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Commercial Boycotting and Conscientious Breach of Contract

(Co-authored with Prince Saprai)

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Abstract

In this article we argue that commercial boycotting is not an uncontested economic right. Rather, the practice of boycotting often requires further moral justification. We argue that this justification should not rely solely on the consequences of boycotting, nor should it rely solely on the complicity of the consumer. We suggest that both justifications are subject to pressing objections. In light of these objections, we outline an alternative non-consequentialist justification of commercial boycotting that is grounded in the moral values of conscience and personal integrity. We then explore the scope of this justification in the legal realm. We focus on cases where consumers lack freedom of exchange due to their contractual obligations and conclude by defending a qualified legal right to breach contracts on conscientious grounds.

Keywords

Boycotting, Complicity, Conscience, Contract, Integrity

Introduction

Boycotts are a way of expressing disapproval about the practices of certain institutional, political, or corporate actors. The focus of our paper is on a particular and very common type of boycott, which we shall call the 'market' or 'commercial' boycott. These boycotts standardly take the form of the withdrawal of trade from consumer to firm, or from supplier to producer. Market actors boycott a firm by intentionally not transacting with it because they object to the firm's practices (e.g. exploitative contracts, unsafe working conditions, unfair executive rewards, environmental negligence, etc.).¹ This practice offers consumers and suppliers an important avenue of social activism that can shape the behaviour of firms.

Market boycotting expresses one market actor's dislike of the target actor's behaviour by changing the target's incentive structure in order to make their objectionable behaviour less profitable. As firms have a basic incentive to seek profits and avoid losses, boycotters use their market power to alter the firm's revenue in order to change the firm's

¹ Monroe Friedman, 'Consumer Boycotts: A Conceptual Framework and Research Agenda', *Journal of Social Issues* 47, 1 (1991): 149-168, at p. 151.

behaviour. When boycotts proceed in a visible and public manner, they also communicate this dislike to firm directors and shareholders, draw fellow consumers' attention to objectionable practices, and create a significant source of shame that may encourage firms to change their behaviour. In sum, market boycotts aim to hurt the profits and reputations of firms that behave objectionably.²

There are many prominent examples of market boycotts: For example, many Liverpudlians continue to boycott The Sun newspaper after its reporting of the 1989 Hillsborough disaster. Some consumers boycott Nestlé because they object that marketing breast milk substitutes in poor countries puts the health of newborns at risk. Some consumers boycott factory farmed eggs due to the cruelty involved in the process of farming them, and so on.

The potentially significant market-altering effects of boycotting raise questions about its permissibility. *Prima facie*, it is unclear that market boycotts are objectionable. It is a central tenet of a liberal market economy that market actors enjoy both freedom *of* contract and its flipside freedom *from* contract.³ If it is permissible not to buy products and services for everyday reasons, like price, brand image, or aesthetic preference, then *mutatis mutandis*, boycotting should also be permitted. Boycotting is merely the *intentional principled* form of this everyday fact of market interaction and is permissible due to this similarity.

This orthodox assumption regarding the permissibility of boycotting informs the view that consumers are at liberty to boycott firms who behave in ways that they do not agree with. On the face of it, this looks like a powerful argument. However, we should distinguish between two types of objection to it:

First, sceptics of the orthodox permissibility of boycotting may raise *generic* objections to the practice. Generic objections track the general features of the practice. For example, we might object to boycotting on political grounds. Although boycotting takes an economic form, it also has social and political effects. Our private consumption choices have public outcomes when they harm other moral agents, non-human animals, and the environment.⁴ When individual consumers choose to purchase particular goods and services over others, they exert market power which rewards the producers of these goods and services. The resulting aggregate patterns of consumption do much to

² Boycotting differs in this aim from its positive alternative, so-called 'Buycotting'. Monroe Friedman, *Consumer Boycotts: Effecting Change Through the Marketplace and the Media* (New York: Routledge, 1999), pp. 201-212; Lisa A. Nielson, 'Boycott or Buycott? Understanding Political Consumerism', *Journal of Consumer Behaviour* 9, 3 (2010): 214-227; Lauren Copeland, 'Conceptualising Political Consumerism: How Citizenship Norms Differentiate Boycotting from Buycotting', *Political Studies* 62, 1 sup. (2014): 172-186.

³ Dori Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Oxford: Hart Publishing, 2003), ch. 5.

⁴ For a defence of this causal claim and taxonomy of the resulting harms, see David T. Schwartz, *Consuming Choices: Ethics in a Global Consumer Age* (Plymouth: Rowman and Littlefield, 2010), pp. 21-67.

determine the material standard of living in capitalist societies. These effects ensure that consumers participate in the market as a mechanism of both economic and social change that distributes both resources and opportunities.

Boycotting, then, is an economic method of effecting social and political change. Furthermore, the market is an unequal place. Some market actors enjoy resources and opportunities at the expense of others and wealthy citizens have significantly more purchasing power than poorer citizens. When market outcomes affect social and political change, and these outcomes are inegalitarian, then market behaviour offers some citizens a greater chance to affect that change than others. Critics may therefore suggest that the permeable relationship between market economics and liberal politics guarantees that market power can be intentionally used to apply undue pressure on the democratic political process. Seen in this light, boycotts are a method by which organised pressure groups and wealthy elites can exert additional power over political decision-making and social outcomes. As this additional influence is not open to all citizens, it threatens to undermine political equality by making some voices in society objectionably louder than others.⁵

Boycotts across national borders raise additional transnational concerns over domestic sovereignty and national self-governance as wealthy global market actors impose significant pressures to shape foreign social and political conditions through global trade. Finally, critics might generically object to boycotting as an extra-legal means of achieving justice. For instance, we might worry that individual consumer acts may aggregate to punish firms disproportionately to their wrongdoing.⁶ We might also worry about the procedural fairness of boycotting by questioning the burden of proof and relevant standards of evidence that motivate boycotters to act.⁷

⁵ Insofar as our opportunities for social and political change should be egalitarian and democratic, boycotting is objectionable because it threatens to distort our equal access to these opportunities. For example, boycotting contravenes the participatory benefits that Ronald Dworkin attributes to political equality by distorting the rough 'Equality of Impact' that democratic decision-making requires for its legitimacy. These benefits include the symbolic recognition, moral agency, and sense of community that citizens enjoy when they participate in an egalitarian democratic process. These goods do not require citizens to possess equal amounts of political influence, but they do require that the votes of individual citizens have a roughly equal impact on political outcomes. Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, MA: Harvard University Press, 2000), p. 187. Boycotting also threatens what John Rawls names the 'Fair Value of Equal Political Liberties' because it is one manner by which wealthy citizens may use their wealth to entrench greater opportunities to enjoy their basic liberties and to deprive other citizens of theirs. John Rawls. *Justice as Fairness: A Restatement* (Harvard: Belknap Press, 2001), pp. 148-50. For more on the deprivation problem, see Waheed Hussain, 'Is Ethical Consumerism an Impermissible Form of Vigilantism?' *Philosophy and Public Affairs* 40, 2 (2012): 111-143, at pp. 117-118.

⁶ Linda Radzik, 'Boycotts and the Social Enforcement of Justice', *Social Philosophy and Policy* 34, 1 (2017): 102-122, at pp. 116-7.

⁷ *Ibid.*, p. 120.

We aim to leave these generic objections to the orthodox permissibility of boycotting to one side.⁸ We neither deny their importance, nor believe that they are insurmountable. Rather, we seek to study a different type of objection to boycotting that is often obscured by generic objections to the practice. *Specific* objections differ from their generic siblings because they arise from particular circumstances of exchange, rather than from the general features of the practice of boycotting. Simply put, specific objections to boycotting are contextual rather than universal.

The circumstances that we are interested in concern the permissibility of boycotting where market actors lack the legal freedoms of contract or from contract that the orthodox view assumes. In such circumstances, the orthodox permissibility of boycotting does not hold. Crucially, however, the reason it does not hold is not because the value of political equality, national sovereignty, or procedural justice defeats our permission to boycott. Instead, the orthodox permissibility fails to hold due to the presence of prior held moral and legal obligations. In such cases, our permission to boycott conflicts with a different set of circumstantial considerations. It is for this reason that the arguments required to justify boycotting in such cases differ from those required to justify boycotting under the orthodox assumption.

The example we will focus on is where boycotting takes place in the context of pre-existing contractual obligations. A consumer or supplier discovers, *after* having entered into a contract with a firm, that that firm engages in morally objectionable behaviour (e.g. by using tax havens to avoid local taxes, using sweatshops in poor countries, polluting the environment, and so on), and as a result the consumer or supplier refuse to perform their side of the contract. This sort of case raises interesting moral and legal issues, and large practical and commercial consequences flow from the manner in which these issues are handled and dealt with.

In what follows, we argue that parties have permission to boycott in these breach of contract cases, subject to certain conditions. We suggest that, due to their causal requirement, consequentialist justifications of this permission are poorly suited to the task. On this view, our permission to boycott is contingent on how effectively it serves the goal of bringing a firm's morally objectionable practices to an end. We believe that the permission has a wider scope than this because individual breaches rarely cause a firm to change its objectionable ways and because we believe that further non-causal factors should play a part in grounding the permission. Therefore, we defend a right to boycott grounded in the conscience and moral integrity of consumers. This justification permits so-called 'symbolic boycotts' - where the boycotter is unlikely to succeed in changing the firm's behaviour. We then explore the legality of the permission granted by this deontic justification. We characterise the permitted acts as a conscientious form of breach of contract and argue that legal permission to breach should be granted according to the

⁸ For discussion of this sort of objection, see Claudia Mills, 'Should we Boycott Boycotts?', *Journal of Social Philosophy* 27, 3 (1996): 136-48; Monroe Friedman, 'Ethical Dilemmas Associated with Consumer Boycotts', *Journal of Social Philosophy* 32, 2 (2001): 232-40; Hussain op. cit.; Radzik op. cit.

moral permission to boycott grounded in the value of moral integrity. We conclude by discussing and rejecting legal objections to our argument.

Why Not Consequentialism?

In our view, the justification for a right to boycott in the breach of contract context is best justified on non-consequentialist grounds. This is because consequentialist justifications are too restrictive along a number of important dimensions. According to the consequentialist view, a right to boycott will depend on how likely it is that the boycott will change the firm's objectionable business practices. Let's call this the *Effectiveness Condition*. As we show in this section, this condition is the source of a number of problems for those seeking to justify boycotting and rules out so-called symbolic boycotts. Here, we focus on four problems – the *Hostage Objection*, the *Warrant Objection*, the *Phenomenology Objection*, and the *Complicity Objection*.

First, consider the difficulty that boycotters face in meeting the effectiveness condition. They meet this condition by creating a *large enough market incentive* to successfully motivate firms into changing their behaviour. Boycotts are effective when they generate market power that is greater than the firm's commitment to its objectionable practices. It is only when the pressure that the boycotters impose on the firm is weightier than this commitment that a boycott will succeed in motivating the firm to change its ways. In some cases, this will only require a single consumer (e.g. where a consumer purchases a lot of produce or service from a small firm). However, commonly this will tend to require a coordinated collective act in order to exert significant pressure through a firm's incentives.

The effectiveness condition is difficult to fulfil because boycotters only wield their own market power. Boycotters cannot control the behaviour of the other consumers that contribute to the firm's incentives. Specifically, they cannot prevent other market actors from continuing to consume the firm's products or perform their contracts with the firm, and they cannot prevent new actors from entering the market to replace their absence by providing new business to the firm.

Boycotts are not like blockades. All that boycotters can do is to withhold their own trade or performance of contracts and inform other consumers about objectionable business practices in order to spur their consciences into action. Hence, although boycotters can control whether or not they buy a firm's products, or breach a contract they have already entered, they cannot control the extent to which the loss of their trade matters to the firm because they cannot prevent the actions of other consumers from negating the effects of their actions on the firm's incentive structure.⁹

⁹ Indeed, some boycotts backfire by creating further harms (e.g., redundancies). These boycotts cannot exert a large enough pressure on the firm to incentivise it to change its objectionable working practices because the workers who lose their jobs in response to the fall in trade are less important to the firm's

These difficulties mean that an individual consumer can never be sure that their consumption choices will contribute pressure to a firm's incentive structure, or that their contribution (if they make one) will make a significant difference to the firm's behaviour. This does not prevent consequentialism from justifying some boycotts as collective actions in the abstract.¹⁰ However, in light of the effectiveness condition, these difficulties do restrict the permission that consequentialism can justify. Consumers are not necessarily permitted to boycott any firm that they find objectionable, nor are they necessarily permitted to boycott firms who commit the greatest wrongs. Rather, consumers are permitted to boycott firms whose wrongful behaviour their boycott is likely to curb. The more likely a boycott is to succeed and the more wrongs that are likely to be righted, the more permissible it is to join a collective effort to boycott a firm.

This outcome-orientated approach has some benefits in judging where a consumer's limited efforts will make the most efficient causal contribution to fighting injustice. However, we worry that it holds each individual's permission to boycott hostage to the actions of the rest of the group of likely boycotters. When permissibility requires effectiveness, and effectiveness requires coordination, individual actors are in a morally relevant sense unfree. Let's call this the *Hostage Objection*.

Second, consider what information consumers need to know in order to judge the permissibility of their actions. Due to the effectiveness condition, consumers need to know that their boycott is likely to succeed in order to know whether their boycott is warranted.

Boycotters face serious epistemic hurdles in estimating the effectiveness, and thus the permissibility, of their intended actions. To know whether their boycott will be effective, a boycotter must be able to estimate and compare the market power of a coordinated boycott and the firm's commitment to its objectionable practices. Both tasks are extremely difficult and go far beyond the expected due diligence of consumers. The former requires consumers to have reasonably accurate knowledge of the market power

bottom line than its objectionable working practices. The firm's response to the boycott reflects this priority.

¹⁰ For example, consequentialists can adopt Shelly Kagan's proposed solution to solving 'collective trigger' cases according to the *discounted expected utility* of each individual's contribution to crossing the threshold required for permissibility. Kagan argues that, under conditions of uncertainty, consequentialism gives us reasons to do what will have the best expected outcomes. If we know that an effective boycott will bring about beneficial results, then even if it is very unlikely that one consumer's individual consumption choice is the choice that transforms an ineffective boycott into an effective boycott, we can discount the overall beneficial results for the low likelihood that the individual consumer's choice made the difference. The net result of this calculation must remain positive (if somewhat diminished) due to the boycott's overall beneficial consequences. This positive result then guarantees that the consumer's participation in the boycott has a positive expected utility, leading consequentialism to give the consumer a moral permission to boycott. Shelly Kagan, 'Do I Make a Difference?', *Philosophy and Public Affairs* 39, 2 (2011): 105-141, at pp. 119-120. For further discussion, see Schwartz op. cit., ch. 3.

of every likely participant in the collective action. The latter requires consumers to know corporate information that they are not privy to, foresee a range of factors (including circumstantial factors) that are relevant to the firm's future behaviour, and accurately predict the firm's likely response to the various pressures of the boycott.

These difficulties mean that even boycotters who are able to coordinate an effective boycott may not know whether their collective actions are permissible. Hence, the complexity of effective boycotting makes the epistemic warrant of permissibility difficult to establish, given the consumer's inevitably limited grasp of the facts on the ground. Let's call this the *Warrant Objection*.

The warrant objection compounds the hostage objection; making it very difficult to justify boycotting on consequentialist grounds. Due to the epistemic hurdles that market actors face when establishing warranted permissibility, morally permissible boycotts may be frustrated and morally impermissible boycotts may be encouraged because consumers struggle to know whether their intended boycotts are more likely to succeed or fail.¹¹ Thus, not only does a consequentialist permission to boycott require a type of causal contribution that consumers rarely make, it also requires evidence that consumers rarely know.

Third, the hostage and warrant objections follow from the effectiveness condition. Boycotts that avoid these objections are likely to be very large and extremely well publicised. Few real-world boycotts satisfy these conditions, and fewer (if any) breach of contract cases do so. This is why we reach beyond the consequentialist justification of permissible boycotting. In our view, the effectiveness condition is too restrictive and allows for too few permissible boycotts. Moreover, we believe that it should be possible to justify boycotting in at least some symbolic cases where the boycott seems highly unlikely to succeed in making the firm change its objectionable practices. We believe that a significant number of breach cases take this form.

The consequentialist may reject this intuition about the justifiability of symbolic boycotting as it conflicts with the effectiveness condition. We hold onto it though, because it reflects the moral experience of many people who engage in boycotting; they believe that their boycotts are justified *whether or not* they succeed in making firms change their morally objectionable behaviour. This belief is an important part of the phenomenology of the moral practice that consequentialism fails to capture. Let's call this the *Phenomenology Objection*.¹²

¹¹ This fact causes a significant problem for those seeking to apply Kagan's methodology to boycotting. In order to justify a boycott by appeal to the discounted expected utility produced by joining, we must first know that the discounted expected utility of joining is positive, and we must overcome the warrant objection in order to know whether this is the case.

¹² To illustrate this aspect of the practice of boycotting, consider the recent case of the journalist Steve Bloomfield who is boycotting his football club, Aston Villa, on account of its recruitment of a football player, John Terry, known to have used racist language. Bloomfield justifies taking this stand on grounds of principle, even though he is well aware his boycott is unlikely to be effective: "The only thing I can do is

It is, of course, open to the consequentialist to offer a revisionary account of justified boycotting that repudiates this aspect of the practice and seeks to answer the hostage and warrant objections. However, we want to explore what sorts of reasons might justify this aspect of the practice. Once identified, we argue these reasons bring to light a rival – potentially more plausible – conception of the practice.

We don't deny that many people engage in boycotting because they see some prospect of success in making the firm change its objectionable practices. Boycotters can and should aim to make a difference. However, it seems equally difficult to deny the moral salience of symbolic cases, where the boycott seems motivated by a desire to avoid association with or to actively disassociate oneself from the firm and its objectionable practices. Causal effectiveness is not the only reason that motivates boycotters. In our view, symbolic cases are an effort by the consumer to uphold an aspect of their moral integrity.

The appeal of the value of moral integrity has of course famously troubled consequentialists in the past.¹³ To close this section, let's consider the distinct version of this traditional problem that the hostage objection raises. The fact that consequentialism makes each individual's permission to boycott rest in the hands of their fellow consumers threatens the moral integrity of the consumer by risking making them complicit in the firm's moral wrongdoing. While the individual causal contribution that consumers make to boycotts is rarely sufficient for establishing permissibility on consequentialist grounds, it is often sufficient to ensure complicity in wrongdoing.

Following Christopher Kutz, we understand complicity as a phenomenon that relies on collective, rather than individual, causal contributions.¹⁴ Consumers are not complicit in the wrongdoing of a firm to the extent that they individually causally contribute to that wrongdoing (as consequentialism requires). Rather, a consumer's complicity involves a thinner *collective* form of causal contribution to the general class of 'consumer'. In the absence of consumers, there would be no firm because without demand there is no need

withdraw my support. I'm not naive enough to believe a boycott will make a difference. But I can't tell my friends "this is my team" and I can't tell my son "this is your team" if John Terry wears claret and blue. As long as John Terry is a Villan, I'm not". Bloomfield's boycott seems justified, but this cannot be on consequentialist grounds. 'After 30 years, I'm boycotting Aston Villa. Why? John Terry's past racist language'

<https://www.theguardian.com/commentisfree/2017/jul/05/aston-villa-fan-boycott-john-terry-racist-past>

¹³ Consequentialism is insensitive to the integrity of moral agents because it requires agents to treat the moral significance of their own personal commitments and judgements as dependent on their weight in an impersonal ranking of states of affairs. Samuel Scheffler, *The Rejection of Consequentialism: A Philosophical Investigation of the Considerations Underlying Rival Moral Conceptions* (Oxford: Oxford University Press, 1993), pp. 41-56.

¹⁴ Christopher Kutz, *Complicity: Ethics and Law for a Collective Age* (Cambridge: Cambridge University Press, 2000), p. 122. See also, Christopher Kutz, 'Causeless Complicity', *Criminal Law and Philosophy* 1, 3 (2007): 289-305.

for supply. This form of contribution is sufficient to implicate the consumer in the firm's wrongdoing without having to prove that the consumer is directly responsible for that wrongdoing, nor that they could prevent that wrongdoing by changing their purchasing behaviour.¹⁵ By purchasing the firm's products, consumers (as a general class) contribute to the continued existence of a firm that acts objectionably. Further, by intentionally benefiting from the firm's products, the consumer threatens her conscience and moral integrity because the benefit that she derives from her consumption is morally tainted by the firm's malpractice.¹⁶

This explains how consequentialist justifications of boycotting can render consumers complicit in corporate wrongdoing. The consequentialist account of permissibility requires a consumer's boycott to make an individual causal difference to the firm's wrongdoing. When this doesn't happen, individual consumers lack an outcome-based moral reason to boycott wrongdoing firms because their solitary boycott fails to constrain the firm's wrongful behaviour. The consumer's actions remain merely symbolic. By withholding this reason from consumers, consequentialism threatens to render them complicit in a firm's wrongdoing. Although the consumer knows that the firm acts wrongfully, they may also know that their boycott is unlikely to cause the firm to change its wrongful behaviour.¹⁷ Thus, although consequentialism might take into account the negative feelings of the consumer towards the firm's practices, it cannot grant them an all things considered moral permission to symbolically boycott the firm (due to the effectiveness condition). This lack of a permission renders the consumer complicit in the firm's wrongdoing. Let's call this the *Complicity Objection*.

Towards a Deontological Justification of Boycotting

In the previous section we argued against causal effectiveness as a necessary condition of permissibility for boycotting. We suggested that this requirement was the source of a number of significant objections. In this section, we outline an alternative non-consequentialist justification of boycotting. The basis of this justification stems from the same values that are ultimately threatened by the consequentialist justification outlined above – the conscience and moral integrity of consumers.

To some non-consequentialists, this justification may be surprising.¹⁸ After all, complicity in wrongdoing may be sufficient to ground a moral permission to boycott a firm without

¹⁵ Bashshar Haydar & Gerhard Øverland, 'The Normative Implications of Benefitting from Injustice', *Journal of Applied Philosophy* 31, 4 (2014): 349-62, at pp. 356-60.

¹⁶ Schwartz op. cit., ch. 4. For further discussion of these types of case and the duties that follow, see Avia Pasternak, 'Voluntary Benefits from Wrongdoing', *Journal of Applied Philosophy* 31, 4 (2014): 377-91.

¹⁷ The Bloomfield case (n. 12) is a clear example of this phenomenon.

¹⁸ Thank you to Adam Slavny and Victor Tadros for this suggestion.

appeal to any further values. We might think that wrong-doing firms lack both the right to act wrongly and the right to make consumers complicit in their wrongdoing. If these firms do not cease their wrongful behaviour, then consumers should be permitted to boycott these firms in order to avoid complicity.

In the context of breach of contract, this view would suggest that the consumer as promisor has no right to promise to perform an act that would make her complicit in wrongdoing. In the same way that some claim that we have no power to promise to perform seriously immoral acts (e.g. I cannot validly promise to torture you), then *mutatis mutandis* we have no right to promise to perform acts that would involve us in such wrongdoing, e.g., my promise to sell you some pliers is subject to the condition that you won't use the pliers to commit torture.¹⁹

If these types of argument are sound, then there is no need to appeal to the values of conscience and moral integrity as they add little more to an already plausible non-consequentialist justification for boycotting. However, we believe that these types of arguments are not sound because the complicity-view misses an important feature of the permission to boycott.

Consumers who are motivated to boycott wrong-doing firms rarely boycott all firms that act wrongfully. Rather, boycotters most commonly choose to boycott firms who are engaged in wrongful acts that they find particularly objectionable, given their broader commitments. Just as the fashionista may discriminate in their purchasing choices against certain types of outfit given their broader aesthetic preferences, so too do conscientious consumers boycott certain types of wrong-doing that they find particularly troubling. The complicity justification cannot easily explain (or condone) this selectivity. It is those wrongs that prick the conscience of the consumer that are often most ripe for boycotting, not all wrongs.

Complicity-theorists can respond to this selectivity worry by suggesting that we should only concern ourselves with *serious* forms of moral wrongdoing, rather than moral wrongdoing *simpliciter*, and/or that there must be high degrees of complicity in order for the right to boycott to bite. These are avenues of argument that we think could profitably be pursued.

However, these responses miss something important about the nature of our permission to boycott. It seems true that there are certain forms of serious moral wrongdoing that plausibly implicate the integrity of *any* human being (e.g. modern slavery). Such cases provide us with strong reasons to boycott regardless of our stand on the issue in question. It is part of what it means to be a responsible moral agent to object to such practices. The

¹⁹ The claim that seriously immoral promises are invalid was famously made by J.E.J. Altham in J.E.J. Altham, 'Wicked Promises' in I. Hacking (ed) *Exercises in Analysis: Essays by Students of Casimir Lewy* (Cambridge: Cambridge University Press, 1985). For the contrary view, see John R. Searle, *Rationality in Action* (Cambridge MA: MIT Press, 2001), pp. 193-200; David Owens, *Shaping the Normative Landscape* (Oxford: Oxford University Press, 2012), pp. 245-249.

justification for boycott in such cases is agent-neutral. But it also seems true that there is a range of wrongful practices which are less serious, but which particular agents still have special reasons to object to because of stances they have taken in the past against similar practices. For example, if I am a vegetarian because I believe breeding animals for human consumption is cruel, then those same reasons give me strong reasons to boycott cosmetics firms that engage in animal testing. Although every agent may have a reason to worry about animal cruelty, the vegetarian has additional reasons of integrity to boycott. These additional reasons flow from the relationship between the wrong in question and the vegetarian's prior moral commitments. Given their similarity, the vegetarian would suffer from a form of moral inconsistency if they acted in one case but not the other. In contrast with the slavery case, the reasons granted by the vegetarian's need to avoid moral inconsistency are agent-relative.

The complicity justification struggles to capture this important distinction between agent-neutral and agent-relative reasons to boycott on its own. Without further argument, the complicity justification cannot account for the latter set of reasons. Yet these reasons are important. Descriptively, it seems an important part of the practice of boycotting that boycotts take place not only in cases where there is serious moral wrongdoing, but also where firms engage in practices that strike at values that particular agents or consumers hold dear. Normatively, these additional reasons might tip the balance in favour of a right to boycott in the presence of prior moral commitment (such as breach of contract). These considerations explain why it seems to be a mistake to ignore these agent-relative reasons in our account of permissibility. This is what gives moral integrity the edge as an explanation of the practice of boycotting.

By moral integrity, we mean to invoke a particular conception of personal integrity, which emphasizes not only the importance that agents attach to their own beliefs, values, commitments, projects, and sense of self,²⁰ but also the fact that these are genuinely held *moral* beliefs, values, commitments, and so on, which it is *reasonable* for the agent to endorse.²¹ This relatively thick conception of integrity captures what we think is at stake in boycotting cases.

We possess moral integrity when we meet our reasonably-held demands of conscience. This has a personal aspect of judging and meeting the obligations that flow from our

²⁰ J.J.C. Smart and Bernard Williams, *Utilitarianism: For and Against* (Cambridge: Cambridge University Press, 1973), pp. 116-117.

²¹ Our conception of integrity then is thicker than the standard *integrated self, identity and clean hands* conceptions. For discussion, see Cheshire Calhoun, 'Standing for Something', *The Journal of Philosophy* 92, 5 (1995): 235-260; Susan Mendus, *Politics and Morality* (Cambridge: Polity, 2009), pp 16-27. Our view is closer to and influenced by Ronald Dworkin's theory of integrity or 'principled consistency' as a conception of law. Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), ch. 6.

commitments.²² This also has a social aspect by imposing duties on others to recognise the importance of principled consistency in our lives, and to avoid imposing burdens which make it too difficult to live up to these standards.²³

Moral integrity is a source of great value. Living up to our moral commitments, regardless of whether doing so maximally benefits ourselves or others, is what marks us out as the particular individuals we are. We show ourselves to be good friends, partners, colleagues, etc., when we fulfil the duties associated with those roles. Acting in this way, though often difficult, leaves us better equipped to navigate a moral landscape marked by plural, competing values.²⁴ Acting in this way is also important for our sense of self-respect, for many of the virtues of personal autonomy, and for satisfactory moral development. Finally, living up to these standards can reduce the psychological harms of disappointment, frustration, and dissonance caused by failing to live up to our full range of moral demands and pressures.²⁵

Principled or conscientious consumers have the capacity to adopt a self-reflective stance toward their own moral deliberations. When we value ourselves as sources of normative practical reasoning, we reflectively endorse these reasons as consistent with our preferences and self-conception. This valuing judgement is the source of our sense of moral integrity and the obligations generated by our commitments establish our demands of conscience.²⁶ When consumers act with integrity, they recognise and privilege the moral demands of their commitments in their purchasing decisions. These demands include avoiding complicity in particular forms of moral wrongdoing that conflict with central aspects of the consumer's moral personality. Avoiding this type of complicity, even when a boycott fails to change the behaviour of firms, is a weighty reason for the principled consumer.²⁷

²² Calhoun op. cit., p. 249; Greg Scherkoske, 'Integrity and Moral Danger', *Canadian Journal of Philosophy* 40, 3 (2010): 335-58, at pp. 352-8.

²³ Calhoun op. cit., pp. 252-60.

²⁴ Kimberley Brownlee, *Conscience and Conviction: The Case for Civil Disobedience* (Oxford: Oxford University Press, 2012), pp. 62-71. Conflicts between these roles and duties creates scope for reasonable disagreement about wrongdoing. Provided that one's commitments are sincere and based on genuine values and true moral principles, the fact of reasonable disagreement does not compromise one's right to stage a principled boycott. It does though mean that political and legal institutions are required to adjudicate disagreements. We return to this point below.

²⁵ David Luban, 'Integrity: Its Causes and Cures', *Fordham Law Review* 72, 2 (2003): 279-310.

²⁶ Brownlee op. cit., pp. 62-6; Calhoun op. cit., p. 258; Dworkin op. cit. 2000, p. 270.

²⁷ In defending the moral permission to boycott on these grounds, we agree with Claudia Mills when she argues that integrity-based justifications of the practice provide consumers with a reason to avoid 'dirtying their hands' by becoming an accomplice to corporate wrongdoing through their purchasing decisions. Mills argues that this justification conflicts with outcome-based justifications of boycotting because the latter

Moral integrity plays an important role in justifying boycotts in circumstances where the orthodox assumptions do not hold, such as cases of breach of contract. In such cases, the promissory obligation establishes a strong impersonal moral reason to perform the contract, even when performance conflicts with one's own personal commitments. For example, it is implausible that one could justify breaching a contract on the grounds that it has come to light that a firm is engaged in practices that compromise one's fundamental aesthetic commitments. That sort of reason lacks the necessary weight to defeat the promissory obligation to perform.

However, where the reason against performance is itself a moral reason (e.g. it comes to light that the firm is engaged in exploitative labour practices), a conflict of duties may arise.²⁸ In the face of that conflict, it seems legitimate that the promisor be granted a right or permission to breach when performance of the contract threatens to compromise her moral integrity. We suggest that this is true when the firm's actions threaten to make her complicit in serious moral wrongdoing of the kind that every principled moral agent should avoid. We also suggest that this is true when the firm's actions threaten to compromise the integrity of her particular moral character given her other moral commitments. Both agent-neutral and agent-relative reasons can play a role in generating a permission in this type of case.

The fact that this account of the practice is capable of generating agent-relative permissions to boycott is important because, otherwise, the demands of impersonal morality seem to require too much from us.²⁹ It allows the right to breach to take seriously the importance of principled moral consistency (to self and others),³⁰ and allows our actions to express the principles and reasons to which we are committed.³¹

The permission granted by this right primarily differs from a consequentialist justification as it is not subject to an effectiveness constraint. Therefore, this right permits both effective and symbolic boycotts. An integrity-based moral right to boycott will not guarantee that we *succeed* in changing objectionable practices, but in cases like breach of contract it will go far in protecting our basic capacity for acting with integrity.³²

requires consumers to get involved precisely in this way in the hope of ending the firm's objectionable behaviour. Mills op. cit., p. 141-5.

²⁸ In the same way that it makes all the difference when politicians lie or betray their promises that they do so for the common good rather than for personal gain. Mendus op. cit., p 51.

²⁹ Ibid., pp. 33-34. Thank you to an anonymous reviewer for helping us to clarify this point.

³⁰ Calhoun op. cit., p. 254; Mendus op. cit.

³¹ Cf Mendus op. cit., p. 50.

³² Cf Brownlee op. cit., p. 79, who uses considerations of conscience to defend a *general* moral right to integrity. She argues that this right '...protects a justified moral claim founded on a sufficiently weighty interest in being able to fulfil our moral responsibilities even when competing considerations make fulfilling those responsibilities morally problematic.' Ibid., p. 127.

This moral right completes our deontological justification of boycotting. Commercial boycotting is best understood as a choice not to trade based on conscience. We have suggested that the moral permission to boycott derives from a conflict between the moral integrity of the consumer and the wrongdoing of the firm. Consequentialist and complicity justifications of the practice emphasise the latter while ignoring the former. This emphasis leads them to encounter the problems identified above. In contrast, integrity-based justifications emphasise the need to balance the two values: when consumers boycott, they are attempting to avoid complicity in, and take a principled stand against, a form of wrongdoing that is incompatible with their own moral identities.

What remains to be investigated is the strength of this moral right. As we argued at the outset, in liberal market economies the right to boycott seems guaranteed by the freedom of contract principle. Consumers usually don't owe their consumption to firms, and they are free not to purchase whatever goods and services they like. They might refuse to buy on grounds of conscience, but equally for many other reasons, such as price, quality, aesthetic preference, brand loyalty and so on. They have then freedom *from* contract. The more morally difficult cases are those where freedom *to* contract has already been exercised. A consumer has bought a good or service, but facts come to light which suggest that the firm has been involved in morally objectionable practices that conflict with the consumer's basic moral commitments. We have argued in this section that the consumer should have a *moral* right to boycott in these circumstances, but how strong should this right be, and in particular, does it justify a *legal* right to breach?

Boycotting in the Absence of Liberty: A Defence of Conscientious Breach of Contract

A Legal Right to Breach?

Suppose that a consumer enters into a contract with a firm for a particular product or service, and facts subsequently come to light which show that the firm is or has been actively engaged in a form of illegality or moral wrongdoing which is incompatible with that consumer's moral profile. We want to exclude cases where at the time of contract formation the firm promised not to engage in these forms of wrongdoing, deceived or misled the consumer about its engagement in these activities, or where the contract itself requires performance of a wrongful or illegal act. Such cases would be dealt with by traditional contract law doctrines, such as expectation damages, misrepresentation, or illegality. Our question is whether, in the absence of these traditional factors, are there grounds for the consumer to refuse performance when facts come to light *after* contract formation implicating the firm in serious malpractice or moral wrongdoing which strikes at the consumer's conscience? No such defence is currently recognised in Anglo-American law.³³

³³ The illegality doctrine in contract law is broad, but its focus is matters of public rather than private interest. See the recent decision of the English Supreme Court in *Patel v Mirza* [2016] UKSC 42 (SC) [120]. Public policy concerns have been used to justify a defence for organisers of a boycott to the tort of procuring

A defence is necessary because the consumer has a *pro tanto* obligation in these circumstances to perform her contractual obligation, due to her (unvitiated and perfectly valid) agreement to the contract. The question is whether the consumer's innocent entanglement in the firm's wrongdoing, which conflicts with the consumer's moral integrity, justifies the consumer's breach of her promissory duty?³⁴ As we have argued, it does; the consumer is permitted to breach in these circumstances.

Is this though 'merely' a *moral* right to breach, or should it go further and justify the creation of a *legal* right; should the state recognise or enforce the right to boycott as a legal defence in the context at least of breach of contract? This has important practical consequences, relating for example to whether the consumer has a duty to compensate the firm for breach. There are two main reasons why we argue that the state should recognise a legal right to boycott: First, it encourages dialogue between citizens and the state about how best to interpret the law; and, second, it fosters the conditions for the expression of moral agency among citizens.

First, the existence of such a defence opens up a channel for citizens to challenge settled interpretations of the law, with a view to prompting the state through its courts to revise those understandings, and improve its protection and recognition of moral and political rights.³⁵ An analogy can be made here to rights to conscientious objection in the criminal law. Ronald Dworkin, discussing the example of those who resisted the draft during the Vietnam War, argued that recognising such rights has several virtues for a legal system.³⁶ First, it creates opportunities for the policy implications of exceptions to rules to be tested. So, before a final determination is made on whether to allow a defence, the courts can make a judgment in the light of experience of conscientious objection about what the likely effects of creating an exception might be. Secondly, it helps courts to reach correct decisions, because in these cases resistance is backed with arguments which bring alive to the courts the matters of principle at stake. And finally, it shows to the courts the strength of feeling against a particular law.

This view of conscientious objection sees law as interactive. As Gerald Postema has argued, law is not a 'top-down' practice: 'Judicial interpretive activity, while prominent

a breach of contract. See *Brimelow v Casson* [1924] 1 Ch 302 (defence granted to an actors' union which induced theatres to break existing contracts with the manager of a female chorus group who was underpaying his staff, with the result that members of the group resorted to prostitution to supplement their incomes). As this tort is now considered a form of accessory liability (see Lord Hoffmann's speech in *OBG Ltd v Allan and others* [2007] UKHL 21 [5]), there may be scope for the evolution of such a defence in the case of a principal's liability for breach. This possibility though has not yet been tested. Thank you to Ben McFarlane for bringing this line of authority to our attention.

³⁴ We invoke a conception of defences here argued for by John Gardner, *Offences and Defences: Selected Essays in the Criminal Law* (Oxford: Oxford University Press, 2007), ch. 4.

³⁵ This feature distinguishes the permission from one of mere conscientious refusal. John Rawls, *A Theory of Justice* (Harvard: Belknap Press, 1971), pp. 368-71.

³⁶ Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), pp. 213-214.

and powerful, is nevertheless dependent in many ways on the interpretive activity of other, professional and lay, participants in legal practice'.³⁷ In our view, the right to boycott for breach of contract is the private law equivalent of the more general and familiar public law right to conscientious objection. The rationale for conscientious objection embraced by republican conceptions of the rule of law, such as Dworkin's, extends, we believe, to justifying the creation of a boycott defence in contract.

This role goes beyond so-called 'proto-legislative' conceptions of boycotting, such as that recently defended by Waheed Hussain. On this view, boycotting is an '...informal prologue to formal democratic lawmaking'.³⁸ Boycotters are permitted to boycott when the formal democratic process has not already addressed the issue in question and when their actions introduce rules that they believe the full citizen body should adopt on full consideration of the facts.³⁹ In contrast, our claim is that because boycotting is linked to notions of moral integrity, it opens up the possibility of principled dialogue between citizens and the state through its courts about what the law actually *is* (*ex ante* the breach of contract) rather than what as a matter of policy it *should* be (*ex post* the breach).⁴⁰ Our view is that boycotting should prompt judicial re-interpretation of the law, as well as legislation.

Our second and related reason for advocating a defence of boycott for breach of contract is that the absence of such a defence might impose an intolerable burden on moral agents seeking to achieve principled consistency in their own lives while simultaneously complying with legal requirements. The tension would arise out of the fact that whilst morally speaking they would be permitted to breach these agreements, the law would hold them to their transactions. This brings their practical identities and moral commitments into direct conflict with their duty to obey the law. Although the law should not seek to enforce morality, we follow Seana Shiffrin here in thinking that it should not make the expression of moral agency unduly burdensome.⁴¹

This need to respect the conditions of moral agency underpins the importance of principled dialogue discussed above between citizens and the state when it comes to

³⁷ Gerald J. Postema, "'Protestant' Interpretation and Social Practices', *Law and Philosophy* 6, 3 (1987): 283-319, at p. 310.

³⁸ Hussain *op. cit.*, p. 125.

³⁹ *Ibid.*, pp. 126-8.

⁴⁰ We rely here on Dworkin's distinction between arguments of principle and policy and his claim that it is the role of courts to make determinations of rights specifically on the basis of matters of principle. We presuppose here a non-positivist account of law which does not contain 'gaps', i.e., areas where there is no law on a particular issue, and where a judge is required to exercise a legally unconstrained discretion. Dworkin *op. cit.* 1977, ch. 2.

⁴¹ Seana Valentine Shiffrin, 'The Divergence of Contract and Promise', *Harvard Law Review* 120, 3 (2007): 708-753. See also Robert C. Hughes, 'Responsive Government and Duties of Conscience', *Jurisprudence* 5, 2 (2014): 244-64, at pp. 256-8.

making determinations about legal rights and duties. Therefore, we conclude that common notions of moral integrity and complicity can ground, as a matter of law, an agent-relative permission to boycott that retains political and moral weight in situations where market actors would otherwise lack the liberty to abstain from trade, such as where the boycott requires breach of contract.

Should Law and Morality Diverge?

An objection might be made that while there is a moral right to boycott, it should not be given legal force because of what Shiffrin calls ‘distinctively *legal* normative arguments’, which count against enforcement. These are moral arguments ‘...whose range is specifically tailored to the special, normatively salient properties of law and its appropriate content and shape’.⁴² If such reasons exist, and are used by the courts to deny rights to boycott, it might be that divergence between law and morality can be justified in these cases.

There are three specifically legal reasons to worry about enforcing the right to boycott in the context of breach of contract: First, there is a potential risk that this right will ‘open the floodgates’ to defences for breach, unsettling commercial transactions and the legal certainty that they rely on. Second, there is a potential risk of fraud as some consumers might exploit the boycott defence as a means of escaping unfavourable bargains. Finally, there is a potential risk that such a defence will create serious epistemic problems for courts, who will have to undertake the difficult task of determining whether issues of integrity are actually at stake in particular cases.

We believe these are genuine concerns, but that they can be dealt with by attaching conditions to the availability of a boycott defence. The danger that such a defence will open the floodgates can be resolved by stipulating that it will not suffice for the consumer to show that they *believe* that the firm is engaged in wrongdoing, but rather they must show that they have reasonable grounds for holding that belief.

There are two elements to making such a claim. First, the consumer will need to show not only that the principle at stake is one that she sincerely believes to be a plausible moral principle; rather, it has to actually be a plausible moral principle, i.e., she must have reasonable grounds for believing it. This requirement rules out cases where the consumer holds clearly unjust moral views.

Many cases though won’t be so simple. Imagine that the consumer discovers that the firm has been using sweatshops to manufacture its goods and that this strikes against her deeply held moral convictions about preventing exploitation. However, the firm argues that their employment practices are justified because they create employment opportunities in poor countries. Such cases will of course involve the courts in making difficult moral judgments, and indeed we don’t deny that there is scope for reasonable

⁴² Shiffrin op. cit. 2007, p. 733.

disagreement here. However, courts as the ultimate arbiters of our civil and political rights routinely make and are indeed required to make these sorts of assessments. For example, the law of tort weighs up principles of freedom and corrective justice when settling on rules to determine what is owed by those who cause accidents. The law of contract weighs up promissory principles and principles that prevent coercion or deceit in determining when a promisor is entitled to a defence of duress or misrepresentation. These are all difficult and contested judgments, but nevertheless it is the duty of courts to make them.⁴³ A boycott defence for breach of contract then requires nothing more of the courts than what they are already required to do.

Secondly, the consumer must show not only that plausible moral principles are at stake in the case, but that the firm has indeed violated these. For example, if the allegation is that the firm is using sweatshops, the consumer will need to provide evidence (perhaps from journalists, NGOs, charities and so forth) which shows this is true on the balance of probabilities (the civil standard of proof).

These moral and evidential hurdles involved in showing the reasonableness of the consumer's belief in the firm's moral wrongdoing help to alleviate the worry that a boycott defence will open the floodgates to litigation. However, they may give rise to the opposite worry of too little litigation. They highlight the risks associated with litigation and its attendant costs. It may be that only the rich will have the resources to defend these claims, and that indeed raises the sorts of concerns discussed at the outset about equality of political impact and fair value of equal liberties. These are valid worries, but it seems to us that these are concerns about access to justice generally and don't specifically relate to the issue of whether there should be a right to boycott. So, to the extent that these are genuine concerns, they are an argument not *against* having a right to boycott, but rather *for* increased access to justice. We would not think these sorts of arguments entail that there should be no right to conscientious objection in criminal law cases, and it's unclear it should be any different for boycott, which we suggest is a similar species of right.

The danger that consumers will exploit the boycott defence by using it to escape unfavourable bargains is mitigated because it is not sufficient for the consumer to show that they had reasons to boycott. Those *guiding* reasons must also be the consumer's *explanatory* reasons for action, i.e., they motivated her to act.⁴⁴ Furthermore, as with certain cases of contractual duress, the courts could adopt a robust causal test for determining when the consumer's motivations justify the defence, i.e., it would not be sufficient to show that the demands of conscience were 'a' reason, or even a 'but for' reason for breach, but rather they might have to satisfy the higher threshold of being a

⁴³ See further Ronald Dworkin, 'The Forum of Principle', *New York University Law Review* 56 (1981): 469-518. Thank you to an anonymous reviewer for helping us to clarify this objection.

⁴⁴ On the distinction between guiding and explanatory reasons, see Gardner *op. cit.*, p. 98.

'decisive or clinching' reason.⁴⁵ The difference with the 'but for' test is that it would be insufficient to argue that in the absence of the threat to the consumer's moral integrity, the consumer would on the balance of probabilities have performed the contract. Rather, the consumer would have to meet the more stringent standard of showing that because of moral integrity even in the absence of other reasons not to perform, she would not on the balance of probabilities have performed.

Finally, the epistemic difficulties associated with determining whether issues of moral integrity are actually at stake can be dealt with by using objective evidence as a proxy for subjective intentions. This objective test for determining intentions is familiar to the courts as the standard device used for contract interpretation. So, it will not be enough for a consumer to say that performance of the contract compromises her integrity, but rather she will have to adduce objective evidence to prove her commitment to the principles violated by the firm's practices (e.g. this might include her membership of certain charities or NGOs aimed at preventing the sorts of injustices at stake).

The concerns expressed here about opening floodgates, the potential for fraud, and epistemic hurdles for the courts, are not unique to the boycott defence. They apply in the context of other contract law defences, such as mistake, misrepresentation, duress, undue influence, and more. The courts have a long history of proving themselves adept at dealing with these specifically legal arguments through a combination of the methods described above. Provided that courts pursue similar strategies in the context of boycotting, we believe these sorts of arguments do not justify law diverging from morality in this context.

On balance then we think there is a case for a boycott defence in circumstances of breach of contract. We should clarify though that we do not mean to deny that the consumer may have responsibilities to take other – perhaps more effective – action *alongside* exercising her moral and legal right to boycott. She may have a duty to protest in other ways, by for example joining a march, writing letters to her MP, giving money to an NGO which exposes such malpractices, and so on. These broader obligations and responsibilities may be implications of the consumer's moral commitments, which give rise to the boycott defence. But they may also be consequences of the fact that the consumer who justifiably breaches her contract with a firm nevertheless owes the firm certain residual obligations on account of having made a valid promise. For example, the duty to seek respectful relations between herself and the firm by taking action to bring the relevant injustice to light (through boycott, letter writing, attending marches and so on), with a view to persuading the firm on *moral* rather than merely prudential or financial grounds to change its practices. These are duties that the principled consumer owes to the firm, which are not discharged by the fact that the consumer availed herself of her right to boycott. That does not though – as Seana Shiffrin has argued in the context of promissory

⁴⁵ *Huyton SA v Peter Cremer* [1999] 1 Lloyd's Rep 620 (Com Ct) 636, and see *Dimskal Shipping Co SA v ITWF (The Evia Luck) (No 2)* [1992] 2 AC 152 (HL) 165.

duress – mean that the firm has a right (moral or legal) to expect the performance of these duties. The firm’s moral wrongdoing precludes them from having such a right; the consumer is bound in conscience only.⁴⁶

Conclusion

Boycotting is a widespread practice with important transnational implications. We have argued that at least in certain contexts, such as breach of contract, it stands in need of justification. We have shown that consequentialist and complicity arguments cannot justify the practice as both arguments fail to adequately explain important features of permissible boycotting.

Rather, the superior justification is deontological and based on the constitutive value of moral integrity and both the agent-neutral and agent-relative demands to avoid complicity in moral wrongdoing that integrity creates. These are moral concerns that courts have a duty to recognise in the context of breach of contract claims, by enforcing in law the moral right to boycott. Legal enforcement provides an opportunity for the state to engage in a principled dialogue with consumers about what the law is, and avoids putting moral agents in the intolerable position of having to choose between their conscience and their duty to obey the law.

Legal reasons for objecting to the defence, such as the danger of unsettling commercial transactions, preventing fraud and epistemic difficulties faced by the courts, are all legitimate concerns. They can however be dealt with by attaching conditions to the availability of the boycott defence. Similar conditions apply in the context of other more traditional contract law defences, such as duress, undue influence, mistake, and so forth. In that context, we suggest that a boycott defence is an increasingly necessary, principled, and workable restriction on freedom of contract in modern liberal economies.

Word Count: 9,714

⁴⁶ See Seana Valentine Shiffrin, *Speech Matters: On Lying, Morality, and the Law* (Princeton: Princeton University Press, 2014), ch. 2.