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Lying and Cheating, or Self-Help and Civil Disobedience?

Aditi Bagchi[†]

INTRODUCTION

Imagine you are a tourist in a large city. Although it is not cold, you stop to purchase an attractive scarf from a street vendor. The vendor describes the scarf as 100% cashmere and asks \$25 for the scarf. A cashmere scarf will usually cost at least \$50. However, this scarf is made of polyester and a polyester scarf of comparable quality and design will normally sell for \$5.

Many of us would say that the seller is lying and cheating. He is lying when he tells you the scarf is cashmere and he is cheating by charging you five times the market price for the scarf, which is not the price he would charge a savvy local. By paying more than market price, you are deprived of the opportunity to spend the money on something else. If you would not have purchased a polyester scarf for \$25 even if that were the market price, then you are actually worse off because of the transaction.¹

But let us add additional facts to the scenario. Imagine the seller is poor and imagine you are rich. Assume that you are part of the same political society, and assume too that this society does not meet its obligations of distributive justice.²

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¹ On a preference theory of well-being, this is true even if the buyer never learns of the deceit. See SHELLY KAGAN, *NORMATIVE ETHICS* 109 (1st ed. 1998) (discussing variety of harms that flow from lies).

² Many people who do not agree on abstract principles of justice will agree that the United States is not presently compliant with the demands of distributive justice (again, we will not agree on the degree of noncompliance). See Kate Andrias, *An*

Without specifying what distributive justice requires, let us suppose that you would be less rich and he would be less poor under just institutions. The amount by which you are set back in the transaction in question is negligible in relation either to your “excess” property under unjust institutions or the seller’s deficit. Does it make any difference to how you judge his conduct toward you?

Some readers will be certain that lying and cheating are morally reprehensible and the political economy against which it takes place is irrelevant. Others, though, may recall uncomfortable moments (perhaps in foreign countries) where you found yourself negotiating with someone over what turned out to be a few cents and realized that those cents mattered a great deal more to the seller than to you. Some readers may want to know more.³ Just how poor is the seller? Just how rich am I supposed to be? And how did I get rich and how did he get poor? On some answers to these questions, some might conclude that overcharging a privileged buyer is a legitimate form of self-help.⁴ Inasmuch a seller flagrantly and unapologetically declines to defer to unjust entitlements or the rules of an unjust market, he may be engaged in civil disobedience.⁵

I will argue that the seller is lying but not cheating. However, his lying is probably justified and should give rise to limited legal recourse. My argument for that conclusion will incorporate the idea that his conduct can be characterized as self-help. More generally, I will suggest that the political morality of background institutions shapes the private ethics of bilateral exchange. In making the case, I hope to illustrate two points, which do not stand or fall together. First, interpersonal private moral obligation depends on background political justice. Second, interpersonal legal obligations (private law obligations) should also depend on background political justice. The overall picture is one where much of what is owed between individuals depends on background justice; injustice moves bilateral relationships out of ideal theory, which describes rights and obligations as they would stand in a state of the world where all rights and obligations are respected. It may not be impossible to be good against a backdrop of injustice but our deliberations about

American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act, 128 YALE L.J. 616, 619 (2019) (“There is now widespread consensus that economic inequality in the United States poses a growing and grave problem.”).

³ That is, while some might regard lying as categorically wrong, others are prepared to make circumstantial allowances that license lying under particular circumstances. The United States appears particularly hospitable to and forgiving of fraud as compared to other Western countries. See EDWARD BALLEISEN, *FRAUD: AN AMERICAN HISTORY FROM BARNUM TO MADOFF* 5 (2017).

⁴ See *infra* Section II.B.

⁵ See *infra* Section II.B.

what morality requires of us vis-a-vis other individuals cannot proceed without taking politics into account, if not at every turn, then at some exhausting frequency.

Focused as it is on deconstructing a narrow hypothetical, the claims in this article regarding the circumstances that generate a license to lie are tentative. Of primary significance is the more general claim that interpersonal moral and legal obligations depend on political justice. The more specific but modest ambitions pertain to the theory and doctrine governing consumer sales. First, I hope to upset the usual (but not universal) assumption that consumers are the vulnerable party in retail sales.⁶ This starting point is most plausible when the seller is a large corporation but even in that case the picture is muddy. Matters are still messier when the seller is socially disadvantaged but in a position to cheat some buyers. Contract theory should not take consumer vulnerability as its starting point but instead develop a more refined framework and distribute interpretive presumptions accordingly. Second, doctrinally, I will argue that our reading of what qualifies as a representation should respond to background facts of the sort laid out above, and I will defend the existing indifference in law to imbalance of consideration standing alone.

Notably, my arguments are not instrumental. If sellers are licensed to lie, it is not because of any imperative to actually move dollars around so that we might achieve a moral equitable distribution.⁷ If lying is permitted in the central case, it responds to a background wrong without undoing it. The seller's lies must appear analogous to a lie you might tell someone who herself regularly lies to you. You may be licensed to lie to a liar even though the lying does not achieve any good. Relatedly, my analysis concerns only the question of whether the seller wrongs the buyer by *lying to her*. This means, for example, that I exclude consideration of potential injuries to third parties, such as other vendors, that speak to whether the seller's lie is a wrong tout court, e.g., as a form of unfair competition that undermines the market. A poor choice of self-defense that results in harm to

⁶ See LYN K. L. TJON SOEI LEN, *MINIMUM CONTRACT JUSTICE: A CAPABILITIES PERSPECTIVE ON SWEATSHOPS AND CONSUMER CONTRACTS* 9 (2017) (observing that the characterization of consumers as vulnerable juxtaposes them against powerful corporations while ignoring other parties, such as sweatshop laborers, whose interests compete with those of relatively privileged consumers).

⁷ For discussion of utilitarian theories of distributive justice, see generally P.J. KELLY, *UTILITARIANISM AND DISTRIBUTIVE JUSTICE: JEREMY BENTHAM AND THE CIVIL LAW* (1st ed. 1990). For a utilitarian or instrumentalist critical review of the kind of liberal account from which I proceed, see Kenneth J. Arrow, *Some Ordinalist-Utilitarian Notes on Rawls's Theory of Justice*, in 1 *COLLECTED PAPERS OF KENNETH J. ARROW: SOCIAL CHOICE AND JUSTICE* 96 (1983).

bystanders might give rise to claims by those bystanders against their injurer. But it will not obviate her defense against the original threat-maker.⁸ Likewise, the fact that others might be worse off as a result of the seller's self-protective conduct might render his conduct ultimately wrongful. But the interests of other vendors do not render his conduct wrongful to the buyer—and it would not be the particular wrong of lying. Of course, the interests of others and myriad respects in which an action might be good or bad are important when choosing a legal response.⁹

It is also worth distinguishing the claim here from two others: one, more modest; the other, more severe. First, I highlight that the argument here stands on the premise of background injustice and any justification for the seller's lie derives from that injustice and not bare necessity, which may or may not characterize unjustified inequality. Most victims of distributive injustice in advanced industrialized democracies are not starving. Indeed, they can probably make a living without routinely lying. Their choice to lie about their wares to buyers may be justified nevertheless. However, I do not go so far as to make a second, more radical claim: that sellers should have no regret about the lies they tell.¹⁰ It might be that even if a buyer is not entitled to the truth from the seller, the seller should regret the harm he inflicts on her, his departure from a personal practice of truth-telling, and the social alienation to which he has contributed. Nothing in this article is intended to suggest otherwise. To the contrary, I will return at the end to the tragic dimension of their encounter, one that is best understood as among the moral fallouts of distributive injustice itself.

Part I below will set forth the parameters of the inquiry here, comparing the morality of lying in contract with lying in other settings of legal import. Part II will set out the essential tension between the private and public lenses on the exchange above. That is, it will elaborate the intuition that the seller wrongs the buyer by lying and cheating and then elaborate, separately, how the same conduct might qualify as self-help or civil disobedience in light of background distributive injustice. Subsequently, Part III will

⁸ MODEL PENAL CODE § 3.09(3) (AM. LAW INST. 1962) (negligent injury of third persons in the course of self-defense does not preclude "prosecution for such recklessness or negligence towards innocent persons," but it does not obviate the defense against the original aggressor).

⁹ See *infra* Part III.

¹⁰ One could go still further and claim that sellers have a duty to resist injustice by the means available to them. Because I assume circumstances of moderate injustice, I assume there is no duty to lie as a matter of resistance. Cf. Carol Hey, *The Obligation to Resist Oppression*, 42 J. SOC. PHIL. 21, 21 (2011) (arguing that individuals have an obligation to resist their own oppression that is "rooted in an obligation to protect their rational nature").

attempt to reconcile these perspectives. Part IV infers some brief lessons for the law and theory of contract.

I. DISTINCTIVE FEATURES OF MISREPRESENTATIONS IN CONTRACT FORMATION

The hypothetical around which the discussion proceeds is intended to be neither the easiest nor the hardest case for remedial lying. Consider two other cases in which lying is easier and harder, respectively, to defend. May a prospective employee lie to an employer about her race, religion, sex or family status? Although it is not legally permitted,¹¹ it is possible to justify lying about this information as a means of protection against discrimination, even if lying is otherwise culpable.¹² Many of us would consider this an easier case than the starting hypothetical. Although the employee protects herself against discrimination based on her social knowledge, her lie does not usually harm the employer unless he would engage in unlawful discrimination. The employee does not misrepresent any information to which the employer is entitled. A discriminatory employer wrongs an applicant by acting on her misrepresentation but a prospective buyer has not and will not wrong the seller in that way. While even this “easy” case raises difficult questions, there is, at least, no conflict between institutional justice and individual morality. The employee’s lie can be justified by the prospect of a bilateral wrong, or a direct interpersonal wrong to the applicant by the employer; by contrast, the street vendor’s lie cannot be justified by any bilateral wrongdoing of the buyer.¹³

¹¹ See *Holly Hill Lumber Co. v. McCoy*, 23 S.E.2d 372, 378 (S.C. 1942) (“[I]t is agreed that an informed vendee must limit himself to silence in order to escape the imputation of fraud. If in addition to the party’s silence there is any statement, even in word or act on his part, which tends affirmatively to a suppression of the truth, or to a withdrawal or distraction of the other party’s attention or observation from the real facts, the line is overstepped, and the concealment becomes fraudulent.”).

¹² Ariel Porat and Omri Yadlin argue that lying by job applicants about protected information should be legally permitted as a means by which to protect the policy that underlies a right of nondisclosure. Ariel Porat & Omri Yadlin, *A Welfareist Perspective on Lies*, 91 IND. L.J. 617, 617 (2016). Narrowly understood, their argument does not apply to the central hypothetical of this article because lying by the vendor does not fall into any of their four delineated categories of potentially permissible lies. See *id.* at 661–62. Nevertheless, Porat and Yadlin’s arguments, broadly conceived, may recommend a tolerant attitude with respect to lies even outside the circumstances they discuss. Their arguments seem to endorse welfare-promoting lies, generally. Neither my hypothetical nor our collective knowledge of the lives of buyers and sellers is detailed enough to allow any confident conclusion in this regard. My own arguments in defense of lying by vendors do not depend on the supposition that such lies promote even the material interests of vendors, let alone welfare at large.

¹³ I do consider *infra* notes 52–60 and accompanying text, the possibility that exchange at market price against the background of unjust institutions might constitute

Consider next a pickpocket who steals from apparently rich people she finds on the street. It is harder to justify that kind of stealing because the person on the street has no particular responsibility for any incremental harm to the pickpocket. By contrast, because we can expect a buyer in a competitive market to walk away with most of the gains from trade, we can expect that the buyer in our central hypothetical would gain more from a transaction unmarred by lies than would the seller, thereby exacerbating the inequality between them—even absent specific wrongdoing by the buyer.

We might also distinguish the pickpocket on the grounds that we have reason to regard property entitlements as generally more robust than contract expectations. This might not be true under conditions of extreme injustice that undermine the legitimacy of all conventional entitlements that originate from and are primarily backed by the state.¹⁴ But we are concerned with more moderate circumstances where the state as a whole is not illegitimate; we are concerned with states of “moderate injustice” in which there is no general right by any group to disregard the law entirely.¹⁵ It is difficult for a legal system to cope with more radical illegitimacy since the very act of deciding cases under law could amount to complicity.¹⁶ But legal systems do and should be responsive to moderate injustice. By taking background injustice into account where it drives the facts of particular cases, courts can render the exercise of state power more just on the margins.¹⁷ Most legal systems recognize themselves as imperfect but not radically unjust.

a wrong but most of this article does not take that conclusion for granted. However, without establishing culpability, the arguments of this essay do hinge on assigning moral responsibility to a buyer for a transaction and its terms.

¹⁴ Tommie Shelby has recently argued that the United States may be so deeply unjust that the social order “cannot reasonably expect allegiance from [the] oppressed group.” TOMMIE SHELBY, *DARK GHETTOS: INJUSTICE, DISSENT, AND REFORM* 215 (2016). In particular, while natural duties persist in an unjust regime, “taking the possessions of others, especially when these others are reasonably well off, may be permissible.” *Id.* at 220. For a defense of an insulated private law on the assumption that our society meets the requisite standard of legitimacy, see Jules Coleman & Arthur Ripstein, *Mischief and Misfortune*, 41 MCGILL L.J. 91, 93 (1995); Melvin A. Eisenberg, *The Theory of Contracts*, in *THE THEORY OF CONTRACT LAW: NEW ESSAYS* 259 (Peter Benson ed., 2001).

¹⁵ Most of private law theory proceeds under the assumption that modern post-industrialized democracies like the United States are partially compliant but not radically noncompliant. See, e.g., Coleman & Ripstein, *supra* note 14, at 93.

¹⁶ See H.L.A. HART, *THE CONCEPT OF LAW* 210 (2d ed. 1994); Vivian Grosswald Curran, *Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology's Impact on Substantive Law*, 35 CORNELL INT'L L.J. 101, 134 (2002); J. C. Oleson, *The Antigone Dilemma: When the Paths of Law and Morality Diverge*, 29 CARDOZO L. REV. 669, 684 (2007).

¹⁷ See generally Aditi Bagchi, *Distributive Injustice and Private Law*, 60 HASTINGS L.J. 105 (2008) (arguing that doctrine of unconscionability in contract is responsive to background injustice); see also Aditi Bagchi, *The Contingent Politics of*

Within the context of moderate injustice, most legal regimes treat contractual and property entitlements differently. Notably, the consequences for theft are very different than for breach of contract or misrepresentation in sales.¹⁸ Many of the reasons that justify treating a pickpocket differently than a dishonest seller derive from this more general distinction. First, involuntary takings of physical property often raise concerns about personal security and even bodily integrity.¹⁹ Second, we have heightened expectations of stability with respect to our property, at least in regard to its use value, and we plan accordingly.²⁰ Finally, because personal property is mobile and contracts bilateral, one can transfer things to avoid detection of theft; it is easier to identify the party responsible when one's contract has gone awry. Not all of these distinctions apply across all kinds of contract and property; our intuitions about the kind of wrong done in contract or with respect to property also vary. Comparing the particular cases of sales fraud and pickpocketing, we can observe that pickpocketing is physically intrusive, the loss entirely surprising and arbitrary, and one is unlikely ever to identify the agent of wrongdoing. We might think these considerations operate different in other cases of theft—e.g., theft from a local bodega—and intuitions about the morality of theft may adjust accordingly. Because each instance of ostensible self-help introduces its own complications, in deconstructing the fraudulent sales case, this article does not aim to justify other forms of self-help such as theft. Indeed, my primary aim is not even to vindicate our particular seller but to show that the

Legal Formalism, in THE LEGACY OF WESLEY HOHFELD: EDITED MAJOR WORKS, SELECT PERSONAL PAPERS, AND ORIGINAL COMMENTARIES (Shyam Baganesh et al. eds., 2018) (presenting idea of system regret and suggesting legal practice should be alert and responsive to even justified normative disadvantages of our institutional choices).

¹⁸ Theft is a crime and may be punished with deprivation of liberty. See MODEL PENAL CODE § 223.2 (AM. LAW INST. 1962). The default remedy for breach of contract is expectation damages and misrepresentation in sales allows for rescission (and sometimes damages). For discussion of expectation damages as a basic remedy for breach of contract, see RESTATEMENT (SECOND) OF CONTRACTS § 344 cmt. a (AM. LAW INST. 1981) (“Ordinarily, when a court concludes that there has been a breach of contract, it enforces the broken promise by protecting the expectation that the injured party had when he made the contract.”); E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 12.1, at 149–50 (3d ed. 2004) (describing expectation damages as the default remedy for contract breach). For discussion of remedies for misrepresentation, see Emily Sherwin, *Nonmaterial Misrepresentation: Damages, Rescission, and the Possibility of Efficient Fraud*, 36 LOY. L.A. L. REV. 1017, 1017–18 (2003) (“The two principal civil remedies for misrepresentation are tort damages and rescission [of contract] accompanied by restitution of benefits conferred.”).

¹⁹ The wrong of physically taking something from someone is central to Kant's account of property, though he expands from there to intelligible possession. See IMMANUEL KANT, THE METAPHYSICS OF MORALS 6:245 (Mary Gregor ed., 2016).

²⁰ For a foundational account of the justificatory role of stability of expectations in property theory, see DAVID HUME, A TREATISE OF HUMAN NATURE, Bk. III, 484–501 (L.A. Selby-Bigge ed., 1896).

interpersonal morality of an action, especially acts in the market, turn on the political morality of background institutions.

II. PRIMA FACIE CONFLICT BETWEEN INTERPERSONAL AND POLITICAL MORALITY

Before we can arrive at any conclusions about the duties of the seller or the rights of the buyer in this case, it is worth investigating the *prima facie*, conflicting intuitions that underwrite our dilemma. On the one hand, the seller engages in conduct that, absent atmospheric embellishment, is not only deceitful but straightforward lying. His conduct also defies ordinary expectations that a seller will not “overcharge” a consumer that is in some way vulnerable to exploitation, including on grounds of poor information.²¹ These demands may be reflected in law but they get off the ground in the space of interpersonal morality. Even apart from any legal regulation of exchange, lying and cheating are bilateral wrongs by one person against another.²² Knowing falsehoods are lies, and lying is *prima facie* wrong. Our seller wrongs the buyer when he falsely describes a good that he aims to sell, and by inducing her in this way to pay well over market price for the good, he cheats her of money that she could have spent otherwise.

At the same time, a more sympathetic account of the seller is possible in the domain of political morality.²³ While some egalitarian accounts purport only to describe major social institutions, or the basic structure of society, others recognize that distributive justice implicates individual behavior as well.²⁴ This line of argument has two kinds of implications for sellers. First, we might think of sellers’ behavior as directly justified on grounds that it amounts to self-help that ameliorates large-scale distributive injustice. It ameliorates the injustice not by undoing it in any substantial way but, as in the case of most inadequate

²¹ See Daniel Kahneman et al., *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728, 734 (1986) (arguing that consumers feel entitled to a reference price).

²² My account is focused on this bilateral wrong of lying and whether it is defeated by background injustice in this case. To the extent lies are also wrongs to the world at large, as on a utilitarian theory, or to oneself, on a virtue-based account, the background injustice at issue is less likely to diffuse the wrong.

²³ I am not committed here to any single theory of distributive justice, though my language is evocative of the theory advanced by John Rawls. See JOHN RAWLS, A THEORY OF JUSTICE 3 (1971) (setting forth his account of “justice as fairness”). However, any theory of distributive justice under which the existing distribution is unjust, and under which this amounts to a wrong to individuals disadvantaged by that distribution, is compatible with the arguments advanced here.

²⁴ See *infra* notes 58–64 and accompanying text.

remedies, obtaining a reverse transfer acknowledges the underlying injustice. Alternatively, we might characterize buyers' objective of extracting a generous share of the transactional surplus as a kind of wrong that justifies defensive behavior by sellers. In either case, the sellers' conduct is responsive to an underlying wrong—whether collective or individual—and can be characterized as self-help.

We could go further. To the extent sellers flout existing rules of exchange that unjustly privilege already socially advantaged buyers, their behavior can be interpreted as civil disobedience. The aim of this Part is to show how we might be tempted to think of sellers' conduct at once as lying and cheating, and as self-help and civil disobedience. It will be the aim of the next Part to reconcile the separate perspectives suggested by interpersonal morality and political morality, respectively.

A. *Lying and Cheating*

In our hypothetical, the seller tells the buyer that the scarf is made of cashmere although it is not. We can assume that the seller knows this. By most definitions of lying, his assertion amounts to a lie. While most people agree that not all lies are wrong—the favorite example is a lie to the murderer at your door—a lie is presumptively wrong.²⁵ At least at first blush, it looks like the reasons we have for regarding lying as wrongful apply in this case.

Alasdair MacIntyre locates the “evil” of lying “in its capacity for corrupting and destroying the integrity of rational relationships.”²⁶ Seana Shiffrin has said that the “wrong of lying is that it operates on a maxim that, if it were universalized and constituted a public rule of permissible action, would deprive us of reliable access to a crucial set of truths and a reliable way to sort the true from the false.”²⁷ Both authors are getting at the idea that we rely on truthful assertions to communicate with one another and know things about each other and the world. Lying compromises the reliability of our assertions and thereby undermines understanding between people and of our environment, each of which is essential to human flourishing. Sissela Bok emphasized the importance of

²⁵ Because I am concerned here with lying as a wrong to the buyer, I do not consider accounts of lying that sound solely in virtue ethics, that is, which focus on the effects of lying on the liar's own character.

²⁶ Alasdair MacIntyre, *Truthfulness, Lies, and Moral Philosophers: What Can We Learn from Mill and Kant?*, in *THE TANNER LECTURES ON HUMAN VALUES* 307, 355 (1994).

²⁷ SEANA VALENTINE SHIFFRIN, *SPEECH MATTERS: ON LYING, MORALITY AND THE LAW* 23 (2014).

truthful communication to social functioning, arguing that “trust in some degree of veracity functions as a foundation of relations among human beings; when this trust shatters or wears away, institutions collapse.”²⁸ For this reason, “some level of truthfulness has always been seen as essential to human society, no matter how deficient the observance of other moral principles.”²⁹

Lying to strangers about the product you are selling impairs a particular social institution, the market. It is an institution that is fundamental to most modern societies. Lying to prospective buyers also erodes even that minimalist trust that strangers in large, anonymous societies bear toward one another. The erosion of this trust is especially insidious because the people who encounter each other in exchanges like that described in the starting hypothetical will rarely encounter members of the other group in other settings, let alone cooperative contexts in which trust is implicated. So the lessons they learn about each other in the course of a simple transaction may endure.

One might argue that the seller’s assertions about the scarf are not lies because they are not necessarily motivated by an intent to deceive. Maybe the seller just wants to convey that the scarf is so soft that it could be mistaken for cashmere. Maybe the seller does not think that the buyer will believe him. On some definitions of lying, the intention to lead someone else to believe the proposition at issue is “essential.”³⁰

However, these are implausible characterizations of the seller’s intent. Deception is a prerequisite to the intended effect of his assertion, that is, extracting a high price from buyer. The buyer can directly assess the softness of the fabric but will only pay the higher price that cashmere commands if she is persuaded that it really is cashmere, or that it might be. Even if the seller cannot be sure that a given buyer will think it is cashmere with sufficient certainty as to act on that belief, the seller’s aim in asserting that the scarf is cashmere is to cause the buyer to proceed as if it were cashmere.³¹ A buyer might not believe that the scarf is cashmere but harbor just enough hope that it tips her decision to buy. That is, a buyer’s beliefs about a

²⁸ SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 31 (1978) (emphasis omitted).

²⁹ *Id.* at 18.

³⁰ ARNOLD ISENBERG, DEONTOLOGY AND THE ETHICS OF LYING (1964), *reprinted in* AESTHETICS AND THE THEORY OF CRITICISM: SELECTED ESSAYS OF ARNOLD ISENBERG 245, 249 (William Callaghan et al. eds., 1973).

³¹ Isenberg specifically claims that an advertiser who describes his goods beyond its merits in the hopes of deceiving at least some buyers is a liar. Even an advertiser who makes exorbitant claims in order to create a “partial or subconscious belief” is a “borderline liar.” *Id.* at 251.

good are always subject to degrees of certainty, and the seller aims here to make the buyer more confident, even if still doubtful, about the proposition that the scarf is cashmere. Even if the seller knows that some buyers will discount his assertion entirely, he makes the representation with the aim of deceiving more credulous buyers.³² Although the seller may be uncertain whether his statement will effectively deceive a given buyer, the assertion is a lie in each case. If I lie to everyone about whether I attended a certain gathering, the fact that there are some people who independently know that I was there does not save the assertion from being a lie. Similarly, the possibility that a given buyer will not attach any weight to the seller's assertion does not redeem it. Since the seller cannot separate credulous and incredulous buyers in advance, his assertion can be treated as a blanket lie.

Some definitions of lying are less focused on seller's intent to deceive in any event. Paul Faulkner argues that "[t]o involve its distinctive manipulative mechanism a lie must purport to provide information to someone who is dependent on the liar for this information."³³ Andreas Stokke argues that "you lie when you *assert* something you believe to be false" and thereby proposes that it become common ground.³⁴ These more expansive definitions emphasize the intended reliance by the listener on the speaker. They appear to track the kind of reliance a seller can expect from a buyer.

It looks, then, that common accounts of lying apply to the seller's conduct in the hypothetical. Turning to the claim that seller's conduct also amounts to a kind of "cheating," we do not have the benefit of the same long-standing conceptual analysis of the amorphous concept of "cheating" that we have with respect to the concept of "lying." Nevertheless, without attempting to work out a general definition of cheating, it seems likely that charging someone a price wholly out of line with the market price of a service, and substantially higher than what the seller himself would ordinarily charge other buyers, qualifies as cheating on a colloquial understanding. Such conduct is regarded as cheating because it fails to abide by prevailing norms—not positive legal rules but generally stated "economic laws" that predict

³² *Id.* at 251 ("[A]n advertiser who makes a false claim for his product in the hope that, though *most* will not believe him, *some* people may, is a liar.").

³³ Paul Faulkner, *What Is Wrong with Lying?*, 75 PHIL. & PHENOMENOLOGICAL RES. 535, 535 (2007).

³⁴ Andreas Stokke, *Lying and Asserting*, 110 J. PHIL. 33, 33 (2013).

homogenous pricing and the perceived social order of the market.³⁵ Those implicit rules usually demand that any given seller charge no more (or not substantially more) than other sellers, and that she charge all buyers the same price without price discrimination.³⁶ Charging a buyer more relative to other sellers and buyers can be thought of as unfair because it fails to abide by the unwritten rules of market exchange, which are ordinarily self-enforcing.³⁷ Even if we think that price discrimination is not inherently problematic (and even potentially efficient and progressively distributive), it might warrant suspicion if sustained price discrimination over time involves some kind of deception.³⁸

Price discrimination in this case has the effect of altering the parties' share of the transactional surplus, and might actually make the transaction a losing transfer for the buyer. That is, the buyer would gain more from the transaction than would the seller *but for* the seller's lie. While people tend in experiments to expect an equal division of the gains from trade,³⁹ such a division would only take place in practice where parties have equal bargaining power.⁴⁰ In consumer transactions in competitive markets (where seller has no market power), consumers are accustomed to reaping almost all of the transactional surplus.⁴¹ Seller's conduct in our hypothetical is a marked contrast. His overcharging of the buyer exploits a contextual advantage with the result that he benefits more from the transaction than he ordinarily would, and at the direct expense of the buyer.

³⁵ See Kahneman et al., *supra* note 21, at 730 (consumers may punish firms that charge them more than reference price, which is often the price that the consumer knows that the firm charges others).

³⁶ We do not usually expect fine-grained price discrimination in practice or in theory because it is too costly for sellers. See Yochai Benkler, *An Unhurried View of Private Ordering in Information Transactions*, 53 VAND. L. REV. 2063, 2072 (2000).

³⁷ See *supra* notes 35–36.

³⁸ See Akiva A. Miller, *What Do We Worry About When We Worry About Price Discrimination? The Law and Ethics of Using Personal Information for Pricing*, 19 J. TECH. L. & POL'Y 41, 80–84 (2014) (discussing price discrimination and deception); Mark Klock, *Unconscionability and Price Discrimination*, 69 TENN. L. REV. 317, 327–29, 355–61, 367–68 (2002).

³⁹ See Alvin E. Roth, *Bargaining Experiments*, in THE HANDBOOK OF EXPERIMENTAL ECONOMICS 253–348 (John H. Kagel & Alvin E. Roth eds., 1995); Colin Camerer & Richard H. Thaler, *Anomalies: Ultimatums, Dictators and Manners*, J. ECON. PERSP., Spring 1995, at 209, 210–14 (reviewing ultimatum bargaining experiments).

⁴⁰ See Lucian Arye Bebchuk, *Property Rights and Liability Rules: The Ex Ante View of the Cathedral*, 100 MICH. L. REV. 601, 615 (2001) (noting that if “the parties have equal bargaining power” they “will share equally in any gains from mutual trade”); Dotan Oliar, *The Copyright-Innovation Tradeoff: Property Rules, Liability Rules, and Intentional Infliction of Harm*, 64 STAN. L. REV. 951, 1009 (2012); Ian Ayres & Kristin Madison, *Threatening Inefficient Performance of Injunctions and Contracts*, 148 U. PA. L. REV. 45, 49 (1999).

⁴¹ MARK SEIDENFELD, MICROECONOMIC PREDICATES TO LAW AND ECONOMICS 41 (1996).

Again, the aim in this discussion so far has not been to definitively establish that seller's conduct qualifies as lying and cheating. In fact, I will revisit the above analysis later. The goal was only to set out a tentative set of plausible judgements. The following section generates a conflicting set of plausible judgements.

B. *Self-Help and Civil Disobedience*

Many readers may see the logic of lying and cheating as more readily applicable to the hypothetical than the language of self-help and civil disobedience. The aim of this section is not to definitively show that the seller's assertions and pricing are ultimately justified but only to make a compelling case that they might be. Again, the goal is to see that the seller's conduct is likely to be appraised quite differently depending on whether one adopts the vantage point of interpersonal morality or the macro perspective of distributive justice.

First, we consider how the seller's conduct might be understood as a form of self-help. Calling it self-help suggests that seller's conduct is remedial and responds to inadequate state action. Although in the usual model of self-help the underlying wrong is private and prior to state inaction, here the underlying wrong is public.⁴² In fact, whether there is a wrong of distributive justice in a given society and what should be done to correct it are quintessential political questions. This means that to make a plausible case for self-help here, one has to reject a conceptual barrier by which public rights and wrongs play out in an insulated sphere and cannot as a matter of principle give rise to private recourse. One does not, however, have to contend that in a well-ordered society, people are entitled to unilaterally adjust their share of resources by taking from others, by way of contract or otherwise. The self-help here is only plausibly legitimate where the first-choice institutional mechanisms by which to resolve distributive justice have failed. To the extent a seller is simply wrong about background injustice, he has no genuine license to lie. Even though it is always unsettling to allow individuals to take matters into their own hands at the expense of others, the argument for self-help will cast the procedural defect in the

⁴² See Edward L. Rubin, *The Code, the Consumer, and the Institutional Structure of the Common Law*, 75 WASH. U. L.Q. 11, 36 (1997) ("Self-help can be defined as one party's ability to take control of an item or sum of money in dispute without judicial intervention."); see also Mark P. Gergen, *A Theory of Self-Help Remedies in Contract*, 89 B.U. L. REV. 1397 (2009); Douglas Lichtman, *How the Law Responds to Self-Help*, 1 J.L. ECON. & POL'Y 215 (2005).

seller's conduct as reflective or symptomatic of background injustice rather than an independent wrong.⁴³

Of course, the chosen method of response to the underlying public wrong—lying—is a *prima facie* private wrong in itself.⁴⁴ We invoke the self-help label here in typical fashion—defensively—to justify an action that would otherwise be impermissible. But it is not literal *ex-post* self-help: No one is claiming that the seller should have the power to demand that an incredulous buyer who buys at a low price return a portion of her consumer surplus back to the seller.⁴⁵

Applying the concept here requires that we identify more specifically the wrong to which the seller responds, that is, the wrong for which he effectively compensates himself without relying on ineffective or unavailable state remedies to which he would in principle be entitled.⁴⁶ There are two kinds of wrongs in the air that could fit the bill: the collective wrong of distributive injustice, or the individual wrong that the buyer might commit in attempting to win a substantial, if not majority, share of the gains from trade. Although these framings are importantly distinct from one another, in both cases the underlying wrong cannot be conceived except by reference to the background—and public—wrong of distributive injustice. Even if our buyer wrongs the seller by leveraging all her bargaining power, her conduct is wrongful only because of background distributive injustice.⁴⁷

To recognize the seller's conduct as self-help against the first type of wrong, a collective wrong, we must accept that there is distributive injustice in the society in which the transaction

⁴³ Andrew Gold has argued that “it is doubtful that conformity to the *nemo iudex* principle is always required in order for other types of justice to legitimately be obtained.” Andrew S. Gold, *Private Rights and Private Wrongs*, 115 MICH. L. REV. 1071, 1093 (2017) (reviewing ARTHUR RIPSTEIN, *PRIVATE WRONGS* (2016)).

⁴⁴ See *supra* Section II.A.

⁴⁵ It is operating as a moral privilege. See Zoe Sinel, *De-Ciphering Self-Help*, 67 U. TORONTO L.J. 31, 50–51 (2017).

⁴⁶ I do not claim that the seller's lying is plausibly encompassed by any existing legal doctrine of self-help. See F.H. LAWSON, *REMEDIES OF ENGLISH LAW* 1 (2d ed. 1980). But many legal concepts piggy-back on moral ones, and we might expect that the individuals are morally entitled to pursue some recourse against wrongdoers even where the state does not officially allow it. That is, we might recognize self-help even where it is not part of the remedial scheme recognized by the state. In these cases, the requisite state failure lies not in failing to uphold a legal right by way of its own enforcement powers but in its failure to recognize the primary wrong at all. Nevertheless, as I will argue *infra* Part IV, withholding adequate enforcement of the primary wrongdoer's rights (here, the buyer's rights under consumer law) may implicitly sanction the seller's self-help after all.

⁴⁷ Contracting parties typically exercise bargaining power, as in the case of a successful business buying assets from a struggling firm. We do not ordinarily treat such market behavior as wrongful. The exercise of market power is only problematic in our hypothetical because of background injustice. For this reason, neither way of understanding the buyer's conduct is as a simple bilateral wrong. Cf. *supra* notes 11–12 and accompanying text (discussing the employment discrimination example).

takes place, and that this represents a wrong to each individual who is worse off than she would be under just institutions. We would then further have to conclude that lying about the material of which a scarf is made is an appropriate form of self-help, i.e., that it imposes burdens fairly and proportionately. By contrast, a seller who would lie about the purity of medicine or baby formula is not *just* lying and effecting a de minimus monetary transfer; such a seller would inflict bodily harm. Whether or when it is ever appropriate to physically hurt someone to correct distributive injustice is beyond the scope of this discussion: I assume the transfer in our case is small.

Even if the transfer is small,⁴⁸ in order that it not be arbitrary, we must explain why any *particular* buyer appropriately bears the cost of self-help.⁴⁹ In relying on collective wrongdoing, we avoid characterizing the individual buyer as culpable. But we still need to find her responsible for the collective wrong—she must stand in the right relation to it—such that it is fair that she bears some of the costs associated with the state of injustice.⁵⁰ In other work, I have argued that the doctrine of unconscionability sometimes operates to allow a party to avoid a contractual obligation when the transaction exploits and exacerbates distributive injustice.⁵¹ In our hypothetical, the advantaged buyer is advantaged vis-a-vis the seller by virtue of distributive justice; she profits from it. Moreover, her expected gains from the prospective transaction unmarred by dishonesty are possible only because of that injustice. Finally, because seller's margins are driven to zero in a competitive market,⁵² the distributions of gains

⁴⁸ The de minimus nature of buyer's monetary loss is still significant in that the degree of "fit" required is less than in the case of a more dramatic loss. For example, we might think we need only a reasonable basis for believing that a particular buyer is responsible; if the prospective loss were grave, then we might require something approaching certainty.

⁴⁹ See Melvin A. Eisenberg, *The Theory of Contracts*, in THE THEORY OF CONTRACTS LAW: NEW ESSAYS 206, 257 (Peter Benson ed., 2001) (rejecting redistribution in contract law as "completely haphazard"); Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEGAL STUD. 283, 284 (1995) ("Critics further argue that the welfare system provides a more equitable way to redistribute wealth than legal rules do, because legal rules redistribute wealth only to people who happen to be injured or people in the class of those likely to be injured in a way that can be redressed by courts—a small and arbitrarily selected portion of the needy population.").

⁵⁰ See Coleman & Ripstein, *supra* note 14, at 93 ("Corrective justice concerns the rectification of losses owing to private wrongs. In contrast, distributive justice concerns the general allocation of resources, benefits, opportunities, and the like. The duty to repair under corrective justice is *agent-specific*—only wrongdoers need make up the losses of others. The duties imposed by distributive justice are, in contrast, *agent-general*—everyone has a duty to create and sustain just distributions.")

⁵¹ See Bagchi, *supra* note 17, at 109.

⁵² See Jeffrey M. Rosenfeld, *Spiders and Crawlers and Bots, Oh My: The Economic Efficiency and Public Policy of Online Contracts That Restrict Data Collection*,

from an honest sale will exacerbate background injustice. These considerations justify holding her responsible for the moral upshot of the transaction even if she is not culpable for it.

Indeed, the primary advantage of this first “collective wrong” account is that it does not treat the buyer’s willingness to buy at market price as an independent wrong. It thus avoids the implication that such transactions must be avoided generally.⁵³ Importantly different from cases of unconscionability, in which one party’s behavior is “shocking,”⁵⁴ the buyer in our hypothetical behaves just as she is expected to. She conforms to market norms. Because the totality of those institutions that authorize her behavior is unjust, the license she derives from them is defective. But she has not overstepped the bounds that have been socially constructed for her, and on which—absent extraordinary circumstances—she is entitled to rely. The market has enough redeeming features, and is sufficiently bound up with our entire social structure, that we cannot afford to treat its imprimatur on conduct as wholly inert without making moral life incompatible with ordinary life as we know it.⁵⁵ It alters the normative character of conduct taken under its auspices even if it cannot wholly redeem it.

Nevertheless, given the moral taint on acts that depend on unjust structures, we should also consider a potential wrong by the individual buyer. On this alternative “individual wrong” account, we would argue that the buyer is not just responsible for the background wrong of injustice but herself stands to wrong the seller. The seller in this argument appears to claim something more like self-defense than self-help. Let us call this the self-protection claim.⁵⁶ The idea is that a person is entitled to take

2002 STAN. TECH. L. REV. 3, 17 (“[T]he conventional Bertrand economics model predicts that price competition among vendors will reduce prices to the marginal cost of production, with sellers generating zero profits.”).

⁵³ There are people who structure their lives to ensure that all their market transactions occur on “fair terms,” not only vis-a-vis their contracting partners but also with regard to the suppliers and workers that appear earlier in the transactional chains that lead up to their own direct purchases. However, it is extremely burdensome and limiting to live this way. And it is reasonable to suppose that while it might be admirable or virtuous to do so, it is unlikely to be morally compulsory. See SAMUEL SCHEFFLER, *THE REJECTION OF CONSEQUENTIALISM* 19–22 (1994) (on demandingness as a constraint on moral theory); BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* 99–100 (1973); Liam B. Murphy, *The Demands of Beneficence*, 22 PHIL. & PUB. AFF. 267, 275 (1993).

⁵⁴ See *Ski River Dev., Inc. v. McCalla*, 167 S.W.3d 121, 136 (Tex. App. 2005) (only shocking terms are unconscionable).

⁵⁵ For an elaboration of the argument that moral theories and the demands they make are appropriately constrained by the requirement that, absent extraordinary circumstances, people should be allowed to devote their lives primarily to their own self-authored projects, see SCHEFFLER, *supra* note 53, at 19–22; Murphy, *supra* note 53, at 275.

⁵⁶ Cf. KAGAN, *supra* note 1, at 116 (discussing how lying in self-defense may lie outside the scope of the moral constraint against lying).

steps to prevent an imminent wrong where there is no mechanism of the state that will prevent it, and no adequate legal redress. It is better to call this self-protection than self-defense because the alleged imminent wrong is the buyer's purchase of the scarf at market price, not any criminal conduct or free-standing wrong under public law.

The self-protection argument only gets off the ground if the buyer's quite ordinary market behavior is actually a wrong to the seller. This claim may be supported by certain powerful lines of critique proffered against the Rawlsian idea of the basic structure as the site of distributive justice.⁵⁷

Many authors have doubted that political liberalism or egalitarian justice can be sustained absent individual attitudes that are other-regarding in the marketplace.⁵⁸ G.A. Cohen famously rejects the assumption in Rawls that, because individuals maximize their own wealth, material incentives are required to induce the talented to work.⁵⁹ He argues that "social justice requires a social *ethos* that inspires uncoerced equality-supporting choice."⁶⁰ Although he expressly sets aside "the choice whether or not to comply with the rules of such structures[.]" he concludes that "principles of distributive justice . . . apply . . . to people's legally unconstrained choices" or "to the choices that people make *within* the legally coercive structures."⁶¹ Others are not prepared to go so far in their interpretation of the difference principle but similarly conclude that principles of justice create some demands on individuals.⁶² Michael Titelbaum argues that "[t]he types of attitudes that lead individuals to support the two principles of justice are not compatible with just any kind of behavior in their private lives."⁶³ Seana Shiffrin argues that, since citizens in a well-ordered society typically accept the public justifications for public institutions, they will be committed to the view that "talents are arbitrary from a moral point of view"

⁵⁷ See *infra* notes 61–64.

⁵⁸ See generally Joshua Cohen, *Taking People as They Are?*, 30 PHIL. & PUB. AFF. 363, 385 (2001) (on the role of an egalitarian ethos in making egalitarian justice compatible with political liberalism).

⁵⁹ See G.A. Cohen, *Where the Action Is: On the Site of Distributive Justice*, 26 PHIL. & PUB. AFF. 3, 8–10 (1997).

⁶⁰ *Id.* at 13.

⁶¹ *Id.* at 3.

⁶² See Michael G. Titelbaum, *What Would a Rawlsian Ethos of Justice Look Like?*, 36 PHIL. & PUB. AFF. 289, 295 (2008) (arguing that Rawls' account of people's "sense of justice" applied only to "cases of voting and officialdom"). Titelbaum allows for individual decisions that disserve the worst-off where "necessary for the development and exercise of the moral powers." *Id.* at 319 (emphasis omitted) (citation omitted).

⁶³ *Id.* at 299.

and for this reason would be unjustified in insisting on material incentives for use of those talents.⁶⁴

Following G.A. Cohen, the typical example in the discussion of egalitarian ethos is a talented individual who must decide whether to demand high compensation on the labor market.⁶⁵ But the logic applies to consumer transactions as well. To the extent distributive justice requires that individuals act in the marketplace in a way that advances the interests of the socially disadvantaged, the buyer in our hypothetical commits a wrong—and perhaps wrongs the seller—by insisting on the advantages she enjoys by virtue of her status as a privileged consumer. The seller might appropriately and defensively respond by denying the buyer that advantage by the only means available to the seller.

The argument for civil disobedience is still trickier but also serves to capture the basic intuition that the injustice against which the transaction takes place creates some license for the seller. Civil disobedience is usually understood to include a number of elements, though unsurprisingly, there is no single list on which everyone agrees. The main requirements are that it involve an illegal action, committed openly, nonviolently, conscientiously (deliberately rather than impulsively), with the intention of frustrating a law, and the actor accepts the repercussions under the legal system.⁶⁶ Seller's conduct seems to fail at least two of these requirements: it appears to be neither open nor undertaken with the purpose of frustrating a law.

These are important elements of civil disobedience. Rawls argued specifically that civil disobedience is not “covert or secretive,” it is “a political act not only in the sense that it is addressed to the majority that holds political power, but also because it is an act guided and justified by political principles.”⁶⁷ Kimberley Brownlee argues that “to remain silent necessarily casts doubt on the sincerity of [the protestor's] conviction that the conduct [being protested] is seriously wrong.”⁶⁸ Rawls addresses behavior that protests distribution in particular and suggests that violations of the difference principle do not lend themselves to civil disobedience because of the complexity of the principle's

⁶⁴ Seana Valentine Shffrin, *Incentives, Motives, and Talents*, 38 PHIL. & PUB. AFF. 111, 121 (2010).

⁶⁵ See Cohen, *supra* note 58, at 366–67.

⁶⁶ See H. A. Bedau, *Civil Disobedience and Personal Responsibility for Injustice*, in CIVIL DISOBEDIENCE IN FOCUS 49, 51 (Hugo Bedau ed., 1991).

⁶⁷ RAWLS, *supra* note 23, at 321.

⁶⁸ KIMBERLEY BROWNLEE, CONSCIENCE AND CONVICTION: THE CASE FOR CIVIL DISOBEDIENCE 29 (2012) (citing ANTHONY DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 28 (2001)).

application, and because “it is difficult to check the influence of self-interest and prejudice.”⁶⁹ He concludes that “[t]he resolution of these issues is best left to the political process.”⁷⁰

Since seller does not announce his own deceit, is presumably motivated by self-interest, and responds to precisely the kind of distributive injustice that Rawls regards as too plagued with uncertainty to justify civil disobedience, it is not obvious how we can characterize seller’s conduct as a kind of civil disobedience. We can get this perspective off the ground though, if we revisit the assumptions about seller’s conduct that I have made thus far.

In particular, upon reflection we might conclude both that seller’s conduct is open and that it is motivationally connected in the right way with background injustice. Finally, we might find that even if the precise demands of distributive injustice are uncertain, sellers can reasonably conclude that the structure in which they operate is unjust.⁷¹ Seller’s conduct might be open in the sense that the assertions they make are easily proven false and they do not take any steps to avoid that disclosure. In fact, most buyers might recognize the falsehood. Although the assertion still qualifies as a lie inasmuch as it aims to deceive some fraction of the listeners to whom it is addressed, it is open in the sense that it is made with the expectation that most listeners will recognize it as false. Seller’s lie is a bald-faced lie, and open for just that reason.

The seller is not motivated to expose or protest injustice in the typical sense associated with acts of civil disobedience. He aims to make more money of the transaction; he is not thinking of capitalism or agitating for a more progressive regime of tax and transfer. By contrast, civil rights activists who sat at whites-only counters were not in it for the food; their aim was to overturn segregation. Similarly, individuals that publicly burned their draft cards during the Vietnam War were not ineptly evading the draft; they were protesting the war.

We have reason, though, to be wary of the scholarly consensus that demands such high-minded purpose of would-be protestors. Although there have been historical periods in which everyday people engaged in mass civil disobedience, most of the time, only the socially privileged are in a position to challenge law in the way that the concept of civil disobedience seems to

⁶⁹ RAWLS, *supra* note 23, at 372.

⁷⁰ *Id.*

⁷¹ For an account of the subtle ways in which the fact of injustice might figure into the psychology of resistance, see ANN E. CUDD, *ANALYZING OPPRESSION* 190 (2006).

require.⁷² Although the moral license to disobey law depends to some extent on failure of democratic institutions, only those who believe they have the power to effect change through their actions will engage in civil disobedience. Individuals who are largely invisible to society will have no expectation that their failure to obey a law will cause anyone to reconsider the justice of the law they broke. In order to conceive civil obedience in less elite terms, we might expand it to include disobedience of laws that the law-breaker justifies to *himself* by reference to the injustice of the law. Many socially disadvantaged people will not expect a wide audience for their behavior, and they will rightfully doubt that a public audience will glean from their law-breaking just the message of protest that a law-breaker might intend. But to the extent injustice plays a role in the self-understanding of a law-breaker, it might meet a modified version of the purpose test traditionally included as an element of civil disobedience. Perhaps we need to develop concepts that capture the idea of resistance outside of civil disobedience as such.

Tommie Shelby's recent book defending at least forms of legal noncompliance—where such conduct does not violate natural duties—seems to capture the idea of resistance that does not amount to civil disobedience, strictly speaking.⁷³ But even Shelby distinguishes between politically motivated dissent, which he characterizes as derivative from a duty of self-respect, and entirely self-interested, private action.⁷⁴ Since the lying at issue in our hypothetical is directed to other citizens, and because the duty to speak truthfully might be a natural duty, seller's conduct might not fall within even Shelby's account of resistance.⁷⁵ I have assumed that seller aims only to recover a larger amount of the transactional surplus, not to change—or even protest—the basic structure of society.

Because it is not my aim to elaborate a general theory of resistance, I do not attempt to advance further a defense of seller's lie as legitimate resistance, let alone civil disobedience.

⁷² See STANLEY A. WOLPERT, *A NEW HISTORY OF INDIA* 301–50 (7th ed. 2004) (describing mass civil disobedience in India); Neeshan Balton, *Principles, Tactics, and Negotiations with the Oppressor*, 20 *YALE HUM. RTS. & DEV. L.J.* 31, 33 (2019) (describing mass civil disobedience in South Africa); Zachary Norris, *Repairing Harm from Racial Injustice: An Analysis of the Justice Reinvestment Initiative and the Truth and Reconciliation Commission*, 94 *DENV. L. REV.* 515, 519–20 (2017) (describing civil disobedience in U.S. civil rights movement). Notwithstanding these historically significant moments, absent unique momentum, socially disadvantaged persons cannot expect their individual acts of civil disobedience to be consequential for society, and they can expect the law to be applied harshly to them.

⁷³ See SHELBY, *supra* note 14.

⁷⁴ *Id.* at 221.

⁷⁵ *Id.* at 215.

But the idea of resistance continues to do work for us as we deconstruct the political nature of self-help in this context. After all, self-help in private law is usually responsive to purely private wrongdoing, and some readers may feel uneasy about the application of the self-help concept to our seller for that reason. Yet the element of political resistance in seller's conduct is not enough to redeem it on traditional understandings of civil disobedience. Seller thus risks falling into a peculiar gap in our theoretical constructs surrounding how individuals may respond to wrongdoing: Injustice in the marketplace is usually private and small on the margin—it materializes by way of small private transactions—but it is only unjust in light of broader structures that are not the doing of any single contracting party. Individual acts of resistance are of a similar, mixed character, and thus risk being both too public (in justification) to qualify as self-help and too private (in motivation) to qualify as civil disobedience.

The result is that none of the concepts of self-help, self-protection, or civil disobedience applies neatly to seller's conduct. But even if those labels do not apply, they get at the idea that social injustice may create individual license. The next Part attempts to reconcile the indictment on interpersonal moral grounds with the defenses that seller might muster from the perspective of political morality. I focus on the defense of self-help.

III. RECONCILING THE DEMANDS OF INTERPERSONAL MORALITY AND POLITICAL JUSTICE

The task of reconciliation assumes its possibility. We might abandon the project by pronouncing the interpersonal morality of exchange and the political morality that governs exchange irreconcilable, derivative from two separate moral spheres that do not allow for integrated analysis. But this delivers the unsatisfying result that the seller's conduct is both wrongful and justified.⁷⁶ To gain traction on the moral upshot of his conduct, we must either draw jurisdictional lines that avoid conflict between the two moral perspectives, or resolve them substantively. In the first section below, I attempt the first

⁷⁶ It would be coherent to think the conduct is both wrong and excused but the argument here is importantly *not* an argument for excuse. The argument is not, for example, that natural feelings of resentment or alienation incapacitate poor sellers to the point where they cannot be expected to comply with moral or legal obligation. Such arguments are descriptively implausible (and offensive, to boot). The claim on the table is not that they should be exempted from a universal moral obligation but rather that the obligation is not universal, and, in particular, it does not apply under the circumstances of the hypothetical sale. The claim under consideration is not that vendors are not responsible for their lies but rather that they are entitled to lie.

strategy of separation. It fails. I then attempt a second strategy, specification. The latter approach helps carve out a potential justification for seller's prima facie wrong.

A. *Private and Political Morality as Separate and Ordered Spheres*

One way to handle the apparent conflict is to say that political morality creates a license that it is improper to exercise. We might similarly say, for example, that it is morally improper to insist on a property right that disadvantages a person of superior need. For example, it would be wrong to refuse to lend a car to someone who needs to go to the hospital, even though the legal system does not recognize any duty to lend one's car. On this approach, we effectively relegate interpersonal morality to extra-legal space and allow the politics to fully occupy the legal terms. Sellers would be wrong to lie and cheat but, in light of their own disadvantage, the law could decline to offer buyers any remedy; or at least, the legal regime should not be designed to express moral opprobrium. Interestingly, such a view bears some similarity to the position that economically privileged individuals might behave wrongly from the standpoint of ethics when they exploit their advantages in the marketplace but their behavior does not have any significance from the standpoint of public justice.⁷⁷

Although such a separation formally manages the conflict, it is unsatisfactory on both fronts: it indicts the seller from a moral perspective more categorically than is warranted. And it offers no legal protection to buyers at all, which exaggerates the bounds of any license for seller.

We could try the opposite tack, more familiar to legal theory. We could insist that the political claims of the seller be dealt with entirely through public law, and insist that private

⁷⁷ Cf. Andrew Williams, *Incentives, Inequality, and Publicity*, 27 PHIL. & PUB. AFF. 225, 234 (1998) (“[S]ome choices, although they may be profoundly influential, cannot be regarded as according with, or violating, public rules. Consequently the nonpublic strategies and maxims that individuals employ in making those choices need not be assessed as just or unjust”); see also Kok-Chor Tan, *Justice and Personal Pursuits*, 101 J. PHIL. 331, 334 (2004) (noting that “institutional egalitarianism” does not require as a matter of justice that people “be egalitarians in their interpersonal decisions and actions within the rules of the basic structure” (emphasis omitted)). Both Williams and Tan conclude that any individual duties that attach to the socially advantaged are not a matter of justice. See Williams, *supra*, at 228 (principles of justice constrain only the basic structure); Tan, *supra*, at 335 (institutional division of labor is necessary to preserving moral space for personal pursuits).

law track the interpersonal moral obligations.⁷⁸ That is, to the extent seller is disadvantaged by distributive injustice, his recourse is political action. He should vote, mobilize, run for office and protest in the park—but he may not expect his legal rights and duties vis-a-vis particular private individuals to adjust based on background injustice.

I have elsewhere argued extensively against this “division of labor” between private and public law.⁷⁹ Without rehearsing all the arguments, it is worth distinguishing between the pragmatic and principled arguments for such a division. Pragmatic arguments to the effect that private law is an ineffectual means of redressing distributive injustice⁸⁰ are compelling, but they invite context-specific empirical inquiry, and they do not apply to arguments that private law should take into account distributive injustice because it alters the moral position of the parties to contract, not in order to advance material equality directly. Principled arguments fail because they falsely assume that the moral valence of individual conduct does not turn on background institutions, and that individual consent to contract obviates any background claims that parties to a contract might have had against one another. If we accept that distributive justice constrains the bounds of the permissible, then the content of interpersonal duties must shift to accommodate its demands.⁸¹

In the end, attempts to relegate interpersonal and political duties to separate spheres do not respond to the underlying feature

⁷⁸ Most legal economists would limit considerations of distribution to the tax and transfer system. See, e.g., A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 153–59 (4th ed. 1993); MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 97–100 (1993); Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 677 (1994). Similarly, most legal philosophers writing about private law have favored excluding distributive considerations from private law. See, e.g., ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 80 (1995) (“As an autonomous form of justice, corrective justice operates on entitlements without addressing the justice of the underlying distribution.”); Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 IOWA L. REV. 515, 607 (1992) (“The justification of abstract right and of its principles of acquisition does not depend in the least on the prior satisfaction of any distributive requirements of background justice.”); Stephen R. Perry, *On the Relationship Between Corrective and Distributive Justice*, in OXFORD ESSAYS IN JURISPRUDENCE: FOURTH SERIES 237, 247 (Jeremy Horder ed., 2000); Arthur Ripstein, *Private Order and Public Justice: Kant and Rawls*, 92 VA. L. REV. 1391, 1395 (2006).

⁷⁹ See Aditi Bagchi, *Distributive Justice and Contract*, in PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 193 (Klass et al. eds., 2014); Bagchi, *supra* note 17, at 107–08.

⁸⁰ Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361, 362 (1991) (showing that sellers will often pass on the costs of rules intended to benefit buyers).

⁸¹ Cf. Kenneth Baynes, *Ethos and Institution: On the Site of Distributive Justice*, 37 J. SOC. PHIL. 182, 194 (2006) (“[T]he requirements of democratic equality themselves help to define what is private and what is public, and thus what is or is not appropriately a more direct site of social justice.”).

of the problem. The seller's conduct is not separately wrongful and defensible; it is wrong only to the extent it is not justified. We need an integrated account that allows us to judge his actions, all things considered. Similarly, any account of the governing contract law that divorces it entirely from interpersonal morality is at odds with the basic structure of contract law, which depends heavily on concepts of voluntariness, promise and consent that originate in the domain of private morality.⁸²

B. Narrowing the Duty Not to Lie by Specification

A more promising approach is to reconcile the two moral narratives by further specification. That is, if we press harder on the question of what makes lying wrong, we might conclude that lying in this context lacks some features of ordinary lying that make the latter wrongful. It could be that lying by the seller does not ultimately qualify as lying at all; or his lies are justified; or his conduct is excused.⁸³ Although I am not attempting here to defend specification over balancing or any other method of sorting out practical conflict as a general matter,⁸⁴ it is important to my project that I am not arguing that the seller's actions may be justified all things considered—indeed, I am not prepared to defend that claim, which is in some sense broader and in other respects more modest.⁸⁵ I am identifying grounds on which we can argue that *his lie is justified*, i.e., that he does not wrong the buyer by lying to her; and so I will focus on considerations relevant to the wrongfulness of lying rather than moral considerations exogenous to the lie.

We have already discussed whether the seller's conduct meets the accepted criteria for lying. I will not pursue further the argument that seller is not really lying at all.⁸⁶ Our aim is to explain why seller's conduct may not be wrongful, not to explain why he should not be held responsible. Thus, we are looking for a morally operative feature of his actions or their circumstances, not something in seller's capacities that might mitigate the

⁸² See Aditi Bagchi, *Voluntary Obligation and Contract*, 20 THEORETICAL INQUIRIES L. 433, 435 (2018) (discussing the centrality of voluntariness to contract and its relation to promise and consent).

⁸³ Cf. Joseph Margolis, "Lying Is Wrong" and "Lying Is Not Always Wrong," 23 PHIL. & PHENOMENOLOGICAL RES. 414, 415 (1963).

⁸⁴ See H.S. Richardson, *Specifying, Balancing, and Interpreting Bioethical Principles*, 25 J. MED. & PHIL. 285, 289 (2000) (describing specification as a method of resolving moral conflict); T. M. SCANLON, *WHAT WE OWE TO EACH OTHER* 197–202 (1998) (same).

⁸⁵ It is a more modest claim because it allows that his conduct may be wrong even if it is a justified lie. It is ambitious because it limits the reasons that might redeem him to those relevant to the morality of lying.

⁸⁶ See *supra* notes 30–32 and accompanying text.

presumptive wrong of lying. That is, we are looking for justification, not excuse.⁸⁷ In Shiffrin's terms, I am exploring whether the seller's lie takes place in a "justified suspended context," or one where the speaker's insincerity is "reasonable and justifi[ed]."⁸⁸

The root of the justification should lie in the same circumstances that centered the discussion of self-help and civil disobedience, namely, background injustice. Interestingly, MacIntyre attributes to John Stuart Mill the belief that "[h]abitual lying is . . . the natural state of those who were both uneducated and subjected" and describes falsehood as "the universal concomitant[] of oppression."⁸⁹ Mill believed that Indians were pathological liars for this reason.⁹⁰ Although neither MacIntyre nor Mill seems to have regarded the phenomenon of mass lying as justified, the observation does raise the question of why it might be that oppressed groups would engage in more lying.⁹¹ It is not clear that Mill was in a position to observe whether Indians lied more than others as a general matter. But perhaps we can read his statements as the more modest empirical claim that Indians regularly lied to the British.

One way to understand the phenomenon, that sheds light on the matter of our seller, is that the risks to civilization posed by lying are not so categorical as our earlier discussion of lying made them out to be.⁹² In particular, those risks might be contained when lies are not told indiscriminately but only in delimited contexts. Thus, the ability of human beings to know something of each other and the world might not be jeopardized by poor sellers lying to rich buyers if the practice of lying is clearly circumscribed both in the minds of sellers and buyers (when they come to learn of the lie).⁹³

⁸⁷ For the distinction between justification and excuse, see George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 954 (1985); Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897, 1900 (1984).

⁸⁸ SHIFFRIN, *supra* note 27, at 16 (emphasis omitted).

⁸⁹ MacIntyre, *supra* note 26, at 307, 329 (internal quotation marks omitted).

⁹⁰ *Id.*

⁹¹ Some studies suggest that lying may be especially prevalent in highly stratified societies and may be directed by both social "superiors" and social "inferiors" against one another. Honesty may be an "in-group" practice. See J. A. BARNES, *A PACK OF LIES: TOWARDS A SOCIOLOGY OF LYING* 83 (1994).

⁹² See *supra* Section II.A.

⁹³ This argument only considers the risks of social contagion, i.e., a general undermining of the practice of truth-telling, or perhaps interpersonal communication itself. A separate issue is the risk of self-contagion. That is, it might be that lying to some buyers undermines sellers' propensity to tell the truth in other situations. They might become habitual liars. I set aside this concern because it speaks to the virtue ethics of lying, and not the question of interpersonal obligation, i.e., whether sellers wrong buyers.

Moreover, it might be that the benefits of a practice of truth-telling, including trust, may be so absent from the relationship between people in highly stratified groups that there is little lost by lying. Bernard Williams alluded to this possibility. He described truthfulness as “a form of trustworthiness, that which relates in a particular way to speech.”⁹⁴ But he went on to say that “[i]n trying to understand Sincerity, . . . we cannot simply assume [relations of trust]. We need to consider the various kinds of communicative expectations that obtain between people who have different kinds of relations to one another”⁹⁵ The question of whether the expectation of trust is warranted is not morally neutral. We need to consider whether a given listener is “unoffending” or “someone who no longer deserves the truth.”⁹⁶ In our context, we must consider whether buyers can legitimately expect the truth from sellers.

Why should buyers not expect the truth? One possibility is that buyers do not trust sellers as a descriptive matter.⁹⁷ While they might update their epistemic beliefs about the product in light of what a seller claims, they do not trust the seller in the sense of relating to the seller as a human being with whom the buyer shares a common fate, such that each takes interest in the well-being of the other.⁹⁸ The same background institutions that produce inequality are likely to produce such alienation. Absent trust, duties from sellers to buyers—including truth-telling—might not apply. Alan Strudler, for example, distinguishes sharply between two situations: While 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. . . . [I]t may be morally acceptable to defend a person in the absence of trust if that deception is necessary to defend against an action that may thwart one’s legitimate interests.⁹⁹

One might worry that permitting lies in response to social alienation is counterproductive because it will only result in

⁹⁴ BERNARD WILLIAMS, TRUTH AND TRUTHFULNESS: AN ESSAY IN GENEALOGY 94 (2002).

⁹⁵ *Id.* at 111.

⁹⁶ *Id.* at 119.

⁹⁷ *Cf.* David Wood, *Honesty*, in PHILOSOPHY AND PERSONAL RELATIONS: AN ANGLO-FRENCH STUDY (Alan Montefiore ed., 1973) (arguing that a husband who perpetually distrusts his wife is not entitled to the truth and, more generally, that the significance of honesty depends on particular social relations).

⁹⁸ Even where buyers are inclined to believe sellers, their attitude is not properly described as trusting. The reliability of someone who is merely self-interested to speak the truth is better described without invoking the concept of trust. *See* Alan Strudler, *Deception and Trust*, in THE PHILOSOPHY OF DECEPTION 139 (Clancy Martin ed., 2009).

⁹⁹ *Id.* at 152.

further alienation. This is almost certainly true but the argument for moral license is not based on a claim that it will cure social stratification, or inequality, or any other social ill. The claim is that those who bear the burdens of existing injustice are exempt from some of the prohibitions that take just relations among individuals for granted. We might compare the argument that lying by vendors undermines relations across social groups to complaints about self-segregation in school cafeterias. I refer to the phenomenon that minority students will often sit together in cafeterias, rather than integrating into white-majority tables.¹⁰⁰ It is perverse to complain that such self-segregation undermines community feeling; it is the racism that motivates self-segregation that undermines community. While self-segregation by a group that has not been subject to race-based oppression may be wrong, self-segregation by minorities usually responds to the background wrongs associated with racism and it is intended to ameliorate the burdens of racial status. Refusing to recognize a responsive moral license only ensures that the personal costs of background injustice are borne more completely by its primary victims.

Defending the seller's lies on grounds of the buyer's lack of trust has its limit. Such an account places a great deal of weight on the role of trust in generating a duty not to lie. Although it is an important way to talk about lying and its wrong, it seems inadequate because it implies that lying requires some kind of underlying relationship to be even a *prima facie* wrong. This goes too far—we are only looking for an account of contingent justification. In fact, even Strudler allows that deception may be justified absent trust only where it protects “legitimate interests.”¹⁰¹

Moving out of the trust and truth framework, we could think about lying in Kantian terms as an improper use of a person as a means to one's own ends, effectively usurping buyer's decision-right to contribute to the seller's ends, or not.¹⁰² But a seller may be released from any duty to defer to the buyer's right to decide whether to buy his goods (based on accurate information) because of her participation in a social structure by which the seller is used as a means to generate unjust advantage for buyer. That is, while lying is a kind of disrespect, the duty to respect might require mutuality, and the disrespect embedded in unjust institutions might justify some forms of reciprocal disrespect. Kant would not

¹⁰⁰ Whether their conduct is properly categorized as self-segregation is already doubtful. But for purposes of this analogy we can assume that minority students to some degree voluntarily choose to consort with other minorities over white students.

¹⁰¹ See Strudler, *supra* note 98, at 152.

¹⁰² See IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* AK 4:429, at 46–48 (Allen W. Wood ed. & trans., Yale University Press 2002) (1785).

endorse this move because his form of deontic thinking does not adjust rights based on the noncompliance of others. But a requirement of mutuality echoes the principle of reciprocity that motivates the familiar duty of fair play.

Mutuality or at least some kind of joint engagement may be quite central to how we understand verbal exchange and the accompanying duty to speak the truth.¹⁰³ If the listener does not engage with the speaker on terms that justify an expectation of the truth, then she may have effectively authorized the lie or even bear responsibility for it; the lie would then extend the conditions of interaction and would not violate the autonomy of the listener.¹⁰⁴

Still, institutional disrespect cannot license disrespect toward other citizens generally, so we need an account of why seller is justified in engaging in the particular kind of disrespect that is lying about his goods. Why does the background wrong of distributive injustice relieve sellers of the duty of truth-telling to buyers, as opposed to the duty to abide by parking regulations? Here, we can incorporate the reasoning by which we earlier cast sellers' deceit as a form of self-help. Lying is justified where truth-telling would facilitate a wrong against the speaker by the listener. As in the self-help discussion above, we can frame the wrong as aggregate or individual.¹⁰⁵ Truth-telling by the seller would as a practice worsen his material position and thereby aggravate the distributive injustice reflected in his social position. Truth-telling by the seller in a given transaction would enable the buyer to extract a substantial portion of the gains from trade, contrary to her duties as a socially advantaged participant in the market. In either case, the seller's lie mitigates an ongoing harm and prevents its imminent worsening. It is justified on those grounds.¹⁰⁶

¹⁰³ Lies must be assertoric, in that they assert something to be true. Patrick Leland argues that speakers only make assertions where they assume responsibility to justify their assertions if challenged, as part of a process of "[r]ational engagement." Patrick R. Leland, *Rational Responsibility and the Assertoric Character of Bald-Faced Lies*, 75 ANALYSIS 550, 551 (2015).

¹⁰⁴ See Glen Newey, *Political Lying: A Defense*, 11 PUB. AFF. Q. 93, 105–06 (1997) (discussing the relationship between legitimate expectations, autonomy, and lying and allowing that "lying is prima facie wrong, but . . . its wrongness is conditional on its violating the autonomy of its (intended) victim" (emphasis omitted)).

¹⁰⁵ See *supra* Section II.B.

¹⁰⁶ My argument resonates with Strudler's claims that "the norms of self-defense may be used to vindicate deception that aims at fending off the prospect of economic harm." Strudler, *supra* note 98, at 145. However, Strudler allows the defense only to protect proprietary information that your adversary in a negotiation has no right to know. *Id.* at 146. For the argument to extend to the hypothetical transaction, it requires separately showing that buyer has no right to know the truth with respect to the product she is buying. There is no reason to think that Strudler would sign on to that proposition, though there are reasons (set out in the text of this article) that buyers may have no such right.

Just as important to the background and prospective harm to seller are the benefits and harms to the buyer. It is important that the seller has reason to believe that the buyer is part of the group that unjustly benefits from background injustice. And it is important that he reasonably believe that, but for his lie, the buyer will benefit disproportionately from their exchange. The background unjust benefits enjoyed by the buyer makes her loss in this particular transaction a mere mitigation. And her willing participation in a transaction that would worsen the inequality that exists between her and the seller marks her with a distinctive responsibility that justifies the seller's imposition of a loss on *her*.

One might wonder whether the implication of the analysis of the buyer's position is that the seller's lies are only justified when he is right about the buyer, i.e., when she really is rich. Or perhaps, the likelihood that he will be wrong in a number of cases renders the lies unjustified altogether. There are at least two reasons to think that the seller's uncertainty about the status of any given buyer does not importantly affect the moral calculus here, as long as his assumptions are justified as a matter of probability, i.e., if he is right most of the time.

The first consideration is that the harm that seller is licensed to impose on buyers is a relatively trivial one. It is unlikely that anyone who will suffer greatly from a loss of about twenty dollars will be on the market—even a street market—for a cashmere scarf in the first place. And, of course, they are not literally deprived of twenty dollars but simply have an inferior scarf, so no important moral interest is in jeopardy. The analysis would be entirely different if the seller were selling impure baby formula or medicine. In this case, whether the buyer is privileged or not, her interest in physical integrity is of a qualitatively different nature than the seller's interest in either mitigation or protection, and misrepresenting the nature of the product would not be justified on grounds of either self-help or self-protection.

The second consideration that allows the seller to reason probabilistically about the buyer's status is the nature of the impersonal platform in which seller and buyer encounter one another. Street markets are impersonal places. All the calculations that go into the parties' terms of exchange are set by their probabilistic knowledge of the market. This is not a context where buyer can reasonably be expected to be treated as a unique individual. Together with her low stakes, this market context entitles the seller to calibrate his treatment of the buyer based on what little he knows about her.

C. *Specification of Cheating*

I turn now to a far briefer discussion of cheating, or the overcharging relative to other sellers and buyers. The general expectation that sellers will not charge certain buyers more than others seems legitimate only before we learn of substantial differences among sellers, and among buyers. Once we learn that sellers face different costs, have different needs, and enjoy different levels of opportunity, it is less surprising that they might not all charge the same price. Similarly, once we learn that buyers differ in their purchasing power and interest in buying a good, it is not surprising that they would pay different prices for it. Of course, it is usually the case that it is not possible or worthwhile for a seller to attempt to discriminate among buyers.¹⁰⁷ But the seller's self-restraint does not reflect a moral obligation. We recognize an obligation against nondiscrimination only where the group that would be disadvantaged is in fact a generally socially disadvantaged group. Our practice is consistent with the principle proposed by Anthony Kronman with respect to advantage-taking in a transactional setting.¹⁰⁸ Advantage-taking of a given sort is permissible, on his view, only where a rule allowing it works to the long-run advantage of the disadvantaged.¹⁰⁹ It is likely that some kinds of fraud or deception—watering down milk, for example—would harm low-income consumers. Rules that regulate price discrimination between low- and high-income buyers, however, would protect high-end buyers at the expense of low-income sellers.¹¹⁰ Thus, there is no reason to endorse a principle of general nondiscrimination among buyers. Sellers are not only legally, but morally free to overcharge customers, and it is not properly characterized as “cheating” after all.

IV. IMPLICATIONS FOR CONTRACT THEORY AND DOCTRINE

The discussion above suggests that interpersonal private moral obligation depends on background political justice. It should be easier to establish that interpersonal *legal* obligations

¹⁰⁷ See Mark Armstrong, *Recent Developments in the Economics of Price Discrimination*, in 2 ADVANCES IN ECONOMICS AND ECONOMETRICS: THEORY AND APPLICATIONS, NINTH WORLD CONGRESS OF THE ECONOMETRIC SOCIETY, 97, 99 (Richard Blundell et al. eds., 2006); RICHARD A. POSNER, ANTITRUST LAW 80 (2d ed. 2001); Michael J. Meurer, *Copyright Law and Price Discrimination*, 23 CARDOZO L. REV. 55, 59 (2001).

¹⁰⁸ Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 492 (1980).

¹⁰⁹ *Id.*

¹¹⁰ If sellers could discriminate on the basis of purchasing power, they would charge high-end buyers more and low-end buyers less, because high-end buyers are likely to be less price sensitive.

(private law obligations) should also depend on background political justice. Many legal observers reject the very idea of private law as a body of law animated by distinct principles from those that drive public law.¹¹¹ Those scholars should directly embrace the idea that contract is subject to the same principles of political morality that constrain other legal institutions that are integral to the basic structure of society. Other scholars regard private law as importantly different from public law because it entitles individuals to hold other private persons accountable on the express grounds that they have been wronged.¹¹² Private law theorists of this sort too should consider private law within the domain of distributive justice if the interpersonal moral obligations that underlie private claims themselves depend on distributive justice.

Even if the permeability of private law to political justice is established as a theoretical matter, the transaction we have studied in-depth reveals why it is challenging to regulate contract by reference to political principles. To the extent that the moral defect of the transaction lies in the basic structure alone, there is no reason that a particular buyer should pay for it with a poor-quality scarf. She would be no more responsible than anyone who accepts a large tax refund, or anyone who does not add some extra amount to her tax submissions based on an estimation of how much more she should owe. While a beneficiary of unjust tax laws may have an imperfect duty to help the disadvantaged, she is not responsible for any margin of disadvantage suffered by any particular person. What distinguishes the buyer in our hypothetical?

Locating responsibility in the buyer of the scarf pins a great deal on the happenstance of her encountering a dishonest street seller. But he is not her friend, she is not involved in his life, she does not owe him anything more or less than any other citizen owes every other citizen. Why her? The trick lies in finding an account of her transaction that is particular without falsely characterizing it as personal. Her admittedly arbitrary encounter with the street seller puts her in a relationship with him—to be sure, a short and impersonal one—but one that is distinguishable from her fully anonymized interactions with the state. It is enough to set her apart from other advantaged people, and to justify his placing a special burden on her—albeit a small

¹¹¹ See John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640, 1645–46 (2012) (describing “private law skepticism”).

¹¹² See *id.*, at 1650–51 (defending the concept of private law and introducing the idea of “New Private Law”); WEINRIB, *supra* note 78, at 3, 10–11.

burden, proportional to her role in the larger injustice that has put seller in his place.

How might we incorporate these propositions, and our extended analysis of the hypothetical, into our understanding of consumer contract law? First, we have reason to be less categorical in our protection of consumers from fraud. The social status of consumers is too heterogeneous to sustain consumers as a legal status, however politically appealing the latter status might be.¹¹³ Consumer protection has cross-class appeal but consumers are a disparate class among themselves. Moreover, they are neither consistently advantaged nor disadvantaged vis-a-vis sellers. The use of consumers as a group against whose interests whole categories of law can be assessed—not only in consumer law but also in competition policy, for example¹¹⁴—is motivated in large part by the sheer numerosity of consumers, which makes their welfare of preeminent significance in both an aggregate welfare analysis and a simple political calculus. But we have seen that there are circumstances under which particular classes of sellers can legitimately regard their buyers as relatively advantaged, and “exploitation” of those rich buyers is of complicated moral valence.

Second, consumer contract law can be modified to recognize that lies are sometimes justified. We can do this directly by adjusting the standard for what qualifies as a lie (that is, the standard for either contractual misrepresentation or consumer fraud), or more indirectly through selective enforcement of contract and consumer law. For example, a party must usually show that she has relied on a representation in order to rescind a contract on its basis.¹¹⁵ Courts could systematically refrain from finding that consumers have relied on representations from street sellers (or at the very least, decline to recognize any false implicatures from seller’s statements) or we could create a presumption that any statements by street sellers are “mere puffery” on which consumers cannot reasonably rely.¹¹⁶ These legal presumptions about, or characterizations of, market behavior will have a feedback effect on what parties’ reasonable

¹¹³ See Aditi Bagchi, *The Political Economy of Regulating Contract*, 62 AM. J. COMP. L. 687, 702–10 (2014) (discussing role of heterogeneity in regulating contract); cf. Oren Bar-Gill & Omri Ben-Shahar, *Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law*, 50 COMMON MKT. L. REV. 109, 114 (2013) (“When consumers are heterogeneous, a one-size-fits-all mandatory approach necessarily hurts certain subgroups of consumers.”).

¹¹⁴ See generally Gregory J. Werden, *Competition, Consumer Welfare, & the Sherman Act*, 9 SEDONA CONF. J. 87 (2008).

¹¹⁵ RESTATEMENT (SECOND) OF CONTRACTS § 164 (AM. LAW INST. 1979)

¹¹⁶ See David A. Hoffman, *The Best Puffery Article Ever*, 91 IOWA L. REV. 1395, 1411 (2006) (“Courts deem statements that could not induce reasonable reliance to be nonactionable puffery.”).

expectations really are. The active construction of the market through legal rules thus allows those rules to improve the ethical code by which participants abide, in the specific sense of rendering them responsive to other institutional commitments—and deficiencies.

If courts and adjudicative administrative bodies do not alter their standards, consumer law enforcement agencies can alter their practices. Politically, street sellers are an easy target. They will offer little organized resistance to any crackdown on misrepresentations. (Realistically, consumers are unlikely to attempt to rescind the sales through a judicial tribunal, so only administrative enforcement is relevant.) But agency directors who reflect on their moral mandate can choose to direct their limited enforcement dollars toward targets that prey on *vulnerable* consumers, and in particular, on consumers who are more vulnerable than the sellers who stand to benefit from their own misrepresentations. In fact, even if an enforcement officer is not persuaded that deceit is ultimately licensed, it might make sense for her to abandon enforcement in some contexts in light of the *de facto* boundaries of legal enforcement. The law cannot sustain honesty on the street on its own,¹¹⁷ and a second-best of arbitrary intervention might be worse. If the phenomenon of deceitful self-help is sufficiently pervasive, cracking down on this conduct may only politicize it, ultimately elevating its status to that of resistance, if not civil disobedience. On the other hand, declining to enforce consumer fraud laws in some markets would not kill misrepresentation as a basis for seller liability as such. It would only treat the regressive character of some market segment as a trigger for heightened enforcement scrutiny.

Our argument for why lies by street sellers may be justified was contingent on the absence of any relationship of trust between seller and buyer. When a seller communicates with a buyer in such a way as to invite such trust, his lies are probably no longer justified.¹¹⁸ At least, we have not explored the ramifications of betraying trust that one has specifically set out to cultivate. However, while consumer law might very well aim to promote trust in society writ large by ferreting out sellers who depart from accepted standards of social conduct, it is not in the business of enforcing the terms of relationships—just the terms

¹¹⁷ See THOMAS CARSON, *LYING AND DECEPTION: THEORY AND PRACTICE* 177 (2010) (“No legal system can effectively police and deter rampant and universal dishonesty in the economic sphere.”).

¹¹⁸ See *supra* notes 94–98 and accompanying text.

of legal agreements.¹¹⁹ It should not matter to the legal status of a seller's representation whether the seller was very friendly to the buyer in the course of the sale. This is true even though the details of the interaction between a seller and buyer may be important to whether the seller's deceit is ultimately justified from a moral point of view.

More generally speaking, the arguments in this article do not purport to establish that disadvantaged persons can lie to and cheat advantaged persons categorically. There are more fully private realms of interaction where our political claims are of diminished significance. For example, in a game of chess, we would not expect the wealthier player to forfeit her rook at the start. But unlike games, contract is not a realm separate and apart from political justice. Unlike love and friendship, it does not even aspire to be separate from state institutions in the self-understanding of its parties. Parties to contract have chosen to avail themselves of a state-operated regime to buttress their exchange relationship. To the extent parties in even those domains of life that seem most distant from political justice, such as marriage, similarly avail themselves of state machinery, the state may be similarly obligated to take into account the distributive implications of its policies.

Finally, our study of the exchange transaction here offers some lessons regarding consideration. Consumer advocates—especially those protective of low-income consumers—are sometimes tempted to require something like proportionality of consideration, or equivalence in exchange.¹²⁰ In the vast majority of cases, market mechanisms suffice to ensure that parties transact for goods and services at the market rate, adjusted for oddities in their transaction. In some cases, avoiding transaction costs, especially search costs and other information costs, might cause a consumer to pay far more than she would otherwise pay.¹²¹ Consumer advocates would have us find these

¹¹⁹ While all contracts are relational, in the sense that parties to contract often have relationships with each other that extend beyond the terms of their contract, not all terms of their private relationship should be of legal import. See Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847, 860 (2000) (“[R]estricting the role of legal enforcement to the enforcement of facially unambiguous express terms will (over time) generate better and more accurate interpretations of those portions of disputed contracts that the parties choose to reduce to formal, legal terms.”).

¹²⁰ See James Gordley, *Equality in Exchange*, 69 CALIF. L. REV. 1587 (1981); see also Nicholas J. Theocarakis, *Antipeponthos and Reciprocity: The Concept of Equivalent Exchange from Aristotle to Turgot*, 55 INT'L REV. ECON. 29, 32–34 (2008) (describing history of concept of equivalence of exchange).

¹²¹ See William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 288 (1987) (describing trade-off between search costs and seller price).

transactions unconscionable on the grounds that buyers have grossly over-paid.

The discussion here should give us pause. Nothing here suggests that courts should protect vendors who fleece poor buyers. To the contrary, the upshot of the argument here is that the law should take into account the status of parties to a transaction because it may inform their duties to each other. Thus, courts and legislatures should be protective of low-income buyers because they are poor and not because they are consumers. It should be just as solicitous of poor vendors. A “class-blind” rule that favors equivalence in exchange will not properly track moral obligations in exchange.

A rule that consistently favors the disadvantaged across the board is self-defeating because it will result in their effective exclusion from the marketplace.¹²² It is an empirical question how protective the legal rules surrounds exchange can be of the socially disadvantaged in any transactional setting without triggering perverse effects.¹²³ In our hypothetical, it will depend, for example, on whether buyers and sellers presently respond to legal protection, i.e., whether they would alter their conduct in its absence, as well as how much knowledge they have of the frequency with which sellers lie. We hold street sellers accountable for their lies to the extent those lies undermine the material position of other street sellers. We should not, however, devote enforcement resources to policing their lies for the sake of the buyers to whom they lie.

CONCLUSION

We started with a hypothetical sale and you, the reader, were cast in the role of buyer. However, our focus has been on the moral plight of the seller. His moral situation is challenging. On the one hand, we do not wish too easily to exempt him from ordinary moral principles—and what is more ordinary than the admonishment not to lie? We are constituted as moral agents in part by the moral principles to which we are held, and it would be actually disrespectful to be less morally demanding of the seller on grounds of his poverty.

¹²² See, e.g., James P. Nehf, *Effective Regulation of Rent-to-Own Contracts*, 52 OHIO ST. L.J. 751, 824 (1991) (“Effective price controls would probably serve, like interest rate ceilings in general, only to exclude some super-high risk consumers from the . . . market.”).

¹²³ For a discussion of the likely effects of apparently pro-consumer rules, see Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361 (1991).

On the other hand, given how vastly disparate our circumstances, it would be strange if there was no important difference among us with respect to our claims and obligations to each other. Talking about the justice of institutions, including the justice of particular laws, can obscure these differences among us, because the relevant question becomes how institutions should be modified. We tend to talk about the social measures that we should take to ameliorate distributive injustice, whether along lines of class, race or disability. Those discussions are important but we should also spend time in the vantage point of individuals. What do we each owe and to what are we each entitled in the world as we now find it? To the extent the philosophical literature broaches these questions, we may be too absorbed in the ethics of advantage.¹²⁴ What do the talented owe the untalented? What constitutes wrongful discrimination?

This article is a modest attempt to contemplate the perspective of the wronged. What is required of them? In particular, how are the obligations of individuals to other individuals compromised by background justice deficits? Because the argument that I have proffered to justify the seller's lie makes a number of factual and moral assumptions, I do not purport to have established that seller does not wrong buyer by lying to her. However, I have illustrated a form of argument that can be used to justify *prima facie* wrongdoing that is responsive to background injustice. My tentative conclusion that poor sellers may be justified in lying to rich buyers is unsettling in part because it suggests other, perhaps more disruptive moral licenses, such as those that low-wage employees might hold against their employers. May low-wage employees take breaks when they are on the clock, even where they are not legally entitled to those breaks and their employers prohibit them?¹²⁵ May low-wage employees falsely claim that they are ill when they will be terminated for absence on any other grounds?¹²⁶ In examples involving low-wage employment, we might be tempted to locate

¹²⁴ Tommie Shelby's book, *supra* note 14, is an important exception.

¹²⁵ Anecdotal evidence and a comparison of hourly productivity rates as between American and other OECD workers may suggest that American workers do exactly this. See OECD COMPENDIUM OF PRODUCTIVITY INDICATORS (2018), <https://data.oecd.org/lprdy/gdp-per-hour-worked.htm> [<https://perma.cc/33U4-47SS>] (comparing GDP per hour worked). Hourly productivity in the United States was below the OECD average for all but one of the last twenty years. *Id.*

¹²⁶ Whether we regard this conduct as permissible might depend in large part on how we characterize the wrong to which it is responsive. When the underlying wrong is extreme, as in slavery, we would regard resistance through lying about illness as praiseworthy and perhaps morally compulsory. See Bernard R. Boxill, *The Responsibility of the Oppressed to Resist Their Own Oppression*, 41 J. SOC. PHIL. 1, 8 (2010) (discussing measures taken by slaves to frustrate owners' objectives).

the primary wrong in the employer, without relying on any political injustice to justify employee conduct. But it is likely that many employers are themselves constrained and cannot afford to compensate employees on better terms than other employers in the industry; the wrong of oppressive working conditions and avoidable vulnerability to illness is ultimately a public one as well. Nevertheless, many people will be comfortable imposing some losses on the particular employers who happen to employ the socially disadvantaged.

Popular intuition supports the contention that social injustice distorts the morality of private behavior in other contexts too. Feminists in the #MeToo movement often claim that women who report sexual harassment or assault should be believed.¹²⁷ Taking any given allegation on its own, this is a puzzling contention. Why would we believe one sex over the other, without knowing more? But we already recognize that public reasons justify defaults of judgment, most notably, the presumption of innocence that applies in the context of a criminal trial. Perhaps the imperative to remedy public injustice justifies—in other contexts—adopting a different principle of judgment that is morally and rationally indefensible but for background injustice. Under exactly what conditions we can justify a default in favor of believing accusers is a hard question. It gets at the ultimate question of whether and under what conditions the disadvantaged can ever justify inflicting loss on the advantaged in the name of redress, or what proportionality entails in a given context. Some harms are surely never a permissible response to background injustice—for example, presuming criminal guilt. But other harms, such as the loss of certain employment opportunities or prestige to which no one is in principle entitled, are less obviously off the table. I cannot sort out here the criteria that must be met before a person or institution deliberately subjects a man to consequences as a result of an allegation of sexual misconduct, but it is likely that those criteria are different under patriarchy than under conditions of sexual equality.

To be sure, it is always unfair in some sense when someone is worse off as a result of wrongdoing outside her control. But in the case of harms that flow from the oppressed to the privileged, the experience of harm is not necessarily an injustice separate from the underlying wrong that cast the

¹²⁷ For a defense of the need to “Believe Women” and an account of the problem the movement is intended to redress, see Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1 (2017).

oppressed and the privileged in their respective social roles. After all, the starting point for our inquiry is that people already suffer under injustice. How closely should we guard the gates around the first-order victims of public injustice? If we collectively allow harm to lie where it falls, must those who bear those harms do the same or are they entitled to spread their suffering around? If we are to reject self-help by the socially disadvantaged, what alternative course of action is justified in its place? What may they do about the injustice in which they find themselves? What picture of moral agency requires that they do nothing more than wait? I worry about a moral-political framework that is so unequally demanding of its subjects.

What we owe each other depends on the larger social structures within which we act, and when those structures are wrongful, it has consequences for the moral lives of its inhabitants. The consequences of distributive injustice, in particular for our private moral lives, are sweeping and almost breathtaking. The possibility that poor sellers are justified in lying to their fellow citizens on the streets is among the myriad ways in which background injustice corrupts civic life in a polity.