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The Government's Lies and the Constitution

Helen Norton
University of Colorado Law School

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HELEN NORTON*

INTRODUCTION

Governments lie. They do so for many different reasons to a wide range of audiences on a variety of topics. Examples include lies about the government's justifications for military action, such as allegations that Presidents Monroe and Madison lied to Congress about military activities in the then-territory of Florida,[1] that President Polk lied about the incidents leading the United States to engage in war with Mexico,[2] that members of the Johnson administration lied about the events that spurred broader U.S. involvement in Vietnam,[3] and that members of the Bush administration lied about the reasons for the U.S. invasion of Iraq.[4] Other examples include deliberate falsehoods about whether a government official or agency acted

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1. *See* Peter W. Morgan, *The Undefined Crime of Lying to Congress: Ethics Reform and the Rule of Law*, 86 NW. U. L. REV. 177, 223 (1992).

2. *See id.* at 216–21.

3. *See* ERIC ALTERMAN, WHEN PRESIDENTS LIE 162 (2004); GEOFFREY R. STONE, PERILOUS TIMES 517 (2004) ("[The Pentagon Papers] revealed that the American government had systematically lied to the American people about the nature, purpose, conduct, and consequences of an ongoing war.").

4. *See* JOHN J. MEARSHEIMER, WHY LEADERS LIE 5 (2011).

in compliance with law,[5] like those told by Nixon administration officials as part of the Watergate cover-up[6] as well as Reagan administration officials' alleged lies about their involvement in Nicaragua.[7] Still others concern the existence or scope of a government program, such as the Eisenhower administration's false claim that Francis Gary Powers's U-2 plane was an off-track weather aircraft[8] or Obama administration officials' assertions about the sweep of domestic surveillance and data collection efforts.[9] The list goes on and includes a wide range of lies to achieve various domestic and foreign policy goals, such as the Kennedy administration's lies during the Cuban Missile Crisis about the extent of its knowledge of the location of Soviet missiles.[10]

Although courts and commentators have extensively explored whether and when the First Amendment permits the government to regulate lies told by private speakers,[11] relatively little attention has yet been paid to the constitutional implications of *the government's* deliberate falsehoods.[12] This Article helps fill that gap by exploring when, if ever, the Constitution prohibits our government from lying to us.

The government's lies can be devastating. This is the case, for example, of its lies told to resist legal and political accountability for its misconduct; to inflict economic and reputational harm; or to enable the exercise of its powers to imprison, to deploy lethal force, and to commit precious national resources. On the other hand, the government's lies can sometimes be helpful: consider lies told to thwart a military

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5. *See, e.g.*, MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 262–76 (2009) (describing Brandeis's efforts in private practice to prove that President Taft had lied about whether he had personally investigated charges against, and prepared a memorandum exonerating, the Secretary of Interior).

6. *See* William H. Simon, *Virtuous Lying: A Critique of Quasi-Categorical Moralism*, 12 GEO. J. LEGAL ETHICS 433, 458 (1999).

7. *See* ALTERMAN, *supra* note 3, at 240–41, 279–88.

8. *See* JIM NEWTON, EISENHOWER: THE WHITE HOUSE YEARS 313–15 (2011).

9. *See* Mary-Rose Papandrea, *Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment*, 94 B.U. L. REV. 449, 467 (2014) (describing Director of National Intelligence James Clapper's testimony to Congress).

10. *See* Arthur Sylvester, *The Government Has the Right to Lie*, SATURDAY EVENING POST, Nov. 18, 1967, at 10 (acknowledging that during the Cuban Missile Crisis he—as Assistant Secretary of Defense under President Kennedy—knowingly approved a press release that falsely stated that "'the Pentagon has no information indicating the presence of offensive weapons in Cuba'").

11. *E.g.*, United States v. Alvarez, 132 S. Ct. 2537 (2012) (striking down a federal statute that criminalized certain lies about receiving military honors as a violation of the First Amendment); Steven G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. U. L. REV. 1, 9 (2008).

12. David Strauss and Jonathan Varat are among the exceptions, as they have considered the problem of government lies as part of broader explorations of lies' First Amendment implications. *See* David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 355–59 (1991); Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, 1108–10 (2006). Others have examined the constitutionality of law enforcement officers' lies. *See infra* notes 85–102 and accompanying text.

adversary or to identify wrongdoing through undercover police work. The substantial harms threatened by some government lies invite a search for ways to punish and prevent them. At the same time, however, the number of lies, the diversity of reasons for which they are told, and the variety of their effects combine to suggest that efforts to enforce blanket prohibitions against the government's deliberate falsehoods would be both difficult and unwise.[13] This Article seeks to identify constitutional and other approaches that attend to these concerns by constraining government lies that threaten especially serious harms. To this end, it examines when (and why) we find government lies most troubling, when those lies pose harms of constitutional magnitude, and when nonconstitutional options might more appropriately address the dangers of such lies.

Part I considers the harms threatened by government lies as well as the challenges posed by efforts to constrain them. More specifically, it examines the specific harms of deception and breach of trust that the government's deliberate falsehoods can inflict upon individual targets as well as upon the broader public. Like other forms of deception, the government's lies not only inflict moral harm by undermining their targets' autonomy but can also injure their targets' interests in more tangible ways—as is the case, for example, of government lies that deprive their targets of life or liberty, or that impose reputational or economic damage. The government's lies can also breach the public's trust in ways that inflict not only the moral and ethical harms of disloyalty but also impose substantial instrumental costs to its effectiveness. Efforts to constrain the government's lies, however, can pose dangers of their own, and Part I goes on to examine significant concerns about courts' limited institutional competence, about undermining the separation of governmental powers, and about chilling government speakers' willingness to engage in important expressive endeavors.

Part II then searches for constitutional principles that attend to these competing concerns and proposes a framework for assessing the constitutionality of the government's deliberate falsehoods. More specifically, it builds on due process and free speech theory and doctrine to identify when and how the government's lies inflict the harms of deception and breach of trust in ways that endanger specific individual rights.

First, it proposes that the government's lies violate the Due Process Clause when they directly deprive individuals of life, liberty, or property or when they are sufficiently coercive to constitute the functional equivalent of such deprivations. Examples include prosecutors' lies to judges and juries that lead to a defendant's imprisonment; law enforcement officers' lies that coerce their targets' involuntary waiver of constitutional rights; and government lies that deprive their targets of the ability meaningfully to exercise voting, reproductive, or other protected rights. The government's lies can also violate the Due Process Clause in those extreme circumstances when they lack any reasonable justification—that is, when they shock the conscience with their outrageousness—and thus constitute an abuse of governmental power.

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13. *See Alvarez*, 132 S. Ct. at 2553 (Breyer, J., concurring in the judgment) (explaining the difficulties raised by government efforts to regulate private speakers' lies in light of "the pervasiveness of false statements, made for better or for worse motives, made thoughtlessly or deliberately, made with or without accompanying harm").

Part II further proposes that the government's lies violate the Free Speech Clause when they are sufficiently coercive of their targets' beliefs or speech to constitute the functional equivalent of the government's direct regulation of that expressive activity. Examples include the government's lies to or about its critics to silence, deter, or otherwise punish their speech, or the government's lies to captive or otherwise vulnerable audiences to manipulate their expressive choices.

Because the Constitution does not provide the only possible constraint on the government's deliberate falsehoods, Part III then explores various nonconstitutional means for addressing some harmful government lies. It identifies a menu of statutory and political possibilities that target the government's deliberate falsehoods on certain subjects, to certain audiences, by certain speakers, or in other settings that threaten especially grave harm.

Part IV applies these various approaches, both constitutional and nonconstitutional, to a range of problems. In so doing, it seeks to start a conversation about how courts, policymakers, and the public might think about the constitutional and other implications of the government's lies.

I start with several caveats. First, this Article addresses the collective speech of a government body or the speech of an individual empowered to speak for such a body.[14] It does not address the very different constitutional issues raised by efforts to regulate lies by an individual government official when expressing her own views in a personal capacity.[15] Unlike such individuals—who possess First Amendment rights of their own—the government is constrained rather than protected by the Constitution and does not itself hold First Amendment rights.[16] Examples of the government's own speech (to which the Article returns in Part IV) include a state agency that lies to certain audiences about when the polls will close in hopes of suppressing their vote and increasing its political allies' re-election prospects, or that deliberately misstates unemployment rates to improve the incumbent's prospects in an upcoming election. Or a governor's office that issues an investigative report that deliberately and falsely covers up its own incompetence or illegal conduct. Or an

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14. *See, e.g.*, Beth Orsoff, Note, *Government Speech as Government Censorship*, 67 S. CAL. L. REV. 229, 248 (1993) ("When a government official sends out a letter, pamphlet, or other written instrument on government stationery or government letterhead or uses any seal of the government, then the official has sent an official government communication.").

15. *See* Lane v. Franks, 134 S. Ct. 2369, 2377–82 (2014) (discussing the First Amendment rights of individual public employees); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (same). Elsewhere I address the constitutional implications of laws that punish campaign lies by individual candidates who have First Amendment rights of their own. *See* Helen Norton, *Lies to Manipulate, Misappropriate, and Acquire Governmental Power in* LAW AND LIES 143, 176–90 (Austin Sarat ed., 2015).

16. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . ."); Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 139 (1973) (Stewart, J., concurring) ("The First Amendment protects the press *from* governmental interference; it confers no analogous protection *on* the Government." (emphasis in original)); MARK G. YUDOF, WHEN GOVERNMENT SPEAKS 44–45 (1983) (arguing that government does not possess First Amendment free speech rights). As explained in more detail, *infra* notes 125–27 and accompanying text, the Court's recognition of a government speech defense to Free Speech Clause claims is better understood as holding that government has a privilege, rather than a right, to its own speech.

agency that posts on its website a press release stating that one of its critics had engaged in illegal misconduct when it knows she had not. Or an Office of the Surgeon General that undertakes an informational campaign in the public schools that seeks to boost sales of a product manufactured by the administration's political ally by falsely reporting its health effects. Or a President who, in order to build support for military action abroad, tells Congress and the public in her State of the Union address that she has evidence that a foreign government violated American territorial space when she knows that she does not possess such evidence.

Second, this Article focuses on the constitutional implications of the government's lies to the American public, not those to non-Americans abroad.[17]

Finally, in this Article I use "lie" to mean a false assertion of fact known by the speaker to be untrue and made with the intention that the listener understand it to be true.[18] This Article thus focuses only on the government's deliberate falsehoods, rather than on the many other ways in which the government may intentionally or unintentionally mislead the public through, for example, secrets or accidental inaccuracies.[19] I chose this narrower scope in large part because the moral and instrumental harms caused by the government's intentional lies are arguably greater than those caused by its nondisclosures and inaccuracies more generally, and thus make more immediate demands for our attention.[20] I recognize not only that others

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17. The Supreme Court has held that the U.S. Constitution does not generally protect noncitizens overseas. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 268–69 (1990) (declining to apply Fourth Amendment protections extraterritorially to aliens); Johnson v. Eisentrager, 339 U.S. 763, 784–85 (1950) (declining to apply Fifth Amendment protections extraterritorially to aliens).

18. *See* DAVID NYBERG, THE VARNISHED TRUTH 50 (1993) ("[W]e can say that lying means making a statement (not too vague) you want somebody to believe, even though you don't (completely) believe it yourself, when the other person has a right to expect you mean what you say."); Mark Tushnet, *"Telling Me Lies": The Constitutionality of Regulating False Statements of Fact* 2 (Harvard Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 11-02, 2011), *available at* http://ssrn.com/abstract=1737930 [http://perma.cc/Q2S8-EEHU] (defining a lie as "(a) a false statement, (b) known by the person making it to be false, and (c) made with the intention that at least some listeners will believe the statement to be true, at least for some period before its falsity becomes evident to the listeners" (citation omitted)).

19. *See* SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 13 (1978) (describing the many ways in which a speaker can deceive her audience, including "through gesture, through disguise, by means of action or inaction, even through silence"). A number of thoughtful commentators have addressed in detail the potential harms of certain government secrets. *See, e.g.*, Heidi Kitrosser, *Classified Information Leaks and Free Speech*, 2008 U. ILL. L. REV. 881, 885 (2008).

20. *See* Stuart P. Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements*, 53 HASTINGS L.J. 157, 177 (2001) (distinguishing various types of deception more broadly as "afford[ing] the listener the opportunity for more precise questioning, which bald-faced lies generally do not"); Mark Spottswood, *Falsity, Insincerity, and the Freedom of Expression*, 16 WM. & MARY BILL RTS. J. 1203, 1235 (2008) ("[T]he harm caused by sincerely believed false speech is generally outweighed by its capacity to drive argumentation, which in turn furthers the collection, dissemination, and preservation of evidence supporting true beliefs."); Strauss, *supra* note 12, at 356 ("Ordinarily, withholding information is not as effective as lying [in offending listener

may choose to define a "lie" differently[21] but also that determinations of what is (and is not) a lie in a particular situation can be deeply contested regardless of the definition one selects.[22] Here I do not seek to revisit debates about whether the government did or did not lie in any given instance. Although thoughtful observers may well disagree about the size and shape of the universe of government lies, I assume for purposes of this Article that there *is* some universe of government lies and consider what, if anything, the Constitution has to say about it.

I. THE POTENTIAL HARMS OF GOVERNMENT LIES AND OF EFFORTS TO CONSTRAIN THEM

This Part starts by considering the variety of ways in which the government's lies can cause moral and instrumental harm to specific individuals as well as to the public collectively.[23] It then examines the substantial chilling, institutional competence, and separation of powers issues raised by efforts to enforce limitations on the government's lies. As we shall see, there are good reasons for concern about government lies, as well as good reasons to worry about efforts to constrain them.

A. The Harms Threatened by the Government's Lies

Although in many respects the harms of government lies track those of nongovernmental speakers more generally (e.g., in their disrespect for listeners' autonomy and dignity),[24] the government's deliberate falsehoods can also threaten distinct and especially serious damage precisely because of their governmental source. This subpart describes government lies' potential harms to specific

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autonomy] because a lie affirmatively throws the hearer off the track.").

21. *See, e.g.*, SEANA VALENTINE SHIFFRIN, SPEECH MATTERS: ON LYING, MORALITY AND THE LAW 116 (2014) ("[A] lie is an assertion that the speaker knows she does not believe, but nevertheless deliberately asserts, in a context that, objectively interpreted, represents that assertion as to be taken by the listener as true and as believed by the speaker. . . . [W]hat I call 'pure lies' need not involve deception or the intent to deceive. They need not even be false; a speaker may lie by asserting what she believes to be false yet, unbeknownst to her, happens to be true.").

22. *See* Steven R. Morrison, *When is Lying Illegal? When Should It Be? A Critical Analysis of the Federal False Statements Act*, 43 J. MARSHALL L. REV. 111, 116–17 (2009) (questioning whether truth and falsity are meaningfully distinguishable for certain legal purposes).

23. Although this Part focuses on the harms that lies inflict upon listeners or targets, lies may harm the individual liars themselves in both consequentialist and nonconsequentialist ways. *See* CHARLES FRIED, RIGHT AND WRONG 60 (1978) (discussing arguments that lies undermine the dignity and humanity of the liar); Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425, 468 (1996) ("Lying leads to a loss of integrity individual to the [police] officer. . . . In a society that generally condemns lying, using that tactic diminishes one's self respect. Officers have feelings of regret for their lying, even though they value its believed utility.").

24. Elsewhere I have discussed some of the harms threatened by nongovernmental speakers' lies. Helen Norton, *Lies and the Constitution*, 2012 SUP. CT. REV. 161, 185–200.

individuals as well as to the general public, and how those harms may vary with the lies' motive, subject matter, and audience.

1. Deception

The harms of lies in general and lies by the government in particular center on the liar's effort to manipulate the listener in ways that are inherently disrespectful of the listener's autonomy and dignity. As Harry Frankfurt explains,

> The most irreducibly bad thing about lies is that they contrive to interfere with, and to impair, our natural effort to apprehend the real state of affairs. They are designed to prevent us from being in touch with what is really going on. In telling his lie, the liar tries to mislead us into believing that the facts are other than they actually are. He tries to impose his will on us.[25]

Government lies on certain topics or to certain audiences may be especially successful in manipulating listeners because they may be more likely to be believed and less amenable to rebuttal by counterspeech.[26] Examples include the government's lies on matters on which the government has a monopoly or to which it has other special access (e.g., executive branch lies about certain national security and intelligence topics) as well as government lies to vulnerable audiences (e.g., to young children in the public schools).

Lies not only inflict moral harm by undermining their target's autonomy, but they can also set back their target's interests in more tangible ways.[27] More specifically, some government lies can deprive their targets of life or liberty—as is the case, for example, of lies told by prosecutors to secure criminal convictions.[28] The lies told by

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25. Harry Frankfurt, *On Truth, Lies, and Bullshit*, *in* THE PHILOSOPHY OF DECEPTION 37, 37 (Clancy Martin ed., 2009); *see also* FRIED, *supra* note 23, at 67 ("Lying is wrong because when I lie I set up a relation which is essentially exploitative. . . . When I lie, I lay claim to your mind."); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 736–37 (1987) ("The case for honesty in all human relations, I believe, rests in part on the importance of treating others with respect: lack of candor often carries with it the implication that the listener is less capable of dealing with the truth, and thus less worthy of respect, than the speaker.").

26. *See* Leslie Gielow Jacobs, *Bush, Obama and Beyond: Observations on the Prospect of Fact Checking Executive Department Threat Claims before the Use of Force*, 26 CONST. COMMENT. 433, 442 (2010) ("A barrier to achieving this kind of contemporaneous accountability for threat claims asserted by the executive department to build support for the use of force is its superior access to and control over the intelligence information that forms the basis of the claims.").

27. *See* STUART P. GREEN, LYING, CHEATING, AND STEALING 34–39 (2006) (distinguishing "morally wrongful" acts as those that intrinsically violate a freestanding moral duty from "harmful" acts as those that inflict consequences that set back another's interests or otherwise interfere with her well-being).

28. *See* Davis v. Zant, 36 F.3d 1538 (11th Cir. 1994) (concluding that a prosecutor's knowingly false statements to the jury that a key government witness had not confessed to murder were fundamentally unfair and thus a violation of due process); United States v. Kalfayan, 8 F.3d 1315 (9th Cir. 1993) (concluding that a prosecutor's knowingly false

government officials to justify the internment of thousands of Japanese American citizens during World War II offer a particularly egregious example:

> The evidence of the government's misconduct in these cases is clear and compelling, and rests on the government's own records. It reveals that high government officials, including the Solicitor General, knowingly presented the Supreme Court with false and fabricated records, both in briefs and oral arguments, that misled the Court and resulted in decisions that deprived the petitioners in these cases of their rights to fair hearings of their challenges to military orders that were based, not on legitimate fears that they—and all Japanese Americans—posed a danger of espionage and sabotage on the West Coast, but rather reflected the racism of the general who promulgated the orders. [29]

Other government lies may inflict reputational or economic damage upon their individual targets.[30] Examples include law enforcement agency lies that falsely brand individuals as criminals[31] and government officials' false declarations that targeted individuals have engaged in other forms of misconduct.[32] Government lies can also inflict tangible harm upon the American public collectively. Government lies to justify the deployment of troops, for instance, can result in demonstrable injury through the loss of life and the depletion of national resources.[33]

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statement to the jury that an absent witness could have refused to testify was willful prosecutorial misconduct of sufficiently prejudicial nature to violate due process).

29. PETER IRONS, UNFINISHED BUSINESS: THE CASE FOR SUPREME COURT REPUDIATION OF THE JAPANESE AMERICAN INTERNMENT CASES 4 (2013); *see also* Korematsu v. United States, 584 F. Supp. 1406, 1418–22 (N.D. Cal. 1984) (granting Mr. Korematsu's coram nobis petition and describing evidence of government lies in the earlier proceedings); Eric K. Yamamoto, *White (House) Lies: Why the Public Must Compel the Courts to Hold the President Accountable for National Security Abuses*, 68 LAW & CONTEMP. PROBS. 285, 292–93 (2005) (describing lies by the executive and military to the public and the courts that sought to justify the internment).

30. For discussion of the reputational and economic harms threatened by government agencies' inaccurate assertions (including but not limited to those that are intentionally false), see Nathan Cortez, *Adverse Publicity by Administrative Agencies in the Internet Era*, 2011 BYU L. REV. 1371, 1374 (2011) ("Agency publicity can be premature, excessive, misleading, or just plain wrong."); James O'Reilly, *Libels on Government Websites: Exploring Remedies for Federal Internet Defamation*, 55 ADMIN. L. REV. 507 (2003) (describing how agency website statements may be inaccurate in ways that harm their targets).

31. *See* Paul v. Davis, 424 U.S. 693, 695 (1976) (describing police department's allegedly defamatory description of the target as an "active shoplifter[]").

32. For examples of alleged defamation by various government officials, see Hutchinson v. Proxmire, 443 U.S. 111, 123 (1979) (senator issued press releases and newsletters criticizing researcher's studies); Chastain v. Sundquist, 833 F.2d 311, 312–13 (D.C. Cir. 1987) (Congressman wrote—and released to the press—a letter complaining that legal services attorney was obstructing enforcement of child support laws); Nadel v. Regents of Univ. of Cal., 34 Cal. Rptr. 2d 188, 190 (Cal. Ct. App. 1994) (state government officials issued press releases and press statements claiming that protestors had engaged in violent and destructive behavior).

33. *See* Gregory P. Magarian, *The First Amendment, The Public-Private Distinction, and*

2. Breach of Trust

By violating its public's trust, the government's lies can inflict moral harms of disloyalty in addition to and distinct from the harms of deception.[34] Seana Shiffrin, for example, has emphasized that

> the primary, distinctive wrong of lies as such does not inhere in their deceptive effect, if any, on listeners, but instead in their abuse of the mechanism by which we provide reliable testimonial warrants, a mechanism we must safeguard if we are to understand and cooperate with one another and to achieve our mandatory moral ends.[35]

As Professor Shiffrin explains, lies by the government can pose especially grave dangers of this sort:

> Politically, those in charge of putting our joint moral commitments into action and enforcing them—namely, state officials—are well placed to serve as points of triangulation, expositors, and repositories of our best information about the law and its moral and political underpinnings. We need salient common sources of information to help us locate the relevant moral and legal facts and to identify the content of the joint perception of those facts. We also need to know that officials *believe* these to be the relevant facts, if those officials are to merit the role of a legitimate political (not merely epistemic) authority. Thus, state officials, at least in a democracy, must aspire to be relevant epistemic authorities on the law and on at least that aspect of morality embodied in law. We *should* be able to rely on their transmissions about the content of law, legally relevant morality, and legally relevant facts.[36]

Public fiduciary theory offers a related way of understanding the government's lies as acts of disloyalty that inflict substantial collective harm by violating the public's trust. Drawing from private law's imposition of fiduciary obligations upon those who have discretionary power over the interests of others, this growing body of literature observes that government actors assert the same sort of power with respect to the public; public fiduciary theorists thus urge the public (as beneficiary) to expect the same loyalty from its government as it would from other fiduciaries.[37]

Nongovernmental Suppression of Wartime Political Debate, 73 GEO. WASH. L. REV. 101, 103 (2004) ("Wars kill people, topple governments, and scar survivors and the ecosystems they inhabit. In no other context can government error or malfeasance do greater harm.").

34. *See* Alan Strudler, *Deception and Trust*, *in* THE PHILOSOPHY OF DECEPTION, *supra* note 25, at 139, 152 ("It is always morally unacceptable to deceive a person in a way that breaches his trust, unless that deception is necessary to defend against a grave wrong. But it may be morally acceptable to defend [sic] a person in the absence of trust if that deception is necessary to defend against an action that may thwart one's legitimate interests."); *see also* GREEN, *supra* note 27, at 103 (distinguishing the moral harms of disloyalty—i.e., breach of trust—from other morally wrongful acts).

35. SHIFFRIN, *supra* note 21, at 116.

36. *Id.* at 198 (emphasis in original).

37. *See* David L. Ponet & Ethan J. Leib, *Fiduciary Law's Lessons for Deliberative*

The government's self-interested lies to its public can thus breach the public's trust in, and expectations of loyalty from, its government.

Government lies breach the public's trust in ways that can inflict not only such moral and ethical harms but also substantial instrumental costs. John Mearsheimer describes these costs to include thwarting the public's ability to hold government accountable for misconduct, frustrating citizens' ability to make informed voting choices, undermining the policy-making process when participants cannot rely on others' assertions, and alienating the public's faith in democratic governance.[38] The less the public trusts the government, the less the public will cooperate with it, and the less effective the government, in turn, will be—with the public suffering collective harm as a result.[39] As just one illustration, the various lies told by government officials as part of the Watergate cover-up imposed these sorts of instrumental costs to public trust and confidence.[40] Relatedly, some commentators argue that lies by law enforcement officers to secure confessions or consent to search can undermine citizens' willingness to trust and cooperate with the police in ways that frustrate law enforcement's effectiveness.[41] Judges' lies similarly threaten to

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Democracy, 91 B.U. L. REV. 1249, 1257 (2011) ("The fiduciary duties are routinely described as a duty of loyalty and a duty of care – as well as duties of candor, disclosure, and utmost good faith. . . . Most centrally, fiduciaries have a duty of loyalty which prohibits them from acting in a self-interested manner. The duty requires that fiduciaries act for the sole benefit of the beneficiary and prohibits their acting in any manner where their interests conflict with the interests of the beneficiary." (emphasis omitted) (footnote omitted)).

38. MEARSHEIMER, *supra* note 4, at 84–86; *see also* ALTERMAN, *supra* note 3, at 14 ("Without public honesty, the process of voting becomes an exercise in manipulation rather than the expression of the consent of the governed. Many a scholar has persuasively argued that official deception may be convenient, but over time, it undermines the bond of trust between the government and the people that is essential to the functioning of a democracy."); MEARSHEIMER, *supra* note 4, at 94 ("[H]iding botched policies can lead to further disasters down the road, not just because incompetents are usually kept in key leadership positions for at least some period of time, but also because engaging in cover-ups makes it difficult to have a national security system in which policymakers and military commanders are held accountable for their actions."); Mathilde Cohen, *Sincerity and Reason-Giving: When May Legal Decision Makers Lie?*, 59 DEPAUL L. REV. 1091, 1112 (2010) ("If citizens expect public officials to mislead them, they will become wary of arguments offered in public discourse.").

39. *See generally* Tom R. Tyler & Peter Degoey, *Collective Restraint in Social Dilemmas: Procedural Justice and Social Identification Effects on Support for Authorities*, 69 J. PERSONALITY & SOC. PSYCHOL. 482, 483 (1995) (describing how individuals' trust in leaders' authority increases their willingness to comply with those leaders' directives).

40. *See* Simon, *supra* note 6, at 458 (describing lies told by government officials as part of the Watergate cover-up as "particularly noxious because they were intended to subvert democratic processes of political accountability").

41. *See* I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835, 835–42 (2008) (arguing that common perceptions that law enforcement officers engage in deceit and other illegitimate behavior discourage public compliance with the law); Young, *supra* note 23, at 458–59 ("As knowledge of police lying spreads, trust of police will decrease and citizens will be less likely to come forward and talk honestly with police. Critical evidence may remain undiscovered or undisclosed."); Jamie Masten, Note, *"Ain't No Snitches Ridin' Wit' Us": How Deception in the Fourth Amendment Triggered the Stop Snitching Movement*, 70 OHIO ST. L.J. 705, 708–09 (2009) (arguing that police deception has triggered public resistance to

undermine citizens' faith in the legitimacy of the justice system and their willingness to rely upon and cooperate with it.[42] In short, government lies can inflict the harms of disloyalty in ways that severely injure not only targeted individuals but also the broader public.

B. The Challenges Posed by Efforts To Enforce Constraints on the Government's Lies

The range of substantial harms threatened by the government's lies invites a search for ways to prevent and punish them. But efforts to enforce constraints on the government's deliberate falsehoods can pose challenges and perhaps even dangers of their own. More specifically, such enforcement efforts trigger significant concerns about courts' limited institutional competence, about undermining the separation of governmental powers, and about chilling government speakers' willingness to engage in important expressive endeavors.

1. Institutional Competence

Even those deeply troubled by the potential dangers of government lies may remain skeptical of courts' institutional competence to police them.[43] As David Strauss explains,

> For the courts to enforce a prohibition against government lying or nondisclosure, they would have to make a delicate and complex inquiry into precisely what information was in the government's possession. They would then have to determine the government's reasons for the nondisclosure or false statements. . . . Institutional concerns, therefore, rather than any theoretical weakness, explain why the autonomy justification for the persuasion principle has not given rise to a judicially enforced first amendment prohibition against false statements by the

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cooperation with the police).

42. *See* EMILY M. CALHOUN, LOSING TWICE 48 (2011) ("Citizens of full constitutional stature rightly recognize that, if justices do in fact lie to each other, they also necessarily lie to us. Citizens will also sense that acts of judicial untruthfulness can treat us as less than equal or as persons whose true consent does not matter to judicial legitimacy."); Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 991 (2008) ("Unless judges are sincere, the grounds for their decisions cannot be scrutinized in the public domain. And without such scrutiny, those subject to adjudication cannot determine whether the reasons given to them are sound."). Paul Butler, on the other hand, is among those to argue that judicial lies are sometimes justified to thwart injustice. Paul Butler, *When Judges Lie (and When They Should)*, 91 MINN. L. REV. 1785, 1785–86 (2007) ("Sometimes [lying] is the best of the imperfect choices that judges have when they are confronted with unjust law. This Article recommends judicial lying only when it will thwart extreme injustice . . . .").

43. *See* YUDOF, *supra* note 16, at 301 ("The danger that, in attempting to recalibrate communications networks, courts will create more problems than they solve is greatest when judicial intervention is greatest—when the courts rely on the Constitution to provide direct limits on government expression.").

> government or manipulative government failures to disclose information.[44]

On the other hand, such challenges are not without precedent, as courts make similarly complex assessments of motive and falsity in a wide range of constitutional, statutory, and common law contexts.[45] Constitutional doctrine, for example, frequently requires courts to identify and evaluate the motives underlying governmental decisions in a number of areas.[46] In addition, as detailed by Gregory Klass, a wide-ranging "'law of deception'" (that includes "the torts of deceit, negligent misrepresentation, nondisclosure, and defamation; criminal fraud statutes; [and] securities law, which includes both disclosure duties and penalties for false statements") often calls upon courts to make a variety of similar determinations regarding falsity and intent.[47]

2. Separation of Powers

Reliance on constitutional litigation to constrain government's deliberate falsehoods requires the judiciary to evaluate the policy choices of the politically accountable branches. Separation of powers concerns may thus leave judges themselves reluctant to enforce constitutional limitations on the government's lies.[48]

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44. Strauss, *supra* note 12, at 359; *see id.* at 358–59 ("Specifically, prohibitions against government lying and manipulative government nondisclosure may be examples of a principle of free expression that is underenforced by the courts. Although the principles underlying the first amendment (under either the persuasion principle or the Meiklejohn theory) should prohibit government action of this kind, that is not a limitation that the courts can implement." (footnote omitted)). That judges may themselves sometimes lie further compounds this challenge. *See supra* note 42 and accompanying text.

45. For arguments rebutting institutional competence concerns in related contexts, see Kitrosser, *supra* note 19, at 914–16 (responding to separation of powers and judicial competence concerns about courts' ability to police unlawful government secret keeping); D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 677 (2013) (describing public fiduciary theory as responsive to concerns about courts' institutional competence to assess other governmental actors and observing that judges frequently enforce related fiduciary duties in the private law context).

46. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 710–21 (3d ed. 2006) (describing the search for impermissible government motive in equal protection doctrine).

47. Gregory Klass, *Meaning, Purpose, and Cause in the Law of Deception*, 100 GEO. L.J. 449, 449 (2012); *see also id.* at 480–81 (noting that there are often good reasons to let judges and juries determine a message's falsity and the speaker's state of mind).

48. As Jonathan Varat observed:

> Nor, for example, if President Bush used erroneous information in making the case for going to war in Iraq, misleading those who were asked to support his policy, is it likely that a court would hold that the First Amendment itself required the president to issue a correction, or to be held liable for damages, even if it were proved that he knew he was making a false statement at the time.

Varat, *supra* note 12, at 1133; *see also* Eric L. Muller, *Constitutional Conscience*, 83 B.U. L. REV. 1017, 1071 (2003) ("Underlying this judicial reluctance to find vindictiveness and selectivity, or even to give defendants the tools they might need to prove them, are real

Recall that in other contexts such concerns (along with concerns about judicial competence and the management of limited resources) have led courts to create and apply a variety of doctrines to narrow the circumstances under which the judiciary is empowered to second-guess the other branches; these include a range of governmental immunities,[49] as well as standing, political question, and other justiciability doctrines.[50]

These barriers, however, are not necessarily insuperable. As the Supreme Court has made clear,[51] preserving the availability of the courts' checking function is especially important when governments act in politically popular ways that nonetheless undermine key constitutional values (e.g., when a government seeks to punish or silence a politically weak or unpopular critic[52]) or when governments seek to entrench themselves in defiance of political controls (e.g., when the government seeks to manipulate election outcomes[53]). To this end, courts have recognized a variety of limits on and exceptions from the justiciability doctrines to help ensure that an independent judiciary remains available in appropriate circumstances to check the political branches.[54] Some of the harms inflicted by the government's lies are more individualized and targeted than others, for example, and are thus more likely to satisfy the requirements of standing doctrine.[55] In addition, governmental immunities generally operate to bar only suits for money damages and not suits

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concerns for the separation of powers . . . .").

49. For example, the Court has held that certain functions are so key to effective government to require absolute immunity from money damages for government actors found to have violated the law when engaged in those functions. *See* Forrester v. White, 484 U.S. 219, 227–29 (1988) (discussing absolute immunity for judges performing certain judicial actions); Nixon v. Fitzgerald, 457 U.S. 731 (1982) (holding that the President is absolutely immune from civil damages liability for his official acts). Even when engaged in functions that do not trigger absolute immunity, government actors found to have violated the Constitution may nevertheless enjoy "qualified immunity" from money damages so long as they did not violate law that was clearly established at the time and of which a reasonable person would have been aware. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818–19 (1982).

50. *E.g.*, Nixon v. United States, 506 U.S. 224 (1993) (ruling that a federal judge's challenge to the Senate's impeachment process was a nonjusticiable political question); City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (finding that the plaintiff had no standing to seek injunctive relief from the police department's allegedly unconstitutional use of chokeholds because he could not show that he was imminently vulnerable to again being subjected to a chokehold).

51. *E.g.*, United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

52. *E.g.*, Derek E. Bambauer, *Orwell's Armchair*, 79 U. CHI. L. REV. 863, 897 (2012) (describing how the government sought to shut down the publication of leaked information by targeting pressure on the relatively unknown WikiLeaks rather than the more mainstream and powerful *New York Times*).

53. *E.g.*, Reynolds v. Sims, 377 U.S. 533 (1964) (striking down state legislatures' refusal to reapportion state legislative districts to reflect major demographic changes as violation of Equal Protection Clause requirement of "'one person, one vote'").

54. *See* Baker v. Carr, 369 U.S. 186 (1962) (holding that equal protection challenge to states' refusal to redistrict was not a political question and was thus justiciable).

55. See *infra* notes 159–160 and accompanying text for additional discussion of whether and when government lies inflict harms that would satisfy the requirements of standing doctrine.

seeking injunctive relief, and in certain circumstances even immunities from damages may be limited, waived, or otherwise overcome to achieve important public purposes.[56]

3. Unintended Consequences: Chilling Valuable Government Speech

Just as the government's regulation of private speakers' falsehoods may sometimes threaten to chill valuable speech,[57] so too may be the case of efforts to regulate the government's own lies. Indeed, measures that constrain government lies may chill both truthful government speech as well as certain beneficial government lies.[58]

First, efforts to constrain government lies may chill government speakers in ways that deprive the public of accurate and thus valuable information. As Mark Yudof observed, requiring government to guarantee truth in its expression might inhibit it from performing important information-gathering and public-communication functions.[59] One can easily imagine efforts by the government's partisan political opponents or by those it has legitimately targeted for enforcement action to exploit constitutional litigation (or the threat thereof) to delay or squelch important government speech.[60]

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56. *E.g.*, Buckley v. Fitzsimmons, 509 U.S. 259 (1993) (declining to find that prosecutor's allegedly false statements made when announcing defendant's indictment fell within zone of prosecutorial functions absolutely immune from damages liability). For extensive and thoughtful discussion of various immunities (and their exceptions) from liability for unconstitutional actions, see John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207 (2013).

57. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) ("Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate. . . . And punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press."); New York Times Co. v. Sullivan, 376 U.S. 254, 282–83 (1964) (concluding that the imposition of damages liability for merely negligent false statements about public officials threatens to chill valuable political criticism).

58. Note that government speech can be valuable even if it is not constitutionally protected. Thus I do not claim that the government has a First Amendment right to its speech even as I note that its speech has value.

59. *See* YUDOF, *supra* note 16, at 46. In a decision most famous for its commerce clause ruling, the Supreme Court relied on related pragmatic grounds to reject a challenger's efforts to invalidate the results of a referendum based on the Secretary of Agriculture's allegedly misleading speech. Wickard v. Filburn, 317 U.S. 111, 117–18 (1942) ("To hold that a speech by a Cabinet officer, which failed to meet judicial ideals of clarity, precision, and exhaustiveness, may defeat a policy embodied in an Act of Congress, would invest communication between administrators and the people with perils heretofore unsuspected.").

60. *See* Morgan, *supra* note 1, at 199–226 (expressing related concern that statutory prohibitions on lying to the government could be inappropriately enforced against government speakers by the government's political enemies for political or other reasons); O'Reilly, *supra* note 30, at 546 ("A primary concern for regulators is to reduce the ability of an affected entity to prevent, remove, or mitigate the appearance of a piece of accurate data on the agency website or other information product concerning that entity. If [inaccurate government speech were actionable], there could be abuse of the new process by affected entities seeking delay or

We may thus fear that the prospect of litigation to enforce constitutional constraints on the government's lies might deter some valuable government expression. Here too such concerns are substantial but not necessarily irrefutable. Recall that I have defined a "lie" for purposes of this Article to mean a false statement known by the speaker to be untrue and made with the intention that the listener understand it to be true. As the Court has acknowledged in related contexts, legal constraints that target only intentionally false factual assertions carry less potential for chilling valuable expression than do measures that sweep more broadly (for example, those that regulate speech on matters other than those that are demonstrably true or false or those that require speakers' accuracy regardless of any culpable mental state).[61] Moreover, as the Court has recognized in the context of commercial speech,[62] chilling may be less of a concern with respect to speakers like the government that have strong incentives to continue to speak.

Second, some government lies in certain contexts may have value in their own right, as can be the case of government's deliberate falsehoods motivated by certain public purposes. Examples may include lies told to foil adversaries in times of war as well as the lies about their identities told by undercover police officers or civil rights enforcement testers seeking to identify and expose illegal behavior.[63] Just as some lies by private speakers may be thought harmless or even helpful, so too may some lies by the government strike us as relatively innocuous or even valuable if they help accomplish important public objectives.[64] Along these lines, many thinkers urge more generally that lies motivated by the speaker's interest in preventing harm to the

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agency silence about the violated conditions.").

61. *See* United States v. Alvarez, 132 S. Ct. 2537, 2552 (2012) (Breyer, J., concurring in the judgment) (noting that "[t]he dangers of suppressing valuable ideas are lower where, as here, the regulations concern false statements about easily verifiable facts"); *Sullivan*, 376 U.S. at 277–82 (holding that the failure to require a showing of a speaker's malice as an element of a defamation claim brought by a public official may chill valuable speech).

62. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 772 n.24 (1976) ("[C]ommercial speech may be more durable than other kinds. Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely. Attributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker." (emphasis in original)).

63. *See Fair Housing Testing Program*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/fair-housing-testing-program-1 (last updated Aug. 6, 2015) [http://perma.cc/8GMK-H6HS] (describing the Department of Justice's Fair Housing Testing Program, in which "individuals who, without any bona fide intent to rent or purchase a home, apartment, or other dwelling, pose as prospective buyers or renters of real estate" to determine whether housing providers are complying with fair housing laws).

64. *See Alvarez*, 132 S. Ct. at 2553 (Breyer, J., concurring in the judgment) ("False factual statements can serve useful human objectives, for example: in social contexts, where they may prevent embarrassment, protect privacy, shield a person from prejudice, provide the sick with comfort, or preserve a child's innocence; in public contexts, where they may stop a panic or otherwise preserve calm in the face of danger; and even in technical, philosophical, and scientific contexts, where (as Socrates' methods suggest) examination of a false statement (even if made deliberately to mislead) can promote a form of thought that ultimately helps realize the truth.").

listener (or others) are morally as well as instrumentally justifiable.[65] John Mearsheimer is among those who see considerable benefit to certain strategically motivated government lies, such as those told to protect national security interests.[66] Kennedy administration Assistant Secretary of Defense Arthur Sylvester even proposed a governmental duty to lie in certain related circumstances:

> Government officials as individuals do not have the right to lie politically or to protect themselves, but they do always have the duty to protect their countrymen. . . . Sometimes, and those times are rare indeed, Government officials may be required to fulfill their duty by issuing a false statement to deceive a potential enemy, as in the Cuban missile crisis.[67]

For these reasons, we may resist constraints on the government's lies that are motivated by certain public-minded purposes.

These concerns may be addressed by treating the government's motive for lying as key to its decision's ultimate legality. As discussed in more detail in Part IV, government lies that trigger strict constitutional scrutiny because they deprive their target of protected rights should fail this scrutiny when motivated by nonpublic (and thus noncompelling) reasons—for example, when the government has lied to protect itself from legal or political accountability, for its financial gain, or to silence or punish a critic's protected expression. But the government's decision should survive such scrutiny when necessary to achieve compelling government interests—for example, to calm public panic in a public safety emergency or to prevent a criminal from hurting a victim.[68]

In sum, the government's lies pose substantial dangers, as do efforts to prohibit them. Empowering government to protect us and our interests while limiting its ability to hurt us is no easy task, requiring care and attention to nuance. Wrestling

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65. *See* BOK, *supra* note 19, at 78 ("Just as lies intended to avoid serious harm have often been thought more clearly excusable than others, so lies meant to *do* harm are often thought least excusable. And lies which neither avoid nor cause harm occupy the middle ground. Throughout the centuries, beginning with Augustine, such distinctions have been debated, refined, altered." (emphasis in original)); Strauss, *supra* note 12, at 355 ("[T]here is a difference between lies that are manipulative and false statements made for different reasons. False statements that are not manipulative lack the element of control and domination. An inadvertently false statement, for example, or a false statement made solely for the purpose of protecting a confidence, is less objectionable because it does not involve the same degree of manipulation as a false statement made for the purpose of influencing behavior or thought.").

66. MEARSHEIMER, *supra* note 4, at 7; *see also* ALTERMAN, *supra* note 3, at 39 ("Lying about peaceful negotiations during wartime is a categorically different act than lying about warlike acts in peacetime, and far less troubling. Successful military operations often require secrecy and sometimes even deception.").

67. Sylvester, *supra* note 10, at 14; *see also* MEARSHEIMER, *supra* note 4, at 7 ("But the fact is that there are good strategic reasons for leaders to lie to their publics as well as to other countries. These practical logics almost always override well-known and widely accepted moral strictures against lying. Indeed, leaders sometimes think that they have a moral duty to lie to protect their country.").

68. *See infra* note 202 and accompanying text.

with the problem of government lies thus requires us to recognize, and seek to accommodate, these tensions. The next Part explores possible constitutional approaches to constraining government's deliberate falsehoods that attend to these competing concerns.

II. POTENTIAL CONSTITUTIONAL CONSTRAINTS ON GOVERNMENT LIES

As the preceding Part described, the government's lies threaten a range of serious harms. That government behaves badly, however, does not necessarily mean that it behaves unconstitutionally. This Part thus seeks to identify when and how the government's lies inflict the harms of deception and breach of trust in ways that endanger specific constitutional rights.[69] More specifically, it explores possibilities for building on due process and free speech theory and doctrine to address harms to targeted individuals while remaining attentive to the enforcement challenges described above.

A. The Due Process Clause

In this subpart, I propose that government lies violate the Due Process Clause when they directly deprive individuals of life, liberty, or property or when they are sufficiently coercive of their targets to constitute the functional equivalent of such deprivations. In other words, sometimes the government's lies inflict the harms of deception in ways that injure their target's protected liberty or property interests in legally cognizable ways. I further propose that even noncoercive government lies may violate the Due Process Clause in those extreme circumstances when they lack any reasonable justification—that is, when they shock the conscience with their outrageousness and thus constitute an abuse of governmental power. In other words, government lies that breach the public's trust that its government's actions will not be mean-spirited or cruel can also violate substantive due process protections.[70]

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69. Although this Article focuses on the Due Process Clause and Free Speech Clause as the most promising sources of constitutional constraint on government lies, other possibilities remain. For example, Article II imposes upon the President an affirmative duty to speak that might be interpreted to include a duty to speak truthfully in that context. *See* Vasan Kesavan & J. Gregory Sidak, *The Legislator-in-Chief*, 44 WM. & MARY L. REV. 1, 25 (2002) (interpreting Article II to require the President's report on the state of the union to include "detailed reporting on the public affairs of the United States so that Congress may properly exercise its legislative power"); *id.* at 63–64 ("The publication of the President's assessment conveys information to Congress—information uniquely gleaned from the President's perspective in her various roles as Commander-in-Chief, chief law enforcer, negotiator with foreign powers, and the like—that shall aid the legislature in public deliberation . . . ."). Government lies designed to manipulate election results might also be understood to offend a commitment to a republican form of government in violation of the Guarantee Clause. *See* U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . ."). The Supreme Court, however, has long held that Guarantee Clause claims are nonjusticiable political questions. *E.g.*, Luther v. Borden, 48 U.S. (7 How.) 1 (1849).

70. *See* Daniels v. Williams, 474 U.S. 327, 331 (1986) (explaining that substantive due process protects against the arbitrary exercise of government power and thus "bar[s] certain

First, courts have already identified a few specific situations where the link between a government lie and the denial of constitutionally protected liberty is sufficiently strong to violate the Due Process Clause. As we know, the Constitution protects persons from governmental deprivations of life, liberty, or property without due process of law.[71] More specifically, government lies can violate procedural due process protections when they deprive individuals of life, liberty, or property without adequate procedural safeguards, and they can violate substantive due process protections regardless of the presence of procedural safeguards when they deprive individuals of life, liberty, or property without adequate government justification.[72] For example, prosecutorial lies to a judge or jury can offend due process protections when they lead to a defendant's conviction and thus the deprivation of her individual physical liberty.[73] Other government lies that falsely assert an individual's misconduct or dangerousness can deprive their targets of liberty in other very direct ways. Imagine, for example, a government's lie that an individual is sufficiently dangerous to be included on a "no-fly" list and thus barred from international air travel.[74]

The scope of such protections, of course, turns in great part on how broadly one defines protected liberty and property interests for purposes of the Due Process Clause. The examples identified in the preceding paragraph involve lies that are directly connected to what all agree are constitutionally protected interests in physical liberty. But other situations trigger considerably more controversy. Consider, for example, whether the Due Process Clause should be interpreted to constrain government's defamatory lies[75]: although the causal connection between the government lie and damage to reputation is apparent, whether reputation itself is a constitutionally protected liberty or property interest remains contested.

The Supreme Court considered this question in *Paul v. Davis*, where it rejected a procedural due process challenge to a local police department's creation and distribution of a flyer that identified the challenger as one of several

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government actions regardless of the fairness of the procedures used to implement them").

71. U.S. CONST. amend. V, amend. XIV, § 1.

72. For a discussion of procedural and substantive due process principles more generally, see CHEMERINSKY, *supra* note 46, at 545–46.

73. *See supra* note 28 (listing examples).

74. *See, e.g.*, Latif v. Holder, 28 F. Supp. 3d 1134, 1139 (D. Or. 2014) (noting conclusion in earlier order that plaintiffs had "protected liberty interests in their rights to travel internationally by air and rights to be free from false governmental stigmatization that were affected by their inclusion on the No-Fly List" and concluding that government's failure to provide plaintiffs with post-deprivation notice or any meaningful opportunity to contest their inclusion on the no-fly list violated procedural due process protections); Aaron H. Caplan, *Nonattainder as a Liberty Interest*, 2010 WIS. L. REV. 1203, 1206 ("Persons appearing on a blacklist [like the "no-fly" list] are not treated as suspected wrongdoers, but as confirmed wrongdoers who face consequences as a result. Yet these consequences are imposed without the procedures the U.S. Constitution ordinarily relies on to ensure that wrongdoers are correctly identified and punishment appropriately imposed.").

75. For purposes of this discussion, I focus only on a subset of defamation—that is, defamatory lies—while recognizing that speech can sometimes constitute defamation if recklessly or negligently, and not only deliberately, false.

"Active Shoplifters,"[76] even though the pending shoplifting charges against him had not been proven and were later dismissed.[77] A divided Court held that government defamation does not trigger procedural due process protections (i.e., a name-clearing hearing) unless it causes some harm—like job loss or other economic injury—in addition to stigmatic injury.[78] In dissent, Justice Brennan objected vigorously to the majority's narrow understanding of the harm to liberty interests necessary to trigger procedural due process review and concluded that the "logical and disturbing corollary of this holding is that no due process infirmities would inhere in a statute constituting a commission to conduct *ex parte* trials of individuals, so long as the only official judgment pronounced was limited to the public condemnation and branding of a person . . . ."[79]

The Court's decision in *Paul* continues to attract criticism from those who would find both procedural and substantive Due Process Clause protections triggered by defamatory government lies that cause reputational damage alone.[80] Barbara Armacost, for example, characterizes the Court's holding as ignoring the unique reputational harms of government defamation, especially in the criminal context: "[B]ecause governmental officials have a virtual monopoly on criminal enforcement, the power to cause this kind of reputational harm is uniquely governmental. . . . The words and actions of police officers and prosecutors are viewed as official declarations of the law enforcement arms of government."[81] She describes the government's defamatory assertion that an individual has engaged in criminal conduct as akin to an adjudication that should thus trigger procedural due process protections.[82]

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76. *See* 424 U.S. 693, 697 (1976).

77. *Id.* at 696.

78. *Id.* at 712 (holding that the government's "defamatory publications, however seriously they may have harmed respondent's reputation, did not deprive him of any 'liberty' or 'property' interests protected by the Due Process Clause").

79. *Id.* at 721 (Brennan, J., dissenting) (italics in original).

80. *See* Eric J. Mitnick, *Procedural Due Process and Reputational Harm: Liberty as Self-Invention*, 43 U.C. DAVIS L. REV. 79, 102, 142 (2009) (arguing that reputation should be protected as liberty for procedural due process purposes, especially in light of states' growing ability to label citizens as "potential terrorists, gang members, sex offenders, child abusers, and prostitution patrons"); Randolph J. Haines, Note, *Reputation, Stigma and Section 1983: The Lessons of* Paul v. Davis, 30 STAN. L. REV. 191, 238–39 (1977) (urging a procedural due process analysis that addresses government defamation motivated by the government's intent to stigmatize the target); Shaudee Navid, Comment, *They're Making a List, but Are They Checking It Twice? How Erroneous Placement on Child Offender Databases Offends Procedural Due Process*, 44 U.C. DAVIS L. REV. 1641, 1667–74 (2011) (describing circuit split as to whether the government's erroneous listing of the plaintiff in a child offender database deprives him of a liberty interest and suggesting procedural cure with a system that permits timely correction of erroneous listings).

81. Barbara E. Armacost, *Race and Reputation: The Real Legacy of* Paul v. Davis, 85 VA. L. REV. 569, 621–22 (1999).

82. *Id.* at 625 ("The distinction between statements that brand or accuse and those that simply report law enforcement actions would serve as a sensible limiting principle for the due process cause of action for governmental defamation.").

Still others argue that government damage to reputation through defamatory lies infringes upon fundamental liberty or property interests in violation of substantive due process protections.[83] The Court itself has explicitly declined to foreclose this possibility.[84] Under this approach, regardless of the adequacy of any procedural protections, the government's defamatory lies can violate the Due Process Clause when they lack an adequate justification.

Consider next the possibility that the government's lies that coerce its target into giving up protected liberties violate due process protections because they are functionally equivalent to directly depriving the target of those rights. Courts and commentators have extensively examined this possibility in the context of law enforcement officers' lies.[85] More specifically, when assessing whether police interrogators' lies deprive their targets of constitutionally protected liberties, the Court seeks to determine whether the lies take the form of "coercion, not mere strategic deception," such that they render a confession (or other decision to waive a constitutional right) involuntary.[86]

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83. *See, e.g.*, Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555, 590–607 (1997) (arguing that government defamation should be understood as infringing a fundamental property interest in reputation and thus triggering strict scrutiny as a matter of substantive due process).

84. *Paul*, 424 U.S. at 711 n.5 ("Our discussion in Part III is limited to consideration of the procedural guarantees of the Due Process Clause and is not intended to describe those substantive limitations upon state action which may be encompassed within the concept of 'liberty' expressed in the Fourteenth Amendment."). Recently, the Court suggested that substantive due process guarantees might apply to the government's defamatory lies. *See* Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 9 (2003) (Souter, J., concurring) ("I join the Court's opinion and agree with the observation that today's holding does not foreclose a claim that Connecticut's dissemination of registry information is actionable on a substantive due process principle. To the extent that libel might be at least a component of such a claim, our reference to Connecticut's disclaimer would not stand in the way of a substantive due process plaintiff." (citation omitted)).

85. *See* Laurie Magid, *Deceptive Police Interrogation Practices: How Far is Too Far?*, 99 MICH. L. REV. 1168, 1174 (2001) ("Interrogation typically requires at least some deception—from professing unfelt sympathy for the suspect, to exaggerating the strength of the evidence against the suspect, to falsely alleging that a witness has identified the suspect."). Although such interrogation lies can offer considerable benefits in uncovering, punishing, and preventing wrongdoing and protecting public safety, they also threaten significant harm through wrongful convictions and decreased public trust. Debate abounds on the comparative costs and benefits of police lies. *Compare id.* at 1171–72 (urging that limiting police deception would impose significant societal harm by reducing the number of convictions of the guilty), *and* William J. Stuntz, *Lawyers, Deception, and Evidence Gathering*, 79 VA. L. REV. 1903, 1907 (1993) ("[G]uilty criminal defendants would benefit substantially if the law were to prohibit deceptive tactics, while innocents would probably be harmed by the impairment of the government's ability to sort cases."), *with* Young, *supra* note 23 (arguing that police lies are unacceptably harmful), *and* Irina Khasin, Note, *Honesty Is the Best Policy: A Case for the Limitation of Deceptive Police Interrogation Practices in the United States*, 42 VAND. J. TRANSNAT'L L. 1029, 1032 (2009) ("Confessions gained through police deception are often factually inaccurate and untrustworthy.").

86. *See, e.g.*, Illinois v. Perkins, 496 U.S. 292 (1990) (finding no constitutional violation when an undercover law enforcement officer posed as a fellow inmate to whom a jailed suspect

This focus on coercion seeks to protect individuals' liberty to decide freely whether to waive a constitutional right (such as the right to be free from compelled self-incrimination, the right to a lawyer, or the right to be free from warrantless searches) while also declining to characterize all police lies as rising to the level of a constitutional violation.[87] Here the hard questions center on the causal connection between the lie and a constitutionally protected liberty—that is, whether and when the government's lie is sufficiently coercive such that it effectively deprives an individual of that right. In assessing whether law enforcement officers' lies are impermissibly coercive, courts often try to determine whether their target could reasonably be expected to resist them with silence rather than with an incriminating response or other waiver of a constitutional right. Along these lines, Christopher Slobogin has synthesized the case law to identify two types of interrogation lies as "clearly illegitimately coercive."[88] First, police lies about the target's constitutional rights coerce the waiver of such rights and thus violate constitutional protections.[89] In other words, the government's lies about the existence of, or the consequences of exercising, constitutional rights can be the practical equivalent of its refusal to honor those rights altogether. Second, courts often characterize lies as coercive if they would be coercive if true—that is, if a reasonable person would likely waive a constitutional right in response.[90] Examples of such lies include false threats to take a suspect's child away or false threats to cut off government financial aid to a suspect's child unless the suspect waived her rights,[91] and false claims that doctors trying to save a child's life needed a suspect's explanation of the circumstances under which he injured the child.[92] Such lies' coercive potential may vary with the audience as well as with subject matter and other contextual factors: for example, a number of commentators assert that teenagers' youth and inexperience leaves them especially vulnerable to police interrogation tactics that include lies.[93]

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made damaging admissions); *id.* at 297 ("*Miranda* forbids coercion, not mere strategic deception by taking advantage of a suspect's misplaced trust in one he supposes to be a fellow prisoner."); United States v. Byram, 145 F.3d 405, 408 (1st Cir. 1998) ("But trickery is not automatically coercion. Indeed, the police commonly engage in such ruses as suggesting to a suspect that a confederate has just confessed or that police have or will secure physical evidence against the suspect. While the line between ruse and coercion is sometimes blurred, confessions procured by deceits have been held voluntary in a number of situations."); *see also* GREEN, *supra* note 27, at 93–95 (distinguishing the harms of coercion and deception as different ways to bend another's will against her own preferences—the first through force or power and the second through the manipulation of information).

87. Many commentators have addressed more generally how courts fashion constitutional law doctrine to accommodate the institutional realities of various government actors. *See, e.g.*, Andrew B. Coan, *Judicial Capacity and the Substance of Constitutional Law*, 122 YALE L.J. 422 (2012); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988).

88. Christopher Slobogin, *Lying and Confessing*, 39 TEX. TECH. L. REV. 1275, 1276 (2007).

89. *Id.*

90. *Id.*

91. *See* Lynumn v. Illinois, 372 U.S. 528, 534 (1963).

92. *See* People v. Thomas, 8 N.E.3d 308, 314–15 (N.Y. 2014).

93. *See* Hayley M. D. Cleary, *Police Interviewing and Interrogation of Juvenile Suspects:*

In contrast, examples of law enforcement officers' lies that courts generally characterize as noncoercive include police lies about the strength of their case (e.g., whether a codefendant has confessed or whether there's a witness), lies about the existence of physical evidence, lies about the comparative blameworthiness of the defendant's or the victim's conduct, lies about the circumstances of the interrogation (e.g., the identity of the interrogator or the results of a polygraph test), and lies by undercover officers about their identities in noncustodial settings.[94] Here courts generally find such lies noncoercive because they believe a reasonable person could resist them simply by remaining silent or otherwise declining to waive a constitutional right. Civil rights testers' intentional misrepresentations about their interest in buying or renting specific property to determine whether housing providers are complying with fair housing laws should similarly be characterized as noncoercive, as the target is free to respond (or not to respond) in any of a variety of ways (other than waiving constitutional rights).[95]

Courts' assessments of the constitutionality of police lies to secure consent to search without a warrant similarly turn on whether they find the lie to be coercive.[96] The Supreme Court, for example, has found a suspect's consent to be involuntary when given in response to law enforcement officers' intentionally false claim that they had a warrant.[97] In contrast, the Court has held that an undercover officer's lie about his identity did not render involuntary the suspect's invitation of that undercover agent into his home for a drug sale.[98]

To be sure, the line between coercive lies and those that are instead "merely" deceptive is far from bright. Just as philosophers have long disagreed over the meaning of coercion, so too have courts and legal commentators.[99] Justices Marshall

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A Descriptive Examination of Actual Cases, 38 LAW & HUM. BEHAV. 271 (2014) (documenting ways in which teenagers may be particularly vulnerable to police coercion due to their youth and inexperience); Errol C. Dauis, Note, *Police Trickery and Juvenile Suspects:* People v. Mays, 15 U.C. DAVIS J. JUV. L. & POL'Y 205 (2011) (arguing that juveniles are especially vulnerable to police coercion because of their youth and inexperience); Patrick M. McMullen, Comment, *Questioning the Questions: The Impermissibility of Police Deception in Interrogations of Juveniles*, 99 NW. U. L. REV. 971, 975–76 (2005) (proposing bright-line ban on police deception when interrogating juveniles in light of juveniles' greater vulnerability to coercion, greater deference to authority, and limited ability to assess consequences).

94. Young, *supra* note 23, at 429–33.

95. *See supra* note 63 and accompanying text.

96. William E. Underwood, Note, *A Little White Lie: The Dangers of Allowing Police Officers to Stretch the Truth As a Means to Gain a Suspect's Consent to Search*, 18 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 167 (2011) (describing police lies about the reasons for a search when requesting consent to search without a warrant); *id.* at 177 (explaining that consents to searches must be free of coercion to be voluntary within meaning of Fourth Amendment).

97. Bumper v. North Carolina, 391 U.S. 543, 550 (1968) (finding that consent to search was not voluntary when given in response to law enforcement officers' false claim that they had a warrant).

98. Lewis v. United States, 385 U.S. 206, 211 (1966).

99. *See* J. Roland Pennock, *Coercion: An Overview*, *in* COERCION 1 (J. Roland Pennock & John W. Chapman eds., 1972) (describing philosophers' debates over the definition of coercion). The Supreme Court itself has defined coercion differently in different settings, and is considerably quicker to find government's actions to be coercive in some areas than in

and Stevens, for example, are among those to have urged the Court to recognize a substantially broader range of police lies as unconstitutionally coercive. More specifically, Justice Marshall vigorously contested the Court's refusal to characterize as coercive an undercover officer's lies to a suspect in custody; he urged that any custodial questioning is inherently coercive, regardless of whether the target perceives the questioner as the police.[100] Justice Stevens similarly objected to the Court's refusal to characterize as coercive law enforcement officers' deliberately false assurances to an attorney that they were not questioning his client; he argued that such lies are the functional equivalent of refusing to allow a suspect to consult with his attorney in violation of the right to counsel.[101] Various state and federal courts have also developed different measures of coercion when assessing the constitutionality of police lies.[102]

One could thus plausibly argue that a focus on coercion as a touchstone for due process analysis lacks conceptual coherence or normative appeal or both,[103] as it not only invites contested determinations of whether a government lie is coercive but also may fail to capture the full range of ways in which even noncoercive government lies can nonetheless inflict harm.[104] But the conceptually coherent alternatives—that is, that we should interpret the Constitution to prohibit all of the government's lies, or none—are even less appealing from a normative standpoint: they either punish harmless and even beneficial government lies, or they insulate some deeply damaging government lies from constraint. Here I do not seek to resolve the limitations of coercion-based analysis; instead I simply propose that government lies in certain contexts can coerce their targets in ways that we should recognize as depriving individuals of liberty in violation of the Due Process Clause. As we have seen, the challenges posed by the government's lies demand attention to context; attention to context, in turn, requires us to tolerate—and perhaps even embrace—some indeterminacy.[105] For these reasons, I suggest that coercion provides a helpful, if

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others. *E.g.*, Nat'l Fed'n of Indep. Buss. v. Sebelius, 132 S. Ct. 2566, 2603–04 (2012) (describing federal government's "threats to terminate other significant independent grants" as coercive of state policy); *id.* at 2634 (Ginsburg, J., dissenting) (finding no such coercion); *see also infra* notes 139–143 and accompanying text (discussing Justices' differing approaches to coercion in the context of Establishment Clause analysis).

100. Illinois v. Perkins, 496 U.S. 292, 306 (1990) (Marshall, J., dissenting) ("The compulsion proscribed by *Miranda* includes deception by the police.").

101. Moran v. Burbine, 475 U.S. 412, 450–56 (1986) (Stevens, J., dissenting).

102. *See* Young, *supra* note 23, at 453–56.

103. *See* Pierre Schlag, The Legal Argument Toolkit 13–18 (Jan. 1, 2015) (unpublished manuscript) (on file with the Indiana Law Journal) (identifying conceptual intelligibility and normative appeal as among the criteria for "sound" legal distinctions). As Schlag points out, these criteria stand in some tension with each other, which makes ideal legal distinctions elusive. *Id.* at 19–20.

104. *See* Young, *supra* note 23, at 456–71 (arguing that even noncoercive lies by police pose unacceptable harms to their ability to gather evidence and to their integrity).

105. *See* Schlag, *supra* note 103, at 34–35 (observing that indeterminacy has a number of virtues, including maintaining flexibility, accommodating future change, postponing decision making, and deferring to other decision makers). In a related context, Toni Massaro has extolled the virtues of constitutional thinking "that is factored, not formulaic; contextual, not trans-contextual; dynamic, not static; tentative, not absolutist; plural, not singular." Toni M.

imperfect, touchstone for identifying the universe of government lies that we should understand to violate the Due Process Clause.

We can build upon this analysis to identify circumstances outside of the law enforcement context in which government lies may operate coercively to deprive individuals of constitutionally protected rights. For example, some government lies about voting matters can violate the Due Process Clause.[106] More specifically, the government's lies about the location of polls or the times at which they close can deprive individuals of the meaningful exercise of voting rights. So too may be the case of the government's lies about candidates' identity or party affiliation.[107]

As another example, the Supreme Court has suggested that laws subjecting women seeking abortions to the government's inaccurate or misleading speech about abortion—presumably including, but not limited to, government lies about the legal or health consequences of abortion—can pose an impermissible undue burden to a woman's reproductive rights.[108] Although to date courts' discussion of this possibility has been very cursory, we might understand such lies as coercive of women's reproductive choices. Indeed, the Court has suggested in other contexts that women seeking abortions at health care facilities can be considered "'captive' by medical circumstance[s]" (i.e., with limited possibilities for exit or rebuttal)[109]—a dynamic that increases the potential for coercion. The coercive effects of such lies may also increase if the government requires that they be uttered by health care providers upon whom patients rely for trusted and expert advice.[110] Again, listeners'

Massaro, *Tread on Me!*, 17 U. PA. J. CONST. L. 365, 367 (2014).

106. *See* Caruso v. Yamhill Cnty., 422 F.3d 848, 863–64 (9th Cir. 2005) (raising the possibility that false ballot speech could violate the Due Process Clause while finding that the contested ballot speech was not misleading); McLaughlin v. North Carolina Bd. of Elections, 65 F.3d 1215, 1227 (4th Cir. 1995) (same).

107. *See* Smith v. Cherry, 489 F.2d 1098, 1102–03 (7th Cir. 1973) (finding possible due process violation when state election officials issued ballot that intentionally misidentified a sham candidate as the nominee, when the sham candidate quickly resigned and was replaced by government officials' preferred candidate).

108. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992) ("If the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible."); *see also* Planned Parenthood Minn., N.D., S.D. v. Rounds, 686 F.3d 889, 898–99 (8th Cir. 2012) (debating whether government-required statements that women who obtain abortions experience increased risk of suicide and suicide ideation were truthful and not misleading and thus consistent with substantive due process).

109. *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 768 (1994) ("[W]hile targeted picketing of the home threatens the psychological well-being of the 'captive' resident, targeted picketing of a hospital or clinic threatens not only the psychological, but also the physical, well-being of the patient held 'captive' by medical circumstance."). For related discussion, see Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 941 (2009); Nadia N. Sawicki, *Compelling Images: The Constitutionality of Emotionally Persuasive Health Campaigns*, 73 MD. L. REV. 458, 516–20 (2014).

110. As a number of commentators have observed, patients might well misunderstand health care professionals to be offering their own independent counsel rather than speaking from the government's required script. *See, e.g.*, Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 172–75 (1996) (arguing that patients could mistakenly attribute the government's

ability to resist, and thus lies' potential to coerce, varies with audience and setting, and some government lies in such circumstances should be considered sufficiently coercive of liberty to violate the Due Process Clause.

Consider finally the possibility that, under certain extreme circumstances, even non-coercive lies by the government may violate substantive due process protections against especially outrageous exercises of governmental power.[111] As the Court has explained, "Since the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary action . . . . [i.e.,] the exercise of power without any reasonable justification in the service of a legitimate governmental objective . . . ."[112] As its test for determining whether executive branch action violates such substantive due process protections, the Court has considered whether "the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."[113] The government's motive is key to this inquiry: "[C]onduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level."[114] Also relevant to this determination is "an understanding of traditional executive behavior, of contemporary practice, and of the standards of blame generally applied to them."[115]

The shocks-the-conscience test thus seeks to capture our expectations—enforceable as a constitutional matter under the Due Process Clause—that our government should not behave outrageously in its dealings with us. This expectation can be frustrated by government lies (or other conduct) that reflects unusually culpable exercises of government power. For example, while declining to find that police officers' deliberate falsehoods to a suspect's attorney about their plans to question his client shocked the conscience in violation of due process, the Court nonetheless noted: "We do not question that on facts more egregious than those presented here police deception might rise to a level of a due process violation."[116]

To date, however, courts have very rarely applied the shocks-the-conscience test of government outrageousness to constrain government action of any sort—and even then most often to constrain physical abuse by law enforcement officers[117] rather than their lies.[118] On the one hand, the test's subjectivity has triggered its share of

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views to their doctors).

111. I am grateful to Toni Massaro for this suggestion.

112. Cnty. of Sacramento v. Lewis, 523 U.S. 833, 845–46 (1998).

113. *Id.* at 848 n.8; *see also id.* at 846 ("[F]or half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience.").

114. *Id.* at 849. In *Lewis*, the Court found that a police officer's allegedly reckless high-speed pursuit of two teens that resulted in one's death did not shock the conscience because it was spontaneous rather than deliberate and did not involve an intent to cause harm. *Id.* at 854–55.

115. *Id.* at 848 n.8.

116. Moran v. Burbine, 475 U.S. 412, 432 (1986).

117. *See, e.g.*, Rochin v. California, 342 U.S. 165, 172 (1952) (holding that sheriff's direction to hospital doctor to pump suspect's stomach, against suspect's will, to retrieve evidence was sufficiently outrageous to violate substantive due process protections).

118. *E.g.*, Tinker v. Beasley, 429 F.3d 1324, 1329 (11th Cir. 2005) (holding that police officers' lies to suspect that her lawyer had abandoned her did not shock the conscience); Livsey v. Salt Lake Cnty., 275 F.3d 952, 957–58 (10th Cir. 2001) (holding that police officer's misrepresentations of victim's private sexual behavior did not shock the conscience); *see also*

criticism, and courts may thus be reluctant to invoke it.[119] On the other hand, Jane Bambauer and Toni Massaro, after extensively reviewing the history of the shocks-the-conscience test, found that "the problems anticipated by critics are more theoretical than actual" and concluded that the test is no more subjective than tort law and that judges have been appropriately restrained in applying it.[120]

Indeed, courts not uncommonly assess the outrageousness of lies (and other behavior) in other contexts—for example, in determining whether conduct satisfies the outrageousness element of an intentional infliction of emotional distress claim.[121] In these other contexts, courts rely on a number of factors, considering not only the liar's malicious intent to injure, but also (and relatedly) whether she abused a position of authority, whether her conduct was repeated rather than isolated, and whether she knew her target to be especially vulnerable.[122] Some lies by the government abuse

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United States v. Byram, 145 F.3d 405, 408–09 (1st Cir. 1998) ("[T]he police can often mislead suspects, at least where coercion is not involved; thus, it is impossible to treat all such false statements as improper, let alone outrageous or uncivilized. Police investigation can be a rough business, and untruths may sometimes be necessary to save a kidnap victim, retrieve a missing firearm, or for other reasons quite apart from the desire to solve a specific crime already committed.").

119. *See, e.g.*, *Lewis*, 523 U.S. at 861 (Scalia, J., concurring) (characterizing the shocks-the-conscience test as the "*ne plus ultra*, the Napoleon Brandy, the Mahatma Gandhi, the Cellophane of subjectivity" (italics in original) (footnote omitted)); Eric L. Muller, *Constitutional Conscience*, 83 B.U. L. REV. 1017, 1045 (2003) ("[The shocks-the-conscience test] persists as a constitutional test without shape or content, and its critics mock it for its subjectivity."). For arguments that the shocks-the-conscience test is insufficiently restrictive of governmental power, see Rosalie Berger Levinson, *Time to Bury the Shocks the Conscience Test*, 13 CHAP. L. REV. 307, 308 (2010) (describing lower courts as having interpreted the test "to impose a draconian standard, mandating, for example, that detainees demonstrate unnecessary and wanton infliction of pain or that students prove intentional malice or sadism in order to challenge excessive, unwarranted corporal punishment").

120. Jane R. Bambauer & Toni M. Massaro, *Outrageous and Irrational*, 100 MINN. L. REV. (forthcoming 2015) (manuscript at 5), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2583926 [http://perma.cc/K79F-7ZND]; *see also Rochin*, 342 U.S. at 169 ("In dealing not with the machinery of government but with human rights, the absence of formal exactitude, or want of fixity of meaning, is not an unusual or even regrettable attribute of constitutional provisions."); Bambauer & Massaro, *supra*, at 7 ("Too much skepticism deprives us of a valuable judicial resource. We therefore advocate for (carefully) increased use of outrageousness and irrationality scrutiny to allow liberty claims to develop organically, cautiously, and contextually.").

121. This tort has its critics as well. *See, e.g.*, Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 51 (1982) ("The term 'outrageous' is neither value-free nor exacting. It does not objectively describe an act or series of acts; rather, it represents an evaluation of behavior. The concept thus fails to provide clear guidance either to those whose conduct it purports to regulate, or to those who must evaluate that conduct.").

122. *See* Kelly v. Gen. Tel. Co., 186 Cal. Rptr. 184, 188 (Ct. App. 1982) (holding that supervisor's false claims that former employee misused company funds and falsified invoices were outrageous); Turnage v. Kasper, 704 S.E.2d 842, 852–53 (Ga. Ct. App. 2010) (holding that false accusations that neighbor violated bond conditions, which resulted in neighbor's arrest, were outrageous); Waldrip v. Waldrip, 976 N.E.2d 102, 117 (Ind. Ct. App. 2012)

its power in ways that satisfy such tests of outrageousness. One federal court, for example, found that law enforcement conduct shocked the conscience when police, among other things, misrepresented that they had a warrant to extract drugs involuntarily from a suspect's vagina such that she then extracted them herself.[123] And three Ninth Circuit judges recently urged in dissent that law enforcement officers' lies rose to the level of outrageousness when they recruited random targets to commit a fictional crime (robbing a drug house that did not exist) for which the targets were prosecuted and convicted.[124]

In sum, some government lies inflict the harms of deception in ways that endanger specific individual liberties protected by the Due Process Clause. Examples include prosecutors' lies to judges and juries that lead to a defendant's imprisonment; law enforcement officers' lies that coerce the involuntary waiver of constitutional rights; and government lies that deprive their targets of the ability meaningfully to exercise voting, reproductive, or other protected liberties. Some government lies can also violate the Due Process Clause by breaching the public's trust that its government will not behave outrageously; examples include the government's lies that lack any reasonable justification—that is, that shock our conscience—and thus constitute an abuse of governmental power.

B. The Free Speech Clause

This subpart explores when, if ever, the government's lies sufficiently injure First Amendment interests to justify a departure from the general rule that the government's own speech is insulated from Free Speech Clause review. The Supreme Court has recognized a "government speech" defense to certain Free Speech Clause claims, holding that private speakers generally have no First Amendment right to silence or alter the government's own expression.[125] The Court's

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(holding that false accusations of battery to gain leverage in child custody proceedings could support a finding of outrageousness); RESTATEMENT (SECOND) OF TORTS § 46 cmt. d, cmt. e (1965) (identifying, as examples of outrageous conduct, lies that the target's husband had been seriously injured and lies that one is a police officer to coerce the target's behavior).

123. United States v. Anderson, No. 5:13-cr-24, 2013 WL 5769976, at *12 (D. Vt. Oct. 24, 2013), *rev'd on other grounds*, 772 F.3d 969 (2d Cir. 2014).

124. *See* United States v. Black, 750 F.3d 1053, 1054 (9th Cir. 2014) (Reinhardt, J., dissenting) ("While trolling in a bar, the paid CI [confidential informant] successfully tempted a randomly-selected person to participate in the (fictional) crime by offering him the opportunity to obtain a huge financial benefit. After the CI put the participant in touch with the government agent, the agent urged the participant to bring others into the plot, played the principal role in devising and executing the imaginary crime, and then walked the defendants through a script that ensured lengthy prison sentences for committing a crime that did not exist."); United States v. Black, 733 F.3d 294, 318 (9th Cir. 2013) (Noonan, J., dissenting) ("Massively involved in the manufacture of the crime, the ATF's actions constitute conduct disgraceful to the federal government. It is not a function of our government to entice into criminal activity unsuspecting people engaged in lawful conduct; not a function to invent a fiction in order to bait a trap for the innocent; not a function to collect conspirators to carry out a script written by the government.").

125. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005) (explaining that the government's own speech is exempt from Free Speech Clause scrutiny); *see also* Pleasant

recognition of the government speech defense provides not that government has a First Amendment right, but instead a privilege, to its own speech.[126] In recognizing such a defense, however, the Court so far has emphasized the ubiquity and importance of the government's expression without yet addressing its potential threats to constitutional values; the only exception to date, as discussed below, is the Court's willingness to interpret the Establishment Clause to constrain government's religious speech under some circumstances.[127] This subpart thus considers whether and when some government lies are sufficiently coercive of their targets' beliefs or speech to constitute the functional equivalent of the government's direct regulation of those expressive choices in violation of the Free Speech Clause.

The government's deliberately false speech can undermine key First Amendment values in furthering participation in democratic self-governance, facilitating the exercise of individual autonomy, and fostering the discovery of truth and the dissemination of knowledge.[128] First, many government lies frustrate democratic self-governance.[129] The Supreme Court has noted that political lies by private

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Grove City v. Summum, 555 U.S. 460, 467 (2009) ("If [public entities] were engaging in their own expressive conduct, then the Free Speech Clause has no application. The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.").

126. *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 55 (1913) ("A right is one's affirmative claim against another, and a privilege is one's freedom from the right or claim of another."); Frederick Schauer, *Hohfeld's First Amendment*, 76 GEO. WASH. L. REV. 914, 914 (2008) ("Existing First Amendment doctrine takes a rather clear position with respect to the Hohfeldian structure: a First Amendment right is a right against the government and only against the government.").

127. *See* Mary Jean Dolan, *Government Identity Speech and Religion: Establishment Clause Limits After* Summum, 19 WM. & MARY BILL RTS. J. 1, 24 (2010) ("[A] large proportion of all Establishment Clause jurisprudence could be thought of as involving claims about government religious speech, with the other broad category relating to government aid."). A number of commentators have investigated the potential harms of government speech in other contexts and have proposed various approaches for addressing those concerns. *See, e.g.*, Caroline Mala Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 N.Y.U. L. REV. 605 (2008); Leslie Gielow Jacobs, *Who's Talking? Disentangling Government and Private Speech*, 36 U. MICH. J.L. REFORM 35 (2002); Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983 (2005); Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587 (2008); Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648 (2013).

128. *See* ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 6 (2012) (summarizing and describing the three major proposed purposes of the First Amendment as "cognitive" ("'advancing knowledge and discovering truth'" (quoting THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970))); "ethical" (furthering individual autonomy and self-fulfillment); and "political" ("facilitating the communicative processes necessary for successful democratic self-governance")); Thomas I. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 423 (1980) (describing the key values underlying the First Amendment's protection of speech to include furthering democratic self-governance, enabling the exercise of individual autonomy, and facilitating the discovery of truth and the dissemination of knowledge).

129. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT

speakers can offend such a Meiklejohnian view of the Free Speech Clause;[130] lies by the government carry even greater potential to undermine this interest. Consider, for example, a government's lies that hide its wrongdoing and thus stymie the public's ability to hold elected officials politically accountable for their misconduct, or that deliberately manipulate policymakers'—and the public's—assessments of competing policy options.[131] Moreover, government lies pose especially grave instrumental threats to democratic self-governance in contexts where such deliberate falsehoods are unlikely to be addressed by counterspeech, as can be the case with government lies about information to which it has near-monopoly access, such as national security and intelligence matters.[132] Just as a government's criminal sanction or economic reprisal intended to punish or silence those who seek to expose its wrongdoing clearly undermine democratic self-governance, so too can be the case of government lies designed to prevent or deter such exposure.

Second, some lies by the government seek to manipulate individual listeners' beliefs and decisions in ways that undermine those listeners' autonomy and dignity. As Jonathan Varat, for example, explains, "[T]he most powerful argument in favor of government authority to restrict deception, and the most powerful argument against government-imposed deception, are the same: the manipulative, domineering, and fundamentally disrespectful invasion of autonomy worked by deception."[133] Just as government laws that require or prohibit certain beliefs

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24–25 (1948) (characterizing expression as furthering First Amendment values when it contributes to democratic self-governance); *id.* at 27 ("It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed." (emphasis omitted)).

130. *See* Garrison v. Louisiana, 379 U.S. 64, 75 (1964) ("That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.").

131. *See* MEARSHEIMER, *supra* note 4, at 93 ("[W]henever leaders cannot sell a policy to their public in a rational-legal manner, there is a good chance that the problem is with the policy, not the audience."); Spottswood, *supra* note 20, at 1253 ("Insincere assertions do not further our interest in governing ourselves through a free and open exchange of information and ideas, because they involve the betrayal of the public interest, not argument made in service of it."); Strauss, *supra* note 12, at 358 ("[F]alse statements by the government . . . can seriously hamper the discussion necessary for democratic self-government that, according to the Meiklejohn theory, the first amendment was designed to protect.").

132. *See* Jacobs, *supra* note 26, at 444 ("[President Bush] and his top officials relied on controlled information release in a number of ways to support their use of force advocacy. That they withheld much information within their control meant that they could rely upon the public's knowledge that they had superior access to the entire body of existing information to characterize the facts with greater certainty than the content of the information reflected, to omit mention of dissent, to suggest that they had more and better quality information than they presented, and to ask the public to embrace the truth of the threat claims based on trust rather than proof.").

133. Varat, *supra* note 12, at 1110; *see also* Strauss, *supra* note 12, at 358 ("[W]hen the government makes false statements or fails to disclose information for the purpose of manipulating its own citizens, its conduct is wrong . . . ."); *id.* at 358 n.67 ("It might be thought that the reason the courts do not enforce a prohibition against government lying is that the

undermine individual autonomy, so too may be the case of government lies that manipulate their listeners into adopting beliefs or expression of the government's choice. Such government lies can be especially effective in manipulating listeners when directed to a vulnerable or captive audience where neither exit nor rebuttal is a meaningful option, as can be the case of government lies to those in custody or to young children in public schools.[134]

Third, government lies can frustrate the search for truth and the dissemination of knowledge.[135] Again, this may be especially true with respect to scientific or national security matters where the government has unusual expertise or selective access to the information in question, thus limiting meaningful opportunities for counterspeech.[136] Just as government efforts to prohibit the expression of certain views contrary to its own can undermine First Amendment enlightenment values, so too can be the case of government lies that successfully distort public discussion of a particular matter or viewpoint.

Government lies can thus deceive their targets in a number of ways that undermine free speech values. Interpreting the Free Speech Clause actually to prohibit such lies, however, requires some refinement of current doctrine, as courts and commentators have yet to grapple with the specific question of whether and when such lies should be understood to "abridg[e] the freedom of speech."[137] In other words, government lies raise challenging First Amendment problems in large part because they do not involve the traditional exercise of state power (unlike, for example, statutes that criminalize or otherwise penalize private parties' speech).

Government lies that coerce expressive activity may constitute the sort of "hard law" that generally triggers constitutional scrutiny.[138] As discussed in the preceding

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language of the first amendment does not authorize such a prohibition. But as a matter of language it is not implausible to say that the government 'abridg[es] the freedom of speech' when it deliberately lies about a matter of great public concern for the purpose of preventing a full public debate." (alteration in original)).

134. *See* Jeffrey M. Cohen, *The Right to Learn: Intellectual Honesty and the First Amendment*, 39 HASTINGS CONST. L.Q. 659, 683 (2012) (urging that students have a First Amendment right to learn that includes the right to "honest, deceit-free" compulsory education).

135. Varat, *supra* note 12, at 1132 ("By its nature, government deception impairs the enlightenment function of the First Amendment, limiting the citizenry's capacity to check government abuse and participate in self-governance to the maximum extent.").

136. *See* Jess Alderman, *Words to Live By: Public Health, the First Amendment, and Government Speech*, 57 BUFF. L. REV. 161, 164 (2009) ("Scientific information can be particularly difficult for listeners to evaluate, so they will turn to sources they trust for information. Because the government is empowered to regulate and promote health, can expend vast resources, and has historically played a central role in the promotion of health, government speech has a uniquely powerful influence on public health.").

137. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

138. A number of scholars focus on what they characterize as the presence or absence of the government's coercion to distinguish more generally between what they call "hard" and "soft" law. *See, e.g.*, FREDERICK SCHAUER, THE FORCE OF LAW 129 (2015) ("[L]aw is coercive to the extent that its sanctions provide motivations for people, because of the law, to do something other than what they would have done absent the law; and . . . law can be said to

subpart, government lies that coerce targets' decisions about whether to exercise constitutionally protected liberties are hard to distinguish from government actions that deny those rights altogether, and thus as a functional matter can be understood to deprive individual liberty in violation of the Due Process Clause. This subpart similarly proposes that we understand the Free Speech Clause to constrain the government's lies that are sufficiently coercive of expressive activity to be the functional equivalent of regulating that expression directly. Along these lines, Toni Massaro has urged that we understand government speech more generally to violate the First Amendment when it "exerts so much expressive power that its actions are tantamount to direct speech regulation."[139] Applying this suggestion specifically to the government's deliberate falsehoods, we can understand the government's lies to exert expressive power in this way when they coerce targets' beliefs or expression.

Indeed, courts already consider the coercive potential of the government's speech when determining whether government has violated the First Amendment's Establishment Clause. More specifically, courts sometimes find government's religious speech to violate the Establishment Clause when such expression coerces its listeners' choices.[140] To be sure, divisions remain even among advocates of coercion theory about whether and when government's religious speech alone can coerce behavior.[141] Justice Kennedy, for example, has defined impermissible

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exercise compulsion when its coercive force actually does induce the aforesaid shift in behavior."); Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 721 (2012) ("Hard power is, quite simply, 'the ability to coerce.'. . . Soft power, by contrast, is 'the ability to get what you want through attraction rather than coercion or payments.'" (quoting Joseph S. Nye, Jr., *Soft Power and American Foreign Policy*, 119 POL. SCI. Q. 255, 256 (2004))); Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 577 (2008) (defining "soft law" to include statements by lawmaking authorities that do not have legally coercive status—that is, those statements "that do not have the force of law"). To be sure, however, a number of thoughtful commentators contest such distinctions as meaningless, instead urging that *all* government action is coercive. *See, e.g.*, Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 471–74 (1923) (arguing that because private actors can assert coercive power just as government can, government's choice to leave certain matters to background law rather than to public regulation simply creates opportunities for coercion by private actors; government, thus, always distributes coercion in different ways rather than coercing or refraining from coercion).

139. Massaro, *supra* note 105, at 402 (emphasis omitted); *see also* Meese v. Keene, 481 U.S. 465, 490 (1987) (Blackmun, J., dissenting) ("[T]he Court takes an unjustifiably narrow view of the sort of government action that can violate First Amendment protections. . . . [T]here need not be a direct restriction of speech in order to have a First Amendment violation."); *id.* at 490–91 ("The Court has recognized that indirect discouragements are fully capable of a coercive effect on speech, and that the First Amendment protections extend beyond the blatant censorship the Court finds lacking here." (citation omitted)).

140. *See* Cnty. of Allegheny v. ACLU, 492 U.S. 573, 659–60 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) ("[G]overnment may not coerce anyone to support or participate in any religion or its exercise . . . . Forbidden involvements include compelling or coercing participation or attendance at a religious activity, requiring religious oaths to obtain government office or benefits, or delegating government power to religious groups." (citations omitted)).

141. *See* Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 941 (1986) ("A noncoercion standard, of course, would not answer all

"coercion" to include government's religious speech that changes onlookers' behavior through peer pressure and other social dynamics; he found this to be the case of a prayer at a public high school graduation that students felt pressure to attend.[142] Justice Scalia, in contrast, has defined impermissible "coercion" for Establishment Clause purposes much more narrowly to include only the threat or imposition of government punishment.[143]

However defined, coercion provides the touchstone for identifying unlawful lies in other contexts as well. The Court, for example, has recognized that in certain circumstances an employer's on-the-job lie may violate federal labor law by impermissibly coercing workers' choices. More specifically, the Court held that an employer's false threats that employees would lose their jobs if they voted to unionize were sufficiently coercive of its targets—economically vulnerable workers—to be unprotected by the First Amendment (and thus regulable by the National Labor Relations Act).[144]

We might similarly interpret the Free Speech Clause to prohibit the government's lies that coerce its targets' beliefs, speech, or other expressive activity. Here too the subject matter of the government's lie, as well as its setting and audience, may shape its coercive potential. As we have seen in the due process context, for example, the government's false threats (like true threats) are especially likely to coerce its targets' choices.[145] Along these lines, Beth Orsoff urges attention to context when assessing the coercive potential of government threats in general:

> [T]he test should be whether the average reasonable person receiving the government criticism would perceive it as a threat, not whether the government official can legitimately execute the threat. Furthermore, this threat should not be narrowly construed only as a threat to prosecute. The government can threaten an individual as effectively in much more subtle ways. For example, threatening to audit an individual's or business' taxes for the past seven years, refusing to issue or renew a permit, or even hinting at a possible grand jury investigation could cause an individual or company to change behavior just as effectively as a threat of prosecution.[146]

Government lies other than false threats or false assertions of legal consequences may also punish, deter, or otherwise coerce a reasonable target's expressive

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questions. For example, it obviously would not answer the question, 'What is coercion?' Enormous variance exists between the persecutions of old and the many subtle ways in which government action can distort religious choice today.").

142. Lee v. Weisman, 505 U.S. 577, 593–95 (1992) (Kennedy, J.) (concluding that prayers by clergy at public high school graduations are inherently coercive given the pressure on students to attend graduation and then not to leave during the prayers).

143. *Id.* at 640 (Scalia, J., dissenting) ("The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." (emphasis in original)).

144. *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969).

145. *See supra* notes 88–93 and accompanying text.

146. Orsoff, *supra* note 14, at 234 (footnote omitted).

choices.[147] Relatedly, then-professor Elena Kagan identified the government's motive to censor speech with which it disagrees as the key to identifying a First Amendment violation and suggested that the First Amendment could be interpreted to constrain government speech (including, presumably, government lies) with such an improper motive.[148] Examples might include the government's efforts to retaliate against or otherwise silence its critics through its lies about them that inflict reputational or economic injury.[149] Recall, for example, the FBI's often-successful efforts during the 1950s and 1960s to silence antiwar protestors and other dissenters by spreading false information about them to friends, family members, and employers.[150] As we have seen, some commentators have suggested that government's expressive branding of a target as criminal is the functional equivalent of punishment for Due Process Clause purposes;[151] the same may also be true for Free Speech Clause purposes.

As another set of possibilities, consider government lies that seek to manipulate captive or otherwise vulnerable audiences in environments like schools or prisons where neither counterspeech nor exit is a meaningful option for the targets.[152]

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147. Of course, government speech other than lies—including, but not limited to, true threats—may coerce their targets' protected expression, and thus they too might violate the Free Speech Clause.

148. Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 431–33 (1996).

149. *See* Penthouse Int'l, Ltd. v. Meese, 939 F.2d 1011, 1020 (D.C. Cir. 1991) (Randolph, J., concurring) ("I believe the First Amendment may well prohibit government officials from spreading false, derogatory information in order to interfere with a publisher's distribution of protected material. While this might require an inquiry into the official's motive, it is not unusual for a First Amendment violation to turn on whether governmental conduct was undertaken for the purpose of infringing on someone's speech."); SCHAUER, *supra* note 138, at 133 ("[Government] shaming can be seen as just another weapon in law's coercive arsenal."); *see also* Trudeau v. FTC, 456 F.3d 178 (D.C. Cir. 2006) (considering the possibility that false government press release issued in retaliation for First Amendment activity may violate the First Amendment, but concluding that the contested government press release was not false).

150. STONE, *supra* note 3, at 490 ("In its effort to destabilize and incapacitate the left, FBI agents wrote letters to employers to cause the firing of antiwar activists; distributed fraudulent college newspapers defaming peace activists; sent anonymous letters to campaign contributors and other supporters of antiwar candidates to sabotage their campaigns; mailed anonymous letters to the spouses of antiwar activists, suggesting that their partners were having extramarital affairs; and spread false rumors that individuals were embezzling funds or secretly cooperating with the FBI.").

151. *See supra* notes 81–83 and accompanying text.

152. *See* YUDOF, *supra* note 16, at 169 ("Perhaps a factor that should be taken into account in determining the likelihood of government distortion of the thinking processes of citizens is the degree to which the government has captured the audience."); Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 99 (2002) (identifying free speech concerns with respect to government speech in public schools that seeks to indoctrinate "a captive audience of undeveloped and impressionable minds"); Brian C. Castello, Note, *The Voice of Government as an Abridgement of First Amendment Rights of Speakers: Rethinking* Meese v. Keene, 1989 DUKE L.J. 654, 676–77 (1989) ("Government speech that forces a

Government lies' coercive potential may similarly increase with respect to matters where the government is a particularly trusted authority, as can be the case where it has monopoly access to the information underlying the lie.[153]

As discussed earlier, coercion analysis is not without its drawbacks.[154] Again, some may fear that it suffers from serious indeterminacy problems, as the line identifying the point at which government lies coerce their targets' expressive choices remains less than bright. Just as is the case when determining when government's religious speech is sufficiently coercive of targets' behavior to violate the Establishment Clause or when a government lie is sufficiently coercive of its target's liberty to violate the Due Process Clause, so too is there room to debate when the government's lie is sufficiently coercive of its target's expressive activity to violate the Free Speech Clause. Again, I do not propose to solve the definitional challenges of coercion here.[155] Instead I simply urge that government lies may sometimes coerce listeners' beliefs or speech in ways that are hard to distinguish from the government's direct regulation of such expressive choices and thus should be understood to violate the Free Speech Clause.

Others may wonder whether a focus on coercion is instead too narrow, in that it fails to address the many ways in which the government's lies can inflict expressive harm even when they do not coerce their targets' expressive activity.[156] In the Establishment Clause setting, for example, Justice O'Connor applied endorsement (rather than coercion) analysis to find that the government violated a constitutional commitment to religious pluralism when it delivered a message that citizens' status varies based on their religion (or nonreligion).[157] Expressivist scholars might

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captive audience to be subject to a particular viewpoint presents the clearest example of coerced consent."). For similar reasons, courts not infrequently consider government's religious speech in the public school setting as coercive for Establishment Clause purposes. *See supra* notes 140–43 and accompanying text.

153. *See* Massaro, *supra* note 105, at 402–03 (urging that we consider "the extent to which government has monopoly power over the information in question" in determining whether and when government speech is the functional equivalent of direct regulation of speech).

154. *See supra* notes 99–102 and accompanying text.

155. *See id.*; *see also* Massaro, *supra* note 105, at 407 ("Distinguishing between permissible and impermissible government coercion requires nuance and a willingness to bend speech principles to accommodate conflicting political, historical, and other regulatory realities.").

156. *See* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 506–07 (1993) ("An expressive harm is one that results from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about. On this view, the *meaning* of a governmental action is just as important as what that action *does*. Public policies can violate the Constitution not only because they bring about concrete costs, but because the very meaning they convey demonstrates inappropriate respect for relevant public values. On this unusual conception of constitutional harm, when a governmental action expresses disrespect for such values, it can violate the Constitution." (emphasis in original)).

157. *See* Cnty. of Allegheny v. ACLU, 492 U.S. 573, 627 (1989) (O'Connor, J., concurring in part and concurring in the judgment) ("As a theoretical matter, the endorsement test captures the essential command of the Establishment Clause, namely, that government must not make

similarly view government's disparaging speech—including, presumably, its defamatory lies—as inflicting a constitutional wrong regardless of any coercive effect on targets' expressive choices.[158]

But an expressivist approach is arguably even more indeterminate than one that relies on coercion and thus may exacerbate concerns about separation of powers, institutional competence, and chilling valuable government speech.[159] By proposing that we understand the First Amendment to prohibit those government lies that coerce their targets' expressive choices, I am suggesting an approach that is more likely to satisfy standing doctrine's requirement of particularized injury[160] (and that is arguably more manageable) while tolerating, as a constitutional matter, lies that inflict significant if less tangible harms. This is no easy choice, and in so proposing I do not mean to suggest that noncoercive government lies are unworthy of our concern. To the contrary, some noncoercive lies by the government may still warrant statutory or political redress even if they do not injure specific due process or free speech interests.[161] The next Part thus examines a range of nonconstitutional approaches to the harms posed by certain government lies.

III. NONCONSTITUTIONAL APPROACHES TO ADDRESSING GOVERNMENT LIES

Just as the preceding Part's due process and free speech discussion relied heavily on contextual analysis, this Part examines a variety of nonconstitutional alternatives

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a person's religious beliefs relevant to his or her standing in the political community by conveying a message 'that religion or a particular religious belief is favored or preferred.'" (quoting Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in the judgment))).

158. Tebbe, *supra* note 127 (drawing from free speech and equal protection doctrine to identify a constitutional theory prohibiting the government from engaging in certain disparaging speech).

159. *See* Pildes & Niemi, *supra* note 156, at 513–14 ("Yet, when courts recognize expressive harms, this traditional requirement of individualized harm comes under considerable pressure. Expressive harms focus on *social* perceptions, *public* understandings, and *messages*; they involve the government's symbolic endorsement of certain values in ways not obviously tied to any discrete, individualized harm. A significant tension, therefore, exists between recognition of expressive harms and traditional requirements of individualized wrongs." (emphasis in original)). Elsewhere I have explored the advantages and disadvantages of coercion and expressivist analyses as applied to government's hateful speech. Helen Norton, *The Equal Protection Implications of Government's Hateful Speech*, 54 WM. & MARY L. REV. 159, 198–208 (2012).

160. As a related example, courts have recognized certain circumstances where government's religious speech inflicts sufficiently concrete and particularized injuries upon listeners to satisfy the requirements of standing and empower the federal courts to consider Establishment Clause challenges to such speech. *See* David Spencer, Note, *What's the Harm? Nontaxpayer Standing to Challenge Religious Symbols*, 34 HARV. J.L. & PUB. POL'Y 1071, 1075 (2011) (describing "two basic tests" among the courts of appeal: "The dominant approach requires a plaintiff to show some version of direct and unwelcome contact with the challenged symbol or display. A second approach requires a plaintiff to show that he altered his behavior to avoid contact with the allegedly offensive display." (footnote omitted)).

161. *See infra* notes 209–11 and accompanying text.

for addressing government lies that occur in specific harm-threatening contexts. It thus identifies a menu of possibilities that include statutory and political remedies for addressing the government's deliberate falsehoods to certain audiences, on certain topics, by certain speakers, or in other settings that threaten especially serious harm.

A. Statutory and Other Legal Constraints

In addition to (or instead of) constitutional approaches that require the development of new doctrine, a variety of statutory options remain available to constrain certain harmful government lies. Not only do legislatures as well as courts have a role to play in protecting constitutional values,[162] but tailored statutory alternatives can ease some of the enforcement challenges described above by addressing government lies in specific contexts that threaten especially grave harms.[163] Such legislative efforts can draw from or add to a number of statutes that already prohibit lies in specific contexts.

For example, some statutes prohibit certain lies in certain settings by speakers generally, including but not limited to government speakers. Perjury law offers an especially prominent illustration of a setting-specific approach, as it targets lies under oath (by governmental and nongovernmental speakers alike) that are material to certain high-stakes decisions.[164] Other examples include laws that target dishonest or corrupt behavior that includes (but is not limited to) lies, such as statutes that prohibit obstruction of justice.[165] Note that perjury and related laws criminalize lies that threaten not only individualized and concrete harms to litigants when they deceive decision makers and thus lead to erroneous verdicts,[166] but also more collective harms to the public's trust in the integrity of the justice system.[167]

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162. *See* Magarian, *supra* note 33, at 168–69 ("Congress as well as courts can safeguard constitutional values. . . . Statutes have normative and practical advantages over the judicial process because Congress is a politically accountable institution with the mandate and resources to make difficult policy decisions." (footnote omitted)).

163. Relatedly, Justice Breyer recommended that legislatures address the most harmful lies by private speakers while remaining attentive to First Amendment concerns by crafting narrowly tailored statutes that address specific harmful contexts. United States v. Alvarez, 132 S. Ct. 2537, 2556 (2012) (Breyer, J., concurring in the judgment) (recommending that a statute require "a showing that the false statement caused specific harm or at least was material, or focus its coverage on lies most likely to be harmful or on contexts where such lies are most likely to cause harm").

164. *See, e.g.*, 18 U.S.C. § 1621 (2012); *see also* United States v. Debrow, 346 U.S. 374, 376 (1953) (describing federal perjury law as prohibiting a "false statement wilfully made as to facts material to the hearing" under an oath authorized by federal law and taken before a competent tribunal, officer, or person).

165. *See* Morgan, *supra* note 1, at 185–86.

166. *See* Geoffrey R. Stone, *The Rules of Evidence and the Rules of Public Debate*, 1993 U. CHI. LEGAL F. 127, 132 ("[Knowingly false evidence] attempts to distort, distract, and mislead. At best, such evidence will waste time and effort in requiring energy to be devoted to demonstrating that the testimony is false; at worst, the falsehood will not be revealed and the jury will reach the wrong substantive result.").

167. *See Alvarez*, 132 S. Ct. at 2546 (plurality opinion) ("Perjury undermines the function and province of the law and threatens the integrity of judgments that are the basis of the legal

Other statutes target lies made to certain audiences. One example is the Federal False Statements Act, which prohibits material falsity in communications with the federal government.[168] The Act criminalizes lies to the government (including but not limited to those made by other government speakers) that are "predictably capable of affecting" government decision making,[169] without regard to whether the lies were intended to obtain monetary gain or whether they caused any concrete harm to the government.[170] Examples of lies prohibited by the Act include not only lies that may affect decisions to grant a government benefit or contract but also decisions about whether and how to deploy the government's investigative energies.[171] The statute's reach thus includes lies that may pose collective harms to the public in terms of depleted or diverted governmental resources.

Defamation law takes a harm-specific approach by targeting lies (and other speech that may be defamatory even if not deliberately false) that damage individual reputation. Although legislatures currently shield many government actors from monetary liability for their defamatory lies with a variety of immunities,[172] they need

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system.").

168. 18 U.S.C. § 1001(a) (2012) ("[W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . . makes any materially false, fictitious, or fraudulent statement or representation . . . shall be fined under this title, imprisoned not more than 5 years . . . or both.").

169. *E.g.*, Kungys v. United States, 485 U.S. 759, 771 (1988) (explaining that a statement is "material" if "predictably capable of affecting" a government decision).

170. *See* Brogan v. United States, 522 U.S. 398, 412–13 (1998) (Ginsburg, J., concurring in judgment) (describing how the Act was originally interpreted to apply to lies intended to defraud the federal government out of its property or money but was later amended to more broadly prohibit deceptive communications that interfered with or obstructed lawful government functions); United States v. Yermian, 468 U.S. 63, 71 (1984) (same).

171. *See* United States v. Gilliland, 312 U.S. 86, 93 (1941) ("The amendment indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described."); Varat, *supra* note 12, at 1114–15 ("Lies in the course of official government proceedings risk producing false beliefs in the minds of official investigators, risking perversion of the investigative process. Arguably, the deceptions in those instances also interfere with the reasoning processes of—and the respect owed to—the deceived parties, and are likely to influence their behavior.").

172. Note that the Speech or Debate Clause provides a constitutional defense to certain defamatory speech by federal legislators only in certain limited circumstances. *See, e.g.*, Hutchinson v. Proxmire, 443 U.S. 111, 133 (1979) ("Voting and preparing committee reports are the individual and collective expressions of opinion within the legislative process. As such, they are protected by the Speech or Debate Clause. Newsletters and press releases, by contrast, are primarily means of informing those outside the legislative forum; they represent the views and will of a single Member. It does not disparage either their value or their importance to hold that they are not entitled to the protection of the Speech or Debate Clause."); Doe v. McMillan, 412 U.S. 306, 313–14 (1973) ("Our cases make perfectly apparent, however, that everything a Member of Congress may regularly do is not a legislative act within the protection of the Speech or Debate Clause. . . . Members of Congress may frequently be in touch with and seek to influence the Executive Branch of Government, but this conduct 'though generally done, is not protected legislative activity.' Nor does the Speech or Debate Clause protect a

not do so. Some states, for example, choose to permit defamation actions against state or local government speakers,[173] and some commentators urge the amendment of the Federal Tort Claims Act to permit similar actions against federal government speakers.[174]

The foregoing examples prohibit lies in certain settings, to certain audiences, or that cause certain harms regardless of the identity of the speaker. Other nonconstitutional constraints on lies take a speaker-specific approach. As an illustration, the Model Code of Judicial Conduct and the Model Rules of Professional Conduct impose an explicit duty of truthfulness on judges and on government actors (and others) who are also members of the bar.[175] For example, Arkansas suspended former President Clinton's state bar license for five years[176] after a district court's finding that he was in contempt of court "by giving false, misleading and evasive answers that were designed to obstruct the judicial process" in Paula Jones's civil litigation against him.[177] As is the case with perjury prohibitions, such constraints seek not only to address the potential harms of deception to individual parties but also harms to the public's trust in the administration of justice more broadly.

Some speaker-specific approaches target lies only by certain government speakers. For example, the Model Rules of Professional Conduct impose heightened requirements of truthfulness on prosecutors as a particular type of government speaker,[178] again to prevent harm both to individual litigants as well as to the public's collective trust in the criminal justice system.

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private republication of documents introduced and made public at a committee hearing, although the hearing was unquestionably part of the legislative process." (citation omitted) (quoting Gravel v. United States, 408 U.S. 606, 625 (1972))); Chastain v. Sundquist, 833 F.2d 311, 312 (D.C. Cir. 1987) ("We reaffirm the common law rule and settled constitutional design that elected representatives must answer for libelous statements made outside the scope of their legislative duties.").

173. *See* Nadel v. Regents of Univ. of Cal., 34 Cal. Rptr. 2d 188, 190 (Cal. Ct. App. 1994).

174. *See* Cortez, *supra* note 30, at 1391.

175. MODEL CODE OF JUDICIAL CONDUCT R. 4.1(A)(11) (2007) (prohibiting judges and judicial candidates from "knowingly, or with reckless disregard for the truth, mak[ing] any false or misleading statement"); MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(1) (2014) ("A lawyer shall not knowingly[] make a false statement of fact or law to a tribunal . . . ."); MODEL RULES OF PROF'L CONDUCT R. 4.1(a) (2014) ("In the course of representing a client a lawyer shall not knowingly[] make a false statement of material fact or law to a third person[.]"); MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2014) ("It is professional misconduct for a lawyer to[] engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]"). Although many disciplinary actions under these rules punish lies like fraud or perjury that violate other legal constraints, some hold lawyers and judges to higher standards of truthfulness by punishing lies that would likely not be punishable if uttered by nonattorneys. *See In re* Pautler, 47 P.3d 1175 (Colo. 2002); *In re* Carpenter, 95 P.3d 203 (Or. 2004).

176. Neal v. Clinton, No. CIV 2000-5677, 2001 WL 34355768, at *3 (Ark. Cir. Ct. Jan. 19, 2001). The State also assessed a fine of $25,000. *Id.*

177. Jones v. Clinton, 36 F. Supp. 2d 1118, 1127 (E.D. Ark. 1999).

178. *See* MODEL RULES OF PROF'L CONDUCT R. 3.8 (2014) (requiring prosecutors not only to refrain from lying but also to make affirmative disclosures in some circumstances); Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 313–14 (2001) ("[T]he prosecutor has a legal and ethical duty to promote truth and to refrain from conduct

The Administrative Procedure Act (APA) may offer another possible constraint on certain government speakers. Some commentators have urged courts to interpret, or Congress to amend, the APA to invalidate any final agency action as arbitrary and capricious when the agency seeks to support it with inaccurate assertions (presumably including lies).[179] Relatedly, some courts have interpreted the National Environmental Protection Act (NEPA) to prohibit agencies from issuing environmental impact statements that are based on false, inaccurate, or misleading data.[180] Consider too the proposed (but never enacted) speaker-specific Executive Accountability Act, which would criminalize executive officials' knowing and willful false statements to promote the government's use of military force.[181] Again, such lies can threaten both individual and collective harm.

Statutory approaches also offer opportunities for specifying nontraditional remedies for harmful government lies that may lessen enforcement concerns.[182] For example, a statute could require removal or rescission of the government's lie rather than impose civil damages[183] (much less criminal sanctions), or could require counterspeech in the form of an official declaration or reprimand. Along these lines, James O'Reilly has

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that impedes truth. The courts have explicitly recognized the existence of this duty, and have implicitly recognized this duty by reversing convictions when a prosecutor engages in conduct that undermines the search for truth." (footnote omitted)); *id.* at 314–15 ("The duty is found as well in the prosecutor's domination of the criminal justice system and his virtual monopoly of the fact-finding process. More than any other party in the criminal justice system, the prosecutor has superior knowledge of the facts that are used to convict the defendant, exclusive control of those facts, and a unique ability to shape the presentation of those facts to the fact-finder." (footnote omitted)).

179. *See* Cortez, *supra* note 30, at 1376–77 ("Congress should declare that adverse publicity is 'final agency action' under the APA and is reviewable for an abuse of discretion . . . ."); *id.* at 1377 ("[C]ourts should recognize a cause of action under the APA or via procedural due process, if applicable."); O'Reilly, *supra* note 30, at 536.

180. *See* Natural Res. Def. Council v. U.S. Forest Serv., 421 F.3d 797, 811–13 (9th Cir. 2005) (finding that the agency's use of inflated, inaccurate, and misleading data violated NEPA).

181. H.R. 743, 111th Cong. (2009) (proposing to prohibit knowingly and willfully making materially false statements for purpose of garnering congressional support for use of American military); S. 1529, 111th Cong. (2009) (same).

182. Remedies for constitutional violations generally include civil damages, injunctions, declaratory relief, the exclusion of evidence (acquired through a constitutional violation), and habeas relief. *See* Jennifer E. Laurin, Melendez-Diaz v. Massachusetts, Rodriguez v. City of Houston, *and Remedial Rationing*, 109 COLUM. L. REV. SIDEBAR 82, 83–84 (2009) (describing various remedies); Michael T. Morley, *Public Law at the Cathedral: Enjoining the Government*, 35 CARDOZO L. REV. 2453, 2454–79 (2014) (same). For a proposal urging greater creativity and flexibility in devising remedies that balance speech and other concerns more generally, see David S. Han, *Rethinking Speech-Tort Remedies*, 2014 WIS. L. REV. 1135.

183. On the other hand, others suggest that damages remedies are among the most effective vehicles for deterring harmful government behavior. *See, e.g.*, Jeffries, *supra* note 56, at 269–70; Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 368 (arguing that a damages remedy would be more effective in deterring Fourth Amendment violations than the exclusionary rule). Note, however, that damage awards for the deprivation of constitutional rights that involve neither physical injury nor economic loss are often quite limited. *See, e.g.*, Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 309–11 (1986).

proposed the statutory creation of agency ombuds charged with responding to complaints about inaccurate agency speech (presumably including complaints about alleged agency lies).[184] The United Kingdom has adopted a similar approach, creating an independent government watchdog agency specifically charged with assessing and publicizing the (in)accuracy of the government's speech.[185]

Finally, legislatures can strengthen and expand statutory protections for government whistleblowers who help expose the government's lies (and other misconduct).[186] Such statutory protections are especially important in light of the Supreme Court's failure to protect many government whistleblowers as a matter of constitutional law. Indeed, the Court's decision in *Garcetti v. Ceballos* frustrated efforts to hold the government accountable for its lies by rejecting the First Amendment challenge of a prosecutor punished for reporting what he believed to be a misrepresentation by the police in seeking a search warrant.[187] Related legal efforts could include more vigorous enforcement of the Freedom of Information Act in which judges are more skeptical and demanding of the government's factual claims.[188]

B. Political Checks

Political remedies offer alternative means for constraining the government's deliberate falsehoods.[189] Political responses to government lies include campaigning,

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184. O'Reilly, *supra* note 30, at 538–39; *see also* Cortez, *supra* note 30, at 1438 (urging use of an ombuds or chief information officer "to review disputes about agency publicity" to "generate more credibility with industries and the media, and perhaps deter litigation").

185. *See* Carl Bialik, *This U.K. Sheriff Cites Officials for Serious Statistical Violations*, WALL ST. J. (June 3, 2009, 11:59 PM), http://online.wsj.com/news/articles/SB124398720006979435 [http://perma.cc/LQ27-TLSD].

186. Because the problems of government lies are not unrelated to the problems of government secrets, we can also learn a great deal from recommendations by secrecy experts. *See* Heidi Kitrosser, *Free Speech Aboard the Leaky Ship of State: Calibrating First Amendment Protections for Leakers of Classified Information*, 6 J. NAT'L SECURITY L. & POL'Y 409, 411 (2013) (urging that "leakers merit robust First Amendment protections against prosecution" to support the information flow necessary for a thriving democracy); Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233 (2008) (discussing the value of leaks and whistleblowers in ensuring government accountability).

187. *See* Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) (holding that the First Amendment does not protect public employees' speech pursuant to their jobs—including their truthful reports of government lies and other forms of misconduct—so long as such reports are part of their official duties). I have discussed this problem extensively elsewhere. *See* Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1 (2009) (describing multiple cases in which lower courts invoked *Garcetti* to permit government employers to punish employees who truthfully sought to expose the government's misconduct). The Court's more recent decision in *Lane v. Franks* narrows *Garcetti* in only one very limited context, holding that the First Amendment protects public employees who testify truthfully as to government misconduct when such testimony is not part of their regular job duties. *See* Lane v. Franks, 134 S. Ct. 2369, 2377–82 (2014).

188. *See* Jenny-Brooke Condon, *Illegal Secrets*, 91 WASH. U. L. REV. 1099 (2014).

189. *See* Ethan J. Leib, David L. Ponet & Michael Serota, *Translating Fiduciary Principles*

voting, lobbying, petitioning, and (with respect to certain government speakers) impeachment.[190] Some observers point to Lyndon Johnson's decision not to seek re-election and Richard Nixon's resignation as examples of successful political challenges to executive branch lies about military matters or its own misconduct.[191] Political efforts also include vigorous legislative oversight of alleged executive branch lies; examples include congressional proposals to establish a select committee to investigate incomplete or inaccurate information provided by the federal government's intelligence operations.[192] Legislatures can also deny funding to agencies engaged in lying.[193]

Political pressure might also encourage the government's self-regulation of its lies and other inaccuracies. James O'Reilly, for example, has urged agencies voluntarily to adopt internal controls for rooting out inaccuracies more generally:

> Agencies should articulate written standards for issuing different forms of adverse publicity, particularly via new media. These standards should address the content of announcements and establish both internal procedures for issuing publicity and procedures for private parties to request corrections or retractions through timely administrative appeals —all subject to reasonable exceptions for emergencies and other justifications in the public interest. Agency self-restraint is perhaps the most effective and most realistic response.[194]

Such an approach could also be applied specifically to government agencies' lies.

Agency Inspector Generals (IGs) offer a related internal check on government's inaccurate speech, including but not limited to its lies. Nathan Cortez, for example, has described how the Securities and Exchange Commission's Inspector General investigated and exposed the agency's inaccurate publicity allegedly intended to

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into Public Law, 126 HARV. L. REV. F. 91, 101 (2013) ("In the political sphere, we have many extralegal mechanisms to reinforce fiduciary obligations: elections, civil society, newspapers, and watchdog groups are as much a part of the tapestry of fiduciary governance as courts are.").

190. The U.S. Constitution, for example, provides for the impeachment of federal judges and certain executive officers. U.S. CONST. art. II, § 4.

191. *See* Morgan, *supra* note 1, at 229.

192. Kitrosser, *supra* note 19, at 917 (discussing structural checks to executive branch secret keeping); Papandrea, *supra* note 9, at 468; *see also id.* at 466 (describing other political checks, including Congress's ability to "conduct hearings, subpoena testimony and documents, leverage its power in the appropriations and appointments process, and pass statutes that require periodic reports from the executive branch").

193. Congress has long barred federal agencies from unauthorized expenditures to engage in "publicity or propaganda." *E.g.*, Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, § 718, 128 Stat. 5, 234 ("No part of any appropriation contained in this or any other Act shall be used directly or indirectly, including by private contractor, for publicity or propaganda purposes within the United States not heretofore authorized by the Congress."). The Government Accountability Office has interpreted (but rarely enforced) this language to include agency lies and other forms of deception about the source of its communications. *See* Helen Norton, *Campaign Speech Law with a Twist: When the Government Is the Speaker, Not the Regulator*, 61 EMORY L.J. 209, 229–32 (2011).

194. *See* Cortez, *supra* note 30, at 1376.

embarrass its target.[195] More recently, the Veterans' Administration's Office of Inspector General documented a variety of misrepresentations by the agency with respect to waiting times and other matters related to patient care.[196]

Norms of behavior offer another potential nonlegal check on government lies. In the United Kingdom, for example, a Ministerial Code outlines expectations of ethical conduct for ministers who lead government departments.[197] Section 1.1 of the Code states that "Ministers of the Crown are expected to behave in a way that upholds the highest standards of propriety,"[198] and section 1.2(c) describes this expectation more specifically to prohibit lies to Parliament:

> It is of paramount importance that Ministers give accurate and truthful information to Parliament, correcting any inadvertent error at the earliest opportunity. Ministers who knowingly mislead Parliament will be expected to offer their resignation to the Prime Minister[.][199]

Without question, the legal[200] and political[201] approaches described in this Part are far from perfect. But the range of available possibilities should encourage us to

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195. *Id.* at 1424; *see also* Papandrea, *supra* note 9, at 473 ("IGs have played an important role in increasing transparency, arguing for reform, and pushing for accountability.").

196. VA. OFFICE OF INSPECTOR GEN., DEP'T OF VETERANS AFFAIRS, REPORT NO. 14-02603 -267, VETERANS HEALTH ADMINISTRATION: REVIEW OF ALLEGED PATIENT DEATHS, PATIENT WAIT TIMES, AND SCHEDULING PRACTICES AT THE PHOENIX VA HEALTH CARE SYSTEM iii (2014), *available at* http://www.va.gov/oig/pubs/VAOIG-14-02603-267.pdf [http://perma.cc/B3J4 -DHKA]; *see also* Richard A. Oppel, Jr., *Watchdog Says V.A. Officials Lied*, N.Y. TIMES, Sept. 10, 2014, http://www.nytimes.com/2014/09/10/us/watchdog-says-va-officials-lied.html?_r=0 [http://perma.cc/S45F-52E7].

197. CABINET OFFICE, MAY 2010 MINISTERIAL CODE, 2009-10, H.C. DEP. 2010-1253 (U.K.), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment _data/file/61402/ministerial-code-may-2010.pdf [http://perma.cc/EY2A-3C79].

198. *Id.* § 1.1; *see also* Lesley Dingle & Bradley Miller, *A Summary of Recent Constitutional Reform in the United Kingdom*, 33 INT'L J. LEGAL INFO. 71, 88–89, 96 (2005) (describing the expectations generated by these nonlegal norms); Rt. Hon. Lord Goldsmith QC, *Keynote Address*, 59 STAN. L. REV. 1155, 1156–58 (2007) (same). Lawrence Sager has relatedly argued that government officials have an "obligation to obey constitutional norms at their unenforced margins" by "fashion[ing] their own conceptions of these norms and measur[ing] their conduct by reference to these conceptions." Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1227 (1978).

199. MAY 2010 MINISTERIAL CODE § 1.2(c).

200. For example, some commentators have urged that courts interpret, or Congress amend, the Federal False Statements Act and similar statutes prohibiting lies to the government to apply to a relatively narrow range of settings to prevent unfair surprise to the unwary. *See* Brogan v. United States, 522 U.S. 398, 409 (1998) (Ginsburg, J., concurring in the judgment) (suggesting a more circumscribed focus for the Act).

201. For example, Mary-Rose Papandrea is among those commentators to have identified limits on the effectiveness of various political checks. *See* Papandrea, *supra* note 9, at 466 ("The executive, however, strongly resists Congress's attempts to force the disclosure of information, and there is very limited opportunity for judicial review of these interbranch disputes."); *id.* at 473 ("Nevertheless, the ability of IGs to check executive power suffers from

think carefully about the specific settings or other circumstances that make government lies especially harmful and then consider targeted nonconstitutional responses.

IV. PROBLEMS AND APPLICATIONS

This Part applies the constitutional and nonconstitutional approaches described in Parts II and III to a range of government lies. For these purposes, please assume that the hypotheticals presented here are "lies" as I have defined them: false assertions of fact known by the government speakers to be untrue and made with the intention that listeners understand them to be true.

We start our analysis by assessing whether the government lie in question infringes specific due process or free speech rights. If so, we apply strict scrutiny to the government's decision to lie; if not, we continue our analysis by first articulating the remaining harm (if any) with as much specificity as possible and then considering nonconstitutional approaches for addressing those harms.

More specifically, the government's decision to lie in ways that deprive or coerce the deprivation of constitutionally protected liberty should trigger strict scrutiny under the Due Process Clause, and the government's decision to lie in ways that coerce targets' protected expression should trigger strict scrutiny under the Free Speech Clause. The government's decision to lie should fail this scrutiny when motivated by nonpublic (and thus noncompelling) reasons—for example, when the government has lied to protect itself from legal or political accountability, for its financial gain, or to silence or punish a critic's protected expression. Governmental decisions to lie should also fail this scrutiny even when motivated by compelling public reasons when they are unnecessary to achieve such ends; for example, coercive lies are by no means the only way—and thus are not necessary—for the government to secure confessions or other evidence to support criminal convictions. In certain rare circumstances, the government's decision to lie may survive strict scrutiny when necessary to achieve compelling government interests. This may be the case when time permits no other option—for example, where the government's coercive lies are necessary to calm public panic in a public safety emergency or to prevent a criminal from hurting a victim.[202] Finally, under certain extreme

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significant limitations; importantly, IGs are appointed and removable by the President, and they cannot report even serious wrongdoing to Congress without first giving the relevant agency head the opportunity to delete sensitive information.").

202. For example, the Court has found that police interrogation of a suspect as to the whereabouts of his gun did not violate the Constitution even absent *Miranda* warnings when the questioner's purpose was to protect the public from the gun rather than to secure a confession or other evidence. New York v. Quarles, 467 U.S. 649 (1984); *see also* United States v. Alvarez, 132 S. Ct. 2537, 2553 (2012) (Breyer, J., concurring in the judgment) (noting the circumstances in which lies can be valuable as including lies told to calm public panic or otherwise protect public safety). For the very rare exceptions in which the Court has upheld the government's regulation of speech under a strict scrutiny analysis, see Williams-Yulee v. Florida Bar, 135 S. Ct. 1656 (2015) (upholding state bar association's rule prohibiting judicial candidates from personally soliciting campaign contributions); Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010) (upholding federal law that criminalized the knowing provision

circumstances, even noncoercive lies by the government may violate substantive due process protections when they lack any reasonable justification (i.e., when they shock the conscience with their outrageousness) and thus constitute an abuse of governmental power.

A return to the hypotheticals offered in the Introduction helps illustrate these points.[203] Consider first a secretary of state's office—the office charged with administering elections within that state—that lies to certain audiences about where polls are located or when the polls will close in hopes of suppressing their vote and increasing its political allies' re-election prospects.[204] Such lies are likely to prevent some number of individuals who intended to vote from successfully doing so and thus are functionally indistinguishable from locking the doors to the polls. In other words, these lies—like lies about the existence of, or consequences of exercising, constitutional rights more broadly—directly deprive targets of a constitutionally protected right for reasons that should fail strict scrutiny, and thus violate the Due Process Clause.

As discussed earlier, the government's lies present especially hard constitutional problems when the causal connection between the lie and the deprivation of a protected liberty interest remains unclear.[205] For these reasons, consider next a department of labor's lie that deliberately misstates unemployment rates to improve the incumbent's prospects in an upcoming election. On one hand, the government's nonpublic purpose here is identical to that in the polls hypothetical above, such that the decision to lie will fail strict scrutiny if strict scrutiny is applied. On the other hand, however, the threshold question whether the lie has coerced voting rights (which is the trigger for the decision to apply strict scrutiny) presents a harder constitutional problem here. The multitude of reasons that inform voters' choices greatly complicates efforts to establish a direct connection between the lie and its targets' voting decisions. In other words, the first example involved a government lie about the process of voting that is very likely to affect targets' ability to cast a vote, while this second example involves a government lie about a substantive matter that may or may not influence voters' decisions. Nor are voters generally particularly vulnerable or captive (except, perhaps, at the polling place[206]), thus lessening the lie's coercive potential. For

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of material support or resources to a foreign terrorist organization as applied to plaintiff's attempt to provide money, training, and advocacy to groups so characterized); Burson v. Freeman, 504 U.S. 191 (1992) (plurality opinion) (upholding content-based ban on political speech within 100 feet of polling place).

203. *See supra* notes 14–17 and accompanying text.

204. In addition to potential constitutional claims, moreover, lies in this very specific setting can also be addressed by statutes prohibiting lies about how, where, and when to vote. *See* VA. CODE ANN. § 24.2-1005.1 (2011) (prohibiting knowingly false communication of election information about the time, date, or place of voting). Lies about voting rights that specifically disadvantage voters based on race may also violate the Voting Rights Act. *See* 52 U.S.C.A. § 10101 (2015).

205. *See supra* notes 88–96 and accompanying text. As discussed earlier, hard questions can also arise about whether the government's lie has deprived its target of what is actually a constitutionally protected liberty interest. *See supra* notes 77–85 and accompanying text.

206. *See* Burson v. Freeman, 504 U.S. 191 (1992) (plurality opinion) (upholding state ban

these reasons, this government lie is harder to characterize as depriving, or coercing the deprivation of, liberty in ways that should trigger strict scrutiny. A variety of nonconstitutional options may thus be more appropriate for addressing the harms posed by such lies. For example, a legislature could establish agency watchdogs empowered to scrutinize the agency's own data in contested cases. Other options include vigorous oversight by legislatures or inspectors general as well as political pressure to adopt self-policing protocols.

Next consider a governor's office that issues an investigative report or a press release that deliberately and falsely covers up its own illegal conduct. The harms are largely the same as described in the preceding example: although the lie frustrates a range of free speech values (especially, but not only, democratic self-governance), it does not coerce speech or voting decisions, even while intended to shape them.[207] If, as I have proposed, we focus on coercion as the appropriate constitutional touchstone in most cases, we must acknowledge that we are choosing to insulate (for constitutional purposes) government lies that inflict significant if less specific harms in exchange for a more manageable enforcement standard—again, no easy choice. Here too nonconstitutional options, however imperfect, may be preferable. For example, government's lies about its own misconduct can be addressed by statutory approaches that target certain specific settings (e.g., lies that obstruct justice, lies under oath, or lies in the context of legislative hearings or other investigative settings). Such efforts can be reinforced by vigorous legislative oversight that requires the relevant officials to testify under oath or in other settings regulated by statute, as well as by strengthened legal protections for whistleblowers who can expose these lies.[208]

Consider next an agency's defamatory targeting of its critics. Suppose, for example, that a state enforcement agency issues a press release that seeks to punish and silence a longtime critic by falsely asserting that she has engaged in illegal misconduct and thus damages her job and business opportunities. This lie seeks to coerce its target's expressive choices for nonpublic—and thus noncompellling—reasons that fail strict scrutiny, and violates the Free Speech Clause.

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on soliciting votes and distributing campaign materials within 100 feet of polling place entrance in part to achieve state's compelling interest in protecting voters from intimidation and undue influence).

207. As noted *supra* notes 14–16 and accompanying text, this Article focuses only on lies by a government body or by an individual empowered to speak for such a body. It thus does not address lies by individuals—including individual political candidates, both challengers and incumbent—when expressing their own views in a personal capacity and who thus have First Amendment rights of their own.

208. Of course, the constitutional and statutory checks discussed throughout this Article only operate after the fact once a lie has come to light through, for example, investigation by the press or by other government actors, or exposure by whistleblowers. In addition to punishing such lies (and perhaps compensating or redressing their victims) after the fact, however, such checks may be valuable by deterring such lies before the fact, as well as by performing law's "expressive function" in establishing norms apart from controlling or punishing behavior directly. *See* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

The government's defamatory lie may also deprive its target of interests protected by the Due Process Clause by damaging her reputation. To be sure, this would require the Court to revisit *Paul v. Davis* to hold that reputation is a constitutionally protected liberty (or property) interest.[209] Because reputation remains valuable even if not constitutionally protected, these concerns can also be addressed through nonconstitutional means like eliminating government immunities to statutory or common law defamation claims.

As yet another example, consider a Surgeon General's Office that undertakes an informational campaign in the public schools that seeks to boost sales of products manufactured by the administration's political ally by falsely reporting their health effects. Such lies frustrate the search for truth (especially given the office's presumed expertise on health matters), undermine listener autonomy by skewing consumer and health choices, and may distort political debates about proposed regulatory action. Here the government's lie targets a relatively captive and vulnerable audience of young people in the public schools who have limited options for exit and counterspeech. The combination of a vulnerable audience together with the government's nonpublic motive distinguish this example, in my view, as a more direct threat to constitutionally protected interests than controversial public education campaigns more generally, and thus this lie may be sufficiently coercive of its targets' expressive choices to violate the Free Speech Clause. Nonconstitutional options also remain available, and again include setting- and audience-specific statutes, the establishment of agency watchdogs, and vigorous legislative oversight.

Finally, government lies about the justification for military force offer especially vexing problems, as they portend disastrous harms together with substantial enforcement challenges. For example, a President's lies to Congress and to the public about the reasons for U.S. military intervention threaten a range of shattering injuries, both individual and collective, as they can lead to the loss of lives by both civilians and soldiers, the ruinous diversion of national resources, and a substantial loss in public trust. Such lies also undermine the public's ability to engage in democratic self-governance, threaten listeners' autonomy by skewing their political choices, and frustrate the search for truth. In addition, such lies concern a national security matter on which the President will often have greater (and perhaps monopoly) informational access, thus limiting opportunities for meaningful rebuttal.

On the other hand, establishing the link between the President's lie and the actual decision to go to war (and the resulting loss of life and liberty for due process purposes) may be difficult, as many factors generally influence that causal chain of events. Characterizing such a lie as coercive is similarly challenging, as the congressional and public audience is neither captive nor vulnerable (except, perhaps, to the extent that the President has a monopoly on information on this topic). Furthermore, one can easily anticipate that constitutional litigation challenging such assertions as lies might be motivated by partisan rather than public interests, and that the judiciary might thus be reluctant to second-guess choices made by the President

209. *See supra* notes 82–85 and accompanying text.

when exercising her Article II powers.[210] Nonconstitutional possibilities include enhanced protections for whistleblowers who can expose the lie, vigorous enforcement of the Freedom of Information Act, and aggressive congressional oversight. In light of the challenges raised by constitutional enforcement efforts in this context, many may prefer these nonconstitutional responses as the best among imperfect options.

These complexities suggest that the government's most catastrophic lies may be those especially resistant to redress under an individual-rights framework that offers possibilities for constraining only those government lies that injure identifiable individuals in relatively tangible ways. Such a framework may be considerably less well-suited to address more collective harms, no matter how severe.

But perhaps lies about the justification for military force may be among the extreme cases where the dreadful consequences of the government's lie coupled with a corrupt governmental motive (and the government's motive will assuredly be key to this determination) are sufficiently outrageous to constitute an unconstitutional abuse of executive power. In other words, this may be among those government lies that are so venal that they could, and should, shock our collective conscience and thus be found to breach our expectations—protected by the Due Process Clause—that our government should not behave outrageously in its dealings with us.[211]

CONCLUSION

Lies are complicated and powerful, and so is the government. The government's lies can be devastating. They can also sometimes be relatively harmless, and occasionally even helpful in advancing the public's interest. We need to empower our government to operate effectively to protect us and our interests, even while we reasonably fear, and should take steps to protect ourselves from, its ability to harm us. As Michael Walzer has written, "I suspect we shall not abolish lying at all, but we might see to it that fewer lies were told if we contrived to deny power and glory to the greatest liars—except, of course, in the case of those lucky few whose extraordinary achievements make us forget the lies they told."[212] In this Article, I have suggested a range of approaches that seek to "deny power and glory to the greatest liars" even while recognizing that some harmful government lies

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210. *See* Julian Davis Mortenson, *Law Matters, Even to the Executive*, 112 MICH. L. REV. 1015, 1015 (2014) (describing national security policy as the area in which "we find judicial deference at its highest, the centralization of modern government at its most pronounced, delegations of authority to the executive at their broadest, and contempt for idealism at its most self-satisfied").

211. Relatedly, recall that public fiduciary theory suggests that the public should expect the same loyalty from its government as it would from other fiduciaries in whom it has placed its trust. *See supra* note 37 and accompanying text. The Supreme Court's interpretation of the Due Process Clause to forbid government action that shocks the conscience offers a possible constitutional basis for enforcing those expectations as a constitutional matter.

212. *See* Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 PHIL. & PUB. AFF. 160, 180 (1973).

will nevertheless likely escape redress. In so doing, I have sought to start a conversation about how courts—and the rest of us—might think about the constitutional and other implications of the government's lies, recognizing that others might choose to strike the balance quite differently.