

Spring 2017

Living Up to and Under Norms

Stephen R. Galoob

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

Recommended Citation

Stephen R. Galoob, *Living Up to and Under Norms*, 52 Tulsa L. Rev. 467 (2017).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol52/iss3/12>

This Book Review is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

LIVING UP TO AND UNDER NORMS

Stephen R. Galoob*

SEANA VALENTINE SHIFFRIN, *SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW*. (PRINCETON UNIVERSITY PRESS 2014). PP. 248. HARDCOVER \$35.00. PAPERBACK \$24.95.

Seana Valentine Shiffrin is one of the most insightful philosophers of our time. Her book *Speech Matters: On Lying, Morality, and the Law* is a collection of essays on a wide range of topics, such as the value of free speech, the wrongfulness of lying, the ethics of communication, and the nature of professional responsibilities.

According to Shiffrin, the essays in *Speech Matters* build on common themes while retaining “rough independence” from each other.¹ That said, several ideas inform *Speech Matters* and run throughout Shiffrin’s other major works. Part I describes the way that these ideas are utilized in *Speech Matters*. Part II identifies a distinctive insight that Shiffrin makes in *Speech Matters* and elsewhere. Put briefly, Shiffrin envisions a crucial difference between the standards for living up to legal, political, and moral norms and the expectations that are appropriate of those who live under such norms. Shiffrin’s position, roughly encapsulated, is that living up to legal and political norms requires a kind of allegiance, while legal, moral, and political principles preclude the state or others from demanding or expecting such allegiance. Shiffrin’s insights in *Speech Matters* apply far beyond the topics discussed in the book.

I. SHIFFRIN ON AGENCY, INTERNALIZATION, AND ACCOMMODATION

Rather than comprehensively summarizing *Speech Matters*, my goal is to examine how three specific topics are analyzed in the book: moral agency, the internalization of norms, and the limits to what states and others can demand of agents. Shiffrin addresses the importance of moral agency most explicitly in chapters 1 and 3. Shiffrin’s account of the internalization of norms is most prominent in Chapters 2 and 6. Chapters 4 and 5 describe the limits of what may be expected of those who

* Stephen Galoob is Associate Professor of Law at the University of Tulsa College of Law. Thanks to Chad Flanders, Andrew Gold, Ethan Leib, and Seana Shiffrin. This work was supported in part by a Dean’s summer research grant from the University of Tulsa College of Law.

1. SEANA VALENTINE SHIFFRIN, *SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW* (2014) [hereinafter *SPEECH MATTERS*], at 4.

live under norms. While this overview leaves out many of Shiffrin's most important contributions in *Speech Matters*, it clarifies what, in Part II, I call "Shiffrin's Insight."

A. Moral Agency

Shiffrin starts from two basic ideas: first that developing one's moral agency is an important goal for any person and second that providing practices and opportunities for people to develop their agency is a paramount political goal.² Someone's moral agency can only develop under specific circumstances—for example, where she has opportunities to interact with others and structures that facilitate these interactions.³ Communicative institutions and practices are thus part of the "foundation of our moral agency."⁴

Concern with moral agency informs Shiffrin's discussion of communication ethics. In Chapter 1, "Lies and the Murderer Next Door," Shiffrin analyzes why lying is wrong, orienting her discussion around Immanuel Kant's conclusion that it would be wrong "to lie to a murderer who asked us whether a friend of ours whom he is pursuing has taken refuge in our house."⁵ Unlike other deontological strategies for analyzing the wrongfulness of lying, Shiffrin's two-step argument does attempt to locate properties that make lying a *sui generis* wrong. Rather, she first identifies a core value of truthful communication: namely, that it is part of communicative practices that provide necessary opportunities for people to develop their moral agency (for example, by enabling people to represent their own mental states, to form reliable pictures of the world, and to enter into valuable relationships with others).⁶ Then, she examines how a lie might frustrate the realization of this value. A lie can harm others by deceiving them. Yet a lie can be wrong apart from its deceptiveness, for example where it reflects a "maxim for action that could not serve as a public principle of action, because it would undermine the rational reliability of warrants altogether and with it, our ability to pursue our joint moral ends."⁷ This feature makes lies a form of subversion: the lie flouts communicative norms and, in so doing, subverts shared communicative practices, regardless of the lie's empirical effect on those practices. Subversion violates what Shiffrin sees as a generic duty to secure and protect communicative practices, given their integral role in the development of human agency.⁸ Shiffrin's explanation of the wrongfulness of lying to the murderer at the

2. *Id.* at 26 (contending that "the fundamental responsibility to secure and protect the individual and social conditions under which we possess [moral] agency and under which we may understand and acquit our moral duties exerts a lexical priority" over other social goals.)

3. *Id.* at 104 (emphasizing the importance of "externalizing mental content and interacting with other thinkers as a method of *developing* one's mental capacities.").

4. *Id.* at 26.

5. *Id.* at 5 (quoting IMMANUEL KANT, *On A Supposed Right to Lie from Philanthropy*, in PRACTICAL PHILOSOPHY 611 (Mary Gregor ed., trans., 2005) (8:425) (internal citations omitted).

6. SPEECH MATTERS, *supra* note 1, at 9-12.

7. *Id.* at 24.

8. *Id.* at 8 ("The conditions of forging moral progress together seem to depend upon securing and protecting the lines of communicative trust.").

door is based on the duty to secure and protect these valuable social practices,⁹ a duty that seemingly generalizes to any social institution or practice whose operation is integral to moral agency.

The vital role for social institutions and practices in the development of moral agency also underlies Shiffrin's case for free speech in Chapter 3, "A Thinker-Based Approach to Freedom of Speech." According to Shiffrin, free speech is an essentially practice-based phenomenon: free speech practices¹⁰ play a "foundational and necessary (though not sufficient) role in ensuring that citizens develop the capacity for moral agency and have the opportunities and information necessary to discharge their moral duties."¹¹ Thus, the most fundamental political argument for protecting free speech arises "both out of respect for the fundamental moral rights of the person and because a well-functioning system of social cooperation and justice presupposes that the citizenry, by and large, have active, well-developed moral personalities."¹² According to Shiffrin, the "thinker-based" approach does not contradict predominant alternative theories (such as those that justify free speech based on the fundamental interests of listeners, the interests of speakers, the tendency of free speech to elicit truth, or the importance of free speech to democracy). Rather, it is bedrock on which each of these alternative theories can be justified.¹³

Shiffrin's "thinker-based" approach justifies more than the institutions, practices and norms of free speech. Like the duty of non-subversion, the "thinker-based" approach seems to apply to any social institution or practice that is integral to the development of moral agency, whether informal (like the practice of promising) or formal (like the legal institution of contract and universities).¹⁴ The value of moral autonomy both establishes the main point of these institutions and grounds duties for those who live under them.

9. On Shiffrin's "content-based" approach, whether it is wrong to misrepresent one's mental content to the murderer at the door depends on what, exactly, one misrepresents. Misrepresenting information "about the victim's location" is not wrongful, since speaking accurately and sincerely would "assist the murderer. . . in carrying out a crime." *Id.* at 32. However, "a permission to misrepresent *tout court* to the Murderer at the Door would place him in something like solitary confinement without a marked exit." *Id.* at 38.

10. For the sake of exposition, suppose that practices and institutions are constituted in part by norms. *See, e.g.,* Michael Rescorla, *Assertion and its Constitutive Norms*, 79 *PHIL. & PHENOM. RES.* 98, 101 (2009) ("[A] norm is constitutive of a practice [if and only if] one must obey the norm to engage correctly in the practice."). Norms are clusters of normative attitudes regarding normative principles that are accepted within practice or institution and "a significant proportion of" the participants in that practice or institution "have certain attitudes" that track (and are prompted by) the content of the normative principle, under standards of publicity. *See* Stephen R. Galoob & Adam Hill, *Norms, Attitudes, and Compliance*, 50 *TULSA L. REV.* 613, 615 (2015) (*citing* GEOFFREY BRENNAN, ET AL., *EXPLAINING NORMS* 613, 615 (2013)).

11. *SPEECH MATTERS*, *supra* note 1, at 92; *see also id.* at 80 ("[T]he foundation of free speech protection is that freedom of speech is necessary for the development and maintenance of the self *qua* thinker, for freedom of thought, and for discharging other aspects of our moral relations.")

12. *Id.* at 92.

13. *Id.* at 85.

14. *Id.* at 70 (contending that contract law is social institution dedicated to facilitating and enforcing promises and is a component of joint project of creating and fairly distributing social resources).

B. *Internalization and “Substantive Virtue Theory”*

Yet for those who live under social structures in which autonomy can be realized, non-subversion is not enough. Throughout *Speech Matters* and elsewhere, Shiffrin envisions a more rigorous standard of engaging with the norms of these institutions and practices. Living up to this standard requires an agent to internalize both the ends of these practices or institutions and the propositions that those ends entail. For an agent who internalizes an institution’s ends and their entailments, there is normative pressure to deliberate and act in ways that are consistent with these ends. Likewise, acting in ways that violate these ends is grounds for a serious form of criticism, regardless of whether formal rules actually hold the agent to these norms.

Although Shiffrin does not extensively discuss internalization in *Speech Matters*, the importance of this phenomenon is most readily apparent in Chapter 6, “Sincerity and Institutional Values.” There, Shiffrin identifies universities and the state as institutions that “do not merely deliver goods and services but have special commitments to moral ends that in turn affect how they may pursue those ends.”¹⁵ These special moral ends, in turn, constrain those who operate within these institutions (like researchers) or act on their behalf (like police officers). According to Shiffrin, both universities and the police have special epistemic ends related to the pursuit of the truth. These epistemic ends give rise to specific responsibilities for institutional actors—for example, prohibitions on investigative lies by the police¹⁶ and special duties of sincerity that preclude university researchers from engaging in deception as part of research.¹⁷ Since these prohibitions and duties are implicit in the ends of the institutions themselves, they apply to institutional actors regardless of whether external (or even institutional) rules enact or enforce them.

How could a special duty apply to someone in virtue of a specific role, even though the law or the institution’s rules do not expressly impose it? Although Shiffrin does not directly discuss this question in *Speech Matters*, she has addressed it in prior work. For example, in a previous article Shiffrin appeals to a “substantive virtue theory” that “in a well-ordered society, citizens accept the principles of justice as well as their major justifications.”¹⁸ On this approach, it is not enough to identify the ethical and political principles that govern people; it is also necessary to examine various “beliefs, habits, dispositions, motives, attitudes, and behaviors” that follow from these principles.¹⁹ Some of these subjective considerations may help realize the directives of political principles.²⁰ Others arise out of the need to publicly justify these principles to others.²¹

15. *Id.* at 223.

16. *SPEECH MATTERS*, *supra* note 1, at 194-98.

17. *Id.* at 214-21.

18. Seana Valentine Shiffrin, *Incentives, Motives, and Talents*, 38 *PHIL. & PUB. AFF.* 111, 113 (2010).

19. *Id.* at 113.

20. *Id.* at 114.

21. *Id.* at 115.

Shiffrin introduces this “substantive virtue theory” methodology while intervening in a debate among political philosophers about whether principles of distributive justice apply only to social institutions (as John Rawls argued),²² or also to the decisions or behaviors of individuals (as G.A. Cohen argued).²³ According to those who favor the latter position, “[i]f a citizen internalizes [the principle of distributive justice] and applies it to her own economic activity, then she will demand only an equal salary to others and perform as productively as possible” in order to help realize this principle.²⁴ Shiffrin’s proposal circumvents the debate between Rawls and Cohen. Regardless of whether the principles of distributive justice apply directly to the actions of people, people accept these principles and their justifications.²⁵ If part of the justification for the principles of distributive justice is the proposition that “talents are arbitrary from a moral point of view,”²⁶ then citizens will not seek to exploit their own talents “on pain of inconsistency,”²⁷ since if “possession of a talent is arbitrary,” then “it cannot serve as the reason for an unequal distribution.”²⁸ If someone acts in a way that supposes otherwise, then she violates a principle that she has embraced as her own.²⁹

In *Speech Matters*, Shiffrin utilizes something like this “substantive virtue theory” methodology to examine the situation of actors in institutions that have special ends. For example, Shiffrin effectively argues that a police officer should accept the fundamental justification for police departments, including the epistemic goals that such departments serve. Having accepted this justification, she should not utilize investigative lies, which contradict and subvert these goals.³⁰ Likewise, a researcher who understands the special epistemic values that justify universities will not engage in deception as a research tool, since such a practice is inconsistent with these values.³¹

22. See, e.g., JOHN RAWLS, A THEORY OF JUSTICE 6-9, 47-9 (1999 ed.).

23. See, e.g., G.A. COHEN, RESCUING JUSTICE AND EQUALITY 8-11 and ch. 3 (2009). See also Brian Berkey, *Double Counting, Moral Rigorism, and Cohen’s Critique of Rawls: A Response to Alan Thomas*, 124 MIND 849, 854 (2015) (“If we accept what appears to be Rawls’s considered view, and understand distributive justice in terms of pure procedural justice, then the view that the principles of justice do not apply directly to individuals seems not only plausible, but perhaps unavoidable. If, on the other hand, we follow Cohen, and understand distributive justice as essentially a matter of the actual distribution of benefits and burdens among individuals, then Institutionalism begins to look somewhat less plausible, for reasons provided by Cohen, among others.”).

24. Shiffrin, *supra* note 18, at 118.

25. *Id.* at 113.

26. *Id.* at 121.

27. *Id.* at 121 n.18.

28. *Id.* at 125.

29. Shiffrin, *supra* note 18, at 131 (“If it is a cornerstone of our conception of equality that we regard ourselves as equal in virtue of our mutual possession of our higher-order capacities . . . then it is a big deal consciously to permit an irrelevant quality to be the basis for a claim to social resources. To do so is to affirm one conception of equality but through our actions to subvert that conception, and, in addition, to deliver a rather different symbolic message about our mutual relations to each other.”)

30. *SPEECH MATTERS*, *supra* note 1, at 198 (“[S]tate authorities, 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.”);

31. *Id.* at 217 (contending that a “posture of open[n]ess” among researchers “is essential to ensuring the possibility of discovering and confirming the truth, to inculcating the skills necessary for students to continue these investigations, and to give citizens sufficient grounds for confidence in the university’s results as sincere, responsible conclusions about matters of individual and public concern. This conception of the university seems to exclude lying to research subjects, even if those misrepresentations will be later corrected.”)

Implicit in both of Shiffrin's arguments is the (sensible) contention that someone derogates his or her duty by occupying an institutional role while failing to accept the justification for that role.

Shiffrin's case for internalization has implications wider than the police station or the psych lab. For example, Shiffrin sees participants in communicative practices as having a generic duty of sincerity, which (she argues) arises out of the role of those practices in facilitating moral agency.³² Likewise, Shiffrin identifies a norm of fidelity that arises out of the practice of promising.³³ This fidelity norm supports Shiffrin's conclusion, in Chapter 2, that promises made under duress exert some moral force on the promisor, regardless of whether such promises are legally enforceable.³⁴ In both instances, the agent should both behave in accordance with the norm and take on the norm as an important goal as part of accepting the fundamental justification for the practice.

C. "Accommodation" and Limits to Demands

For Shiffrin, moral agency is both limited and fragile. Within a "complex, interdependent community," respecting the moral agency of others requires not only respecting their rights, but also doing one's part to "creat[e the] conditions for [autonomy's] meaningful exercise."³⁵ Each of us must not only "tolerate some level of burdensome other-regarding behavior," but also "subsidize some such behavior."³⁶ Moreover, everyone's moral agency is prone to weakness and failure.³⁷ To expect perfection out of others is to deny their humanity and to hold them to a standard more demanding than is justified.

In light of these realities, Shiffrin argues for a robust form of accommodation, according to which "third parties or the community. . . shoulder some burdens associated with [an agent's] choice, rather than compelling the individual agent to shoulder [those burdens] entirely herself."³⁸ Shiffrin sees such choice-protecting accommodation not as an entreaty to the haves, but rather as a principle of political morality. Even when our fellow citizens display some degree of weakness, they do not cease to have lives to lead or to generate claims on us. Accommodation is an imperative, a way of realizing everyone's equal interest in pursuing a rewarding life. As Shiffrin puts it, accommodation is part of "a minimal willingness to behave cooperatively, do one's part, treat others equally and with respect" that is a "prerequisite of eligibility for demanding that one is entitled to equal treatment by others."³⁹ In the moral domain,

32. *Id.* at 193.

33. *Id.* at 70.

34. *Id.* at 65.

35. Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUB. AFF. 205, 239 (2000).

36. *Id.*

37. SPEECH MATTERS, *supra* note 1, at 175.

38. *Id.* at 159.

39. *Id.* at 169; see also Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214, 1223-4 (2010) ("Being a moral agent does not merely involve compliance with a set of legal directives. It also demands active engagement and understanding of the situations of others; standards of these sorts require

accommodation entails not only helping others, but also accepting their imperfections. Accommodation is also animating principle for social and political institutions, one that citizens of a just society should internalize.⁴⁰

The imperative of accommodation constrains what others may demand of an agent. For example, while it is acceptable to punish and condemn those who subvert valuable social institutions and practices, there are no “comprehensive suspended contexts” in which none of the background norms of communication (like sincerity) hold regarding a particular person. When addressing the murderer at the door, one may not lie to him about *everything*.⁴¹ Shiffrin denies that anyone is ever an outcast, someone whose interests do not matter at all and who gives rise to no claims on others.⁴² The prospect of outcasts is inconsistent with respect for the moral agency of those (like the murderer at the door) who do wrong, since outcasting denies those wrongdoers access to institutions and practices that are essential to realizing their moral agency.

This link between accommodation and the limits on what states may demand informs Shiffrin’s discussion (in Chapters 4 and 5) of the regulation of “pure” lies. A “pure” lie is a lie whose wrongfulness cannot be appraised in terms of its deceptiveness or its falsity.⁴³ Shiffrin focuses on pure lies in order to establish what is wrong with lying as such. Many lies are deceptive and false, and these considerations help explain why those lies are wrong. But not all lies deceive and, on Shiffrin’s definition, not all lies are false.⁴⁴ If a lie does not deceive, is it still wrong and worth regulating?

To appreciate the wrongfulness of pure lies, Shiffrin focuses on the category of autobiographical lies, or “lies about one’s personal characteristics, or accomplishments in public.”⁴⁵ Shiffrin contends that pure autobiographical lies (that is, lies about one’s past that do not actually deceive the listener) are wrongful and do not demand free speech protection. Such lies share a common feature with deceptive and

such engagement and thereby directly promote moral agency. Being treated with respect sometimes requires that others respect your boundaries by steering clear of them. But in many cases, it involves actually being the subject of respectful and sympathetic attention and deliberation. . . . [I]n many circumstances, respectful treatment involves others apprehending and appreciating your needs and interests and responding to them as such.”)

40. SPEECH MATTERS, *supra* note 1, at 181 (“If our legal actions and omissions generate a climate in which citizens justifiably internalize the sense that their belonging and their equal status is not contingent upon their perfection, then this demonstration succeeds, even if the justified belief is not the product of a deliberate, explicitly conveyed message.”) To be sure, Shiffrin envisions a limit to the types of actions that call for accommodation, arguing that we have strong reason not to accommodate actions that involve “particular intended victims of harm, or where the damage to public interests [from accommodation] is or would be significant. . . .” *Id.* at 177.

41. *Id.* at 43 (“[O]ne would go very wrong by *volunteering gratuitously* to the Murderer at the Door that one does not regard the context as justifiably suspended and that one really is telling the truth.”).

42. *Id.* at 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.”).

43. *Id.* at 116.

44. Shiffrin defines a lie as “[a]n intentional assertion by A to B of a proposition P such that (1) A does not believe P, and (2) A is aware that A does not believe P, and (3) A intentionally presents P in a manner or context that objectively manifests A’s intention that P is to take and treat P as an accurate representation of A’s belief.” *Id.*, at 12 (internal citations omitted). On this definition, it is possible for A’s lie to fail to deceive B. It is also possible for A’s assertion of P to be true and also a lie, so long as conditions (1)-(3) are satisfied.

45. SPEECH MATTERS, *supra* note 1, at 119.

false lies: each subverts social practices of communication by “abus[ing] the mechanism of direct communication and threaten[ing] the basis of our testimonial trust with one another.”⁴⁶ Pure autobiographical lies also violate the freestanding duty of sincerity that is incumbent on all participants in social communication practices.⁴⁷ A speaker who has internalized this duty of sincerity would not engage in autobiographical lying.

At the same time, Shiffrin contends, pure autobiographical lies should not be criminally prohibited.⁴⁸ Shiffrin makes the case against criminalization not in terms of free speech values, but rather in terms of accommodation. “[A]lthough free speech principles pose no barrier to regulating pure autobiographical lies, declining to regulate them may nevertheless represent a warranted form of accommodation that conveys an important sort of inclusivity and recognition of the sort of agents we are.”⁴⁹ For Shiffrin, pure autobiographical lies are paradigmatically the products of agential limitations—the “flaws and foibles” of others.⁵⁰ Criminally prohibiting such lies would violate the imperative of accommodation by failing “publicly to manifest compassion and understanding” for the shortcomings of the speaker.⁵¹

II. SHIFFRIN’S INSIGHT

What is it to live up to the norms that comprise legal, political, and moral institutions? What are the limits to the demands or expectations that can be imposed on those who live under such institutions? It is natural to think that the answers to these two questions run in tandem, with the content of the norms being identical to the permissible expectations of or demands on those living under them. For example, if the standards for living up to political norms are rigorous, then it makes sense that the state may impose rigorous demands on those subject to its authority. On the other hand, if the standards for living up to political norms are lax, then it makes sense that the demands on those living under such norms are also lax.

What I will call “Shiffrin’s Insight” is that the answers to these questions can and should come apart—the standards for living up to legal, moral, and political norms should be rigorous, yet a narrower scope of expectations or demands should apply to those who live under these institutions. Shiffrin’s Insight is captured by her contention that a “constrained practice of accommodating some moral wrongs” and other shortcomings of moral agency “dovetails with a plausible interpretation of political equality, one that demands a high degree of willing compliance with moral principles, but not perfect compliance.”⁵²

46. *Id.* at 116.

47. *Id.* at 119.

48. Shiffrin’s discussion of pure autobiographical lies is centered around the Stolen Valor Act, 18 U.S.C. §704 (2006), a federal criminal statute that prohibited falsehoods regarding military service and awards and was recently struck down by the U.S. Supreme Court as violating the First Amendment. SPEECH MATTERS, *supra* note 1, at 120 (citing *United States v. Alvarez*, 132 S. Ct. 2537 (2012)).

49. *Id.* at 162.

50. *Id.*

51. *Id.* at 163.

52. *Id.* at 158.

Before examining the components of Shiffrin's Insight, some background might be helpful. Norms might vary in their laxity or rigor along several dimensions. A norm can be formulated as a demand or as a permission.⁵³ Norms can vary in their relative priority to others of an agent's projects.⁵⁴ Some norms apply directly to a person, while the application of other norms is mediated through institutions.⁵⁵ Norms might also vary in terms of what they govern. For example, complying with some norms might be entirely a matter of behaving in a particular way.⁵⁶ For other norms, compliance implicates both behavior and deliberation, such that someone who behaves in the required way but fails to deliberate appropriately fails to comply with the norm.⁵⁷

A. *Living Up to Norms*

For Shiffrin, the norms of autonomy-facilitating institutions (*e.g.*, the practices of communication, the practice of promising, and the university) impose rigorous demands. As a straightforward matter, these institutions regulate how participants behave. Yet living up to these institutions is more than a matter of behaving in the appointed ways. A participant must also support these institutions. Doing so requires, at a minimum, not free riding on⁵⁸ or subverting⁵⁹ these institutions.

Living up to the norms of such institutions also has a significant cognitive dimension.⁶⁰ On Shiffrin's "substantive virtue theory," as discussed above, a citizen should internalize some of the ends and norms of social and political institutions as

53. For example, norms of legal ethics might classify the maintenance of client confidences as required or as optional (that is, neither required nor forbidden). Stephen R. Galoob & Su Li, *Are Legal Ethics Ethical? A Survey Experiment*, 26 GEO. J. LEGAL ETHICS 481, 502, 513 (2013) (discussing variation in status of confidentiality across legal ethics regimes).

54. For example, the moral norm of beneficence might vary in the demands that it imposes, on some formulations leaving room for an agent to pursue her important projects even though others are in severe need and on other formulations not. See generally LIAM MURPHY, *MORAL DEMANDS IN NONIDEAL THEORY* chs. 2-4 (2000); SAMUEL SCHEFFLER, *HUMAN MORALITY* ch. 2 (1992).

55. This is the crux of the debate between Rawls and Cohen about the application of principles of distributive justice, described *supra* at notes 18-29 and accompanying text.

56. See BRENNAN, ET AL., *supra* note 10, at 50 ("[F]ormal norms typically involve normative principles that apply only to actions."); ERIC A. POSNER, *LAW AND SOCIAL NORMS* 24 (2000) ("[S]ocial norms are always about observed behavior.").

57. See Galoob & Hill, *supra* note 10, at 629 ("[S]ome social norms are deliberation-sensitive. Complying with these norms requires both behaving and deliberating in specific ways.").

58. SPEECH MATTERS, *supra* note 1, at 7 ("To lie for personal convenience seems to violate fundamental norms of equality and interpersonal respect by wrongfully treating oneself as more important than one's interlocutor, whether because one thereby makes an exception for oneself to crucial rules of communication, because one thereby attempts to gain an unfair epistemic advantage over another, or because one attempts to manipulate another's trust for one's own private ends.").

59. *Id.* at 11-12 (portraying lying as a "special way" that duties of sincerity and truthfulness "are subverted," which "might constitute a form of harm to self and to humanity, as well as an insult and, potentially, a harm to the recipient in particular."); see also Niko Kolodny and R. Jay Wallace, *Promises and Practices Revisited*, 31 PHIL. & PUB. AFF. 119, 132 (2003) (participants in valuable social practices have a generic duty not to "exploit or undermine" those practices).

60. On the cognitive dimensions of legal norms generally (and norms of promising and fiduciary loyalty in particular), see Stephen Galoob & Ethan J. Leib, *Intentions, Compliance, and Fiduciary Obligations*, 20 LEGAL THEORY 106, 107-18 (2014); Ethan J. Leib & Stephen Galoob, *Fiduciary Political Theory: A Critique*, 125 YALE L.J. 1820, 1827-38 (2016).

part of accepting the fundamental justification for these institutions.⁶¹ This internalization rules out a variety of ways that the citizen might take advantage of social practices. For example, it precludes a citizen from taking advantage of gaps in norms where such exploitation would be based on a maxim for action that is inconsistent with the system's rational justification.⁶² Shiffrin's depiction of the cognitive engagement required to live up to these norms resembles the kind of allegiance that many communitarian and "associative" political theories call for.⁶³ Betraying ends that you hold licenses a serious form of criticism, as does missing the point of ends that you do (or should) hold.

These rigorous requirements for living up to norms support a series of seemingly harsh verdicts in *Speech Matters*. The old man who invokes his nonexistent military service record during a city council meeting commits a serious wrong, even if nobody actually believes (or even listens to) his war stories.⁶⁴ So, too, might the victim of a robbery who, after "remonstrat[ing] with the robber to give up his life of crime and instead to enter rehab, promis[es] to help him gain entry to a program the next day," all the while never intending to provide such assistance.⁶⁵ The researcher who uses deception in order to conduct an experiment that will be written up in a scholarly article betrays the fundamental epistemic goals of universities, regardless of whether this practice is widespread or condoned by an institutional review board.⁶⁶ The police officer subverts the special role of police in "our scheme of epistemic moral cooperation" when, suspending doubts about a suspect's guilt, he uses deceptive tactics to trick the suspect into incriminating herself during interrogation.⁶⁷ Each of these agents can be accused not only of having violated a norm but also of having betrayed values that they hold important.

61. See *supra* note 18.

62. SPEECH MATTERS, *supra* note 1, at 26; see also Seana Valentine Shiffrin, *Bedrock*, 129 HARV. L. REV. F. 242, 247 (2016) ("[W]here [testimonial] reliance is based on listeners taking a risk in the veracity of speakers, or on listeners being able to verify their veracity through independent means," lying indicates "either (1) that our reliance is spotty and dependent on what specific information we have about the speaker or (2) that this reliance is rationally unsupported but rests on hope, denial, or a failure of alternatives. In these ways, lies will desiccate the *rational* quality and nature of our practices of trust, even if their form persists.").

63. See, e.g., Simon Keller, *Royce and Communitarianism*, 2 THE PLURALIST 16 (2007) ("A central communitarian theme is the claim that loyalty to community is what makes ethical thinking possible and meaningful."); Sibyl A. Schwarzenbach, *On Civic Friendship*, 107 ETHICS 97-8 (1996) (contending that *philia*, a "form of friendship" that citizens in a just society experience for each other under which "they wish each other well for their own sake, do things for fellow citizens both individually and as a citizen body, and share in values, goals, and a sense of justice" is "an essential factor unifying even the just modern state."); ANNA STILZ, LIBERAL LOYALTY 24 (2011) ("[C]itizens' endorsement of justice as an important value gives them perfectly sufficient reasons for allegiance to their state and for solidarity with their compatriots.").

64. This description fits the facts of the *Alvarez* case that Shiffrin uses to illustrate her analysis of pure autobiographical lies. SPEECH MATTERS, *supra* note 1, at 120-1.

65. *Id.* at 54.

66. *Id.* at 220 (researcher who utilizes deception "acts on a maxim that affirms presenting the false as though it were true with the aim that it be taken as true for the researcher's purposes of furthering knowledge. Although the context is delineated, affirmation of that maxim seems in tension with a foundational commitment to sincere expression as an ethical and meaning-bestowing constraint on the pursuit of knowledge.").

67. *Id.* at 194-199, 197.

Aside from the examples discussed in *Speech Matters*, many other institutional norms impose rigorous standards for living up. For example, the executive who demands an exorbitant wage⁶⁸ can be said to have missed the point of distributive (and, perhaps, social and political) equality. The criminal defense attorney who, in defending someone accused of rape, harshly cross-examines a complaining witness he knows to be telling the truth⁶⁹ might be said to act on a maxim (“my client’s interest above the interests of justice”) that subverts the criminal justice system. So, too, might the prosecutor who utilizes the widespread tactic of “overcharging,” or “multiplying the number of accusations [against a single defendant]” or “charging a single offense at a higher level than the circumstances of the case seem to warrant” in order to maximize leverage during plea negotiations.⁷⁰ Shiffrin’s logic suggests that all of these cases involve agents shirking or overlooking their responsibilities to just institutions. It is not enough to simply mind the rules or to avoid free riding. These actors make sure that their actions do not subvert such institutions. Sometimes, living up to these duties requires seeing the world in a new way. Failing to do so is failing to live up to the institution’s norms.

B. *Living Under Norms*

Although Shiffrin portrays the norms constituting social and political institutions as demanding, she also sees limits to what those institutions may demand. In part, these limits align with restraints on state power that arise out of the liberal political tradition.⁷¹ However, the realities of moral agency provide another significant source of limitation. The fragility of agency and imperative of accommodation justify some tempering of the demands on those who live under social and political institutions.

Violating the norms of an institution usually licenses a severe form of criticism, or punishment, or both. However, Shiffrin’s logic suggests, a just state should treat norm violations that arise out of certain agential defects (most prominently, our “weaknesses as moral agents”)⁷² differently from those that do not. For example, the old man whose pure autobiographical lie violates norms of communicative sincerity should not be subject to prison or serious fines.⁷³ Nor should the victim of robbery who utilizes a lying promise to the robber be legally held to that promise, regardless of whether the promise has moral value.⁷⁴ Presumably, the agential frailties of the

68. See, e.g., COHEN, *supra* note 23, at 27-86.

69. See, e.g., Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1474 (1966); DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 150-1 (1988).

70. Albert W. Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 85-6 (1968).

71. See, e.g., Samuel Scheffler, *Egalitarian Liberalism as Moral Pluralism (Part I)*, Supp. Vol. 79 ARISTOTELIAN SOC’Y. 229 (2005).

72. *SPEECH MATTERS*, *supra* note 1, at 175.

73. *Id.* at 122 (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,” Stolen Valor Act “offended for its disproportionate remedy.”).

74. *Id.* at 70 (“were the legal institution of contract to enforce promises made under duress in private suits between coercers and the coerced, 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 to performance. Without such a

researcher who engages in experimental deception and the investment banker whose wage demands are inconsistent with distributive justice should also be accommodated.

Each of these cases involves a norm violation, yet each such violation arguably results from a defective exercise of moral agency. Rather than punishing violations of these norms and the subversion of these institutions, the appropriate response is to accommodate the defects of moral agency, to help the agent understand the significance of his or her action.⁷⁵ Thus, while Shiffrin construes the standards for living up to norms consistently with “thicker” accounts of political morality (like communitarianism and “civic friendship”), her account of what it takes to live under such norms is consistent with the limits on state demands favored by “thinner” political theories like libertarianism and classical liberalism. The limitations on moral agency explain any seeming tension between the standards for living up to and living under social institutions.

Shiffrin’s Insight, then, is that considerations related to moral agency simultaneously call for norms of social and political institutions that are rigorous and demands incumbent on those living under such institutions that are more limited. Shiffrin’s Insight differs from a more straightforward legal moralism, which construes the standards for living up to such norms as identical to the standards for living under them.⁷⁶ Shiffrin’s Insight also differs from retributivist theories of the justification for criminal punishment, which see norm violations resulting from defective exercises of agency primarily as occasions for giving an agent what she deserves.⁷⁷ For many retributivists, any accommodation of an agent’s weakness is demeaning,⁷⁸ rather than a potential way of respecting his limitations (and our own).

Shiffrin’s Insight is undeniably novel. Is it also persuasive? Answering this question would take a career. However, Shiffrin’s influential (although controversial) work

claim, the community’s joining forces with the coercer seems (highly) inappropriate, given the injustice of the coercing agent’s behavior and the injustice of the circumstances the coercing agent created that elicited an agreement.”).

75. The same accommodation-based limitations would presumably not apply to abuses by state officials, as in the case of investigative lies by police officers or overcharging by prosecutors.

76. In criminal law, legal moralism is the view that “the state can and should criminalize immorality, as such, independently of whether the immorality involves harm.” See David O. Brink, *Retributivism and Legal Moralism*, 25 *RATIO JURIS* 496 (2012). Among private law theorists, legal moralism is tantamount to what Shiffrin calls the “reflective approach,” according to which “interpersonal morality” operates as a “template for legal rules” and “the law should reflect everyday moral judgments whenever possible, whether because this is the nature of law or because, as a matter of political philosophy, it is what law should aim to do.” Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 *HARV. L. REV.* 708, 713 (2007).

77. See, e.g., Jules Coleman, *Tort Law and the Demands of Corrective Justice*, 67 *IND. L.J.* 349, 370-1 (1992) (“Culpable agency is the very heart of retributive justice.”).

78. See MICHAEL MOORE, *PLACING BLAME: A THEORY OF THE CRIMINAL LAW* 149 (1997) (to refuse to punish or blame another for his wrongdoing is to deny his “capacity to will and reason— and thus to be and do evil. Far from evincing fellow-feeling and the allowing of others to participate in our moral life, it excludes them as less than persons.”).

on promissory morality and contract theory utilizes something like Shiffrin's Insight.⁷⁹ So does her work on distributive justice.⁸⁰ Shiffrin's Insight also seems, to this reviewer at least, to provide a powerful explanation of many foundational debates in professional ethics.⁸¹ Seana Valentine Shiffrin's contribution in *Speech Matters*, then, has implications far wider than the matter of speech.

79. See, for example, Shiffrin's "accommodationist approach" to the proper relationship between contract law and promissory morality, on which "legal rules should be sensitive to the demands placed on moral agents so that law-abiding moral agents do not, as a regular matter, face substantial burdens on the development and expression of moral agency." Shiffrin, *supra* note 76, at 712, 715.

80. See *supra*, notes 18-29 and accompanying text.

81. Indeed, Shiffrin's accommodationist position regarding contract law and promissory morality provides a fresh way to respond to Charles Fried's famous question "Can a good lawyer can be a good person?" See Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1975).