PROPERTY, DURESS, AND CONSENSUAL RELATIONSHIPS

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SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW. BY *Seana Valentine Shiffrin*. Princeton and Oxford: Princeton University Press. 2014. Pp. xi, 223. $35.

INTRODUCTION

Professor Seana Valentine Shiffrin[1] has produced an exciting new book, *Speech Matters: On Lying, Morality, and the Law*. Shiffrin's previous rigorous, careful, and morally sensitive work spans contract law,[2] intellectual property,[3] and the freedoms of association[4] and expression.[5] *Speech Matters* is in line with Shiffrin's signature move: we ought to reform our social practices and legal and political institutions to, in various ways, address or *accommodate* moral values—here, a stringent moral prohibition against lying, a strident principle of promissory fidelity, that is, the principle that one ought to keep one's promises, and the general value of veracity.

The book grows out of Shiffrin's *Hempel Lectures* at Princeton University and honorary lectures she has given at Cornell and New York Universities. Shiffrin cotaught a seminar with the late Professor Ronald Dworkin, which discussed a prepublication draft of the book (pp. ix–x). The volume is organized into six essentially independent chapters or lectures. Chapters One, Two, and Six began as independent, stand-alone lectures; Shiffrin crafted Chapters Three, Four, and Five to further expand on the arguments of One and Six (p. 4).

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2. Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708 (2007).

3. Seana Valentine Shiffrin, *Lockean Arguments for Private Intellectual Property*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 138 (Stephen R. Munzer ed., 2001).

4. Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839 (2005).

5. Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283 (2011).

While the volume bears a unifying theme, Shiffrin intended the chapters to retain their independence as distinct lectures, and she welcomes readers to delve into the chapters independently of one another (p. 4). *Speech Matters* is, at its core, a rich discussion of moral agency and the normative values of sincerity, truth telling, promissory fidelity, and the effect they ought to bear on personal and social relations, and political and legal institutions. This Review brings forward this unifying theme and provides a critical appraisal, contrasting Shiffrin's stridently Kantian approach with an alternative foundationally deontic, if less severe, distributive approach.

I. Agency

A. *Channels to Communication*

Shiffrin is concerned with "moral agency" (p. 1). It is not only social cooperation and human flourishing, but moral agency itself that requires a fragile domain of sincerity and trust. This domain, *Speech Matters* holds, requires an extraordinarily stringent social and legal prohibition against lying and the protection of fidelity (pp. 2, 26). "The means of successful communication are crucial . . . mechanisms for the most valuable human endeavors—from establishing and conducting personal relationships, to engaging in cooperative activities . . . ." (p. 25). Shiffrin argues that "[p]reserving and protecting these means therefore figure among our fundamental moral priorities" (p. 25). But *Speech Matters*'s unique and somewhat counterintuitive claim is that a failure to recognize an extraordinarily stringent—indeed nearly absolute—prohibition on lying,[6] "precludes . . . moral relations . . . by obstructing the sort of mutual understanding[s] . . . based on rational communication."[7] That failure thereby obstructs the channels required for moral progress and the sorts of mutual engagement, which serve as the precondition to giving normative effect to our social practices and legal and political institutions.[8]

Given the focus on pathways to communication, one may feel tempted—indeed invited—to conclude that Shiffrin offers a straightforward consequentialist or outcome-oriented account of the freedom of speech; after all, her view plainly involves "delving into the moral purposes and value of communication" and seemingly justifies the value of open channels of communication in consequentialist terms (p. 26). Yet Shiffrin is clear: she aims at a view that is not "render[ed] . . . consequentialist."[9] To understand

6. *E.g.*, p. 2 ("I will defend a qualified absolutism about lying . . . .").

7. P. 23; *see also* p. 1 (making clear that "[p]rotecting . . . channel[s] of mutual access must . . . be a substantial moral priority").

8. *See* p. 26 (arguing that we can secure and protect the social conditions under which we possess moral agency by maintaining the presumptions that enable successful moral agency).

9. P. 1 ("I hope to unify a variety of issues about communicative ethics and to motivate the outlines of a principled, nonconsequentialist approach to these issues—in particular to issues about lying, promissory fidelity, and the freedom of speech.").

the normative foundations of communication, it is essential to consider communication's normative relationship to moral agency.[10] Absent open channels or pathways, for Shiffrin, it is not just that our communication becomes constrained and weak—as if we had insufficient bandwidth to support our streaming video—it is, rather, that open pathways are a deontic precondition to understanding ourselves and others as thinking persons, or at base, understanding one another as deliberative moral agents (p. 26). For Shiffrin, there is a fundamental responsibility to secure the conditions under which moral agency obtains and that this agency requires reliable and precise communication.[11]

Shiffrin's nonconsequentialist insight is subtle: our very ability to contemplate our aims, goals, plans, or duties and to make the relevant calculations and trade-offs required to achieve our outcome-oriented goals—admittedly, often an empirical task—is predicated on moral agency. This agency only fully exists, however, under certain social conditions—those embodying the pathways to precise communication (p. 26). Our deontic responsibility, then, is to secure and protect these social conditions through compliance with a stringent conception of the lying prohibition and a nearly absolute commitment to the values of sincerity, veracity, and a revised conception of promissory fidelity (pp. 1, 26). Stringent adherence to this set of commitments constructs pathways to communication and the normative basis of freedom of expression.[12] The source of normativity in communication is not merely a function of consequences, but derives from a deontic conception of moral agency itself.[13]

The argument is elegant and operates at a high level of abstraction. But to make the view concrete, Shiffrin introduces an instructive metaphor concerning the value of truthful communication even in the context of "those who intend to do wrong" (p. 24): "the wrong of the lie as a generalization of the wrong of perfidy and, in particular, of the abuse or misuse of the white flag in war" (p. 24). Even in the context of war, the white flag—the signal of willingness to surrender or negotiate—commands respect. Once a party raises the white flag, it is impermissible to attack the messenger carrying the flag, and it is a crime of war to use the white flag to surprise or sabotage. "Even between parties who are authorized in some sense to kill one another, the white flag is regarded as sacrosanct."[14]

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10. P. 26 ("My argument is not that we must attempt to maximize the realization of moral communication. Nor is my argument that the permissibility of misrepresentations hangs on . . . whether they . . . do or do not increase or diminish episodes of moral behavior.").

11. P. 26 ("[T]he fundamental responsibility to secure and protect the individual and social conditions under which we possess . . . agency and . . . understand and acquit our moral duties exerts a lexical priority. . . . Understanding and acquitting the full range of our moral duties depends upon having reliable forms of precise communication.").

12. *See* pp. 1, 26.

13. *See* pp. 1, 26.

14. P. 24. Michael Walzer initially argues in line with Shiffrin's near absolutism: "A soldier who surrenders enters into an agreement with his captors: he will stop fighting if they will

The motivation behind this convention is that "even when we are at each other's throats and even when we are grappling with evil" it is essential that we preserve a way out (pp. 24–25). Shiffrin vividly describes the moral necessity involved: "We must preserve an exit through which we could negotiate an end to conflict and move toward reconciliation using rational discourse," as opposed to merely "relying . . . upon the crude tools of violence, domination, and extermination. To avoid . . . devastations and massacres and to protect the possibility of peace, an absolutely trustworthy method of communication must be preserved" (p. 25).

While these are illustrative consequentialist observations, Shiffrin's position remains subtly deontic: we have an initial moral duty or responsibility to construct and maintain the social conditions necessary to human agency and flourishing (pp. 1, 26). But this agency requires open channels of communication that themselves require stringent requirements of sincerity, promissory fidelity, and a nearly absolute prohibition against lying (pp. 3, 26). Despite the palpable temptation to a consequentialist interpretation of communicative duty and, in turn, freedom of expression, Shiffrin's account is—at the foundation—duty- and agency-based. The deontology lies in the initial duties and responsibilities that, in turn, require that the pathways to communication be constructed openly.

B. *Trade-Offs in Constructing Open Channels*

But demonstrating that the argument is deontological at its foundation is one thing; justifying a normative demand for rigorous honesty—near absolutism in the duties of veracity, sincerity, and in promissory fidelity even under extraordinary or quite extreme conditions—is another. Shiffrin's move from basic deontic notions of duty and responsibility to the social demand for channels of communication constructed to pattern nearly absolutist duties may be too quick; the very values that serve moral agency and that lead to moral progress and flourishing, in her view, may at times serve to defeat the strength of the very duties of veracity that are in question.

Interestingly, Shiffrin begins with—but ultimately departs from—a somewhat Rawlsian spirit: the idea that the above stated preconditions to full moral agency take a "lexical priority" over other values (p. 26). But it is unclear that stringent adherence to fidelity and sincerity will do the normative work Shiffrin asks of them. It seems more likely that interpersonal relations and social and legal institutions required to support the sort of thick moral agency Shiffrin has in mind must answer to a complete *set* of values

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accord him . . . 'benevolent quarantine.' Since it is usually made under extreme duress, this is an agreement that would have no moral consequences at all in time of peace." Michael Walzer, Just and Unjust Wars: A Moral Argument with Historical Illustrations 46 (4th ed. 2006). But, "[i]n war it does have consequences." *Id.* Walzer then argues in a vein less absolutist than Shiffrin: "It is not easy to see all this as the simple assertion of a moral principle. It is the work of men and women (with moral principles in mind) adapting to the realities of war, making arrangements, striking bargains," *id.*, although he ultimately notes, consistent with Shiffrin, that "[t]he war convention is written in absolutist terms." *Id.* at 47.

that are broader than veracity, and also must importantly embody a conception of the duty of sincerity significantly less stringent than Shiffrin's. Moral agency of the sort Shiffrin embraces requires a commitment to a range of blended and balanced basic liberties, as well as material well-being. For a view like Shiffrin's, the question is how stringent duties, however normatively appealing in isolation, might fit in such a scheme.[15]

So while it is clear that reliable mechanisms and channels for communication are necessary to have freedom of speech and communication, it is less clear that Shiffrin's *stringent* prohibition on lying maps in any one-to-one fashion in constructing and maintaining such channels and, in certain instances, it may run counter to the preservation of such channels. The prohibition on lying—as well as the value of free speech itself—must in some circumstances be traded off against other crucial basic liberties, say, when security of the person is significantly at issue. A nearly unyielding account of the lying prohibition—in service to freedom of speech—may ultimately be too wooden to find its home in a *complete* set of basic liberties and freedoms that in conjunction with one another provide a well-balanced, complete system of protected liberty.

The open channels of communication needed for moral agency, as Shiffrin recognizes, may require more than mere adherence to a strict conception of promissory fidelity, sincerity, and veracity; such duties cannot do the work alone. To construct full pathways to moral agency, one must also address aspects of private ordering: economic institutions and the details of property ownership and entitlement, as Shiffrin does. But my concern is not just that such duties are not enough, but, crucially, that the strength of such duties, for which she advocates, may itself run *counter* to moral agency, rather than being necessary to it.

II. Applications

Shiffrin's abstract argument has significant, specific ramifications for the regulation—indeed reform—of our social and interpersonal relations and legal and political institutions. Shiffrin holds that even in the context of extreme nonideal circumstances, conditions that many would describe as dire, our duties to ensure truthful and sincere communication and fidelity remain well-engaged. The book aptly acknowledges that duties of sincerity and the like, if they are to be taken seriously, must hold short of requiring that one become a criminal accomplice, say, via a commitment to rigorous honesty with would-be criminals (p. 36). But, perhaps shockingly to some, for Shiffrin, such duties do require that along important dimensions we ought to remain truthful even with an inquiring aggressor intending the

15. *See* John Rawls, *Reply to Alexander and Musgrave*, 88 Q.J. Econ. 633, 640 (1974). ("[Basic] liberties have a central range of application within which they can be limited and adjusted only because they clash with other basic liberties. None of these liberties, therefore, is absolute, since they may conflict with one another; but, however they are adjusted to form one's system, this system is to be the same for all. . . . Liberties not on the list [of basic liberties], for example, [include] the right to own property and freedom of contract . . . .")

violent or murderous attack of innocents. In a similar vein, certain communications, even those with a mugger—at least implicitly threatening one's life—ought to remain truthful (pp. 35–36). And perhaps most boldly and counterintuitively, in a supreme defense of "fidelity," Shiffrin maintains that morality demands that we ought to keep certain promises offered under genuine duress, even if, divergently, the state should not enforce contracts entered into under similar conditions (pp. 47–49, 68–70). The book also maintains that freedom of speech doctrine should not protect genuine intentional lies[16] and that our social and legal institutions, specifically universities and policing agencies, become self-effacing if they lie—even when in service of urgent and (ostensibly) overridingly laudable goals.[17]

A. *Lying*

Shiffrin addresses the interpersonal moral prohibition on lying, a rich discussion that effectively provides a background for the discussion of promising, duress, and contract law that follows. Shiffrin maintains that lying is wrong along three dimensions. First, lies wrong listeners by deliberately presenting listeners with unreliable warrant to believe, which creates a gap in knowledge between listeners and the speakers, precluding the possibility of an equal partnership in full moral engagement (p. 23). Second, a liar harms himself by self-imposing isolation from his listener (p. 24). And finally, the lies wrong humanity; the maxim for action from which the liar's act emanates embodies "disrespect to our collective interest and [our] duty to maintain reliable channels of communication and the liar's action begins, concretely, to sow seeds of doubt in one another's testimony" (p. 24).

But Shiffrin analyzes these characteristics of lying in isolation. The hard work comes under less than ideal conditions in which misrepresentations are not told in isolation, but in their full social context. "To identify these three facets of the wrong of the lie does not yet confront the special issues raised by communication with those who *intend* to do wrong" (p. 24; emphases added). After all, it is under *these* special circumstances—in which the moral stakes are high and one's own well-being or that of innocent

16. *See* p. 117 ("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 . . . powers of legal regulation to rebuke (and perhaps deter) its occurrence.").

17. *See* p. 217 ("[W]illingness to misrepresent reduces the basis others have to trust whether the university's other declarations are reliable . . . ."). Shiffrin acknowledges that while "complete abstention from . . . misrepresentation might preclude the acquisition of certain forms of knowledge . . . adhering to demands of sincerity may involve serious epistemic losses. . . . [But this] is part . . . of moral, democratic life." Pp. 216–17; *see also* p. 197 ("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.").

others are at issue—that it not only becomes psychologically difficult to remain truthful, but that, morally speaking, one *ought* to simply misrepresent the truth.[18]

Consider Shiffrin's *Just War Theory* example (pp. 24–25). The insight here is two-fold. First, a scheme of moral requirements that allows us to abrogate communicative duties—failing to properly honor the white flag—would preclude us, in the circumstances she describes, from acting and engaging as deliberative agents, as opposed to "reactive creature[s]" (p. 46). With pathways to communication and deliberation closed, we find our only avenues to escape the situation via violence and manipulation, rather than through mutual engagement (p. 25). The point of the metaphor runs deeper than merely noting the difficulty of escape from nonideal circumstances. Second, in the context of complete communication breakdown, the very pathways to human agency are blocked, so too are the pathways to moral progress and ultimately redemption, via mutual engagement.[19]

If this is true in warfare, the most extreme of nonideal contexts, it holds for more ordinary circumstances as well. The impetus to override our communicative duties, *simpliciter*, say, through the use of genuine broad-based misrepresentations, even in the face of ostensibly overriding consequential gain, and even "when an 'innocent' life is in jeopardy" (p. 44), may be unjustified. Instead, there is a nearly absolute commitment to the value of sincerity, couched in the very ideas of moral agency and then progress and redemption (p. 45). "[T]here are actions we think we cannot perform and rights that are not forfeited, even by wrongdoers, although our abstention from these actions may represent a missed opportunity to prevent harm" (p. 45).

Speech Matters is self-consciously a work of nonideal theory, that is, a discussion of the bindingness of normative requirements in the context of actual or "real-world," as opposed to idealized constructed or theoretical conditions (p. 60), so Shiffrin has license to depart from a set of liberties that one would adopt under more theoretically ideal conditions. But the circumstances of nonideal conditions cut in both directions: the distortions imposed by extreme circumstances equally well strengthen duties surrounding security of the person, as opposed to those surrounding the value of communication. Shiffrin makes a strong case for the white flag and its ties to communication and agency (pp. 24–25), but in the context of nonideal theory in which the stakes are high, one wonders if there is an equally strong argument to be made in the direction of truncating communicative duties of sincerity, based on security of the person. I suspect much would turn on which factual realities are more conducive to moral agency.

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18. *See* pp. 24–25.

19. *See* p. 37 ("There are important values . . . not confined to the wartime arena, namely: that a peaceful avenue to social and moral reconciliation and redemption always be open even to those who have strayed . . . .").

Shiffrin takes care to demonstrate the deontic foundation of her view. When speaking under ordinary circumstances, we are taken to provide listeners with reason to believe in the sincerity of communications.[20] But when others are acting wrongfully—say a mugger demanding the location of one's wallet, or an inquiring murderer asking the location of his would-be innocent murder victim whom you are hiding—the morality of the situation changes (pp. 33–34). In asking their questions, these characters do not possess any legitimate "moral expectation that communications on *this* subject will be reliable, trustworthy, or otherwise provid[ing] a warrant" (p. 35). Absent such initial good reason to believe, no moral wrong is committed in misrepresenting the truth, so long as one's misrepresentation is surgically circumscribed (p. 35).

As one would hope, the duty of sincerity does not require that one become an accomplice to murder, nor does it require that one aid or assist criminals in pursuit of their immoral ends. Shiffrin is clear: morality in truth telling does not require a wholesale revision of the criminal law of accomplice. But, interestingly, for Shiffrin, the bounds of the criminal law of accomplice (also) serve as essentially the contours of the justified suspension of the duty to refrain from misrepresentation. When it comes to communications with wrongdoers, it is not the case that anything goes—and surprisingly for many, short of being made into a criminal accomplice, one ought to remain truthful.[21] The idea is that requests for information concerning a would-be victim's location from an inquiring would-be murderer are, in a sense, void *ab initio*; since there is no legitimate expectation that one be truthful with regard to this specific subject, the duty not to misrepresent is suspended (pp. 34–35).

But this approach threatens to justify a good deal more "suspension" than Shiffrin might hope. Can it be true that the would-be murderer has no legitimate moral expectation that one be truthful in providing the location of a would-be victim, but does have a legitimate expectation that one will provide truthful information concerning the state of the criminal law when falsified information would peacefully deescalate a would-be murderer? That view is plausible enough, but fails to provide the surgically circumscribed account Shiffrin seeks, which she openly acknowledges (p. 36). Her rhetoric would appear to answer the above question in the affirmative, but her theoretical approach appears to push in the opposite direction. Here, Shiffrin draws a distinction between "misrepresenting information that would constitute assistance in the commission of a crime" and "misrepresenting information that would, in another way, stop or solve a crime" (p. 36). While duties of sincerity do not require the former, they may be strong enough to disallow the later. She holds that "one might . . . intentionally misrepresent to the murderer" at the door, but that "that justification may nonetheless

20. *See* pp. 32–33 (describing situations that have or do not have a "presumption of truthfulness").

21. *See* pp. 35–37.

have limits" that disallow telling "any and all intentional falsehoods that would be useful" in stopping the crime (p. 40).

In the first case, there is no reasonable or legitimate expectation of truthful representation, but in the second, things are different. Recall the white flag (pp. 24–25). We ought to keep pathways to communication and peaceful resolution open, even in dealing with evil aggressors; to construct a rule of general application that countenances a "truth-free zone" in dealing with wrongdoers would be to close, ex ante, the possibility of any open communication or dialog. This would leave wrongdoers in complete isolation, unable to communicate or seek knowledge that might create the circumstances of reform (p. 38).

Aptly making this abstract point concrete, Shiffrin discusses the Supreme Court's holding in *Holder v. Humanitarian Law Project*.[22] In that case, the Court upheld a statutory mandate against providing assistance to specified terrorist organizations, finding no First Amendment violation. The Court maintained that speech indicating how to use legal means to end conflicts peacefully was, in the context of the statute, properly construed as providing "assistance."[23] Shiffrin describes the decision as "shocking"; her concern is that "[i]n essence, the statute isolates those considered to be terrorists from communicative assistance, even assistance aimed at using peaceful and lawful methods to . . . implement social change" (p. 37). For Shiffrin, when the pathways to communication close, there is no deliberative way to more ideal circumstances (p. 38).

Shiffrin carves out a middle ground: duties of sincerity should not allow criminals to make us into accomplices, but it does not follow that anything, by way of *misrepresentation*, goes.[24] The matter becomes acute, however, when one affirmatively indicates that one is being truthful to a wrongdoer. "One is categorically prohibited from voluntarily offering the murderer concrete and material assistance in the commission of his crime" (p. 43). Yet "one would go very wrong by *volunteering gratuitously* to the Murderer at the Door that one does not regard the context [i.e., the duty to be truthful] as justifiably suspended and that one really is telling the truth" (p. 43). The crucial yet subtle point is this: we should devise a rule of social morality that preserves a communicative way out of difficult or extreme circumstances.[25] This requires that there be some way to voice a "last word"[26] when being believed is not just left to the chances of psychological manipulation, but that one indicates instead that one is reliable and *to be believed*, whether the

22. P. 37; 130 S. Ct. 2705, 2728–31 (2010).

23. *Humanitarian Law Project*, 130 S. Ct. at 2728.

24. P. 38 ("[T]he murderer cannot expect veridical statements that would constitute cooperation with his nefarious enterprise, [however,] the arguments for that limited justified suspended context do not justify placing [the murderer] in a wider arena of epistemic isolation.").

25. *See* pp. 45–46.

26. Thomas Nagel, The Last Word 101 (1997) (discussing ethics and a final vocabulary).

white flag in war or the utterance "I am really telling the truth" in the criminal context.[27] Absent the conceptual space for such a "last word," we and the engaged aggressor would be left in utter communicative "isolation" or "solitary confinement" (p. 38).

It is crucial that we preserve reliable communicative pathways even in the worst circumstances and even with aggressors pursuing criminal aims.[28] Still, there is more to it: Shiffrin engages with communication and what she calls "redemption." The idea here is "that a peaceful avenue to social and moral reconciliation and redemption always be open even to those who have strayed" (p. 37). She points out that "even those who engage in wrong remain members of the moral community" and that "not all forms of constraint and respect owed to agents are inapplicable to wrongdoers; and that the availability of this opportunity should not be confined to those who have fully repented . . . because achieving such repentance and recognition is usually a process that requires assistance from others" (pp. 37–38).

While Shiffrin has identified intriguing and morally salient features of these situations, I am uncertain that these features are conclusive in constructing a complete set of universally binding rules that serve full moral agency. Balancing is needed, particularly when basic security of the person itself is at stake and nonideal conditions obtain. I doubt such rule constructions could directly pattern Shiffrin's stringent duties of sincerity. Further, when there might be functional overlap, the ultimate reasons behind such rules would likely not be of the type Shiffrin urges. The normative basis of any functionally overlapping construction may well draw from an opposing direction.

B. *Duress and Promise*

Shiffrin presses her argument further still by addressing the question of fidelity in promising under duress (p. 48). If there are surprisingly stringent limits to the bounds of justifiable misrepresentations in dealing with active criminals, perhaps there are significantly more circumscribed limits to the proper function of duress in vitiating promises. Much of the art of the navigation and negotiation of life takes place under less than ideal or desirable circumstances (p. 49). Our interactions with the world can be viewed along

27. P. 42 ("If we actively . . . deliver a *declaration* to the mugger, then we do wrong to misrepresent, because we then implicitly affirm a principle that, if public, would undermine our ability to exit the suspended context. An ethical permission to misrepresent would obstruct the believability of all of us to achieve such exit.").

28. P. 31. Shiffrin describes misrepresentations about the legal status of the death penalty and the effect of the criminal's past record "to the *legal* disposition of his situation if he turns himself in now rather than proceeding . . . to commit one final murder" as "wrongful lies." P. 31. She continues: "I am terribly troubled by the negotiator misrepresenting to the hostage-taker whether his requests have been or will be met, to effect a release of hostages," and further comments, "I believe these strategic lies are out of bounds," and finally "condemn[ing] moral misrepresentations . . . express[ing] false sympathy with the hostage-taker's cause and methods, as well as misrepresentations by the police, when they attempt to elicit a confession through false expressions of solidarity." P. 31.

a spectrum of voluntarism. At one extreme, one's hands can be quite literally forced by those of another (p. 47). But one also makes choices under less than ideal circumstances ranging from cases of genuine duress to more ordinary hard choices.

Once again, Shiffrin has a brilliant—if counterintuitive—insight: even in the context of genuine duress, we have constrained choices and these choices may serve as a pathway out of difficult or extreme circumstances. Even in the face of an armed gunman asking for one's precious watch, one might negotiate settlement, say, if one attaches idiosyncratic value to the watch but can offer its market value in cash instead. Shiffrin observes that even while under genuine duress, parties may be able to engage their agency to navigate a pathway out; there is, even under such substandard conditions, room to maneuver, to actively engage, or, so to speak, to privately order a "workout."[29]

This maneuvering room, however, requires a *reformation* of the morality of promise keeping. To negotiate under duress, one must have the liberty to offer promises, which need to be taken seriously, that is, be understood as binding (p. 58). Absent the possibility of a gunman-listener with warrant to believe that an unscripted promise—that, for Shiffrin, goes beyond the gunman's initial demand, and is, in some sense, authored and advanced by his victim—is binding, the two are unable to engage their moral agency. Quite simply, absent belief in the possibility that the victim will make good on his word, he has no leverage in negotiation, agency cannot be engaged, and the parties are both left to the accidents of manipulation, force, or chance (p. 58).

This is a two-way street. When the gunman has no warrant to take victim-offered promises seriously, he too is isolated from communication and the mutual engagement of agency that, for Shiffrin, represents the rudiments of the pathway to reform and the building blocks of moral progress.[30] Picking up the tread of the earlier argument—that we must, in certain respects, remain truthful to those actively engaged in wrongdoing—Shiffrin maintains that under circumscribed circumstances, promises offered under duress should be *morally* binding.[31]

For Shiffrin, in standard circumstances, "a promise to *phi* at time *t* divests the promisor of her right to reconsider whether to *phi*, that is, her right to entertain any and all considerations that bear on whether to *phi* at *t*" (p. 65). Typically, "[t]hat right is transferred to the promisee who may demand

29. P. 58. By analogy, the United States Bankruptcy Code allows for—in fact encourages—privately structured prebankruptcy workouts, that is, *contractual* arrangements, entered into even under dire conditions. *See* 11 U.S.C. § 305(a)(1) (2012); *In re* Colonial Ford, Inc., 24 B.R. 1014, 1016 (Bankr. D. Utah 1982) ("[T]he workout is sensible. Workouts contemplate, indeed, depend upon, participation from all parties in interest, good faith, conciliation, and candor. The alternative is litigation and its bedfellows—bluff, pettifoggery, and strife.").

30. *See* pp. 25–26.

31. *See* p. 58.

or waive performance by the promisor" (p. 65). But in the context of duress, she describes the situation differently: "[T]he promisor divests her standard power fully to reconsider whether to *phi* at the time of performance. But, . . . this divestment is decoupled from a right to demand performance of the promisor by the promisee" (p. 65). She concludes that "the promise has some *moral* force, but of a different sort than the moral force of standard promises, both because the promisee is not directly empowered by the promise initiated under duress and because third parties need not enforce the initiated promise on the promisee's behalf" (p. 65; emphasis added).While persisting in attributing morally binding force to promises made under duress, yet continuing to contrast the morally salient aspects of them with promises made under standard conditions, Shiffrin holds that, "the substandard . . . formation (that block[s] the transfer of a right to demand performance of the promise) may also affect how complete the divestiture of the normative power to reconsider is," and that this "may explain why the promise has moral force but may not strictly bind the promisor to the full terms of its original content" (p. 65). So, the moral force of the promissory arrangement is retained—albeit under significantly less stringent terms than under standard conditions. A conception of the principle of fidelity obtains.

C. *Duress and Contract*

The assertion that promises offered under such circumstances should be kept naturally invites the question whether such promises should be *contractually* binding. If such promises are binding, morally speaking, should we also reform contract law to accommodate binding promissory relations? Shiffrin answers this question in the negative, noting first that in her analysis there is no right to third-party support, and second that promissory principles and contract law diverge. She holds that while a qualified principle of fidelity[32] requires that one keep such promises, the private law of contract should *not* enforce them (pp. 69–70).

There is, of course, a gap between norms of promising and contract law; there is no one-to-one mapping between the two.[33] Contract law, for example, requires consideration and does not enforce gratuitous promises; further, contractual remedies do not pattern our practices of promise keeping.[34] Consider contract law's reluctance to require specific performance[35] and the use of efficient breach.[36] Shiffrin implicitly distinguishes between normative principles that govern interpersonal relations—for example, the morality of mere promissory relations, and those that also apply to institutions, such as

32. Pp. 69–70 (describing the qualified principle of fidelity).

33. *See* p. 70.

34. *See* Shiffrin, *supra* note 2.

35. *Id.* at 722.

36. *Id.* at 730–31; *see also* Seana Shiffrin, *Could Breach of Contract Be Immoral?*, 107 MICH. L. REV. 1551 (2009).

contract law.[37] The justification for the asymmetry turns upon "a conception of the larger mission and broader meaning of contract law" (p. 70).

Because contract law is in no small measure an institutional, as opposed to merely an interpersonal, matter,[38] differing normative principles or values apply.[39] In contrast to merely interpersonal promissory relationships, "[c]ontract law is the primary social *institution* dedicated to both the facilitation of promises as well as their enforcement, while *simultaneously* operating as one component of our *joint project* of creating social resources and distributing them in a fair manner" (p. 70; emphases added). Contrasting contract law with promising, Shiffrin writes, "contract law should accommodate the ability of citizens to fulfill their duties and live moral lives" (p. 70); but, the law of duress "should not prohibit or interfere with performance by willing promisors" (p. 70). She continues, "[b]ut, were the legal *institution* of contract to enforce promises made under duress . . . it would throw the weight of the community behind the aims of the coercer, even though the moral argument for fidelity does not establish any moral right or claim of the promisee to performance" (p. 70; emphasis added).

This qualified promissory fidelity and the corresponding account of the divergence between promise and contract, however, may not sit well with libertarians or genuine proponents of the autonomy or ex post conception of contract law, in which there is a demand for a one-to-one pairing between contract law and promise or other genuine deontic requirements.[40] But, Shiffrin works carefully to justify the divergence; she holds that because there is no right on behalf of the "victimizer" to demand performance and there is no right to third-party assistance, analogously, there is no right to contractual enforcement.[41] While this qualified-promise explanation goes some distance in meeting the "will theorist," the view would still appear to give primacy to ex ante theories of contract law—those most antithetical to the autonomy or "contract as promise" account of contract law.[42] What the contractual status of Shiffrin's "qualified promises" offered under duress might be in the hands of a committed "will" or "autonomy" theorist remains an open question. One wonders if the ex post theorist would have grounds for objection, were such arrangements taken to be contractually or

37. *See* p. 70.

38. Shiffrin, *supra* note 2, at 730–31; *see also* Shiffrin, *supra* note 36.

39. *See* p. 70.

40. Charles Fried, Contract as Promise: A Theory of Contractual Obligation 17 (2d ed. 2015).

41. *See* pp. 70–71.

42. *See, e.g.*, Richard A. Posner, Economic Analysis of Law 152–55 (9th ed. 2014); Kevin A. Kordana & David H. Tabachnick, *Rawls and Contract Law*, 73 Geo. Wash. L. Rev. 598, 615–16 (2005) (maintaining that Rawlsianism is consistent with the ex ante conception of contract law, but conflicts, at the level of principle with the ex post conception of contract law); Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 Yale L.J. 472 (1980); Samuel Scheffler, *Distributive Justice, the Basic Structure and the Place of Private Law*, 35 Oxford J. Legal Stud. 213 (2015) (discussing Rawlsian distributive justice and private law's role in the basic structure of society).

otherwise legally binding, and if so, whether he or she would persist in considering such arrangements—even if in a qualified sense—actually promissory as Shiffrin does?

Below, I discuss this divergence while contrasting it with an account of promising and private ordering, rooted in ideals of fairness and distributive justice associated with a Rawlsian conception of justice; interestingly, a starting place that Shiffrin herself at times embraces,[43] although she ultimately departs from it at the conceptual level.[44] Indeed, one way to interpret Shiffrin is as providing a stridently Kantian (pp. 49–50) or "pre-institutional," liberal alternative to Rawls[45] or even a corrective to Rawlsianism. In contrasting *Speech Matters* with the outline of a Rawlsian distributive approach, I do not intend a criticism. Rather, I intend to point out the distinct manner in which these two foundationally deontic positions diverge, even given similar starting positions.[46]

Shiffrin discusses the divergence of contract law from promise as a matter of our de facto promissory practices, on one hand, and the positive law, on the other; arguing that given the divergence, contract law still ought to instrumentally accommodate certain aspects of moral life.[47] In this view, morality should, in some measure, affect contract law by articulating qualified-normative demands that contract law ought to accommodate. But *Speech Matters* does not begin with de facto morality in the context of promising. Shiffrin aims to significantly *reform* our practice of promising to allow for a "qualified" principle of fidelity to be binding (pp. 69–70). *Speech Matters* does not, to be clear, depart from Shiffrin's earlier position. Instead, she simply finds little reason for the *institution* of contract law, in its capacity as

43. Shiffrin does not name Rawls specifically, but invokes the Rawlsian methodology of understanding certain basic liberties as taking "lexical priority." *See* p. 26.

44. P. 168 (noting, in the context of *accommodation*, "I will situate the problem within a framework that is, roughly, Rawlsian, although the Rawlsian framework is essential neither to the ultimate conception nor to the solution to the problem").

45. For Rawls, basic liberties guaranteed by the first principle of justice do not pattern Kantian comprehensive moral doctrine or Kantian notions of autonomy of the kind Shiffrin invokes. Consider H.L.A. Hart's remarks on Rawlsian basic liberties, that such liberties may "refer[ ] not to 'liberty' but to basic or fundamental *liberties*, which are understood to be legally recognised and protected from interference," H.L.A. Hart, *Rawls on Liberty and Its Priority*, 40 U. CHI. L. REV. 534, 538 (1973), and correctly diagnosing "important differences between Rawls's doctrine of liberty and Kant's conception of mutual freedom under universal law." *Id.* at 538 n.19. Rawls embraces Hart's suggestion: "Hart noted, however . . . , that in *A Theory of Justice* I sometimes used arguments and phrases which suggest that the priority of liberty as such is meant; although, as he saw, this is not the correct interpretation." John Rawls, The Basic Liberties and Their Priority (Apr. 10, 1981), *in* 3 THE TANNER LECTURES ON HUMAN VALUES 1, 6 (Sterling M. McMurrin ed., 1982).

46. Rawls is committed to Kantianism, but his deontology does not take the form of Shiffrin's. For Rawls, the Kantianism is found in the construction of the original position, not in the practical application of the two principles of justice. *See* Thomas Nagel, *Justice and Nature*, 17 OXFORD J. LEGAL STUD. 303, 306 (1997) ("Rawls's approach is theoretically deontological in foundation, though its development leads in a consequentialist (but nonutilitarian) direction.").

47. Shiffrin, *supra* note 2, at 709.

an instrument of social justice, to accommodate her counterintuitive reformist account of *interpersonal* promissory relations.[48] One wonders if the very reasons she takes to defeat the moral demand for accommodation of the latter, also defeat the plausibility of the bindingness of the former.

III. Individuals and Institutions

A. *Promises and Fidelity*

When a principle of fidelity, that is, a principle enjoining the obligation to keep one's promises, is invoked, a certain form of normative complexity arises. This complexity cannot be avoided by distinguishing between principles for individuals and principles for institutions and relying on reasons, however plausible, for the maintenance of a gap between the two, as I explain, albeit in somewhat Rawlsian terms. The very practice of promising is *itself* a social institution.[49] The institution of promise keeping is a set of rules that delineates which of our commitments are morally binding obligations; the institution defines the very terms of the answer to the question of what counts as a promise; further and importantly, the principle of promissory fidelity, the very demand that one ought to keep one's promises, is binding or regulatory only if predicated on an antecedently just set of promissory rules.[50] It is essential that rules constitutive of the practice of promising, on which any principle of promissory fidelity is predicated or binding, be just.[51]

Setting aside for a moment questions of contract law, the question of promissory fidelity becomes acute in any promissory scheme that takes non-contractual (that is, non-legally binding) economic promissory obligations or economic transactions to be *morally* binding. As noted above, Shiffrin recognizes an analogous point: "[c]ontract law is the . . . social institution dedicated to . . . the facilitation of promises . . . while simultaneously operating as one component of our joint project of creating social resources and distributing them in a fair manner" (p. 70; emphases added). But when parties make promises over details of ownership and invoke economic exchange, the very institution of promising itself, in conjunction with contract law, property, and the system of taxation and transfer, is a component of the complete set of economic institutions.[52] When property and the details of ownership are at stake, it is not at all clear that one may, without normative

48. *See* p. 70.

49. John Rawls, A Theory of Justice 303 (rev. ed. 2003).

50. *Id.* at 303–04.

51. *Id.*

52. P. 70. In discussing distribution, Shiffrin acknowledges that contract law may play a role in *conjunction* with property law and the system of taxation, but excludes the practice of promising. "[C]ontract law itself is not the major offender here in failing to instantiate distributive justice. That finger should be pointed in the general direction of property law and our tax system." P. 70; *cf.* Rawls, *supra* note 49, at 304 ("It must suffice to remark that the principles of justice apply to the practice of promising in the same way that they apply to other institutions.").

objection, disconnect the rules governing promises so distinctly from rules governing the details of ownership and exchange.[53]

B. *Shiffrin's Reforms and Principles for Just Institutions*

Here, a distinction between principles for institutions and principles for individuals is instructive. Rawls, for example, introduces his original position-derived[54] two principles of justice that govern social institutions.[55] But he also discusses moral requirements that regulate the conduct of individuals, which he describes as natural duties.[56] To elaborate briefly, Rawls's first principle of justice, understood to take lexical priority over the second, constructs a system of equal basic liberties—for example, security of the person, the right to hold personal property, freedom of thought and conscience, freedom of assembly, freedom from arbitrary search and seizure—sufficient to the full exercise of what Rawls—and Shiffrin—both describe as the two moral powers.[57] Rawls's second principle of justice requires that *all* economic inequalities be arranged to maximize the position of the least well-off, subject to an equal opportunity constraint.[58] For Rawls, then, the economic details of expansive bodies of property law and ownership, beyond mere personal property, systems of taxation and transfer, the law of contract and economic exchange, the law of business organization, intellectual property, etc., are properly understood as second-principle economic constructions.[59] Rawls further distinguishes these two principles from another set of original position-derived principles for individuals, the natural duties, which I return to below. But first, I return to Shiffrin and the duty of fidelity in promise keeping.

One wonders if Shiffrin misdraws the line between principles for individuals and principles for institutions, characterizing the practice of promising as subject to the former, as opposed to the latter. In my view, the rules governing the practice of promise keeping—if it is to exist—is a function, not of duties for individuals, but principles for institutions, in Rawlsianism,

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53. *See* p. 70.

54. John Rawls, Justice as Fairness: A Restatement 14 (Erin Kelly ed., 2001) (describing Rawls's original position as an idealized social-choice scenario in which representatives select political and economic principles so as to maximize their self-interest under conditions of less than perfect knowledge from behind a veil of ignorance).

55. *Id.* at 42–43 ("[First Principle:] Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and [Second Principle:] Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society (the difference principle).").

56. Rawls, *supra* note 49, at 293–301.

57. *See* p. 168; Rawls, *supra* note 54, at 18–19.

58. Rawls, *supra* note 54, at 42.

59. *Id.* at 42–43.

the two principles of justice.[60] But now the matter becomes further complicated and is not merely one of a textual mislocation on Shiffrin's part; once one acknowledges that the practice of promising is itself subject to principles for institutions, namely, the two principles of justice, one must recognize that *any* economic aspects to the practice of promising are to be constructed instrumentally, in service of the maximizing demand of the second principle of justice, in conjunction with all other economic constructions.[61]

My concern is that even Shiffrin's qualified principle of fidelity in the context of duress would not survive this Rawlsian construction. This is particularly true when the promise in question involves economic exchange or alterations in the ground rules governing the details of ownership. For example, consider "voluntarily" authoring and offering up a promise to switch—while threatened at gun point—terms of ownership, say, between property and liability rule protection;[62] the just scheme of rules governing promissory relations, aimed at maximizing the least well-off, is just simply unlikely to admit of such contractualist latitude. Although Shiffrin operates in nonideal theory, it is unclear that this will turn the trick: her analysis of the promissory rule is too much about agency and voluntarism and not enough about the goal of distributive or economic justice.

C. *Duress and Institutional Design*

Now—to be clear—this does not mean that Shiffrin's promissory rule could not ultimately be adopted in a Rawlsian scheme. As noted above, there could be functional overlap with the rule Shiffrin advocates, but if her rule were so adopted, it would be adopted for reasons different from those she offers. Like Shiffrin's view, Rawlsianism is, at its foundation, deontic. But for Rawls, the deontology is found in the assumptions that construct the original position. Moving forward from the original position, the two principles of justice, once adopted, operate in tandem to construct the complete scheme of rules constitutive of social institutions[63]—inclusive of promise practices—in an instrumentalist fashion.[64] Interestingly for Rawls, were a promissory rule akin to Shiffrin's to be selected, its adoption would be a

60. *See* Rawls, *supra* note 49, at 304 ("I shall not regard promising as a practice which is just by definition . . . . There are many variations of promising just as there are of the law of contract. Whether the particular practice as it is understood . . . *is* just remains to be determined by the principles of justice." (emphasis added)).

61. *See id.* at 303–04 ("In general, the circumstances giving rise to a promise and the excusing conditions must be defined so as to preserve the equal liberty of the parties and to make the practice a rational means whereby men can enter into and stabilize *cooperative agreements for mutual advantage*." (emphasis added)).

62. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089, 1105–10 (1972) (drawing a distinction between liability- and property-rule protection).

63. *See* Rawls, *supra* note 54, at 42–43.

64. *See* Rawls, *supra* note 49, at 304

function of the very consequentialist reasons that Shiffrin acknowledges but ultimately disavows.[65]

Shiffrin asks, in effect, that in selecting between promissory schemes, we pick among at least two, our present scheme that does not allow for the moral enforcement of promises offered under duress versus her reformist scheme that does.[66] But what is striking is the manner in which one would reason in making this decision, were one a Rawlsian. One might, for example, evaluate Shiffrin's reformist scheme along the first principle dimension, in the context of security of the person. One would reason that Shiffrin's provision would allow for the consequential benefits of privately ordered "workouts" or "self-rescue" in case of duress, but at the same time recognize that the rule would ex ante create perverse incentives to criminal conduct. This is quite distinct from Shiffrin's direct deontic appeal to *pre*institutional Kantian conceptions of mutual agency.

D. *Individuals and Institutions*

Return now to the normative principles for individuals mentioned above. For Rawls, principles for individuals are derived in the original position.[67] This is, however, quite unlike Shiffrin's view where such duties are understood as Kantian *pre*institutional duties.[68] Rawls provides an example of how such duties are constructed. By way of example, he discusses the duty to help "another when he is in need or jeopardy, provided that one can do so without excessive risk or loss to oneself."[69] This duty is adopted in the original position, not for preinstitutional Kantian reasons of the sort Shiffrin embraces, but instead because representatives in the original position reason in consequentialist fashion that ex ante the duty would generate individual benefit at limited cost.

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65. Pp. 1, 26, 49–50. By way of contrast, for Rawlsianism, Shiffrin's account may be too reliant upon her commitment to comprehensive Kantian *pre*institutional notions of autonomy and responsibility, as opposed to *post*institutional liberty constructed in service of distributive principles of justice. For a discussion of the distinction between pre- and postinstitutional conceptions of justice, see Kevin A. Kordana & David H. Tabachnick, *Taxation, the Private Law, and Distributive Justice*, Soc. Phil. &SC Pol'y, July 2006, at 142, and in the context of private ordering, see Kevin A. Kordana & David H. Blankfein Tabachnick, *The Rawlsian View of Private Ordering*, Soc. Phil. & Pol'y, July 2008, at 288.

66. *See* pp. 70–73.

67. George Klosko, *Political Obligation and the Natural Duties of Justice*, 23 Phil. & Pub. Aff. 251, 254 (1994); *see also* Rawls, *supra* note 49, at 93 ("I have considered the principles which apply to institutions or, more exactly, to the basic structure of society. It is clear, however, that principles of another kind must also be chosen, since a complete theory of right includes principles for individuals as well.").

68. *See* Christopher Heath Wellman & A. John Simmons, Is There a Duty to Obey the Law? 156 n.38 (2005) ("[T]he natural duties actually discussed by Rawls are not 'natural' in any very strong sense, but are only the 'postinstitutional' moral duties that original position reasoners would select to bind themselves in their subsequent interactions. As such, much of the discussion to follow may seem to be aimed at a Rawls who is more Kantian than Rawls actually wished to be.").

69. Rawls, *supra* note 49, at 98.

Rawls, like Shiffrin, addresses the divergence between principles for individuals and principles for institutions, but the two differ. For Rawls, the original position-derived duties for individuals must be given content by the principles of justice.[70] The principles of justice are to be selected in the original position, first. "The important thing is that the various principles are to be adopted in a definite sequence . . . ."[71] Further, "the sequence . . . reflects the fact that obligations presuppose principles for social forms" and that duties for individuals "presuppose such principles."[72]

Because the duties that apply to individuals require normative property and economic baselines drawn from the principles of justice, the natural duties cannot be entirely divorced from principles of justice. There is a conceptual connection between duties for individuals and principles for institutions. This becomes clear where Rawls discusses and rejects the *utility principle* as a principle for the regulation of individual duties on the basis of the possibility of conflict with the two principles of justice. The two sets of principles operate in tandem.[73] So duties for individuals, although derived separately in the original position, are importantly *dependent* upon the antecedent property baselines and details of ownership, as well as the scheme of legal and political institutions constructed by the two principles of justice. Rawls discusses the duty not to injure and the duty not to harm the innocent; what exactly constitutes injury and harm is determined postinstitutionally by the two principles of justice.[74] This would hold true for the bounds of, any original position-derived duty of sincerity or any prohibition on lying.[75]

The preceding discussion may illuminate the plausibility of stringent duties against lying that Shiffrin advocates. Consider again the bounds of an individual duty not to lie to wrongdoers engaged in criminal activity. One

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70. For a discussion of natural duties and the private law of tort and the principled conflict with the value of corrective justice in a Rawlsian scheme, see Kevin A. Kordana & David H. Tabachnick, *On Belling the Cat: Rawls and Tort as Corrective Justice*, 92 VA. L. REV. 1279, 1290 (2006).

71. RAWLS, *supra* note 49, at 93.

72. *Id.*

73. *See id.* at 294 ("[T]he choice of principles for individuals is greatly simplified by the fact that the principles for institutions have already been adopted. The feasible alternatives are straightway narrowed down to those that constitute a coherent conception of duty and obligation when taken together with the two principles of justice . . . . [L]et us suppose that the persons in the original position, having agreed to the two principles of justice, entertain the choice of the principle of utility . . . as the standard for the acts of individuals. . . . [This] would lead to an incoherent conception of right. The criteria for institutions and individuals do not fit together properly.").

74. *See* RAWLS, *supra* note 54, at 42–43.

75. Note, for Rawls, the very meaning of these terms, importantly, is not understood in ordinary terms or language, because the inclusion conditions of these concepts are constructed by the principles of justice. Rawls writes that "the concept of something's being right is the same as, or better, may be replaced by, the concept of its being in accordance with the principles that in the original position would be acknowledged to apply to things of its kind." RAWLS, *supra* note 49, at 95.

may share Shiffrin's sentiment that not just "anything goes" (pp. 36–37). But, one might be skeptical of the narrow metes and bounds of permission she grants, given that any such stringent duty not to lie would need to be independently cost justified in the original position and also be consistent with a property construction, instrumental to the maximizing demand of the second principle of justice. In Shiffrin's discussion, security of the person and economic arrangements loom large, and the conceptual space for her stringent constraints is unlikely to exist (pp. 186–99).

Shiffrin's position also diverges from a Rawlsian account in her discussion of freedom of speech in the university and university-managerial discretion and authority. In discussing her view of the relationship between efficiency and the freedom of speech, Shiffrin objects to Robert Post's invocation of *Connick v. Myers*[76] and his account of managerial efficiency in government, public, or university operations as "presuppos[ing] criteria of success that valorize smooth and quickly executed hierarchical relations" (p. 208). She argues that such efficiency, however useful in business organizations, is not suited to public democratic institutions including universities.[77] Shiffrin contrasts Post's position with her presumably more normatively laudable democratic approach in which the university "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" (p. 212). But Post, problematically for Shiffrin, distinguishes between categories of First Amendment coverage, distinguishing between democratic "legitimacy" (for example, the public square) and mere democratic "competence" (for example, the university classroom).[78] The former domain is understood to be significantly more open and free, while the latter is, of necessity, comparatively less protective of freedom of expression, given the need for judgment, regulation, and evaluation in the imparting of degree-worthy knowledge, sufficient to democratic competence. Correspondingly, Post maintains that a university might constrain freedom of expression, as compared with the freedom of expression allowed in the public square (p. 212).

By way of analogy, consider a Rawlsian account of categories of rules governing expression in the advertising context. Here, one must distinguish among (1) the liberties surrounding *basic* "political"[79] speech and (2) nonbasic (that is, nonconstitutional), second principle of justice, liberties surrounding (i) equal opportunity in, say, advertising for jobs, (ii) the liberties and regulations surrounding, say, advertising in the context of consumer information, and (iii) market-strategic advertising. In a Rawlsian view, even

76. 461 U.S. 138 (1983).

77. *See* pp. 208, 211–12.

78. *See* Robert C. Post, Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State (2012).

79. Rawls, *supra* note 45, at 77.

the right to *basic* political speech must be adjusted to construct a well-balanced "family"[80] of basic liberties and, of course, not all speech is basic.[81] So crucially, the principles of justice apply differently to different forms of speech.[82] To continue with the advertising example, the first principle of justice may protect some *political* advertising, although clearly in a nonabsolute fashion. Other advertising speech would be a function of the second principle of justice's opportunity constraint, and the bounds of liberties concerning commercial advertising in (1) the dissemination of crucial consumer information[83] and (2) "market-strategic"[84] advertising are constructed by the difference principle, maximizing the position of the least well-off.[85] Now, return to the dispute between Shiffrin and Post over efficiency in the university. By analogy with advertising, the rules protecting even political speech in a university must find a home in a balanced family of basic rights, none of which is absolute. Further, even when certain components of university function or classroom speech are political in nature, it is certainly not the case that *all* of it is political or basic. Indeed, for Rawlsianism, many of the rules governing speech are second-principle-of-justice constructions, thereby regulated by distributive, as opposed to First Amendment, concerns.[86]

Institutions such as universities have a significant impact on the distribution of primary goods (for example, consider universities' tax-exempt status, acceptance of government-subsidized student loans, impact on well-being via essential medical research, and the cultivation of human excellence

80. *Id.* at 72 ("[T]he basic liberties constitute a family, and that it is this family that has priority and not any single liberty by itself."); *id.* at 74. ("Political speech may be regulated in order to preserve the fair-value of the political liberties. . . . These regulations do not restrict the content of political speech and hence may be consistent with its central role. . . . [T]he mutual adjustment of the basic liberties is justified on grounds allowed by the priority of these liberties as a *family*, no one of which is absolute.").

81. *Id.* at 80.

82. *Id.* at 83 ("[T]he protection for different kinds of advertising varies depending on whether it is connected with political speech, or with maintaining fair equality of opportunity, or with preserving a workably competitive and efficient system of markets.").

83. *Id.* at 80. Rawls contrasts dissemination of information via advertising with political speech: "The law may impose penalties for inaccurate or false information, which it cannot do in the case of freedom of thought and liberty of conscience" and too "for the protection of consumers the law can require that information about harmful and dangerous properties of goods be clearly described on the label." *Id.* Further, the law may render it "forbidden for firms, or for trade and professional associations, to make agreements to limit or not to engage in this kind of advertising," and "[t]he legislature may require, for example, that prices and accurate information about commodities be readily accessible to the public." *Id.* Rawls concludes that "[s]uch measures help to maintain a competitive and efficient system of markets and enable consumers to make more intelligent and informed decisions." *Id.*

84. *Id.*

85. *Id.* at 81 ("Much of this kind of advertising is socially wasteful . . . [t]he funds now devoted to [it] can be released for investment or for other useful social ends.").

86. *Cf.* Renee Newman Knake, *Legal Information, the Consumer Law Market, and the First Amendment*, 82 Fordham L. Rev. 2843 (2014) (discussing an expansive conception of First Amendment protection).

and talent) and are subject to the two principles of justice. But the *revised first principle* requires *merely* sufficient basic liberty, the measure of freedom of speech necessary to construct a complete scheme of basic liberties sufficient to the full exercise of the two moral powers.[87] Now it is true, as Rawls notes, that the structure of the university is not to be "read off" the two principles of justice;[88] the rules of such structure must find a home in the complete scheme of legal and political rules that instrumentally serve the two distributive principles.[89] There is room here for an *instrumentalist* division of labor between various institutions.

Still, when there is a demand that the overall scheme of legal and political rules *maximizes* the position of the least well-off, Shiffrin cannot be so certain that, qua justice, Post is off base once *sufficient* basic liberty is established through social, political, and legal institutions that are inclusive of political speech. In this account, it is not clear that Post is merely valorizing or presupposing efficiency; institutional waste—even in a university—is a hazard to a scheme that *must* maximize the position of the least well-off. On the other hand, we may be able to pick up the "slack" in primary goods in other areas. But given universities' size and function, it would be odd to think that a managerial strategy, like the one Post advocates, sensitive to protection of adequate freedom of expression, would be obviously normatively objectionable because it requires a measure of economic efficiency.

It is true that the first principle of justice would rule out *certain* managerial strategies, for example, those requiring strict wealth maximization, and would likely rule out any general prohibition on compelled speech or preordained protection of commercial speech. The second principle of justice would also preclude a wide range of managerial strategies. But it is not clear that a measure of efficiency highly constrained by an adequate scheme of balanced First Amendment values, compatible with basic liberty sufficient to the full exercise of the two moral powers, is objectionable qua Rawlsian justice.

To be clear, Shiffrin does not purport to present a Rawlsian position. Instead, she shares in several Rawlsian starting points, but ends with distinct conclusions.[90] In drawing the contrast, I hope to illuminate the difficulty involved in the construction of a complete scheme of social, political, and legal institutions, as well as duties for individuals, while holding Shiffrin's stringent normative commitments constant.[91]

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87. Kordana & Tabachnick, *supra* note 70, at 1301; *see* RAWLS, *supra* note 54, at 18, 42–43 (discussing the two moral powers and the revised first principle of justice).

88. Kordana & Tabachnick, *supra* note 70, at 1307.

89. *Id.*

90. Scholars have discussed Shiffrin as a "neolibertarian." *See* JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY 10–13 (2012) (distinguishing between Rawlsian liberalism and neolibertarianism); *see also* ANDREW KOPPELMAN WITH TOBIAS BARRINGTON WOLFF, A RIGHT TO DISCRIMINATE? 63 (2009) (characterizing Shiffrin as "neolibertarian").

91. My concern is a general problem of institutional design, namely, that independent metrics of normative appraisal or isolated stringent normative demands can conflict with

Shiffrin takes care to address human weakness in her discussion of accommodation; but she backs off her strident admonishment of insincerity in favor of the accommodation of human or psychological failings out of charity or kindness.[92] But given the stringency of the moral demand for sincerity, the normative force of charity or generosity becomes unclear. Even when saving lives may be at stake, misrepresentation is to be traded in favor of sincerity. It is hard, then, to find the normative grounds for institutional rules that trade sincerity away in favor of benevolence.

In contrasting Shriffin's view with Rawlsianism, there is a third possibility, which sculpts an appealing normative path between Kantian near-absolutism and utilitarianism. This view shares in many of Shiffrin's initial deontic commitments but ultimately provides a framework for blending and balancing a plurality of values that serve as preconditions for moral agency, while attending to justice in economic distribution.

Shiffrin does discuss social, political, and legal institutions in the context of policing and the university, applying her earlier views on lying to these institutions. The discussion is rich and unsurprisingly forthright in admonishing lying in police interrogation, law enforcement's misrepresentation of basic legal rights (pp. 195–96), lying to research subjects, and any university practice of suspending a duty of sincerity in efforts to obtain significant human welfare-oriented medical or scientific gain (p. 217). While Shiffrin's concern that the status quo embodies too much misrepresentation may be well-taken, it is a little less clear exactly how, for Shiffrin, institutional rules in this regard should be designed and what the precise bounds of any "suspension" of duty should be (p. 186).

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broader maximizing principles of justice or the justified scheme of political and legal rules constructed by such principles. *See, e.g.*, LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE (2002) (discussing independent metrics of fairness in taxation); David H. Blankfein-Tabachnick, *Intellectual Property Doctrine and Midlevel Principles*, 101 CALIF. L. REV. 1315 (2013) (arguing that midlevel intellectual property principles are insufficient to explain or predict the outcomes of cases, and that such principles conflict with certain foundational accounts of property); George P. Fletcher, *Corrective Justice for Moderns*, 106 HARV. L. REV. 1658, 1669 (1993) (book review) (discussing the value of corrective justice in the context of the institution of tort law and noting that corrective justice "is not an *absolute* demand of justice and morality," and that it "is not immanent in the tort system . . . . [n]or does it provide a bulwark against economic and regulatory reasoning in tort law" (emphasis added)); *cf.* Robert P. Merges, *Foundations and Principles Redux: A Reply to Professor Blankfein-Tabachnick*, 101 CALIF. L. REV. 1361 (2013) (arguing that the four midlevel intellectual property principles—proportionality, efficiency, nonremoval of public domain enhancement, and dignity—are consistent with foundational commitments).

92. Pp. 163–64 (arguing that, in cases of "personal insecurity, coupled with negligence toward others and insufficient respect for the importance of maintaining the social fabric and its strength," Shiffrin holds that "accommodating such flaws through forbearance from legal rebuke is a way publicly to manifest compassion and understanding for one another's shortcomings. In so doing, we demonstrate the strength of our inclusivity" (footnote omitted)).

Conclusion

Speech Matters is a superb book. This Review articulates several of its intellectually rich and carefully argued themes while identifying fault lines in its qualified absolutism, suggesting that the view may have difficulty finding a conceptual home in a complete scheme of moral, social, and political rules that themselves serve some of the very values Shiffrin initially embraces. That said, even if one stops short of Shiffrin's avowed near-absolutism, one is absolutely convinced that she has isolated precisely what is at stake, and the morally salient aspects of the world that might be traded away if one does not follow her all the way to her conclusions. *Speech Matters* will spark significant debate among scholars of philosophy, the private law, freedom of expression, and institutional design. This important work provides a rare opportunity to engage with the careful and keenly morally sensitive ideas, insights, and arguments of one of the very best legal theorists we have.