced a proposition she did not believe but then qualified it mentally and privately such that she did believe the combination of its public and private elements, then she did not lie. For example, if asked whether one took money from the kitty and, in fact, one had but did not wish it known, one could say, "No, I did not take money from the kitty," and then add, mentally, the qualification "in the last two hours." The doctrine is obviously insufficiently sensitive to the social purposes of communication and the interests of hearers. It may have seemed attractive to those focused on whether, in the presence of God, a being purported to have access both to one's mind and to one's public statements, one affirmed propositions one believed to be false and whether one resisted self-deception. More moderate use of it was advocated by some as a way to elude unjust danger or unjust inquiries. *See* PEREZ ZAGORIN, WAYS OF LYING 153–221 (1990); *see also* SISSELA BOK, LYING 35–37 (1978). Interestingly, the federal oath of office executed by all U.S. officials (but the President) explicitly excludes mental reservation. One must swear to "... take this obligation freely, without any mental reservation or purpose of evasion ...." 5 U.S.C. § 3331 (2006).

MISREPRESENTATION TO FURTHER SOCIAL RELATIONS

Finally, some commend insincere speech for its role in lubricating social relations and thereby connect insincere speech with free speech values. It is alleged that misrepresentations play an important role in etiquette, by strengthening relationships that would be made fraught by (too much)

[60] Think of those frustrating forms and surveys that offer only inadequate classificatory options and no box for comments.

[61] I bracket the more complicated question of when recipients would have grounds for complaint if they were thereby deceived by the speaker's answer. That question is more complex, in part because with respect to the duties surrounding deception, it may matter whether the recipient is among those responsible for, or beneficiaries of, the constraints placed on the communication; whether the recipient has reason to know of the constraints; and when speakers are responsible, if ever, for preventing unreasonable inferences by listeners.

[62] A further question concerns whether the speaker must herself be the party who elects not to avail herself of the opportunity to give a fuller answer. If that responsibility be vested in another independent party, it may help to explain why leading questions may be posed within a courtroom but yet witnesses under oath may perjure themselves if they privately substitute their own standards and conceptual criteria for the operative ones governing in the courtroom. Within an adversarial system, the reason the witness might be expected to answer truthfully within the confines of the operative standards is that the attorney on the other side has the ability to ask further open-ended questions that permit clarification. Because the point of communicative endeavor within the courtroom is to elicit the truth through fair and adversarial means, we might locate the responsibility for protecting the communicative environment to the judge and the attorneys, rather than to the particular witnesses.

truth, and by saving oneself and others from embarrassment and invasions of privacy.[63] Although this line of argument is driven by some important insights, its strength relies on conflating lies with reticence, mere deception, and with the use of suspended contexts in which the presumption of sincerity does not operate. The case for the legal regulation of lies does not depend on the questionable view that we must adopt a practice of frequent, regular revelations of all painful truths or a practice of correcting all misunderstandings of our audience. There is an important distinction between directly advancing and affirming a falsehood and permitting (and even encouraging) another to form or retain a false belief. In some cases, the latter violates a duty of care toward supporting the accuracy of others' beliefs, but in other cases, especially in domains of privacy and social relations, there may be no such default duty. Yet many of the examples offered by way of demonstrating the value of lies of this kind instead involve failures to disclose painful information or partial truths that may, predictably, be misunderstood by listeners as denials of painful truths. As I discussed in Chapter One, when the listener develops or retains a false belief from a sincere communication coupled with a failure to disclose, this is a case of deception but not of a lie because the false belief is not the result of a direct and explicit misrepresentation of the speaker's thoughts and does not involve the abuse of testimonial warrants.

The deterioration of the reliability of testimonial warrants is especially worrisome, not merely because reliable warrants backing personal revelations are the foundation of strong social and moral relationships, but because such warrants may figure among the last resorts to repair other breaches of trust. When deception or reticence are inappropriately used or when parties mistreat one another in the myriad ways of which we are capable, the apology and the truthful, detailed and direct attestation to correct the misunderstanding promulgated by deception operate as crucial remedies. If those mechanisms are sullied too, digging our way out of cynicism, distance, and distrust may prove progressively more and more infeasible.

To be sure, there are some persuasive examples involving the articulation of propositions the speaker privately rejects, such as exclamations of joy at the prospect of a dreaded reunion. These cases, when persuasive, seem however to involve standard forms of etiquette (as do many of the

[63] *See, e.g.*, United States v. Alvarez, 132 S. Ct. 2537, 2553 (2012) (Breyer, J., concurring); United States v. Alvarez, 638 F.3d 666, 674–75 (9th Cir. 2011) (Kozinski, C.J., concurring).

permissible forms of deception discussed above). Social norms of etiquette, as I argued in Chapter One, often operate in the kinds of justified suspended contexts in which we use communication to achieve purposes other than advancing propositions to be taken as true, e.g., cementing minimal commitments to social inclusion. This is publicly understood and the face-saving claims of unknown sincerity that people make within such contexts are not well-characterized as lies because, objectively understood, they are not forwarded to be taken as true. Some false claims, made defensively, to shield one's privacy from invasive and inappropriate (however innocent) inquiries should also be understood to operate in suspended contexts and should be understood as deflections, rather than lies (at least for moral and legal purposes).

There is no gainsaying that lies may have instrumental value and that they may be used as means to further otherwise good ends. But the same might be said of many other wrong actions, of many other regulable actions, and even of other forms of recognizably regulable speech. The proceeds of theft may be directed at poverty relief. Intentional defamatory speech might be used to increase the sales of newspapers whose profits all go to worthy charitable causes; fraudulent speech might be used to generate market activity and consumer confidence when the economy is faltering; incendiary speech might be used to spark violence that in turn creates effective pressure for needed government reform. So while it is undeniable that lies may be motivated by and used to further worthwhile ends, as may a range of other activities legitimately subject to legal regulation, lies are not essential to the achievement of these ends. Yet, they do inflict a unique form of damage on our ability to use communication for our most essential purposes.[64]

What is at issue is not whether lies can be used to further the speaker's ends or whether they may be used to further important and significant social ends, but whether these facts bear on whether lies have significant free speech values. My contention is that because the lie does not directly participate in the values underlying freedom of speech and because its use threatens many of the substantial purposes that motivate a free speech regime, we have reason to doubt that freedom of speech demands that lies be immune from regulation. Merely showing that lies can be put to instrumentally valuable use does not dislodge that conclusion. What would have to be shown is that lies have some overarching, unique value

[64] I discuss a subset of those cases in which lies are purportedly essential to uncovering the truth, such as the lies involved in police interrogations and certain forms of academic research in Chapter Six.

that cannot be readily achieved through other, more benign forms of action or sincere speech. The arguments canvassed for the value of the lie fail to meet this measure.

The Level of Review

Before I conclude the discussion of freedom of speech, I want to acknowledge what many legal readers will have noticed long ago: that my analysis did not proceed by identifying and then applying the appropriate standard of review, whether strict scrutiny, intermediate scrutiny, or rational basis. Nor have I suggested what standard of review should apply to regulations of deliberate falsifications. This is not because I endorse the view that lies (or false speech) fall outside the scope of the First Amendment.[65] My rationale is three-fold. First, I find the standard-of-review analysis at best a highly flawed heuristic device that summarizes the conclusions of arguments that first must be made; it rarely serves as a helpful algorithm for addressing new or hard issues. Second, I am fairly skeptical of the idea that regulations on some sorts of speech fall entirely outside the scope of the First Amendment, but rather think that the usual examples are either entirely wrongheaded (e.g., the obscenity and fighting words doctrines) or better explained as cases in which First Amendment concerns are adequately answered. And third, because even were I more sympathetic to the idea that some speech regulations fall outside the scope of First Amendment protection, I am not confident legal regulations on lying would fall among them.

If, for practical purposes, I were pressed to reformulate my conclusions in terms of the appropriate standard of review, I would say the following: Because the lie as such has no free speech value, strict scrutiny seems inappropriate. The government's reasons for regulating need not be compelling to warrant their regulation. But, given the serious political and structural concerns associated with the regulation of such speech, placing such regulations outside the scope of First Amendment protection or only subjecting them to rational basis review would be inadvisable. It would fail to take those concerns sufficiently seriously. Hence, I would favor a modified version of intermediate scrutiny.

[65] For powerful advocacy of the claim that deliberately false speech does fall outside the scope of the First Amendment, see Brief of Professors Eugene Volokh and James Weinstein as Amici Curiae in Support of Petitioner at 22–34, United States v. Alvarez, 132 S. Ct. 2537 (2012) (No. 11–210), 2011 WL 6179424.

Here is the modification that I have in mind. On its face, the usual recitation of the intermediate scrutiny standard asks whether the regulation substantially furthers an important governmental interest. I have been arguing that some legal regulations of the lie would further an important government interest. But, what troubles me about the usual reading of "governmental interest" is that it focuses entirely on the adequacy of the positive rationale for regulation, e.g., whether it is important and appropriately content-neutral. What is missed by this formulation is official, structured attention to the side effects of the regulation on other mandatory governmental interests—here, whether the particular regulation in question did, in the circumstances, as applied, chill speech or serve as an avenue for governmental abuses. The idea that the concern about stifling (valuable) speech, whether through actual or perceived governmental abuse, is already factored in because some scrutiny is applied seems fanciful. Briefly, my own interpretation of intermediate scrutiny would not take for granted that where there is low value speech (in this case deliberate misrepresentations outside a justified suspended context) and the substantial furthering of an important government interest (in this case, the protection of and/or the affirmation of the significance of reliable warrants), that these facts necessarily compensate for any and all side effects on the climate for speech. I would diffidently suggest a further prong of intermediate scrutiny that expressly asked whether, on its face or as applied, the regulation overburdened (valuable) speech (or other constitutionally protected interests). That test may often be satisfied in practice.

Conclusion

I have not tried to build a decisive case for the legal regulation of lies, but rather to argue that, from a constitutional point of view, whether to grant legal impunity to the lie is not settled by the foundational commitment to *freedom of speech*. Free speech values are not intrinsically threatened by legal regulation of lies. Moreover, a powerful, content-neutral motive for regulation may be to protect and strengthen the effectiveness of our communicative practices and the foundations of a free speech culture.

Acknowledging this compatibility could have practical implications, such as offering grounds to simplify the burdens of proof associated with the regulation of commercial misrepresentation by shifting the evidentiary issues from how audiences were deceived or put at risk of deception to whether or not speakers believed their utterances. Casting aside the

freedom of speech objection could also push our deliberation about regulation in new directions, both toward matters of regulatory design and toward the more careful consideration of what other significant values are implicated by legal regulation. In the next chapter, I take up this latter task with respect to regulation of the autobiographical lie. Although its regulation does not inherently encroach on the free speech interests of the thinker, I argue that other substantial values of equality and community counsel against regulation and in favor of legally accommodating this wrongful behavior.

Institutions and Duties of Sincerity

Related constraints govern institutions and their ability to create permissible suspended contexts by declaration alone. Care must be taken to ensure that the creation of suspended contexts within institutions does not exert such strong influence on the culture at large that these contexts deteriorate the general presumption of sincerity. Further, their operation cannot work on the individuals within such institutions so as to compromise their habits, expectations, and the personal honest relationships that facilitate their effective participation in our culture of presumptive truthfulness.

Finally, the use of the suspended context must not work to undermine the valuable ends to which the institutions are dedicated, to frustrate the epistemic goals and duties embedded within those ends, or to disable our ability to achieve other compulsory ends. Consider, for example, newspapers and encyclopedias that plant false articles to prove that other sources "steal" their material.[12] Their *aims* may well be justifiable, namely to embarrass and deter free riders and, more importantly, to ensure accuracy by preventing and exposing unattributed copying that imparts false impressions of independent confirmation. Pursuing those ends by deliberately planting false articles, however, works to undermine the point of such accuracy—namely, that newspapers may be taken at their word. The practice is therefore in tension with their larger aim of serving as a reliable epistemic resource.[13]

The Police

In what follows, I want to focus on this last point. I want to consider how the epistemic ends of particular sorts of institutions place particular constraints on their use of deliberate misrepresentations to achieve those ends. Before turning to my main interest, the university, I want to rehearse another example of how an institution's mission may include its serving as an epistemic resource, and how this in turn constrains its generation of suspended contexts to pursue other aspects of its mission. Although newspapers are more obviously an epistemic institution than the police, a particular version of this problem attaches to misrepresentations by government officials generally and by the police in particular, because the police serve as one of the major points of direct contact between citizens and the government.

My worries about police misrepresentation do not stem from idle hypotheticals. Lies by the police are everyday, officially sanctioned practices. Lying to interrogation subjects is a commonplace, recommended police procedure, whether about material facts relating to the case, the evidence the police have, or the moral gravity of a crime.[14] Interrogators are advised to vilify the victim to induce the suspect to let down his guard and confess. For example, the interrogator might speculate (falsely) that an unwilling sexual partner was a tease, probably wanted things to get rough, and that the purported forced encounter was understandable.[15] The leading criminal interrogation manual recommends that the interrogator "sympathize with the suspect by affirming that, in the circumstances, anyone would have engaged in the criminal behavior"; "minimiz[e] the moral seriousness of the offense" to reduce the suspect's guilt-related inhibitions; "suggest a face-saving motive for the commission of the crime, which he knows is not true"; and "[i]n some cases . . . falsely imply, or outright state, that evidence exists that links the suspect to the crime."[16] In sex offense cases, as a form of sympathy and minimization of the crime, the manual recommends that the interrogator should

[12] Shyamkrishna Balganesh, *"Hot News": The Enduring Myth of Property in News*, 111 COLUM. L. REV. 419, 444 (2011); ISAAC CLARKE PRAY, MEMOIRS OF JAMES GORDON BENNETT AND HIS TIMES 135 (1855); Henry Alford, *Not a Word*, NEW YORKER, Aug. 29, 2005, at 31 (describing a deliberately false biography in the *New Columbia Encyclopedia* of 1975 about Lillian Virginia Mountweazel [a nonexistent person] and identifying "esquivalience" as the fake word planted in the New Oxford American Dictionary); cf. Mrinal Pande, *Check Please*, INDIAN EXPRESS (Apr. 9, 2010), http://www.indianexpress.com/news/check-please/602256/ (reporting a newpaper's April Fool's prank of planting false stories to catch plagiarism by rival media).

[13] A related stance propels the admirable frustration and contempt of Jim Fingal, a fact-checker, in his colloquy with John D'Agata, an "essayist." D'Agata's article on a Las Vegas suicide regularly invented details and altered facts for dramatic and syntactic resonance, yet deployed a fact-laden style to impart a feeling of verisimilitude, as chronicled in JOHN D'AGATA & JIM FINGAL, THE LIFESPAN OF A FACT (2012).

[14] FRED INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 241–68, 293–98, 427–29 (4th ed. 2004) ("Many of the interrogation techniques presented in this text involve duplicity and pretense"). *See also* Richard A. Leo, *Police Interrogation and Social Control*, 3 SOC. & LEGAL STUD. 93, 106–08 (1994); Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America*, 18 CRIME L. & SOC. CHANGE 35, 43–47 (1992); Anne M. Coughlin, *Interrogation Stories*, 95 VA. L. REV. 1599, 1605–06, 1642–51 (2009).

[15] Coughlin, *supra* note 14, at 1642–51.

[16] INBAU, *supra* note 14, at 241–47, 427–29. The authors recommend that lying about what evidence has been collected should be avoided, however, because investigators may lose credibility if the suspect gathers that they are bluffing. *Id.* at 429. *See also* Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425, 427–28 (1996) (mentioning the advice of training manuals and seminars).

falsely represent that, in the past, a friend, relative, or even the questioner himself engaged in similar coercive behavior.[17]

Misrepresentations about *legal* rights usually encounter constitutional hurdles, but not always insurmountable obstacles.[18] Still, not all legal misrepresentations are constitutionally barred from giving rise to admissible confessions and other evidence. In Nebraska, for instance, the police misrepresented whether sexual conduct with a minor was a crime to prompt a confession, which a state court ruled was not invalidated by the misrepresentation.[19] In Indiana, to elicit a confession, police officers allegedly misrepresented that the suspect's purported conduct would only constitute manslaughter and not murder and reinforced that misrepresentation by showing the suspect the Indiana criminal code; a federal court denied the defendant habeas relief and held that the alleged legal misrepresentation would not render the confession involuntary.[20]

In the U.S., a great deal of police misrepresentation is, it seems, commonplace and officially sanctioned. One serious complaint about this practice is that some evidence suggests that police lies play a substantial role in eliciting false confessions.[21] These allegations are serious and very

[17] *See* INBAU, *supra* note 14, at 241–43; *see also* Coughlin, *supra* note 14, at 1646–51.

[18] The constitutional approach to lies that elicit confessions is to ask whether the misrepresentation renders the confession involuntary. *See, e.g.*, Moran v. Burbine, 475 U.S. 412, 421 (1986) (holding that for a confession to be admissible, the waiver of the right against self-incrimination must be voluntary, not the product of "intimidation, coercion, or deception"). *See generally* 2 WAYNE R. LAFAVE ET. AL., CRIMINAL PROCEDURE § 6.2(c) (3d ed. 2007). Misrepresentations about facts, including about what evidence the police have, are not thought to render consequent confessions involuntary per se and are frequently upheld as constitutional through an analysis asking whether given the "totality of the circumstances," the confession was voluntary. *See, e.g.*, Frazier v. Cupp, 394 U.S. 731, 739 (1969) (upholding a confession obtained through a misrepresentation by the police that the suspect's cousin had confessed and thereby implicated him); Lucero v. Kerby, 133 F.3d 1299, 1311 (10th Cir. 1998) (upholding a confession following a police misrepresentation that the suspect's fingerprints were found at the crime scene); *see also* United States v. Lall, 607 F.3d 1277, 1285 (11th Cir. 2010) (holding a confession involuntary in a case in which the police assured a suspect that information provided would not be used to prosecute and that the suspect did not need an attorney and remarking that "police misrepresentations of law [as contrasted with police misrepresentations of fact] . . . are much more likely to render a suspect's confession involuntary").

[19] State v. Walker, 493 N.W.2d 329, 334 (Neb. 1992) (finding that a police officer's misrepresentation that consensual sexual contact with a minor would not constitute a crime did not invalidate the defendant's confession). *See also* Commonwealth v. Colby, 663 N.E.2d 808, 810 (Mass. 1996) (holding that an alleged police misrepresentation that polygraphs were admissible in Virginia would not invalidate a confession and noting no qualitative difference between misrepresentations of law and misrepresentations of fact).

[20] Conner v. McBride, 375 F.3d 643, 653 (7th Cir. 2004).

[21] Misrepresentations may play a role in eliciting false confessions, whether because the suspect begins to believe the false narrative about his guilt, because the suspect operates under the misunderstanding that even the authorities consider that little is at stake, or because the suspect thinks his (true) claims of innocence are futile but that a confession may reduce his sentence. *See* Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1097–99 (2010) (describing police misrepresentations about the evidence in their possession and the role it may have played in eliciting false convictions); *but see* Laurie Magid, *Deceptive Police Interrogation Practices: How Far Is Too Far*, 99 MICH. L. REV. 1168, 1190–97 (2001) (contending that the evidence that police deception elicits false confessions is inconclusive and anecdotal).

troubling. If lies in interrogation promote inaccuracy, they seem utterly unsustainable. Here, though, I want to offer another argument that is independent of the substantial concerns about the unreliability and inefficacy of the practice. Assume (as against all likelihood) that, where deployed, direct misrepresentation is more episodically effective at gleaning important and accurate information than direct interview methods. I would still contend that these lies, while understandable, are wrong. The police have institutionally grounded reasons not to lie, even effectively, to achieve their valid and admirable purposes. The practice of lying is in tension with the role the police play and should play in our scheme of epistemic moral cooperation.

That role might be elaborated as follows. So far, I have been emphasizing that successful moral agency involves epistemic cooperation. To know the specific contents of our moral duties, we need information from others about themselves that we could not glean on our own. Further, given the complexity of moral circumstances, we often need help identifying and understanding the mid-level moral principles that govern our situation. Finally, many of our moral duties are triggered (and sometimes determined) by joint decisions or collective actions, whether those that generate a circumstance calling for response, those that generate a worthwhile convention, or the joint decisions comprising law. To recognize our moral obligations and opportunities, we need a supportive, reliable epistemic environment.

If we are indeed engaged in epistemic moral cooperation and take advantage of some divisions of labor, it would make sense that we would locate some sources as epistemic authorities, that is, sources we can and should be able to rely upon for information and judgment about our moral, political, and legal duties. Ultimately, as individuals, we are each responsible for our moral agency—for getting it right and understanding why it is right. Still, given the challenges of maintaining moral agency and the complexity of our modern moral and political circumstances, sincere sources of information and judgment may play valuable roles as reality

checks and calibration points, while also constituting a source of common culture. This is especially important in the legal domain.

Politically, those in charge of putting our joint moral commitments into action and enforcing them—namely, state officials—are well placed to serve as points of triangulation, expositors, and repositories of our best information about the law and its moral and political underpinnings. We need salient common sources of information to help us locate the relevant moral and legal facts and to identify the content of the joint perception of those facts. We also need to know that officials *believe* these to be the relevant facts, if those officials are to merit the role of a legitimate political (not merely epistemic) authority. Thus, state officials, at least in a democracy, must aspire to be relevant epistemic authorities on the law and on at least that aspect of morality embodied in law. We *should* be able to rely on their transmissions about the content of law, legally relevant morality, and legally relevant facts.

These ideas would render police misrepresentation—even to a wrongdoer—especially morally problematic. If their role partly involves serving as a reliable epistemic repository, then the police subvert their own role when they misrepresent the content of the law, the moral severity of an offense, or the evidence they have collected. There is no gainsaying that the end that mendacious police interrogators pursue is substantial, namely the identification of the culpable and, though less prominently touted, the exoneration of the innocent. Nonetheless, the practice subverts what seems to be a compulsory end of the government, and of the police specifically: to act as a source of reliable and trustworthy moral knowledge—an epistemic repository—about the law, its application to relevant situations, and its underlying justifications. They have that duty even to persons of interest, perhaps especially to guilty parties who are, *ex hypothesi*, struggling with moral and legal compliance issues. Because their epistemic responsibilities are bound together with and frame their investigatory aims, the police cannot argue that the mere significance of the end justifies the suspension of the truthfulness presumption.

One may object that when interrogating, the police are not acting within their role as epistemic sources. They are collecting, rather than disseminating, knowledge; and so the standards of reliable dissemination do not apply.

I find this position unsatisfactory. For the police, collecting and offering knowledge are necessarily intertwined and not liable to strict compartmentalization. In attempting to discover information about a crime, the police engage in moral and legal representations. They rely upon their status as legal authorities to convey the importance and seriousness of the situations about which they collect information. They further rely on their status as legal authorities to convey the protection they can and must offer those questioned. They represent that a particular behavior constitutes a crime that is sufficiently serious to merit a citizen's cooperation, even if it is against that citizen's personal interest. The police rely upon these representations as well as their general credibility to cajole, persuade, and intimidate citizens into supplying information truthfully and voluntarily. The success of the untruthful statement within interrogation depends upon its being presented as truthful and upon the perception that the police are trustworthy agents discharging their public duties. Moreover, information-gathering encounters serve to reinforce the status of the police as well as the significance of legal compliance. Because the mission of the police requires that they be taken at their word about legal matters in important circumstances, the use of the lie in one such circumstance undermines their justified credibility in other structurally similar circumstances. The police are at all times engaged in educating citizens about the law and its situational application, as well as in observing and documenting compliance and noncompliance. That being the case, in important ways, all situations in which they operate are structurally similar.

Academic Freedom and Academic Misrepresentation

I have briefly touched upon the subjects of media, commercial, and police misrepresentations, but I do not pretend to have done more than scratch the surface of the issues they present. My remarks aimed simply to introduce some examples of how one might begin to doubt the general invocation of institutional exceptionalism to justify deliberate misrepresentation. Although institutions may not have the same mental properties that underpin some of the arguments against lying, they may have specialized epistemic ends, internal to their missions, that are incompatible with the use of episodic misrepresentation to achieve those or other ends. To pursue this idea further, I now turn to resist some institutional exceptionalist arguments deployed to justify restrictions on freedom of speech within public employment contexts, and the university in particular, and also used to justify the use of the lie as a research technique at the university. I will start by proposing a partial, incomplete conception of the (public) university that emphasizes some salient characteristics germane to build-

mitting to your *demands*, rather than your suggestions, about how that question should be investigated, then the independence of my judgments is burdened. The approval requirement also introduces the opportunity for considerations irrelevant to the intellectual inquiry to constrain what knowledge is pursued. As the one-time chair of the University of Chicago IRB for the biological sciences shockingly admitted, in the spirit of defense and not concession, "Universities are sensitive to political influences that compromise their corporate interest. Institutional Review Boards can forestall the public image problems and protect the institution's reputation by weeding out politically sensitive studies before they are approved."[30] Exactly. Although the university has moral interests in ensuring that its facilities and powers are not irresponsibly deployed to cause people harm, those interests should be pursued in ways compatible with its equally fundamental end of respecting intellectual freedom as the constitutive method of collecting and celebrating knowledge.

EMPLOYEE SPEECH AND INSTITUTIONAL EXCEPTIONALISM: *GARCETTI*

A similar problem besets the increasingly powerful idea, both outside and inside the university, that the efficient management of institutional structures permits substantive requirements of agreement, and that these requirements are compatible with our other core commitments to freedom of speech because those commitments apply only in other domains. That idea drives *Garcetti* and is beginning to infect university culture, through its contestable premise that governance matters are separate from academic endeavors and therefore exempt from free speech guarantees. As part of the circuitous path back to academic misrepresentation, I want to address what is wrong with this division. The error in this way of thinking of the relationship between free speech and institutional structure, especially university structure, also illuminates the mistake we make, I think, in authorizing misrepresentation in research.

Start with the general idea driving *Garcetti*, that free speech guarantees do not apply within a bureaucratic structure because free speech may hamper organizational effectiveness. What motivates *Garcetti*, partly, is a narrower, reasonable idea—that employers, even public employers, should have a relatively free hand in evaluating workers' performance and in making employment decisions based on the quality of that performance. Where the work being evaluated involves speech, the task will inevitably involve content-based evaluations of speech. I accept the general proposition that activity that is disruptive to the workplace or that constitutes subpar work performance, including speech, may reasonably be subject to workplace evaluation and discipline. But the decision as to what counts as disruptive or inadequate work performance should be influenced and constrained by our free speech commitments.

A commitment to individual free expression should prevent state officials from reprimanding employees merely for their sincere, civilly expressed opinions about the conduct of government affairs, even about—*especially* about—subject matter that falls within the scope of the speaker's employment. Why especially? Employees are likely the people who know the most about the relevant issues at their worksite and about its products. Their concerns may find their most immediately relevant, competent audience on site, so their individual interests in worksite expression are particularly pressing. This site-specific expertise, plus the fact that the internal governance of government workplaces is intrinsically a matter of public concern, forms the crux of the infirmity of *Connick v. Myers*, the precursor to *Garcetti*, which declared that speech restrictions could be levied on public employees speaking about internal workplace matters because these were perversely deemed not to be matters of public concern.[31]

If we are committed to the importance of individual self-expression, while remaining fully alive to the fact that individuals differ and often react strongly to their differences, then we have to accept that it is a natural outgrowth of free, robust, candid expression that some people will be upset, concerned, thoughtful, and mentally occupied on occasion about what others have to say; they may talk about others' speech, either to evaluate it or excoriate it. A certain amount of time-consuming controversy comes part-and-parcel with the freedom of citizens to make their thoughts known and to hear and try to understand others. This may, concomitantly, reduce the efficiency of some governmental operations, measured in a particular way, compared with the efficiency that might be achieved if they were run on a strict hierarchical basis. Getting things done quickly, with maximum levels of pleasantness and apparent consensus, may be harder when people present their sincere views rather than parrot a party line. But these criteria of measurement are too narrow. The

[30] Jonathan Moss, *If Institutional Review Boards Were Declared Unconstitutional, They Would Have To Be Reinvented*, 101 Nw. U. L. Rev. 801, 804 (2007).

[31] 461 U.S. 138 (1983). For an extended, persuasive critique of *Myers*, see Steven H. Shiffrin, The First Amendment, Democracy, And Romance 74–80 (1990).

free circulation of information and opinions provides significant legitimacy and accuracy gains that should also count as forms of success, alongside speed and pleasantries, within a public enterprise.

In making these points, I aim to respond to some of Robert Post's frequently voiced themes about the different forms of speech regulation suited to the "managerial domain," which he puts to the service of justifying the approach of *Myers*.[32] One difficulty with the invocation of the need of management structures to justify restrictions on public employee speech is that Post's conception of efficiency in governmental operations seems to presuppose criteria of success that valorize smooth and quickly executed hierarchical relations. However well- (or ill-) suited that conception might be to the business world, it does not seem sensitive to the general nature of government operations within a democracy (with the exception of emergency situations of the kind encountered by fire departments, hazardous waste crews, and their ilk). The criteria of success more reasonably applicable to them should include the desiderata that decisions are accurate, substantively legitimate, fair to the public they serve, and undertaken with an effort to ascertain the needs and perspectives of those affected by them, including the employees who execute them.

The mere fact of doubts or dissension, along with the associated effects of reactions to them *as such* (e.g., response, discussion, and the natural moderate tensions associated with the airing of difference), cannot be treated as relevantly disruptive, "efficiency-reducing," or incompetent to a discipline-worthy degree if, at the same time, we embrace freedom of speech and the more democratic criteria of success just articulated. In a free speech culture, part of management's task is to channel difficult outbursts or dissident expression so that, while they may naturally produce choppy waters, they do not mature into an unmanageable storm that disables colleagues from adequate job performance. Dissent or agreement registered in ways that overwhelm thoughtful management may qualify as workplace disruption reasonably subject to discipline, but the mere fact that the *content* of the expression is unwelcome or provocative to others, including supervisors, should not.[33]

[32] *See, e.g.*, Robert Post, Constitutional Domains: Democracy, Community, Management 260 (1995); Robert Post, *Recuperating First Amendment Doctrine*, 47 Stan. L. Rev. 1249, 1273 (1995) (endorsing *Connick v. Myers*).

[33] One method that might reasonably prove cause for discipline would be repeated, persistent speech in a manner that becomes harassing and thereby interferes with workers' ability to perform other job functions. I take it that that isn't really a content-based objection.

In many cases, the government has obligations to engage in truthful speech about its activities, both because of its constituent ends and to enable accountability. Hence, discipline of employee speech within the scope of employment is all the more disturbing when the speech is disciplined *because* it is factually true. It is beyond bizarre that the First Amendment demands that falsity must be proven in most libel cases,[34] but that actual, relevant, non-confidential, non-garbling, factual truth does not constitute a decisive First Amendment defense against the disciplining of a public employee *qua* employee for disfavored speech.

It should serve as a *reductio* of the *Garcetti* line of cases that a recent appellate court, reviewing a police officer's termination for his refusal to retract his own truthful eyewitness report about a colleague's physical abuse of a suspect, held his speech was protected under the First Amendment only because his speech could be construed as delivered *qua* citizen and not *qua* official.[35] The idea that the officer's truthful speech was protected (only) because he spoke in the capacity of a citizen seems a convoluted rationale given that he witnessed the incident only due to his employment status. Likewise, although it delivered a welcome result, the Supreme Court's recent unanimous decision in *Lane v. Franks* unfortunately invoked this rationale in holding that the First Amendment protects a public employee from employer retaliation for giving truthful, compelled testimony about corruption, a matter of public concern, even when the employee's knowledge was gleaned through the employment. In *Lane*, the Court placed emphasis both on the facts that the employee's speech at issue was *sworn* testimony and that the testimony was offered as a citizen and not as part of the employee's ordinary job responsibili-

[34] *See, e.g.*, New York Times v. Sullivan, 376 U.S. 256, 267–83 (1964); Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775–76 (1986).

[35] Jackler v. Byrne, 658 F.3d 225, 240–42 (2d Cir. 2011). Because filing factual reports was part of his job duty, as the lower court remarked with more of a sense of paradox than the sense of ridicule that seems warranted, "Jackler's refusal to alter his report was done in his capacity as a police officer . . . . Ironically, it is because he was a public employee with a duty to tell the truth that his insistence on fulfilling that duty is unprotected." Jackler v. Byrne, 708 F. Supp. 2d 319, 324 (S.D.N.Y. 2010). It is tragicomical that, given *Garcetti*, to find for the fired officer the appellate court had to claim that the First Amendment problem lay not with firing him for filing a truthful report but with attempting to compel him into perjury. *Jackler*, 658 F.3d at 242. *See also* Dahlia v. Rodriguez, 735 F.3d 1060 (9th Cir. 2013) (en banc). Dahlia found that a police officer's reports of police abuse were protected by the First Amendment when, but only when, the officer's reports did not go up the chain of command and, thus, could be construed as falling outside of his job duties. Judge Pregerson's sensible and more coherent concurring opinion argued instead that a police officer's reports of police abuse should be protected by the First Amendment whether such reports are required by the job or not and whether they are filed within the chain of command or not. *See id.* at 1080.

ties.[36] Although the Court did not reach the question whether the First Amendment would also extend to protect truthful, but disfavored, testimony when testifying falls within the scope of one's employment duties, as is common for police officers, coroners, and many social workers, it would be perverse and arbitrary to draw a sharp distinction between these categories. Not only would a distinction disserve the public interest in eliciting the truth from public officials and in protecting the reliability of sworn testimony, but it would also force public employees more deeply into untenable moral conflicts in which employment and loyalty are pitted against sincerity and truthfulness; within a First Amendment culture, the government, even when acting as an employer, should not be allowed to place these needs and virtues in opposition but should be required to reconcile them. Furthermore, although there are unique legal risks associated with perjury, sworn statements do not uniquely implicate employees' interests as people in speaking truthfully and sincerely. A sincere truthful complaint of corruption or police abuse to one's superior should gain the same protection as sworn testimony in court about the same matter—whether that testimony is compelled or volunteered and whether it is offered pursuant to or outside of one's official duties.

The more straightforward rationale for protecting public employees' speech is that government employees *qua* employees enjoy rights of free speech with respect to the duties and conditions of their employment unless that speech is substantially disruptive of an important governmental function or constitutes inadequate job performance. Furthermore, the concepts "disruptive" and "inadequate" must be interpreted charily to realize this speech-friendly approach.

That is, the fact that the speech is relevant, competently and civilly delivered, and factually true should operate as a complete defense to a *content-based* claim of disruption or inadequacy, except when factually true speech breaches a legitimate demand of confidentiality (or privilege) or when it garbles the government's speech. With respect to garbling, some employee speech may immediately, by itself, disable, disrupt, or subvert the relevant government speech or activity, and so may be reasonably subject to discipline consistent with free speech. Think for example, of the police officer who reads the Miranda warnings to a citizen just arrested but, without losing a beat, adds, "They make me say all that stuff, but it's a pile of malarkey. You should just tell us what happened

[36] 134 S. Ct. 2369 (2014).

right now, without delay."[37] That demonstration of disagreement may garble the government message that the citizen's rights will be respected; a reasonable listener may take the officer's coda as a prelude of forthcoming abuse and an unwillingness to respect those rights. The government, however, has a strong, legitimate interest in its own speech: in speaking clearly and in having that officer, *qua* government employee, deliver its message. But we should understand this category narrowly. I would distinguish, for example, the police officer who publicly opines, "A referendum has passed that decriminalizes marijuana; that's the public policy and I will stand by it, but personally, I regard this policy as a disaster."[38] Because the officer makes explicit the difference between her personal and the official stance and affirms she will abide by the public position, her speech does not garble the government's message.

GARCETTI AND ACADEMIC FREEDOM

Apart from my general opposition to *Garcetti*, a special problem bedevils that decision's extension to the public university setting. So far, I have argued that *individual* interests in expression should be recognized in on-duty, job-related speech. Now I want to argue that the (public) university's function and its special epistemic ends generate unique concerns

[37] The mandatory reading of the Miranda warning does not demand insincerity on the part of this officer; the demand that one not garble the government message in this case demands only contextual reticence about the officer's attitudes toward the practice of giving the warnings. The warnings themselves do not represent the speaker as affirming the importance or normative appropriateness of the rights of representation and against self-incrimination and the means to their satisfaction. There are, I believe, strong thinker-based reasons to attempt to ensure that government speech is worded in ways that do not demand direct insincerity or its appearance on the part of officials, even when they speak on behalf of and represent the government. Further, the case might differ if after the reading, the official says, truthfully and sincerely, to warn rather than to intimidate, "It says an attorney will be provided for you, but I should warn you that the guy who hangs out at the courthouse is an incompetent lush. It would behoove you to find someone else." That official's speech, where true, should be protected. The qualification in effect dilutes the government's message, but the culprit is the state's failure to ensure representation that respects the suspect's rights, rendering the diluted message more accurate than the intended message.

[38] Context and position matter when assessing whether individual speech garbles a compulsory government message. A prosecuting attorney, even a deputy district attorney, who voices sincere, reasonable concerns about the validity or sufficiency of evidence against a defendant partly discharges her role as an attorney of the court in doing so, given the presumption of innocence and general obligations of the state to use its considerable power carefully, even if her superior disagrees with her assessment. A federal public defender who publicly makes known his doubts about the innocence of a colleague's client, even as an act of private conscience, may thereby undercut his role as an advocate in ways that garble the government's message and its stance that every person merits a rigorous defense.

about *Garcetti* and bolster a claim that the public university should be treated as special within First Amendment jurisprudence.[39] Although a university differs from a park in some ways I have mentioned, like the park, it operates as a public forum in which independently minded speech is invited for its own sake, for the sake of its members, and for the sake of the broader community. Because it solicits speech and knowledge for its own sake and is also devoted to enabling the development and exercise of our capacities to think and reflect as mutually influencing but autonomous agents, a core First Amendment function, the university should be regarded as a publicly established center for the fostering and enriching of First Amendment activity. To invite free speech as way to develop knowledge and then to impose measures of content-restriction unnecessary to, and in tension with, the forum's function seems inconsistent with guarantees of and rationales for freedom of expression.

Thus, I take issue with Robert Post's general line of argument, an extension of his position on *Myers*, that "[t]he classroom is not a location in which the value of democratic legitimation is at stake," and more generally that "[a]cademic freedom is covered by the First Amendment not because of the value of democratic legitimation, but because of the value of democratic competence."[40] Post aims to make the point that the classroom and the university generally differ from the public square in that faculty must make content-based determinations of quality to assess students' performance and these assessments then may determine students' status at the university; those determinations involve the exercise of disciplinary authority, rather than the toleration and equality for all that is required in contexts that underscore the value of democratic legitimation.[41] In this way, faculty members promote democratic competence by developing disciplinary expertise amongst themselves and their students and contributing to the common stock of disciplinary knowledge. These

[39] In *dicta* in *Garcetti*, the Court gestured in this direction (although only with respect to teaching and research). "There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence." Garcetti v. Ceballos, 547 U.S. 410, 425 (2006). Justice Kennedy was attempting to assuage Justice Souter's well-founded concern that *Garcetti* would be extended to the university. *See id.* at 438–39 (Souter, J., dissenting).

[40] Robert Post, Democracy, Expertise, and Academic Freedom 70, 83–84 (2012). Post is critical of interpreting *Garcetti* to allow university administrators to dictate the content of faculty research and teaching, but he is silent on the issues raised by *Garcetti*'s application in the lower courts to student and faculty free speech with respect to internal administrative affairs and faculty governance at the university. *Id.* at 93–96.

[41] *Id.* at 33–34.

are fair points, but Post goes too far in intimating that opining on a ballot measure and voting in an election uniquely epitomize the important forms of and sites of contribution to democratic legitimation. A classroom (and a university) embodying a full-blown commitment to freedom of speech plays a role in exemplifying, reinforcing, and training citizens in democratic values of toleration and openness to criticism that a dictatorial classroom does not. Both may produce the same level of disciplinary competence that contributes to a well-informed citizenry, but the former instills disciplinary expertise within an environment that remains as open as possible to input from all comers and to criticism. It thereby operates as a forum and exemplar of democratic legitimating activity, whereas the dictatorial classroom, however powerful it is at instilling the disciplinary competence that serves democracies, is in tension with democratic values.

If we further regard the public university as serving as a showcase for First Amendment values, then protecting the speech of its members serves the symbolic function of modeling our commitment to free speech and demonstrating the strength of the state's willingness, in its own institution, to bear the same sorts of costs for that commitment that the public in general commits to absorbing for the First Amendment. Thus, there are distinct First Amendment reasons to extend guarantees of academic freedom to members of the public university, by which I mean guarantees that members will not be obstructed from participating in university life, whether it be in the areas of research, teaching, or university governance, because they express their sincere, even if unpopular, judgments.[42]

Thus, I have claimed that both having to gain permission to do basic research and being deterred from evincing sincere opinions about the conditions under which we seek knowledge are antithetical to standard, individualistic free speech values. Moreover, they are antithetical to the rather special commitments the university makes to reject the presupposition of a univocal perspective and, positively, to prioritize and symbolize the values of knowledge and inquiry with integrity. These values fuel a hostility to hierarchical efforts to control access to information, to make authoritative declarations about what views indepen-

[42] Further, they should be insulated from suffering negative employment (and educational) repercussions as a response merely to the fact and content of the expression of their candid, responsible, supported, sincere opinions. In light of this understanding of the university's function, these guarantees should extend not merely to research and teaching activities, but also to university governance and to constrain or preclude many forms of IRB oversight.

dent researchers should adopt, and to restrict commentary on knowledge claims and the conditions of their pursuit, even when those hierarchical efforts are motivated by the aim of efficiently obtaining and maintaining knowledge.

Academic Misrepresentation

For these reasons, I also contend that the underlying foundation of academic freedom is hostile to the use of academic misrepresentation as a research tool. Yet the practice of such misrepresentation is commonplace. Likewise, direct misrepresentations figure in the standard experimental repertoire of the experimental psychologist.

The use of the lie to research subjects is approved by the American Psychological Association Code of Conduct when the researcher determines that the research will not cause the subject physical pain or severe emotional distress,[43] the deception is justified by "the study's significant prospective scientific, educational, or applied value," and "effective nondeceptive alternative procedures are not feasible."[44] Psychology faculty regularly enroll subjects in research and directly lie to them about the experiment and its contents. Standard examples involve lying to subjects about the question pursued by a study or the identity of the objects, tasks, or people encountered during the experiment.[45] A recent study of two prominent psychology journals found that between a third and a half of the studies they published used deception as an investigatory technique.[46]

[43] This component of the Code rules out the most famous of the deceptive experiments, the Milgram experiment, in which participants were directly misled into believing they were administering increasingly more painful, eventually seemingly tortuous, electric shocks as sanctions to other research subjects who purportedly answered exam questions inaccurately. The subjects' recognition that they were capable of such brutality was tremendously distressing to them. Stanley Milgram, *Behavioral Study of Obedience*, 67 J. OF ABNORMAL AND SOC. PSYCHOL. 371 (1963); STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW 44–54 (1974).

[44] American Psychological Association, 2010 *Amendments to the 2002 Ethical Principles of Psychologists and Code of Conduct*, 65 AM. PSYCHOLOGIST 493 (2010). The American Sociological Association's Code of Ethics contains similar guidelines. American Sociological Association, "Code of Ethics," *asanet.org* 1997, http://www.asanet.org/images/asa/docs/pdf/CodeofEthics.pdf.

[45] Franklin G. Miller, John P. Gluck, Jr., & David Wendler, *Debriefing and Accountability in Deceptive Research*, 18 KENNEDY INST. ETHICS J. 235, 236–37 (2008).

[46] Ralph Hertwig & Andreas Ortmann, *Deception in Experiments: Revisiting the Arguments in Its Defense*, 18 ETHICS & BEHAV. 59, 64–67 (2008). Unfortunately, Hertwig and Ortmann do not always distinguish between lies and indirect forms of deception, so one cannot isolate the specific percentage of cases using direct misrepresentation; but they note that in one of the journals they studied the direct provision of false information about stimulus material, about the identity of participants, and about the subjects' performance were very common methods of deception, used 62 percent, 24 percent, and 30 percent of the time when deception was used. *Id.* at 66.

One common example is the Trier Social Stress Test, a standard research protocol for assessing stress used in numerous psychological studies around the world.[47] Subjects are asked to perform a public speaking exercise while researchers aim to distract and irritate them. To make the speaking sufficiently stressful, researchers tell the subjects that the speeches are being filmed and will later be reviewed by an expert. In fact, the camera has no film and no expert evaluates the speeches.[48]

Although the Trier test is routinely approved by IRBs, it is not clear how it passes the requirement that nondeceptive techniques be infeasible. Those paired lies are completely gratuitous; even if the suggestion of observation were essential to create the appropriate sort of stressful environment, neither lying nor deception is necessary to achieve that goal. The researchers could actually film the speeches; they could hire an expert to screen them. Presumably, they do not do this because observation would cost more money without advancing their research aims. But that doesn't mean that the study is not possible or even practicable without lying. It suggests that, in practice, "feasible" is taken to encompass cost considerations. In practice, it suffices as a justification for lying to research subjects that to tell them the truth would be more expensive than to lie, at least with respect to "harmless" lies.

In the more ethically interesting cases, the lie told to research subjects is more integral to the research question under investigation. Elizabeth Loftus's research figures among the more notable examples of academic misrepresentation, both because of the genuine significance of her results and the bold, personal lies she tells. Loftus demonstrated the potential unreliability of memories (and the hazards of eye-witness testimony) by showing that it is possible to implant false memories by lying to subjects about their past. In a famous study, she collected information about subjects' childhood and then presented them with written biographical ac-

[47] Clemens Kirschbaum, Karl-Martin Pirke, & Dirk Hellhammer, *The 'Trier Social Stress Test'—A Tool for Investigating Psychobiological Stress Responses in a Laboratory Setting*, 28 NEUROPSYCHOBIOLOGY 76 (1993); Brigitte Kudielka, Dirk Hellhammer, & Clemens Kirschbaum, *Ten Years of Research with the Trier Social Stress Test—Revisited*, *in* SOCIAL NEUROSCIENCE: INTEGRATING BIOLOGICAL AND PSYCHOLOGICAL EXPLANATIONS OF SOCIAL BEHAVIOR 56, 57 (Eddie Harmon-Jones & Piotr Winkielman eds., 2007).

[48] *See also* Ralph Hertwig & Andreas Ortmann, *Deception in Psychological Experiments: Two Misconceptions and a Research Agenda*, 71 SOC. PSYCH. Q. 222, 224 (2008) (reporting that many deceits "are typically driven by convenience rather than necessity").