

# INCOMMENSURABLE GOODS, RIGHTFUL LIES, AND THE WRONGNESS OF FRAUD

ALAN STRUDLER<sup>†</sup>

Lies that alter the course of a negotiation often constitute fraud,<sup>1</sup> but not always. Successful lies that a person tells about her reservation price in a negotiation, for example, need not be actionable.<sup>2</sup> The legal acceptability of such lying seems at odds with the deeply entrenched idea that lying is morally wrong.<sup>3</sup> In this Article, I examine some of the apparent tensions between legal and moral responses to lying and draw some lessons about the normative structure of justifiable judgments about truth-telling.

---

<sup>†</sup> Department of Legal Studies, The Wharton School, University of Pennsylvania. I am grateful to Edward T. Swaine and David Wasserman for valuable comments on an earlier draft. My research for this Article was supported by the Zicklin Center for Business Ethics Research.

<sup>1</sup> See Leon Green, *Deceit*, 16 VA. L. REV. 749, 750 (1930) ("Any sort of misleading conduct ranging from express false statements, partial statements, concealment, to mere silence may constitute a false representation.").

<sup>2</sup> Fraud requires a material misrepresentation that causes damage. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 108, at 753 (5th ed. 1984) ("The party deceived must not only be justified in his belief that the representation is true, but he must also be justified in taking action on that basis. This usually is expressed by saying that the fact represented must be a material one."). Lies about reservation prices may be regarded as not fraudulent because they are immaterial, but it is a little puzzling that these lies could be deemed immaterial. The legal rationale for regarding a lie as immaterial is that a lie is inconsequential where a reasonable person would not believe it. Negotiation experts, however, suggest that deception about reservation prices is commonly a large factor in determining the outcome of a competitive negotiation. See, e.g., ROBERT H. FRANK, PASSIONS WITHIN REASON 165 (1988) ("The art of bargaining . . . is in large part the art of sending misleading messages about [reservation prices]."). Experts therefore imply that it is common for people to believe lies about reservation prices and that it is common for these lies to affect significantly the outcomes of negotiations. If lying about reservation prices is common and effective, it hardly seems, as the standard legal rationale suggests, that such lying would not affect a reasonable person or that it would be inconsequential.

<sup>3</sup> For a good historical discussion, see Alasdair MacIntyre, *Truthfulness, Lies, and Moral Philosophers: What Can We Learn from Mill and Kant?*, in 16 THE TANNER LECTURES ON HUMAN VALUES 307 (Grethe B. Peterson ed., 1995). MacIntyre states, "I have distinguished two rival moral traditions with respect to truth-telling and lying, one for which a lie is primarily an offense against trust and one for which it is primarily an offense against truth." *Id.* at 336.

If one sees differences between the law and ethics of lying, it is natural to regard these differences as reflecting the limits of law. One then may suppose that law embraces lower standards for truth-telling than does morality, because it is too costly to enforce the high standards of morality in the law of fraud. Put somewhat differently, the problem with imposing a rule against lying might be understood comparatively: Imposing the rule would fail to secure as much value as not doing so would. This, however, suggests a particular model of normative reasoning that requires us to think about choices among options by asking which offers the most value or the most good. A salient assumption of this model is that options are commensurable in value.<sup>4</sup> Although one of my main objectives in this Article is to argue against commensurabilist models of normative deliberation in law and morality, I suspect that arguments against commensurability, when made at a high level of generality, will ring hollow. Discrediting the commensurabilist model requires demonstrating that it creates problems in practice, specifically, that thinking about incommensurables cannot be eliminated in ordinary normative reasoning. Reflection on the example of reasoning about lies that lawyers tell in negotiation, I suggest, shows how incommensurability is an utterly ordinary feature in normative choice.

I have an ulterior motive, distinct from concern about dialectical effectiveness, for joining abstract theory about incommensurability and modest casuistry about truth-telling. I think that some of what legal scholars write about the role of incommensurables in legal reasoning is misleading because it is overly dramatic. Cass Sunstein, for example, suggests that when we confront issues in law whose resolution requires appeal to incommensurable values, we should make the

---

<sup>4</sup> Throughout this Article, I use the terms "commensurable" and "comparable" interchangeably. Ruth Chang recommends that we reserve the term "commensurable" to signify comparisons measured on a cardinal scale, and that we use the term "comparable" to signify comparisons measured on an ordinal scale. See Ruth Chang, *Introduction, in* INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 1, 2 (Ruth Chang ed., 1997) ("Given that the two ideas are distinct, let us henceforth reserve the term 'incommensurable' for items that cannot be precisely measured by some common scale of units of value and the term 'incomparable' for items that cannot be compared."). Although I agree with Chang that the ideas of cardinal and ordinal incommensurability are distinct, the distinction is not relevant to this Article. For reasons of simplicity, therefore, I choose not to follow her linguistic recommendation. By "commensurable," I mean both cardinal and ordinal commensurability.

choice that expresses the appropriate evaluative attitude.<sup>5</sup> He also says that “[b]y making certain choices and not others, people express various conceptions both of themselves and of others.”<sup>6</sup> I think that virtually all real decisions about value, including decisions as simple as how much sugar should be included in a cake recipe, require judgments about incommensurables.<sup>7</sup> I will try to demonstrate that the role of incommensurables in law, although often conceptually recalcitrant, need raise no more profound questions about our conception of ourselves than does the role of incommensurables in cake recipes. Although I agree with Sunstein that there are cases in which dealing with incommensurables requires adopting appropriate evaluative attitudes that touch on our conceptions of ourselves and others, I maintain that these cases form a specialized subset of incommensurable cases and that it is unclear that they predominate in law.

My plan in this Article is as follows. In Part I, I explain the concept of incommensurability and identify some of the limits that generally confront an analysis of normative problems in commensurabilist terms. In Part II, I discuss a commensurabilist account of the norms of lying about reservation prices in negotiation. In Part III, I develop skepticism about the commensurabilist account. In Parts IV through VII, I develop an alternative account of the norms of lying in negotiation, which I argue is incommensurabilist. In Part VIII, I consider and reject arguments that deliberation about the relevant norms must be deliberation about commensurables. Finally, in Part IX and the Conclusion, I diagnose the intellectual tendency to overdramatize incommensurability, and summarize the results of this Article.

## I. INCOMMENSURABILITY IN CHOICE

The idea of a choice between normative alternatives, or options, that have incommensurable value is explained most easily by contrasting it with choice among commensurables. In the commensurabilist model, other things being equal, if we can compare two options in terms of which is more just, or which produces more utility, then we

---

<sup>5</sup> See CASS R. SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* 91 (1997) (“When evaluating a legal rule, we might ask whether the rule expresses an appropriate valuation of an event, person, group, or practice.”).

<sup>6</sup> *Id.*

<sup>7</sup> See MICHAEL STOCKER, *PLURAL AND CONFLICTING VALUES* 282 (1990) (examining the limits of a commensurabilist analysis of how much sugar should be used in a cup of tea).

should pick the option that offers more of the property. Within the realm of commensurable value, betterness is gauged in terms of moreness, and deliberation consists of comparing options to determine which option has more of the relevant desirable property.<sup>8</sup>

Examples of commensurables outside of morality include physically measurable quantities such as length, average velocity, temperature, and earthquake intensity.<sup>9</sup> Consider temperature. We can easily specify a procedure, involving the use of a thermometer, for measuring and comparing the temperatures of two different cups of tea. We know in advance what we seek, and our only question is how much of it we find. Value or normative commensurability is similar. As Henry Richardson explains, value commensurability obtains only when we can compare goods in terms of the degree to which they share certain desirable characteristics as a basis for making a choice among them:

Two values (or goods) are deliberatively commensurable with respect to a given choice if and only if there is some single norm (or good) such that the considerations put forward by those two values (or goods) for and against choosing each of the available options may be adequately arrayed prior to the choice (for purposes of deliberation) simply in

---

<sup>8</sup> Even so, a commensurabilist approach does not imply consequentialism, the view that the best option is that which promises to produce the most good consequences, for example, the highest sum of utility. When choosing options in terms of greatest value, nothing in a commensurabilist position precludes identifying "more value" in terms of a stricter adherence to a nonconsequentialist norm rather than in terms of an optimal quantity of good consequences. Suppose, for example, that one is a Kantian, thus believing that a morally right action is one that treats a person as an end in herself and not as a mere means. One may still be a commensurabilist if she thinks that the proper deliberative procedure for making a choice simply requires arraying all relevant act alternatives against a universalizability norm, comparing the options in terms of which conforms most to the norm and choosing that which most conforms. The option that conforms most to this Kantian norm need not be the same as that which produces the most good consequences, nor need it be that which most conforms to a consequentialist norm.

The concept of universalizability is specified in the following question: "Would I be content that my maxim . . . should hold as a universal law for myself as well as for others?" IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 19 (Lewis White Beck trans., Bobbs-Merrill Co. 1959) (1785). Adhering to a universalizability norm requires acting based on a "maxim" or principle such that one consistently could will that everyone do the same. The intuitive idea of a universalizability norm seems captured in the classical notion of the Golden Rule, which prescribes that a person treat others as she herself would be treated. See ALAN DONAGAN, THE THEORY OF MORALITY 57-59 (1977) (comparing the Golden Rule to Kant's first fundamental principle of morality).

<sup>9</sup> See BRIAN ELLIS, BASIC CONCEPTS OF MEASUREMENT 74-89 (1968) (discussing choices one must make while selecting the proper fundamental measuring procedures).

terms of the greater or lesser satisfaction of that norm (or instantiation of that good).<sup>10</sup>

Nothing in Richardson's definition requires denying the obvious—that there is always some purely formal sense in which all options, including incommensurably valuable options, can be compared in terms of which has more of a given property. For example, I can say that one option has more of the property of "being likely to be chosen by me" than does the other. Additionally, I can even say that one of the options has more of the property of "being the morally right option" than the other. When deliberating about which is the morally right option to choose, however, it is not useful to ask whether any of the options has these above-mentioned properties. When deliberating among options, we seek properties that identify one option as better than another. "Being more likely to be chosen by me" is not something that marks an option as morally better; "being the morally right option" is the conclusion that the option is morally better, not a basis for reaching that conclusion. Commensurable properties that moral options share, I maintain, are often simply insufficient to serve as bases for making moral choices.<sup>11</sup>

Deliberatively incommensurable values may be defined as the complement of the set of deliberative values identified in Richardson's definition: When it is impossible to deliberate rationally among options by judging which option has more of some desired property, but it is still possible to deliberate rationally, the objects of deliberation are incommensurably valuable.<sup>12</sup> This characterization of incommensurability, however, is purely negative; it says nothing

---

<sup>10</sup> HENRY S. RICHARDSON, *PRACTICAL REASONING ABOUT FINAL ENDS* 104 (1994).

<sup>11</sup> In an otherwise skeptical discussion of incommensurability, Ruth Chang seems to agree that commensurable properties cannot always serve as the basis of rational moral choice. She says that sometimes "the fact that it is my duty or that I am obligated to choose [a particular alternative] is not plausibly reduced to a comparative fact about the alternatives." Ruth Chang, *Comparison and the Justification of Choice*, 146 U. PA. L. REV. 1569, 1588 (1998).

<sup>12</sup> Here I rely on the standard philosophical idea that incommensurability allows the cognitive response of rational deliberation. See RICHARDSON, *supra* note 10, at 89-103. Joseph Raz provides an alternative, voluntarist view of incommensurability, perhaps more familiar in the legal literature, according to which responding to incommensurability often requires an act of brute "will." See Joseph Raz, *Incommensurability and Agency*, in *INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON*, *supra* note 4, at 110, 127 (arguing that the "will" plays an independent role in "commensurating value"). Because adjudicating between cognitive and voluntarist accounts of incommensurability is outside the scope of this Article, I will align myself with cognitivism.

about the nature of incommensurable values except that they differ from commensurable values. It is hard to make a meaningful general statement about incommensurable values because there are many different sources of incommensurability. One frequently discussed source is the plurality and diversity of legitimate moral concerns.<sup>13</sup> For example, a town may confront a choice as to whether to devote its small tax surplus to refurbishing a historical site or to renovating a homeless shelter. Although each option involves real value, it is doubtful that there exists some value (or values) the options share such that we might choose between the options by determining which one possesses more of that value.

When the town chooses between refurbishing a historical site and renovating a homeless shelter, it seems to confront a hard or even a tragic choice, because, no matter which construction option the town embraces, a deserving party loses, and a legitimate value may be compromised. Tragedy is sensational, and it is no wonder that legal scholars discussing incommensurability focus on it.<sup>14</sup> If one accepts, however, the definition of incommensurability I endorsed earlier, which provides that one chooses among incommensurables if the concept of "more value" cannot serve as the basis for choosing among options,<sup>15</sup> then one must recognize instances of incommensurability that involve no hard choices and no tragedy. In some important moral choices, I will suggest, the pivotal issue, and hence the basis for choice, is not which option provides more value, but whether either or both options provide morally legitimate value. Such value inheres in traditional deontological notions such as respect for autonomy and respect for individual rights. The hard deliberative work often lies in assessing the moral legitimacy of the options in these terms; once it is resolved, the choice among options may become simple or even trivial. One option may be so devoid of moral legitimacy that it ceases to be a contender; an option that appeared illegitimate or tainted may turn out on analysis to be perfectly acceptable. Traditional deontological notions, such as respect for individual autonomy and respect for individual rights, are pivotal in determining the moral legitimacy

---

<sup>13</sup> See STOCKER, *supra* note 7, at 282 (noting that although there may be one final end sought via the incommensurabilist decisionmaking process, there will often exist many means to achieve that one end, thus expanding the realm of moral concerns).

<sup>14</sup> See Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 859 (1994) (asserting that "recognition of incommensurability is necessary to keep alive the sense of tragedy").

<sup>15</sup> See *supra* note 12 and accompanying text.

of an option and must be accommodated in moral and legal decision-making, but their relevance cannot be understood in terms of an aim to produce more of a certain value. Hence, I maintain that the relevance of these notions must be understood in terms of incommensurable value.

Consider a very familiar example of how deontological notions complicate deliberation in ways that make the deliberation process resist analysis in terms of "more value." Suppose that society is at a stage of economic development such that the gross domestic product surely will improve vastly if society can find a few people to perform some tasks that only a slave would perform. Without slavery, however, we may plod along with far fewer goods and a lower gross domestic product. We have two options: society with slavery and society without. How should we think about our choice between them? It does not help to think about the choice as a matter of determining which option provides more value. The slavery option provides a lot of one sort of value: crude economic value, reflected by gross domestic product. The nonslavery option provides another kind of value: social well-being achieved without the taint of wrongful acquisition. We decide which value is worth pursuing by thinking about which value does not violate deontological constraints, not by comparing the magnitude of some further value.<sup>16</sup> We reject slavery because it involves a morally tainted value, not because it involves a lesser quantity of value than does the alternative. The choice between society with slavery and society without slavery is therefore about incommensurables.

I do not wish, however, to deny the possibility of devising a value that formally serves as a basis for comparing options, such as morally untainted economic prosperity. Indeed, one might maintain that we can compare the options of a slave and a nonslave society in terms of how they measure on a scale of untainted prosperity, and that we may then choose between these options by asking which weighs more on a scale measuring this value. In representing the deliberative processes that should actually occur if one were to reason about the acceptability of slavery, however, it is implausible that a significant component

---

<sup>16</sup> A similar view is set forth in Richard Warner, *Excluding Reasons: Impossible Comparisons and the Law*, 15 OXFORD J. LEGAL STUD. 431, 431-32 (1995). Warner suggests that sometimes law denies the status of legally relevant reasons to certain categories of considerations. *See id.* On Warner's view, as I understand it, one would then say that it is impermissible to compare the utility derived from slavery with the utility achieved without slavery because utility derived from slavery is "excluded" from consideration.

of such representation would include comparing the amounts of "morally untainted value" that occur in slavery and nonslavery. We choose between slavery and nonslavery by determining that slavery is wrong, that it violates human rights, and that any good it involves is not morally considerable. After making these observations, it is of trivial consequence that nonslavery provides more untainted good than does slavery. It follows that the idea of providing more good or more value plays no significant role in deliberation. It is an empty formalization of the moral reasoning that precedes it. Explaining moral deliberation between choices about slavery as an attempt to find the option that involves more untainted value is just as empty as explaining such deliberation in terms of an attempt to find the option that possesses more of the property of being the morally right option: The explanations are formally correct but uninformative and substantively empty.

Here is a clearer, even if uglier, illustration of the same point. Suppose that one hundred sadists are stranded on a desert island with a single terminally ill child. They know that they will be rescued in two weeks and given a drug that permanently eliminates their sadism, but that the child, no matter how well they treat her, will die of natural causes before the rescue. The sadists share an urge to torture the child. If they do not satisfy the urge, their frustration will lead them to commit acts of violence against one another, thereby jeopardizing their lives. Now suppose that, oddly enough, the sadists want to do the right thing. If they were to deliberate about what to do, it would hardly seem productive for them to think in terms of which option—torturing or not torturing—provides the most value. Both options provide value of some sort, but only one sort is a value worth pursuing. In fact, the pleasure that people derive from sadism is so morally tainted that the more "value" people derive from their sadistic actions, the worse the actions seem. In explaining why it is morally unacceptable for the sadists to torture the child, we make no progress by asking whether torture produces more value than its alternatives. The plausible answer to the question of moral acceptability instead requires explaining why value achieved through torture is tainted in ways that preclude it from having moral weight.

In both the case of torture and the case of slavery, the choices at issue are inaptly characterized as choices about which option provides the most value. Choices about torture and slavery are not normal moral choices. Indeed, few people would have to spend time deliberating about torture or slavery to realize that both are wrong. One



might suspect, then, that normal moral choices operate differently—that taint is not a factor, and that the notion that one option provides more value than another is somehow helpful in choosing among such options.

One of my aims in this Article is to show the importance of incommensurable value in mundane moral choices.<sup>17</sup> I think that it is a fundamental misinterpretation of the process of moral deliberation to view it as involving, in normal cases, an attempt to discern which option offers the most value possible, or even more value than the alternatives. Hence, I will examine the role of incommensurables in the context of a very ordinary problem in commercial and legal life: making choices about truth-telling in negotiation. The notion of moral taint arising from the violation of deontological constraints complicates the assessment of lying in negotiation. In determining whether lying is acceptable, we cannot simply ask whether more value derives from lying than from not lying. Instead, we must ask whether the value derived from lying is as worthy of pursuit as its alternatives. I argue that this line of inquiry requires thinking about incommensurables.

## II. LYING IN NEGOTIATION: A COMMENSURABILIST INTERPRETATION

In an influential article, James J. White not only discusses his moral qualms about lawyers who lie in negotiation, but also acknowledges the legality of some immoral lying.<sup>18</sup> In this Part, I examine one plausible interpretation of White's view, which attributes to him an analysis of the relevant law in terms of commensurable values.

Why should the law allow lies that morality prohibits? Sometimes, White suggests, there is little choice. He provides an example in which a lawyer, negotiating on behalf of his client, is asked a question by opposing counsel:

Assume that the defendant has instructed his lawyer to accept any settlement offer under \$100,000. Having received that instruction, how does the defendant's lawyer respond to the plaintiff's question, "I think

---

<sup>17</sup> See also Alan Strudler, *Moral Complexity in the Law of Nondisclosure*, 45 UCLA L. REV. 337, 338 (1997) (stressing the necessity of deontological theory in understanding ordinary moral problems).

<sup>18</sup> See James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926, 926-27 (discussing the difficulty of enacting acceptable rules to require honesty in negotiations). White is largely concerned with issues of professional responsibility and not actions for fraud, but his arguments can be easily extended to cover fraud.

\$90,000 will settle this case. Will your client give \$90,000?" Do you see the dilemma that question poses for the defense lawyer? It calls for information that would not have to be disclosed. A truthful answer to it concludes the negotiation and dashes any possibility of negotiating a lower settlement even in circumstances in which the plaintiff might be willing to accept half of \$90,000. Even a moment's hesitation in response to the question may be a nonverbal communication to a clever plaintiff's lawyer that the defendant has given such authority. Yet a negative response is a lie.

It is no answer that a clever lawyer will answer all such questions about authority by refusing to answer them, nor is it an answer that some lawyers will be clever enough to tell their clients not to grant them authority to accept a given sum until the final stages in negotiation. Most of us are not that careful or that clever. Few will routinely refuse to answer such questions in cases in which the client has granted a much lower limit than that discussed by the other party, for in that case an honest answer about the absence of authority is a quick and effective method of changing the opponent's settling point, and it is one that few of us will forego when our authority is far below that requested by the other party. Thus despite the fact that a clever negotiator can avoid having to lie or to reveal his settling point, many lawyers, perhaps most, will sometime be forced by such a question either to lie or to reveal that they have been granted such authority by saying so or by their silence in response to a direct question.<sup>19</sup>

Despite the fact that lying about reservation prices is morally wrong in this case, White maintains, nothing illegal occurs because the "law . . . recognize[s] the bounds of its control over human behavior."<sup>20</sup> White contends that when a lawyer lies about her client's reservation price, it is at most legally, but not morally, acceptable. I call this contention the "normative discontinuity thesis," because it insists upon a substantial separation between the legality and morality of deception among lawyers. The normative discontinuity thesis offers a bleak and overly pessimistic portrait of the ethics of lawyers, suggesting that it is a morally regrettable fact that lawyers often lie about reservation prices.

I maintain that lawyers' lies about reservation prices are often benign, and that it is a mistake, encouraged by commensurabilist models of reasoning, to follow the normative discontinuity thesis in supposing that law and morality diverge on the acceptability of these lies. Still, I do not wish to assert that all lies about reservation prices are morally benign. When an experienced used car salesperson lies

---

<sup>19</sup> *Id.* at 932-33.

<sup>20</sup> *Id.* at 934.

about her reservation price to a naive young person, for example, I have no doubt that these lies are exploitative and morally wrong, even though they are not legally fraudulent. Thus, in many negotiations in which an unsophisticated party is the victim of a lie about her bargaining opponent's reservation price, the law does not treat the lies as fraudulent. In such cases, law and morality diverge, and some counterpart to the normative discontinuity thesis obtains. My aim in this Part is not to argue that law never departs from morality, but rather to explore how the normative discontinuity thesis, which concerns only lies that lawyers tell each other, exaggerates the extent to which law departs from morality and distorts the moral evaluation of some negotiation behavior.

Why does White believe that there is a difference between the requirements of law and morality with regard to lawyers' lies about reservation prices? Unfortunately, his interests rest in other issues, and he offers no rationale for the distinction beyond asserting that, in these matters, the "law . . . recognize[s] the bounds of its control over human behavior."<sup>21</sup> That statement leaves unanswered the question as to why law should recognize these "bounds." More than one explanation is possible. One might, for example, appeal to moral principle, holding that because of proof problems, laws prohibiting lies about reservation prices cannot be enforced fairly. For reasons beyond the scope of this Article, I am not persuaded by this appeal to principle.<sup>22</sup> Hence, I will develop a different rationale, suggested by legal economists, as to why one should think that lying about reservation prices is properly beyond the law's control. I believe that this economic account provides the most natural support for White's normative discontinuity thesis.<sup>23</sup>

Legal economists identify obstacles that stand in the way of an efficient and hence, in their eyes, a socially valuable law of fraud. They argue that law should embrace an antifraud rule only when doing so produces "the optimal amount of fraud," which represents a more fa-

---

<sup>21</sup> *Id.*

<sup>22</sup> This argument does not succeed because it seems, at most, to show that we should allow fraud-based actions for lying about reservation prices only on those rare occasions when there is reliable proof of the lie. Additionally, the argument leaves open the possibility that it might be socially valuable to classify lies about reservation prices as fraudulent so that we could encourage well-intentioned lawyers not to lie, or so that we could prosecute relevant cases when reliable evidence becomes available.

<sup>23</sup> I should emphasize that nothing in White's text suggests that he would accept or reject this defense of his position. Although I find this defense to be flawed, I regard it as the strongest defense available to White.

avorable balance between the benefits and costs of fraud than would be produced in the absence of such a rule.<sup>24</sup> This argument easily can be extended to lies about reservation prices. Ordinarily, it is not possible to prove that someone lied about her reservation price, because facts concerning reservation prices are only thoughts inside a person's head. Although there is no reason to doubt that there are objective facts about a person's thoughts and that such behavior provides some evidence about those facts, it is rarely feasible to obtain evidence sufficient to prove that a negotiator held a particular reservation price at the time of her negotiation. Even if a person reduces her attitudes toward her reservation price to written form, or otherwise communicates these attitudes to a third party in such a way as to create comparatively reliable external evidence, that action may not suffice as proof about her reservation price, because, in her own mind, she may have changed her reservation price once the negotiation commenced. Any attempt nonetheless to establish facts about a person's reservation price would be expensive because it would trigger court costs, legal fees, evidence gathering costs, and the like. Of course, the anticipated benefit of a law against fraud is a lower incidence of lying, as prospective liars would be deterred by the threat of being caught. As we have seen, however, catching those liars is no sure thing. So, on an economic account, the costs of monitoring and enforcement will yield few or no benefits. To make matters worse, from an economic point of view, even if we could credibly threaten to catch those who lie about reservation prices, a rule prohibiting lies about reservation prices seems even less attractive than rules prohibiting other lies. Thus, it seems doubtful that any deterrence would be achieved or that a rule prohibiting lies about reservation prices would be economically beneficial. Loss that derives from misrepresentation in negotiation is in allocational efficiency—misrepresentations about goods may cause a person to buy something that she does not really want. It is not obvious, however, that lies about reservation prices can have that effect. If someone buys something after being lied to about a reservation price, she gets what she wants at a price she finds acceptable, even if she would have preferred a better price. Because the parties to a negotiation thus get what they want, goods end up in the hands of those who value them most, and no allocational inefficiency

---

<sup>24</sup> See Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J.L. & ECON. 67, 68 (1973) (suggesting that the government should not intervene to prevent fraud unless regulation would "cause an increase in [social] welfare sufficient to pay [the] cost" of regulation).

occurs. Thus, from an economic point of view, it is hard to see why one would bother discouraging lies about reservation prices. Doing so is costly, does not achieve its deterrence objective, and would not be economically beneficial even if it did achieve that objective.

In its broadest contours, the economic account presents a simple and familiar commensurabilist picture. The task of the legal system is to create the greatest possible net social good.<sup>25</sup> In assessing any particular legal rule, one must consider the good likely to be produced

---

<sup>25</sup> The picture I sketch omits details important to legal economists. For example, legal economists tend to be skeptical about the possibility of interpersonal comparisons of utility, and they suggest that concerns about producing good should be tempered with concerns for equitable distribution. See, e.g., PAUL A. SAMUELSON, FOUNDATIONS OF ECONOMIC ANALYSIS 90-92 (enlarged ed. 1983) (observing that economists are reticent to recognize the possibility of interpersonal comparisons of utility); PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 140-41 (15th ed. 1995) (recognizing the need to temper efficiency with equity in economics). But cf. Heidi Li Feldman, *Harm and Money: Against the Insurance Theory of Tort Compensation*, 75 TEX. L. REV. 1567, 1600 (discussing the neoclassical economists' view on terms of preference versus need). Feldman states:

Neoclassical economics broke with its predecessor, classical utilitarianism, when economists substituted preference-satisfaction for utility-maximization as the goal of social welfare policy. The switch was motivated by a desire to escape the evaluations latent in interpersonal utility comparisons. Because pleasure is a purely experiential state, an outsider comparing two others' pleasure must evaluate both the quality and quantity of their respective experience, placing the others' pleasure on a single scale devised by the outsider. Observing the choices others make is, in contrast, primarily a descriptive enterprise.

*Id.* The problem of interpersonal comparisons of utility makes it hard to apply a notion of aggregation—seemingly a prerequisite for determining whether a particular state of society has “more good” than another. If we cannot compare meaningfully one person's utility to another's, then we cannot add their utilities together, and the very idea that one social state contains more utility than another becomes problematic. See Donald Davidson, *Judging Interpersonal Interests*, in FOUNDATIONS OF SOCIAL CHOICE THEORY 195 (Jon Elster & Aanund Hylland eds., 1989) (discussing the difficulty in comparing the interests of two or more people). Legal economists have their own ingenious strategies for dealing with those issues. Instead of talking about one social state being better than another because it contains more utility and hence more good than the other, they talk about one state possessing superior efficiency characteristics to another because the better state in some sense optimizes the satisfaction of preferences. See DANIEL M. HAUSMAN & MICHAEL S. MCPHERSON, ECONOMIC ANALYSIS AND MORAL PHILOSOPHY 71-83 (1996) (discussing various theories of welfare). As even legal economists recognize, however, unless the satisfaction of preferences is somehow connected with the production of greater utility or more good, it is not at all clear why, on an economic account, it is normatively important. Legal economists therefore recommend, other things being equal, striving for states that contain the most good or utility, even though in practice it may be necessary to allow efficiency to stand as a surrogate for goodness or utility and to temper concerns for creating more social utility or more goodness with distributive concerns. For the legal economist, then, there is always a presumption of picking a legal rule that produces the most net good.

by its enforcement and discount the value of that good by the prospect that enforcement will produce harm. The problem with a law prohibiting lies is that the law's alternatives produce more net good than it does. So, speaking in economic terms, we should not legally prohibit lies about reservation prices. If we couple that conclusion with White's assumption that lying about reservation prices is morally wrong, we get the normative discontinuity thesis, which provides that if a lawyer lies about her client's reservation prices when speaking to another lawyer, such a lie may be legally, but not morally, acceptable.

### III. PROBLEMS WITH THE NORMATIVE DISCONTINUITY THESIS

In this Part, I give reasons to be skeptical about the normative discontinuity thesis. I also dispute the kind of economic argument offered in support of the normative discontinuity thesis in the previous Part.

Use of an economic account to support the normative discontinuity thesis relies on a problematic commensurabilist assumption: When deliberating about the norms governing options in deception, it helps to compare options and look for that which provides the most value. This assumption is problematic for the case of lies about reservation prices. Before looking for the option that creates the most value, it is necessary to make a decision as to which things count as valuable. In the case of assessing rules about lies regarding reservation prices, the importance of a decision as to which things count as valuable looms so large that it may resolve the normative discontinuity thesis and leave no room for comparing options. Depending on one's position regarding the morality of lying, one may take starkly different positions on how the law should respond to lying about reservation prices. First, one may think that because lying about reservation prices is a serious moral wrong, the law should deem it fraudulent. Second, one may think that lying about reservation prices is not a moral wrong, and that such lying should not be treated as legally wrongful. If one embraces either of these positions, then one thinks that there is no essential tension between what morality requires and what the law should require. Neither position can be lightly dismissed.

Suppose that one thinks that it is terribly wrong to lie about reservation prices because all lies, no matter how small, are, as a matter of principle, morally wrong. One who holds this view may, following

Kant, see any lie as rendering its utterer "contemptible," no matter what the material consequences of the lie.<sup>26</sup> Similarly, one may, following Augustine, regard lies as wrong in principle, no more justifiable by virtue of their consequences than would be other evil actions, such as rape and murder, which are actions that may be worse than lies, but that are no less clearly evil.<sup>27</sup> If lies are evil in those ways, courts may have some reason, rooted in moral principle, to consider agreements made on the basis of such lies as fraudulent. In response to the legal economists' complaint that it is not economically advantageous to make such actions fraudulent, a proponent of moral principle may respond that the mere fact that a law is expensive or awkward to enforce does not mean that it is unjust or otherwise morally undesirable. There are laws outside fraud that seem to corroborate the principled position. Consider an extreme example—laws against the sexual abuse of children. Suppose that enforcement of these laws was terribly costly because many people were falsely accused, families were damaged because accusations of abuse were too often fabricated, and successful prosecution of offenders was rare because of proof problems. Even if these tragic problems affected enforcement of child-abuse laws, one reasonably might find repugnant any system of law that did not articulate clearly the criminal status of child abuse.

In assessing the relevance of the child-abuse case to fraud about reservation prices, one should not be distracted by the fact that child abuse is plainly morally far worse and more easily proven than mere lies about reservation prices. A wrong may be considerable even if its gravity is slight when compared to child abuse. Indeed, a law against a wrong such as lying may be practically valuable even if not broadly

---

<sup>26</sup> IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 225-26 (Mary Gregor trans., Cambridge Univ. Press 1991) (1797). Kant explains his position as follows:

A [human being] who does not himself believe what he tells another . . . has even less worth than if he were a mere thing; for a thing, because it is something real and given, has the property of being serviceable so that another can put it to some use. But communication of one's thoughts to someone through words that yet (intentionally) contain the contrary of what the speaker thinks on the subject is an end that is directly opposed to the natural purposiveness of the speaker's capacity to communicate his thoughts, and is thus a renunciation by the speaker of his personality, and such a speaker is a mere deceptive appearance of a [human being], not a [human being] himself.

*Id.*

<sup>27</sup> See Saint Augustine, *Lying*, in 16 *THE FATHERS OF THE CHURCH* 45, 109 (Roy J. Deferrari ed. & Sister Mary Sarah Muldowney et al. trans., 1952) ("Whoever thinks, moreover, that there is any kind of lie which is not a sin deceives himself sadly . . .").

enforced: It may motivate a person by appeal to her desire to do what is right rather than her fear that it will be enforced against her. Recall White's lawyer contemplating whether to lie to opposing counsel.<sup>28</sup> A law declaring that such lying would be fraudulent may be practically valuable for this lawyer. She may invoke the law in an argument against her client to defend a nonlying posture. Indeed, such a law may prove useful in a person's own private deliberation. If she otherwise respects the legal system but feels uncertain about the ethics of lying about reservation prices, then the relevant law may have persuasive value for her.

Thus, one way to doubt the normative discontinuity thesis is to insist that a just system of law would resemble morality in that both would abhor lying generally, and, therefore, that both would contain a prohibition against lying about reservation prices. Another approach, which I will defend, is to deny the normative discontinuity thesis by arguing that just systems of law and morality are in fact consistent when it comes to a lawyer lying about her reservation prices, because both permit such lying. The idea here is simply to deny that it must be morally wrong for a lawyer to lie about her client's reservation prices. The plausibility of this approach is suggested by Benjamin Constant, who responded to Kant's view that it is always wrong to lie by asserting that telling the truth is a duty one has only toward a person who has a right to the truth and that a person who improperly insists on getting information from another has no right to the truth.<sup>29</sup> Charles P. Curtis takes a line similar to Constant's, asserting that it is not wrong to lie when doing so would protect a lawyer's client from losing sole rightful possession of a valuable truth.<sup>30</sup> In sanctioning lies, Constant and Curtis do not differ from even the most conservative thinkers, including Kant and Augustine, regarding the idea that some deception is morally acceptable. They differ instead on whether it is acceptable to deceive by action (lying) as well as by omission (silence). The conservative thinkers favor the latter but not the former. Constant and Curtis remind us of a recalcitrant but fundamental moral question: What makes it morally wrong to lie?

---

<sup>28</sup> See White, *supra* note 18, at 931-35 (presenting five hypothetical bargaining situations to highlight the pitfalls facing lawyers in negotiations).

<sup>29</sup> See Jules Vuillemin, *On Lying: Kant and Benjamin Constant*, 73 KANT-STUDIEN 413, 415 (1982) (examining Constant's asserted connection between duty and right).

<sup>30</sup> See Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 8 (1951) (asserting a lawyer's duty to lie in limited circumstances). The reader should note that I do not mean to agree with Curtis about the scope of acceptable lying.



Given the analysis of incommensurability offered in Part I, it seems plain that answering the question of whether it is wrong to lie involves assessing the possibility that we confront options of incommensurable value. Remember that a choice concerns incommensurable goods if, but not only if, one may not rationally choose between options by determining which involves more good, but instead must determine which option involves a good worth pursuing or a morally untainted good. Now consider a lie about reservation prices that is expected to yield bargaining and, hence, monetary advantages. Such lying provides more of a good (money) than does not lying. But knowing that lying provides more of that good does not take one far in solving the deliberative problem about whether one may lie. To solve that problem, one must also consider whether money gained by lying is wrongly acquired and thereby morally tainted—in other words, whether acquiring it through lying violates some deontological norm. Money gained through lying in negotiation and money gained without lying are at least potentially incommensurable goods in just the same sense that prosperity gained through the institution of slavery and prosperity gained without slavery are incommensurable goods.

So far, we have found reasons to be skeptical about the normative discontinuity thesis and reasons to be skeptical about the commensurabilist assumption in the economic account that would support the normative discontinuity thesis. Perhaps lying about reservation prices need not be so bad after all, and perhaps we would do better to think about these issues in ways that do not assume the commensurability of value. In the next four Parts, I examine aspects of the structure of normative reasoning about lying, argue that this reasoning involves thinking about incommensurables, and defend some lying.<sup>31</sup>

---

<sup>31</sup> For reasons of space and because of my judgment about their comparative plausibility, I ignore several general arguments against lying. See Geoffrey M. Peters, *The Use of Lies in Negotiation*, 48 OHIO ST. L.J. 1, 50 (1987) (arguing that lying is wrong because it is inefficient). I find this line of argument unpersuasive because I see nothing morally wrong with inefficiency. See Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980) (rejecting the social goal of maximization of wealth for its own sake). Mary Catherine Gormally argues that lying is wrong because it violates a semantic rule. See Mary Catherine Gormally, *The Ethical Root of Language*, in LOGIC AND ETHICS 49, 53 (Peter Geach ed., 1991). I see nothing morally wrong with violating a semantic rule, however.

## IV. LYING AND AUTONOMY

One tempting deontological argument against lying appeals to autonomy—the idea, very roughly, that a lie interferes with its victim's rational deliberation, that it robs a person of her prospects for making certain rational choices about what to do or what to believe, and that such interference is presumptively wrong in ways that cannot be rebutted by considerations of personal gain.<sup>32</sup> This argument from autonomy is most plausibly attributed to Kant, and has been developed in recent years by several Kantians.<sup>33</sup> I will suggest that the argument from autonomy presents considerations that are relevant to any assessment of a lie, that it suggests the importance of incommensurable values in thinking about lying, and that although it precludes much lying, it does not preclude all lying about reservation prices in negotiation. Arguments from autonomy cannot be understood as relying on the idea that one option will provide more good than another. Instead they express the idea that one option involves a good that is tainted and hence not relevant to evaluation. If my argument succeeds, it will support skepticism about White's normative discontinuity thesis. My argument shows that the central argument used to demonstrate the wrongness of lying does not imply the wrongness of a lawyer lying about reservation prices, and, hence, that there is no essential tension between the law and ethics of truth-telling in this area.

Kantian proponents of the argument from autonomy do not offer many exceptions to the principle that lying is wrong.<sup>34</sup> The most commonly discussed exceptions involve using untruth to defend the innocent from harm, either on paternalistic grounds or because in-

---

<sup>32</sup> For a good historical discussion of the relationship between Kantian notions of autonomy and the ethics of deception, see MacIntyre, *supra* note 3, at 336, which distinguishes the tradition in which a lie is considered an offense against trust, which may sometimes be justified, from the tradition that considers a lie an offense against truth, which can never be justified. For a thorough discussion of the Kantian notion of autonomy, see J.B. SCHNEEWIND, *THE INVENTION OF AUTONOMY* (1998).

<sup>33</sup> See CHARLES FRIED, *RIGHT AND WRONG* 54-78 (1978) (arguing that lying is wrong because it interferes with our capacity for judgment); ONORA O'NEILL, *CONSTRUCTIONS OF REASON: EXPLORATIONS OF KANT'S PRACTICAL PHILOSOPHY* 105-25 (1989) (stating that actual consent can be achieved only through a recognition of, and respect for, people's limitations); Christine M. Korsgaard, *Two Arguments Against Lying*, 2 *ARGUMENTATION* 27 (1988).

<sup>34</sup> See MacIntyre, *supra* note 3, at 350 (observing that on Kantian principles, lying is morally acceptable only on those very rare occasions in which lying is morally required).

nocent persons are threatened by wrongdoers.<sup>35</sup> Consider a paternalistic case. A man is struggling to recover from heart surgery. Bad news could trigger a heart attack, literally threatening his life. His son just died in a plane crash. He asks you about his son, and you know that if you tell him the truth, it likely would prove fatal. Arguably you may lie to him because doing so would save his life, and the untruth is something that can be cured later, when his health returns.<sup>36</sup> Consider another case in which lying may seem acceptable even to someone who thinks that, because of concerns about autonomy, lying ordinarily is wrong. A prospective murderer stands at your front door. She asks you the location of her intended victim. You lie to her in order to save her intended victim's life. In both of these cases you lie, not to obtain an advantage, but to protect an innocent person from harm. Some autonomy theorists grudgingly concede the acceptability of lying in these circumstances because it seems necessary to protect autonomy.<sup>37</sup> Although these theorists seem willing to permit lies that protect threatened autonomy because they see these permissions as somehow consistent with the value of autonomy itself, they are reluctant to sanction lying for other moral reasons. There is no suggestion that it might be morally permissible—consistent with respect for individual autonomy—to lie for personal gain. But, of course, the purpose of lying about reservation prices is to secure personal gain. Why think that lying for personal gain ordinarily compromises personal autonomy? A credible answer to this question requires some grasp of the notion of autonomy.

Autonomy is not a simple notion,<sup>38</sup> but it plainly includes the idea of voluntariness since an involuntary action or choice is not autonomous.<sup>39</sup> Lying may compromise autonomy because it undercuts the voluntariness of the action or choice of its victim. For example, if I lie to you about the contents of some liquid you hold in your hand, telling you that it is water when it is in fact poison, and you serve the liq-

---

<sup>35</sup> See *id.* at 335-61.

<sup>36</sup> See THOMAS E. HILL, JR., *AUTONOMY AND SELF-RESPECT* 37-42 (1991) (noting that if you believe in the "right of autonomy," a lie may be justified only if it averts a disaster significant enough to override the right).

<sup>37</sup> See, e.g., CHRISTINE M. KORSGAARD, *CREATING THE KINGDOM OF ENDS* 133-58 (1996) (arguing that actions that would otherwise be wrong may be justified not merely because they prevent bad occurrences, but rather because they protect against interference with the proper exercise of individual liberty).

<sup>38</sup> For an explication of some of the complexities of autonomy, see JOEL FEINBERG, *HARM TO SELF* 27-51 (1986).

<sup>39</sup> See *id.* at 113-16.

aid to your guests, then you may poison your guests, but you do not voluntarily do so. My lie, coupled with the fact that you believe it, renders your action involuntary.

Even if lying sometimes undercuts voluntariness, it hardly follows that it always does so. Sometimes a lie does not undercut voluntariness because it fails to convince its intended victim. Although such a lie may still be wrong because of what it attempts rather than what it achieves, this observation provides no interesting argument against the general claim of a link between lying and undercutting autonomy. Instead, it suggests the qualification that only "successful" lying undercuts voluntariness and hence autonomy. One might then say that ordinarily the wrongness of lying, whether or not the lies are successful, rests in its attempt to undercut autonomy or perhaps in its imposition of an unreasonable risk of undercutting autonomy.

Does a successful lie always undercut voluntariness? I suggest not. There are lies that do not undercut autonomy even though they succeed in persuading an innocent and competent person. Consider a lie I tell about my reservation price. Suppose that you and I bargain over the sale of my used car, and I lie about my reservation price. I say that I could not accept less than \$5000, when in fact I would happily sell it for \$4500, because I hope that my lie causes you to pay a higher price. Here is why it strikes me that the lie about my reservation price need not jeopardize your autonomy: You have read economic accounts of deception in negotiation.<sup>40</sup> You know that in the bargaining context in which I tell my lie, lying is normal. For you, my statement about a reservation price is therefore mere data from which you may make inferences about my reservation price. It is, after all, your choice whether to believe me. You could choose to be agnostic about my reservation price, dismissing my lie. Your decision about how to proceed in negotiations with me is made difficult by my lie, but a decision might be at the same time difficult and autonomously made. No doubt your decision is not as well-informed as you would like, and I am to blame for that; my lie gives you false information. Still, you are not forced to accept or use the information. You might innocently choose to use it, and, if you do, the choice that you make while relying on that information, at least insofar as you rely on the information, is voluntary.

---

<sup>40</sup> See, e.g., FRANK, *supra* note 2, at 165 (explaining that "[t]he art of bargaining, as most of us eventually learn, is in large part the art of sending misleading messages about" reservation prices).

One might object that the considerations thus far adduced at most show that you, the victim of the lie about my reservation price, are not forced to accept the information contained in the lie—that is, that the decision to accept the information is made voluntarily. If that is all that these considerations show, then lying may still undercut a victim's autonomy in the sense that once a victim of lies accepts bad information, the question will remain whether decisions based on the lies she has been told are therefore involuntary. If one answers this question affirmatively, then one may consistently think that when I lie about my reservation price, it undercuts the voluntariness of your decision to buy my car, or at least the voluntariness of your decision about how much money to offer me. The appeal of this objection derives from the fact that sometimes bad information that comes from a lie does seem to undermine the voluntariness of the action of whoever relies on the lie. In the case of the poisoned drink discussed earlier,<sup>41</sup> for example, a lie transmits bad information that undercuts the voluntariness of one's act of poisoning a guest. If a lie undercuts voluntariness in the case of the poisoned drink, then why not also in the case of the false reservation price?

At least two factors seem to distinguish the reservation price case and the beverage case. First, the harm that occurs as a result of lying in the beverage case is substantially worse than the harm that occurs in the reservation price case. This difference, however, is uninteresting and can be eliminated by supposing that the poison causes severe stomach distress rather than death. Second, and more interestingly, in the reservation price case, but not in the beverage case, one voluntarily accepts a statement that one knows might be a lie. By this, I do not mean to suggest that in the reservation price case one voluntarily believes a statement that one knows to be a lie, but rather that one voluntarily believes a statement about which one knows that there is some real prospect that it is a lie. In the reservation price case, for example, you know there is a possibility that I am lying, and you make an unforced choice to believe me anyway. In the beverage case, you lack such knowledge. There is, then, a difference that matters between the two cases. When one makes a free and informed choice to believe a statement that one knows might well be false, one makes an autonomous choice, and, other things being equal, any choice or action that issues from that choice is also autonomous.

---

<sup>41</sup> See *supra* text following note 39.

My claim is more modest than it may seem. I am not suggesting that if one voluntarily accepts a statement about which one knows that there is some real prospect that the statement is a lie, then one voluntarily assumes the risk that it is a lie. Voluntary assumption of risk is a morally strong notion.<sup>42</sup> If I voluntarily assume the risk that something untoward might happen, and it does happen, then I lose the right to complain about it. For example, if you post a sign warning that a bridge is dangerous and should not be crossed, and you take every reasonable precaution to keep people off the bridge, but I cross it anyway, then I may have voluntarily assumed the risk that the bridge will collapse, and you may be blameless for injuries I suffer. Beliefs about statements that turn out to be lies do not obviously fit this voluntary-assumption-of-risk model. If you voluntarily believe a proposition that you know might be a lie, and it in fact turns out to be a lie, you may well have been wronged. If, for example, I have lied to you in the past about whether I will repay loans, and I now lie to you and say that I intend to repay this one, then of course the fact that you believe me does not make my lie any less wrong. If you naively rely on my lie, however, you may be responsible for the consequences. If you voluntarily believe my lie, even though you do not voluntarily assume the risk that I am lying, then you must take responsibility for the consequences of your choice—that is, you must take responsibility for the fact that because I did not repay my loan, you do not have enough money to take care of your debts. Thus, one might be the wrongful victim of a lie but not have one's voluntariness impinged upon. This is important because it leaves open the possibility that lying, even though it does not impinge on voluntariness, is still wrong. In Part VII of this Article, I explore ways to explain what makes lying wrong apart from conflicts with the values of autonomy and voluntariness.

So far I have merely sketched some reasons to think that lying need not impugn autonomy. A stronger case can be built by showing the failure of the leading arguments for the view that lying necessarily impugns autonomy.

---

<sup>42</sup> See FEINBERG, *supra* note 38, at 98-142 (discussing voluntariness and assumption of risk); see also Alan Strudler & David Wasserman, *The First Dogma of Deontology: The Doctrine of Doing and Allowing and the Notion of a Say*, 80 PHIL. STUD. 51, 56-60 (1995) (defining a strong moral right as one that cannot be overridden under any circumstances).

## V. LYING AS CONTROLLING THE VICTIM'S WILL

Writers trying to make sense of Kant have provided some of the best recent discussions about the connection between autonomy and the wrongness of lying. Barbara Herman's statement of the Kantian autonomy-based objection to lying is particularly instructive:

Using deceit to control access to facts, one moves someone to deliberate on grounds she believes (falsely) she has assessed on their merits. When deceit is effective, it causes the victim to have the beliefs necessary for her to adopt ends and choose actions that serve the deceiver's purposes. The victim's will becomes an instrument of the deceiver's purposes—under the deceiver's indirect causal control.<sup>43</sup>

The moral problem with lying, by Herman's account, is that lying allows the liar to control the victim's will. Although this sort of control sounds repugnant, it is not obvious why the control that occurs in lying is any worse than the control that occurs in certain other morally acceptable ways of affecting people's decisionmaking.

No Kantian need suggest that there would be anything wrong with trying to affect another person's will or decisionmaking by reasoning with her. Herman should not classify an attempt to change a person's mind by sincerely reasoning with her as trying to "control a person's will." But there are also ways, seemingly legitimate, in which one may try to affect another's will by putting pressure on her, or by making her decision otherwise difficult. In competitive bargaining, for example, I may tell you, in order to force your hand, that if you do not answer my offer within two days, the deal is off. Or, I may refuse to allow you to have an advisor with you when we negotiate the terms of our agreement, or insist that we bargain at "my place" rather than yours, knowing that you tend to bargain less fiercely when you do not have "home-court advantage." Sometimes, of course, such actions against you would be unconscionable attempts to gain an unfair advantage, but not always. Take the home-court advantage scenario as applied to a car purchase. Suppose that we possess enough mutual knowledge about our psychological makeups to be sure that whoever succeeds in securing home-court advantage will get the better price. Suppose also that it is only practical to meet in your place or mine, that we both know the range of fair prices for the car being sold, and that the car will be sold only within that range. If I agree to bargain at your office, then I am giving you money as to which I have just as

---

<sup>43</sup> BARBARA HERMAN, *THE PRACTICE OF MORAL JUDGMENT* 228 (1993).

much right. Either I will feel the pressure, and give up this money, or you will. In this situation, there is nothing wrong with my trying to secure home-court advantage, even though if I do, I will put pressure on you that will affect your decisionmaking processes. That is, I will attempt causally to affect your will, and to do so through means that operate quite nonrationally.

If I secure home-court advantage, I put pressure on you. If it works, I will alter your decisionmaking, and hence, in Herman's terms, indirectly control your will.<sup>44</sup> If indirectly controlling your decisionmaking is not necessarily wrong when it occurs as a bargaining tactic such as using home-court advantage, why must it be wrong when it takes the form of a lie in a negotiation? That is, if it is acceptable for me to degrade the quality of your autonomous decisionmaking by tactics that impose time constraints and the like, why is it not also acceptable for me to degrade the quality of your decisionmaking by lying, at least as long as such lies do not undermine the prospect of your getting an acceptable deal? To answer these questions, it seems that we need more than Herman's assertion that lying is wrong because it indirectly controls the will. We also need, at a minimum, an explanation of what is wrong about the way in which lying indirectly controls the will and how that wrong differs from morally acceptable means of exerting pressure and affecting decisionmaking processes.

## VI. LYING AS UNDERMINING FREEDOM TO ASSENT

Perhaps lying seems like a worse way to control another person's will than does exploiting home-court advantage because lying involves a distinctive indirect component. When I lie to you, I hide what I am doing. When I apply high-pressure tactics, however, I may be open about it, thus giving you a chance to reason with me about what I am doing. Because facts about my use of "hardball" pressure tactics are accessible to you for use in your rational deliberation, it may seem that using such tactics is more respectful of your rationality, and hence your capacity for autonomous decisionmaking, than is lying.

An argument very similar to the idea that the distinctive wrongness of lying stems from its attempt to control its victim without reasoning is made by Christine Korsgaard. Giving credit for the idea to Kant,<sup>45</sup> Korsgaard analyzes the wrongness of lying by noting that when

---

<sup>44</sup> See *id.*

<sup>45</sup> See KORSGAARD, *supra* note 37, at 138.



one lies to a person, one treats her in a way as to which she cannot assent.<sup>46</sup> For example, by lying, one aims to do something to another that the other does not know about. In fact, the very nature of a lie is something kept secret from its victim. Korsgaard argues that it is wrong to treat people in ways to which they cannot assent, and thus, lying is always and inherently wrong:

People cannot *assent* to a way of acting when they are given no chance to do so. The most obvious instance of this is when coercion is used. But it is also true of deception: the victim of the false promise cannot assent to it because he doesn't know it is what he is being offered. But even when the victim of such conduct does happen to know what is going on, there is a sense in which he cannot assent to it. Suppose, for example, that you come to me and ask to borrow some money, falsely promising to pay it back next week, and suppose that by some chance I know perfectly well that your promise is a lie. Suppose also that I have the same end you do, in the sense that I want you to have the money, so that I turn the money over to you anyway. Now here I have the same end that you do, and I tolerate your attempts to deceive me to the extent that they do not prevent my giving you the money. Even in this case, I cannot really assent to the transaction *you* propose. We can imagine the case in a number of different ways. If I call your bluff openly and say "never mind that nonsense, just take this money" then what I am doing is not accepting a false promise, but giving you a handout, and scorning your promise. The nature of the transaction is changed: now it is not a promise but a handout. If I don't call you on it, but keep my own counsel, it is still the same. I am not accepting a false promise. In this case what I am doing is *pretending* to accept your false promise. . . . My knowledge of what is going on makes it *impossible* for me to accept the deceitful promise in the ordinary way.<sup>47</sup>

In this very rich passage, Korsgaard makes at least two important and interesting claims. First, because of the logic involved in making statements, it is not possible for a person to assent to being told a lie. Second, it is always wrong to treat a person in such a way that she cannot give her assent to being treated in that way.

It is hard to doubt Korsgaard's claim about the moral importance of the possibility for assent. A normal condition for most morally acceptable actions is that when you do something that might have an adverse impact on somebody's interests, that person can at least discuss it with you. In contrast, if I lie to a person, my intent is that she not know my plans. Such lying seems like a denial of her right to

---

<sup>46</sup> *See id.*

<sup>47</sup> *Id.* at 138-39. For a more in-depth discussion of Kant's philosophy and the right to lie, see *id.* at 133-58.

have a say in what happens in her life. Korsgaard's possibility-for-assent condition seems useful in distinguishing between lying and other ways of controlling the will of one's victim. If, in hard bargaining, I insist that I get home-court advantage, then you can at least discuss that prospect with me. The effect of home-court advantage also will be sufficiently transparent so that you might attempt to develop a rational strategy for dealing with it. Therefore, in the case of a demand for home-court advantage, there seems to exist a morally relevant possibility for assent. Korsgaard suggests, however, that it is not similarly possible to assent to lies, because in order to assent, one must know that one is being lied to, and if one does know, then a successful lie becomes impossible.

I do not think that Korsgaard's possibility-for-assent argument works as an explanation of why lying is sometimes wrong. It seems too easy to find ways in which one might assent to being told lies, particularly if the lie is told obliquely.<sup>48</sup> Consider the following. I propose to sell you a car, and I give you a choice. Either I will tell you the complete truth about the car and sell it to you for \$5000, or you will grant me the right to lie about a part, damage to which would be regarded by a court as a nonmaterial issue, in which case I will sell it to you for \$4600, which, I guarantee, is within the range of the fair market price of the car. You are free to cross-examine me about the car and take it wherever you like for an inspection. There may be good reasons for me to offer a transaction of this sort. Suppose I know that the air-conditioning system would cost \$1500 to replace and that although it probably will last for many years, I also know that it might not and that you would tend to exaggerate grossly the economic disvalue attaching to the risk that the system will require replacement. Because I believe that in order for me to get a good price from you, you cannot believe that the air conditioner is at risk, I want to lie. I therefore buy your permission to lie about something or other, but I do not tell you about exactly what I will lie. Now, it does not seem that the mere fact that you have given me this permission will undercut the value of my lie. If I am a good enough liar, I can get away with it. Moreover, it seems plausible enough that you may assent to my lying. You may think that it is worth dealing with the risk of the lie because the car is within fair-market value, and you will have a chance to uncover the lie.

---

<sup>48</sup> See Jonathan E. Adler, *Lying, Deceiving, or Falsely Implicating*, 94 J. PHIL. 435, 440-41 (1997) (disagreeing with Korsgaard's argument by showing situations in which one might assent to being told a lie).

A relevant and similar right to lie is now commonly defended in the jurisprudence of corporations.<sup>49</sup> Defenders of lying argue that when executives, acting on behalf of a corporation, contemplate a major transaction, such as the acquisition of another corporation, they should be granted a right to lie about their intentions, at least when such lies protect the interests of their shareholders by limiting speculation that might increase the price of stock in the corporation to be acquired. Moreover, these defenders of lying argue that shareholders sometimes should be permitted to vote to give executives the right to lie to them. At this point, I do not want to consider either the moral defensibility or the practical wisdom of an agreement to allow a car seller to lie to her prospective buyers or executives to lie to shareholders and the general public. I would rather suggest that these agreements seem like ones that could, in fact, be made and executed.

In a puzzling footnote, Korsgaard herself seems to recognize that one might assent to the possibility of being lied to in the kinds of scenarios I have sketched:

Sometimes it is objected that someone could assent to being lied to in advance of the actual occasion of the lie, and that in such a case the deception might still succeed. One can therefore agree to be deceived. I think it depends what circumstances are envisioned. I can certainly agree to remain uninformed about something, but this is not the same as agreeing to be deceived. For example, I could say to my doctor: "Don't tell me if I am fatally ill, even if I ask." But if I then do ask the doctor whether I am fatally ill, I cannot be certain whether she will answer me truthfully. Perhaps what's being envisioned is that I simply agree to be lied to, but not about anything in particular. Will I then trust the person with whom I have made this odd agreement?<sup>50</sup>

Korsgaard believes that once a person assents to being told a lie—for example, regarding whether her physician believes that the person is gravely ill—the person will no longer trust the potential liar and hence will not believe the lies the potential liar is permitted to make. If Korsgaard is making an empirical claim, it seems plainly false. People sometimes believe liars even when they only have bad

---

<sup>49</sup> See Jonathan R. Macey & Geoffrey P. Miller, *Good Finance, Bad Economics: An Analysis of the Fraud-on-the-Market Theory*, 42 STAN. L. REV. 1059, 1069 (1990) (suggesting that it is legally acceptable under a "fiduciary duty analysis" for a corporation publicly and falsely to deny involvement in merger negotiations when "a rational shareholder group would have endorsed [this] strategy"); see also Ian Ayres, *Back to Basics: Regulating How Corporations Speak to the Market*, 77 VA. L. REV. 945, 997 (1991) (arguing that there is a default "fiduciary duty to tell the truth" that corporations can avoid by contracting "to waive this warranty").

<sup>50</sup> KORSGAARD, *supra* note 37, at 155 n.5.

reasons to do so. Many of us, at times, have believed the words of people whom we have reason to distrust. It is a mark of a good liar that she can persuade a person about quite unlikely propositions, just as it is a mark of a good magician that she can cause us to believe what we should know is not true. In Korsgaard's own physician case, one might need, for irrational reasons, so much to believe that one is healthy that one accepts the physician's lies. Perhaps in her case, the victim of lying behaves irrationally. Indeed, one might even argue that the victim's agreement to be lied to is inherently irrational, that it is irrational for a patient to believe her physician if she has told the physician to lie. If this irrational argument worked, however, it would show merely that one who agrees to be lied to cannot avoid some taint of irrationality; it would not show what Korsgaard needs to prove, namely that one cannot, even if irrationally, give one's assent to being lied to.

There is no need, however, to consider cases of irrational belief in order to doubt Korsgaard's position that a person cannot believe a statement if she gives assent to being told a lie. Suppose that instead a person gives assent to being made the victim of a lie about some member of a set of propositions. For example, suppose I agree that you may tell me one lie during the next two days about some relatively unimportant matter, even though we do not agree about which unimportant matter, and in exchange you will give me \$25. I can think of no reason why my deal is irrational, or why it would be irrational for me to believe the statements you make during the next two days. There is nothing irrational about believing a set of propositions, even if one knows that one member of the set is false and that she cannot determine which member of the set is false. Indeed, some epistemologists argue that this is precisely the position that each of us takes with respect to our own perceptual beliefs.<sup>51</sup> Even if each proposition a person believes is justifiably held, she should know that she is fallible and prone to perceptual error; hence, she should recognize that, very probably, some proposition she believes, even though she does not know which one, is false. It seems perfectly ra-

---

<sup>51</sup> Many epistemologists grappling with the lottery paradox hold that a person might justifiably believe that one member of a set of propositions is false, not know which member is false, and nevertheless still justifiably believe the truth of each member of that set. Consider a fair lottery in which one ticket is the winner and 999,999,999 are losers. It may be reasonable for you to believe that each ticket is a loser, yet unreasonable for you to believe that all of the tickets are losers. *See, e.g.,* RICHARD FOLEY, *THE THEORY OF EPISTEMIC RATIONALITY* 241-60 (1987) (explaining how each member of an inconsistent set of propositions can be epistemically rational).

tional for a person of limited cognitive capacity, which includes all rational beings other than God, to accept this plight because doing so expresses a rational policy of taking epistemic risks to get attractive epistemic payoffs. A person takes a chance in believing something that might be false because she sees it as a necessary path to accessing perceptual truths. If we rationally can believe a set of perceptual propositions knowing that one of them is probably false, then we can rationally believe a set of propositions knowing that we have been made the victim of a lie regarding one of the propositions. Korsgaard's argument against the possibility of assenting to believing something false thus seems unfounded.

We have taken a tortured path to arrive at this point, but it now seems plain that even the very best arguments cannot show that lying must compromise autonomy in ways that make it wrong, or that it is always wrong to lie about one's reservation price in a negotiation. On the other hand, nothing uncovered so far suggests that lying never compromises autonomy, or that one may always rightfully lie about one's reservation price in a negotiation. A responsible person in a negotiation will have to confront the question as to whether the person with whom she bargains is sufficiently sophisticated and alert so that lying to him would be consistent with respect for his autonomy. But this analysis has deadly consequences for the idea that a morally responsible person, assessing her options about truth-telling in a negotiation, may regard herself as deliberating among commensurables. Her deliberative task is no longer to determine which of her options promises the most value, but instead becomes which of her options promises morally worthy value or value worth pursuing. Such a choice is about what satisfies the concept of rightness and not about commensurables. No doubt a commensurabilist will resist this interpretation of deliberation about lying and autonomy. I deal with these commensurabilist doubts in Part VIII of this Article.

## VII. LYING AS UNFAIR TREATMENT

In this Part, I begin by showing how considerations of fairness seem to create a duty to tell only the truth. I then argue that, when examined more closely, there are strong limits on what fairness requires regarding veracity. I conclude that norms of fairness sanction some lying, including lying about reservation prices among sophisticated negotiators.

All people depend on others to tell the truth. A common strain in the most widely accepted philosophical theories of language, and a

thesis I will accept for purposes of this Article, is that if people could not accept that others were at least trying to tell the truth in most of their utterances, communication would be impossible, and attempts to interpret the language that others use would be doomed to fail.<sup>52</sup> If a commitment to truthfulness among speakers is one of the very assumptions necessary for language to succeed as a tool of communication, it may suggest moral obligations of veracity on the part of language users. The relevant duty is best understood as an instance of the duty of fair play, a duty most commonly deployed in political theory to explain the obligations that beneficiaries of a nation's laws owe to obey those laws.<sup>53</sup> The duty of fair play also can be extended to other realms.<sup>54</sup> I will suggest that the norm of fairness is very relevant to assessing the morality of truth-telling in negotiation, but that rather than requiring truthfulness as a general matter, the norm instead sanctions lying in a narrow range of circumstances.

Although the duty of fair play can be traced plausibly to Hobbes's conception of the social contract, its most influential recent statement is by John Rawls:

Suppose there is a mutually beneficial and just scheme of social cooperation, and that the advantages it yields can only be obtained if everyone, or nearly everyone, cooperates. Suppose further that cooperation requires a certain sacrifice from each person, or at least involves a certain restriction of his liberty. Suppose finally that the benefits produced by cooperation are, up to a certain point, free: that is, the scheme of cooperation is unstable in the sense that if any one person knows that all (or nearly all) of the others will continue to do their part, he will still be able to share a gain from the scheme even if he does not do his part. Under these conditions a person who has accepted the benefits of the scheme is bound by a duty of fair play to do his part and not to take advantage of the free benefit by not cooperating.<sup>55</sup>

A powerful feature of the duty of fair play is that it seems to explain how one can commit a moral wrong without causing a tangible harm. Suppose, for example, that because it confronts a shortage in

<sup>52</sup> See 1 DAVID LEWIS, *PHILOSOPHICAL PAPERS* 169 (1983) ("[A] language  $\mathcal{L}$  is used by a population  $P$  if and only if there prevails in  $P$  a convention of truthfulness and trust in  $\mathcal{L}$ , sustained by an interest in communication.").

<sup>53</sup> See Edward A. Harris, Note, *Fighting Philosophical Anarchism with Fairness: The Moral Claims of Law in the Liberal State*, 91 COLUM. L. REV. 919, 921 (1991) (explaining the different political-duty theories).

<sup>54</sup> For an optimistic discussion of the flexibility and power of the notion of fair play, see GEORGE SHER, *DESERT* (1987).

<sup>55</sup> John Rawls, *Legal Obligation and the Duty of Fair Play*, in *LAW AND PHILOSOPHY* 3, 9-10 (Sidney Hook ed., 1964).

its water supply, a small community adopts a water-rationing scheme that requires each member to use no more than ten gallons of water per day. One community member, Fred, a water engineer, accurately calculates that the community erred in measuring the amount of water it must save. Fred correctly figures that he can secretly take an extra ten gallons per day without harming anybody. Moreover, Fred knows that if he publicly raises the issue of the surplus he found, so that the extra water might be equitably distributed, it would risk destabilizing the agreement the people have reached on distribution and would likely cause substantial public harm. Suppose also that if Fred takes the extra ten gallons a day, it will increase his personal utility and, hence, the social utility. One might suppose this prospective increase in utility provides some morally relevant reason for Fred to take the water. The obligation of fair play, however, provides a moral reason for Fred to move in the opposite direction. Because Fred is a participant in a fair cooperative scheme from which he benefits, he would be free-riding on a fair social practice and exploiting his fellow rationers if he took the water. Free-riding would occur even though Fred would harm no one. More good is achieved by Fred taking the water than by him not taking the water, but this leaves open the question of whether his taking more water is fair.

In many ways, those who engage in even harmless lies resemble Fred the free-rider. A language, like a water rationing scheme, constitutes a practice whose success depends on the cooperation of most of its beneficiaries. If most people do not ordinarily make their utterances with the intent to speak truthfully, a language cannot succeed in its function as a tool for communication. Liars, then, may be free-riders, unfairly taking advantage of their fellow speakers' propensity to speak truthfully. Unfairness is morally wrong, and thus lying, too, may seem wrong as a general matter. If that is so, then even lying about reservation prices should also be regarded as wrong.

Despite the appeal of the linguistic argument from fairness, I maintain that it cannot establish the general wrongness of lying. To reach the result that all lying is unfair and hence wrong, we must conservatively interpret the rules of linguistic practice in our community as prescribing truthfulness as a general matter. Although it may be unfair and hence presumptively wrong to violate linguistic rules required for successful communication, there is no reason to think that the linguistic rules that operate in our community of speakers conform to the conservative interpretation. Consider an alternative interpretation of the practice in our linguistic community which I will

call the permissive interpretation. Suppose that people must ordinarily speak the truth, but that they need not speak the truth when doing so puts either themselves or someone else at unreasonable risk. Under the permissive interpretation, our linguistic community may be interpreted as having the convention that everybody should speak the truth unless doing so will risk significant harm to an innocent person. One, then, may lie to protect the innocent. For example, one may lie to a prospective murderer about the whereabouts of her intended victim.

Linguistic communication would still succeed as a practice under the permissive interpretation because, in ordinary circumstances, one could always rely on the propensity of a person to be truthful. It might even succeed in cases where there is significant risk, as long as one could somehow persuade whomever threatens her that she is not treating this as a case in which she is under risk. If the linguistic practice in our community accorded with the conservative interpretation, which requires one to be truthful no matter what consequences ensue, then by lying one would be exploiting those who adhere to the practice of truthfulness. But, if the practice instead accords with the permissive interpretation, then lying need exploit no one. Even so, there would be a general obligation of veracity rooted in fairness.

In our society, it may be a controversial matter as to whether our linguistic practices accord with the conservative or the permissive interpretation. If, however, one sincerely interprets our linguistic practice as according with the permissive interpretation, it would provide some reason to think that one could lie, without acting unfairly, in limited circumstances where it was necessary to protect the innocent.

So far, I have argued that lying to protect the innocent may be consistent with considerations of fairness. In such lying, one acts defensively. In lying about reservation prices, however, one need not act defensively. Instead, one may try to get a bargaining advantage, and, hence, act offensively. Even offensive lying, I wish to maintain, may be consistent with fair play. A convention permitting offensive lying about reservation prices in negotiation can help solve a shared problem in a linguistic community. Consider a phenomenon encountered in our earlier discussion.<sup>56</sup> In a negotiation among sophisticated people, it is in neither party's antecedent interest to state her reservation price, because if she does and the other party remains si-

---

<sup>56</sup> See *supra* Part II (discussing problems associated with disclosing reservation prices in negotiation).



lent, the person who states a reservation price puts herself at significant risk. Still, it is in the interest of each party that there be some exchange of information about the range of the other's reservation price. On the basis of artful lies about reservation prices, sophisticated negotiators can allow a bargaining foe to infer the needed information about reservation prices. Although negotiating parties share the problem of communicating in a risky environment, a right to lie about reservation prices forms part of a cooperative scheme that can help solve this problem. Moreover, among sophisticated bargainers, each person who takes advantage of this scheme has a good shot at acquiring its benefits. Thus, the right to lie about reservation prices is a fair and *ex ante* advantageous solution to a mutual problem, a problem shared not only by seasoned negotiators, but also by the economic community that relies on such negotiators to make transactions.<sup>57</sup> It follows that a rule permitting lying about reservation prices among sophisticated negotiators can form part of a cooperative scheme that secures a needed social good and fairly distributes benefits and burdens.

I have now attempted to defend morally a rule permitting sophisticated negotiators to lie about their reservation prices. I have argued that such a rule can be both fair and consistent with the notion of respect for the autonomy of the involved parties. My ulterior motive in this discussion was to advance an argument about the role of incommensurable values in normative reasoning. To do that, I must return to the topic of incommensurability. In the next Part, I take stock of the reasons for regarding deliberation about the norms of truth-telling as deliberation about incommensurable values.

#### VIII. LYING AND INCOMMENSURABILITY

Lies that alter the course of a negotiation are often wrong. They may compromise the autonomy of their victims, and they may treat their victims unfairly. I have argued, however, that in some cases, when sophisticated negotiators meet, if one lies to the other about a reservation price, no such wrong occurs. In making cogent judgments about whether a lie is morally acceptable, one must reason by

---

<sup>57</sup> There is no reason to think that a similar rationale could apply to lies about material aspects of a deal, however. Lies about material aspects of a deal may cause their victim to purchase something that she does not really want, while lies about reservation prices seem far less likely to have that effect. Hence, lies about material aspects of a deal seem less likely to be mutually advantageous than do lies about reservation prices.

asking whether such a lie is consistent with a notion of respect for autonomy and whether such a lie is fair. One makes no progress by asking whether lying involves more good than its alternatives. Because the concept of more value plays, at most, a limited role in explaining cogent moral deliberations about lying, these deliberations do not concern commensurable values. Lying about reservation prices may be a narrow problem, but it is neither rare nor odd. The relevance of deontological notions to this problem suggests that incommensurability is an utterly ordinary and pervasive feature of the normative choices that people confront.

A commensurabilist may respond by insisting that, even in the case in which our aim is to assess the ethics of some particular act of lying, we need do nothing but compare the act to its alternatives in terms of how much good or value each involves. Hence, she may agree that if telling a lie involves wronging a person by compromising her autonomy or by treating her unfairly, any good the lie yields is tainted. Yet, she also may urge that a judgment regarding the decision to lie can proceed by comparing alternative acts to determine which involves the most good, as long as we start by eliminating from consideration any value that is wrongfully acquired or otherwise tainted. This commensurabilist, however, would paint an unrealistic picture of the process of deliberating about truth-telling in negotiation. The reasoning that ordinarily occurs in deliberations about the ethics of truth-telling consists of reasoning toward a judgment about whether the value one might gain from lying would be wrongfully acquired. That work requires applying the conceptual framework of respect for autonomy and fairness, as discussed in the two previous Parts of this Article. After that framework is applied, there remains no significant moral task of deliberating among options, at least in terms of which provides more value. How, then, can we reason or deliberate among options without comparing them in terms of which provides more value? We do it all the time. This Article has presented an extended example of such reasoning in matters of truth-telling. When we ask whether an act compromises autonomy or whether it treats someone fairly, we ask a noncomparative question. Answering the question does not require making comparisons and, hence, does not require commensurable values. There is nothing problematic or exotic about noncomparative questions. Even when we ask such an easily valuated question as whether a particular number is the positive square root of 625, we ask a noncomparative question.

I suspect that the real power in the commensurabilist position stems from doubt about the coherence of an incommensurabilist position. It may seem puzzling that, as an incommensurabilist claims, one might be able to reason to the conclusion that one option is better than another without appealing to the idea that the better option has more of some desirable value.<sup>58</sup> The following reasoning reflects, I think, the commensurabilist's puzzle:

An incommensurabilist must say that some option, *A*, is morally better than another option, *B*, even though *A* and *B* cannot be compared, and hence are incommensurable. Yet if *A* is better than *B*, the two cannot be the same, and there must be some morally relevant difference between them: call it possession of property *F*. But then, *A* and *B* can be compared with respect to the degree to which they possess property *F*, and they are commensurable after all. Moreover, in choosing between *A* and *B*, the only sound basis of choice must focus on which possesses more of property *F*. So it seems that the only rational way to choose between *A* and *B* is by comparing them in terms of their possession of property *F*; therefore, if one thing is better than another thing, the two must be commensurable.

Although I think that this argument captures an intuition that drives commensurabilism, it also seems plain that the argument is unsound in that it seems to suggest an infinite regress. To see this, assume, *arguendo*, that the commensurabilist is correct, and that if *A* is better than *B*, then there must be some property *F* in virtue of which *A* is better than *B*. More generally, it would seem that on the commensurabilist account, in any case in which one thing is better than another, it is better in virtue of some feature of that thing. Now consider the property *F* that, on the commensurabilist account, makes *A* better than *B*. *F* must be relevantly better than not-*F*, but if so, then it must be better by virtue of its possession of some property *F*<sup>\*</sup>, which distinguishes *F* from not-*F*. And *F*<sup>\*</sup>, in turn, must be better than not-*F*<sup>\*</sup> by virtue of some further property *F*<sup>\*\*</sup>. And so on, *ad infinitum*.<sup>59</sup> Thus, on the commensurabilist account, in order to make the comparative judgment that any one thing is better than another thing,

---

<sup>58</sup> See Chang, *supra* note 4, at 11 (arguing for a "theoretical" challenge to comparativism (or commensurabilism)). Chang suggests that for any proposed noncomparativist (or incommensurabilist) interpretation of a justification of a normative judgment, we can construe the interpretation in comparativist (or commensurabilist) terms. See *id.*

<sup>59</sup> For a similar argument that, to avoid infinite regress in justification, one must accept the thesis that some rational judgments are not justified in terms of other judgments, and hence need involve no act of comparison, see RODERICK M. CHISHOLM, *PERCEIVING* 50-53 (1957).

one must make an infinite number of comparative judgments. That seems problematic for two reasons. First, it does not seem even possible to make an infinite number of such comparative judgments. Second, even if it were possible, doing so would not conform to the phenomenology of judgment-making: When we decide that one thing is better than another, we do not ordinarily contemplate an infinite sequence.

To see more concretely how the commensurabilist picture gets things wrong, let us flesh out the argument of the last paragraph in terms of the example of lying. A commensurabilist must say that if an option of lying is wrong, then that option attains less good or value than does at least one of its alternatives, and it must do so by virtue of some property that it possesses to a greater degree than does the competitor option. Suppose that the relevant property is respecting autonomy, and that lying is worse than not lying in a particular case because lying has less of the property of protecting autonomy than does not lying. By parity of reasoning, if respecting autonomy is better than not respecting autonomy, then it must be so by virtue of some property. What could that property be other than the property of being morally right? But then, again by parity of reasoning, the commensurabilist must suppose that there is some property that distinguishes being morally right from not being morally right. Even if we could continue forever finding properties that make one option somehow better than the other, the process seems absurd. It corresponds to nothing in the phenomenology of decisionmaking. We cannot proceed forever finding appropriate commensurability to serve as a basis for choosing between options, and therefore choice cannot be among commensurables.

#### IX. THE MEANING OF INCOMMENSURABILITY

I have urged that reasoning about incommensurables is a routine feature of normative judgment and that a model of commensurability cannot explain the normative judgments that people make. There is, however, some temptation to regard reasoning about incommensurables as raising profound issues that take it out of the realm of the routine. Cass Sunstein, for example, asserts that when reasoning about incommensurables, we should strive to express “appropriate evaluative attitudes” and that “[b]y making certain choices and not others, people express various conceptions both of themselves and of

others."<sup>60</sup> Much of this Article may be viewed as a counterexample to Sunstein's claim that reasoning about incommensurables requires reflection on issues of self-expression. In this Article's review of strategies for reasoning about incommensurability in matters of truth-telling, for example, it at no point proved helpful to discuss self-expressive or reflexive concerns. I have argued that in deciding moral and legal questions about the acceptability of deception in negotiation, it is crucial to apply notions such as fairness and autonomy, but I can conceive of no reason, and Sunstein offers no reason, why applying notions such as these raises expressive concerns any more than solving mathematical equations raises such concerns.

Why might someone assume the existence of a general connection between self-expression and incommensurables? As Sunstein suggests, there seem to be at least some cases in which expressive concerns are crucial to reasoning about incommensurables.<sup>61</sup> Although I think that Sunstein is plainly correct, I suspect that he too quickly generalizes from these cases. Let me explain, then, why I think that although expressive concerns may sometimes prove very important when thinking about incommensurables, these concerns might nonetheless be quite limited in scope. Because of limits of space, I will summarize and rely upon an argument that I present at length elsewhere.<sup>62</sup>

My argument suggests that when an individual causes harm, a distinct reason for expressing regret or other moral emotions for what she has done is created. The argument focuses on an idea prominent in recent work in moral psychology: that our inclination to experience what P.F. Strawson calls reactive attitudes toward one another is

---

<sup>60</sup> SUNSTEIN, *supra* note 5, at 92. Sunstein is not alone in claiming these reflexive and expressive elements in reasoning about incommensurables. In an important book on practical reasoning, Henry Richardson makes similar claims, and plausibly identifies John Dewey as a source of the idea that judgments about incommensurability involve such reflexive and expressive elements. See RICHARDSON, *supra* note 10, at 159-90 (discussing Dewey's theory of deliberation).

<sup>61</sup> See SUNSTEIN, *supra* note 5, at 93 ("[E]xpressive function is a part of political and legal debate. Without understanding the expressive function of law, we will have a hard time in getting an adequate handle on public views with respect to civil rights, prostitution, the environment, endangered species, capital punishment, and abortion.").

<sup>62</sup> See Alan Strudler, *Mass Torts and Moral Principles*, 11 LAW & PHIL. 297, 315-25 (1992); see also Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56, 69 (1993) (arguing that skepticism about commensurability creates problems for the interpretation of compensation for pain and suffering in tort law).

an essential and hence invaluable part of moral life.<sup>63</sup> In relevant respects, this lofty-sounding sentence amounts to the claim that if we did not feel regret (a reactive attitude) for the harm we sometimes do to one another, we would be morally far worse off, if not morally barren. For example, when a person tortiously compromises the physical integrity of another person by harming her, it is important that she feels regret for what she has done. An essential part of feeling regret is the desire to express it. Providing aid is a natural way to express such regret. Even if a person does not express regret voluntarily, it may be valuable for society to express formally its commitment to the ideal that we should care about what we do to one another. Tort law may be reasonably interpreted as a conventional device for compelling people to express regret by providing aid in the form of monetary damages.<sup>64</sup> Even so, no amount of aid, and certainly no amount of money, can fully compensate a person for suffering a bodily injury; therefore, the values of aid and injury are not commensurable. Tort law involves the compelled expression of attitudes that are essential to social identity, at least in the absence of a social insurance system that provides an alternative means for such expression. In the realm of tort law, the reasoning about the incommensurable goods of bodily harm and monetary compensation requires deliberating about expressive attitudes and social identity. Criminal law, because it involves causing loss, is another area of law raising these concerns. I suggest that Strawsonian worries about noncompensable—and hence incommensurable—loss, rather than the mere presence of incommensurable values, are the prerequisites for the relevance of expressive concerns. Sunstein is thus correct in suggesting that dealing with incommensurables may raise expressive concerns,<sup>65</sup> but there is no reason to think that these expressive concerns are relevant for the whole range of incommensurables. Indeed, reflection on the examples of incommensurability in norms about lying demonstrates the absence of a link between incommensurability and expressive concerns.

---

<sup>63</sup> For an excellent exposition of Strawson's idea, see R. JAY WALLACE, *RESPONSIBILITY AND THE MORAL SENTIMENTS* 52-83 (1994).

<sup>64</sup> See Strudler, *supra* note 62, at 322-25 (suggesting "that if the law enforces a norm according to which a person expresses regret for harm he does to others, then certain important goods will be produced and we will have a reason to see the law as more worthy of respect").

<sup>65</sup> See *supra* note 61 and accompanying text.

## CONCLUSION

What makes lying wrong? Often the wrongness of telling a lie may be understood in terms of the lie's interference with the autonomy of its victim, or in terms of the lie's unfair treatment of its victim. Some lies, however, neither infringe on autonomy nor treat a person unfairly. In particular, I have argued that lies that sophisticated lawyers tell each other about their reservation prices in certain circumstances may not be wrong in any relevant way. It follows that we should be skeptical about what I have identified as James J. White's normative discontinuity thesis, which provides that if a lawyer lies about her client's reservation prices when speaking to another lawyer, such a lie may be legally but not morally acceptable.<sup>66</sup>

My inquiry into the normative discontinuity thesis was aimed not merely at shedding light on the norms of truth-telling, but also at shedding light on the process of reasoning about these norms. The normative discontinuity thesis may seem initially plausible because we are too often inclined to look at the values at stake in issues of truth-telling in commensurabilist terms. For example, we suppose that lies about reservation prices are tolerated in the law because the value that we might expect to secure by an anti-lying rule compares unfavorably with the value (or disvalue) involved in trying to enforce such a rule. I have argued that this comparative perspective is analytically inapt, and that normative judgment in this area is best viewed as about incommensurables. Our concern cannot be merely about which option provides more value than the alternatives; instead, it must be about which option provides morally acceptable value, a category of value not commensurable with morally unacceptable value. I have suggested that because there is nothing unrepresentative or idiosyncratic about the example of lying about reservation prices, we should think that reasoning about incommensurables is an utterly ordinary part of normative deliberation.

---

<sup>66</sup> See *supra* notes 18-21 and accompanying text.

\* \* \* \* \*