

A THEORY OF FRAUD IN MARKET ECONOMIES

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by

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ABSTRACT

Of the many forms of human behavior, perhaps none more than those of force and fraud have caused so much harm in both social and ecological environments. In spite of this, neither shows signs of weakening given their current level of toleration. Nonetheless, what can be said in respect to the use of force in the West is that it has lost most of its competitiveness. While competitive force ruled in the preceding epoch, this category of violence has now been reduced to a relatively negligible degree. On the other hand, the same cannot be said of fraud. In fact, it appears that it has moved in the other direction and become more prevalent. The causes for this movement will be the fundamental question directing the inquiry. In the process, this dissertation will trace historical events and methods of control ranging from the use of direct force, to the use of ceremonies and rituals and to the use of the methods of law.

An additional analysis of transformation will also be undertaken with regards to risk-sharing-agrarian-based societies to individual-risk-factory-based ones. The structural conditions of each will be assessed along with their affects on human behavior and in particular the behavior of deception. The latter will be assessed histor-

ically through two frames: (1) buying and selling proper and (2) buying and selling within centralized work, i.e., the corporate form. Following Thorstein Veblen, it is hypothesized that as the West evolved from one to the other productive form (from risk-sharing-agrarian-based to individual-risk-factory-based), multiple degrees of separation between individuals emerged. These degrees stretched human relations first when buying and selling broadly entered into communal farming, then when buying and selling broadly entered into factory work and finally when managerial control and absentee ownership became the dominant model for business. And it is postulated that the attitudes and behaviors arising from these degrees facilitate the expression of human deception.

Lastly, an analysis of transaction fraud will be undertaken from the disparate behavioral theories developed in the discipline of psychology and economics over the past century. This will include theories from the psychoanalytical approach, the structuralist and behaviorist approaches, the standard economic approach and from the functional and original institutionalist economic approaches. The contemporary dual-process model of the mind along with William Powers control theory of behavior will also be discussed in relation to the approach of the original institutionalist economists.

APPROVAL PAGE

The faculty listed below, appointed by the Dean of the School of Graduate Studies have examined a dissertation titled A Theory of Consumer Fraud in Market Economies, presented by Nicola R. Matthews, candidate for the Doctor of Philosophy degree, and certify that in their opinion it is worthy of acceptance.

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CHAPTER 1

INTRODUCTION

Scope and Method

Of the many forms of human behavior, perhaps none more than those of force and fraud have caused so much harm in both social and ecological environments. In spite of this, neither shows signs of weakening given their current level of toleration. Nonetheless, what can be said in respect to the use of force in the West is that it has lost most of its *competitiveness*. While competitive force ruled in the preceding epoch, this category of violence has now been reduced to a relatively negligible degree. On the other hand, the same cannot be said of fraud. In fact, it appears that it has moved in the other direction and become more prevalent. The causes for this movement as well as an explanation regarding the human capacity for the behavior will be the fundamental questions directing the inquiry. In the process, an attempt will be made to develop a theory that explains both phenomena.

The research will be guided by a working hypothesis, namely that *systemic* behavior emerges from the structural properties of the dominant institutions of society. It is hypothesized that the two modern and dominant institutions are the state and the business enterprise. Thus, in an effort to discover the causes of fraud, an inquiry into

these two institutions along with their structural properties will be constructive. It is further postulated that as a result of the business enterprise's hierarchal organization and minority legal control, defined as the ability of an individual or small group to directly or indirectly determine the law irrespective of the larger community's input, impediments were created that effectively obstruct the growth in personal relations and magnify the degrees of separation between individuals where it is principally these degrees of separation that allow for the systemic expression of fraudulent behavior.

In conjunction with this approach, an investigation will also be made into the values, the narrative(s) and the quality of control within the dominant institutions. It is surmised that the current and *ruling* value-claims are status-seeking, competition (in economic form), individualism and pecuniary emulation. While it is probable that all four claims may have existed in different degrees over distinct time periods, the last three, and in their ruling form, are likely a recent phenomena in the history of the West. If this is true, the dominant institutions of the past era, such as the Papal church and monarchy, their values, narrative(s) and the quality of control would be markedly different and can not only be used comparatively to define modern institutions more sharply but through a process of historical and evolutionary documentation, they may serve as a method to locate markers of change and in so doing assist in locating causes for fraud.

Chapters two, three and four will attempt to do just this. Specifically, chapter two will chronicle the Medieval era's dominant institutions, their evolution and character of control. Where the Papal church will be singled out as the pre-eminent institution with three distinct mechanisms for control — (1) rituals and ceremonies designed to

reinforce behavioral codes and values, (2) religious (canon) law and (3) force. Chapter three will analyze the transformation of customary to quasi-deliberate law which was, in the main, a transfer of legal control first from the church to the crown, then from the crown to the state and finally from the state to the business enterprise. In the process and as a means to originally support the crown and then the state, a new narrative of governance and social order was gradually put forward. But what eventually facilitated this transformation was the physical, practical and economic changes occurring on the ground. Chapter four documents this evolution, delineates the specific forms of economic organization (the structural properties) and the values and behavior that arise from it. Notably and throughout the historical legal and economic transformation the means–ends continuum of productive activities was broken and centralized work institutionalized via the business enterprise. The result was the emergence of the aforementioned ruling values and an increase in fraud.

Although structural and institutional parameters can determine the values, narratives and quality of control, what it cannot explain is how the individual comes to learn, retain and communicate to others these attributes. For this endeavor, a behavioral (as in human conduct) and biological theory is needed. Chapter five addresses this concern by providing a review of the better received psychological and behavioral theories. It further describes how each would explain the behavior of fraud. Following theories on habit behavior, contemporary dual-process models of the mind and control theory, a dual-process control theory of behavior is suggested as perhaps the best model to explain how individual's thoughts and actions become attuned to some dispositions over others.

Throughout the inquiry, three historical epochs will be assessed (the Medieval era, the industrial revolutionary era and the post-industrial era or market economies) and three general approaches employed. The first is the inferential-valuation approach. The purpose of this approach is to explicitly recognize that value-claims are almost always present in scientific inquires. It is an approach that attempts to make inferences by directing these value-claims consciously as opposed to unconsciously through experience and evidence collection. In this way, it will also be an attempt to build a theory from the evidence. The second is the comparative historical approach. This approach is helpful in that it has the tendency to illuminate and clarify the nature of contemporary conditions. The third, original institutional economics (OIE) is an approach that emphasizes the role of institutions in determining human behavior. The inquiry then is interdisciplinary by design and crosses several domains from history to law to economics to psychology. In addition to these three general approaches, both inductive and deductive methods will be used throughout. In short, this inquiry will attempt to address the structural, institutional and biological factors that account for human behavior and in the process attempt to explain the capacity for and prevalence of fraud in modern market economies.

1.1 Defining Fraud

Fraudulent crime is distinct from other criminal activities, such as larceny, robbery and burglary because it does not involve the use of force. Instead, it often involves the use of cunning and intelligence. But how a specific human behavior comes to be defined, categorized and theorized will usually depend upon the dominant framing

surrounding that behavior which in turn depends on society's dominant institutions and their narrative(s) that support various forms of social organization. In the main, the Western interpretation of human behavior is either attributed to the individual's eccentricities and/or the Big Five personality traits.¹ This individualist view largely ignores the intrinsic features of the species (biology) as well as the influence of structural and institutional conditions. Moreover, such framing makes the question of frequency (how often certain behaviors are expressed) irrelevant to theories of science because it makes the identification of patterns or regularities impossible. On the other hand, a biological, structural and institutional interpretation allows for the identification of regularities without discounting individual uniqueness and can address the frequency question. The difference between the two interpretations can be illustrated by comparing several different definitions of fraud. The most common — the individualist approach — are represented below:

The crime of using dishonest methods to take something valuable from another person (Merriam-Webster Learner's Dictionary, Accessed October 2, 2017. <https://www.merriam-webster.com/dictionary/fraud>).

A deception practiced in order to induce another to give up possession of property or surrender a right (The Free Dictionary, Accessed October 2, 2017. <http://www.thefreedictionary.com/fraud>).

The intentional use of deceit, a trick or some dishonest means to deprive another of his/her/its money, property or legal right (Law.com, Accessed October 2, 2017. <http://dictionary.law.com/Default.aspx?selected=785>).

Fraud is a generic term, and embraces all the multifarious means which human ingenuity can devise, which are resorted to by one individual, to

¹The Big Five traits are neuroticism, openness to experience, extraversion, agreeableness and conscientiousness.

get an advantage over another by false representations. No definite and invariable rule can be laid down as a general proposition in defining fraud, as it includes surprise, trickery, cunning and unfair ways by which another is cheated. The only boundaries defining it are those which limit human knavery (Webster New World Dictionary, College Edition, 1964, p.380).

Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in same manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other (Black, 1910, p.521).

These definitions situate the behavior of fraud on the individual's shoulders. And while many of these definitions illuminate other types of behavior expressed during a fraudulent act, such as dishonesty, deception, deceit, knavery, trick or artifice, they do not give an explication to motives or to structural and institutional determinants and thus also do not give any indication of its frequency. Interestingly however, many of these definitions imply that the act of fraud usually occurs within the domain of the buying and selling process. Other definitions that use the modifier, consumer, begin to incorporate a more expansive picture, as a few of these make clear:

Consumer frauds [are] deceptive practices that result in financial or other losses for consumers in the course of seemingly legitimate business transactions (The Free Dictionary (Legal), Accessed October 2, 2017. <http://legal-dictionary.thefreedictionary.com/Consumer+Fraud>).

Consumer fraud refers to an act resulting in financial or other losses for consumers in the business transactions. The act where the use or employment by any person of any unfair commercial practice, deception, fraud, false promise, suppression, or omission of any material fact with an intention to sell or advertisement of any product by misleading the consumer is declared to be an unlawful practice. Consumer fraud can takes place

in person, by telephone or mail, or over the internet (US Legal, Accessed October 2, 2017. <https://definitions.uslegal.com/c/consumer-fraud/>).

Consumer fraud is an act or omission in the conduct of trade or commerce designed to mislead a consumer (Duhaime's Law Dictionary, Accessed October 2, 2017. <http://www.duhaime.org/LegalDictionary/C/ConsumerFraud.aspx>).

Consumer fraud occurs when, in the context of a business transaction, false statements of fact are made, the person making false statements knew that the statements were false when they were made, and that the other party in the transaction relied on the false statements to their detriment (The Cochran Firm, Accessed October 2, 2017. <https://www.cochranfirm.com/practice-areas/other-practice-areas/business-and-consumer-fraud-lawyers/>).

Consumer fraud is an expansive term that includes a seemingly endless variety of unfair and deceptive acts. It usually involves some form of trickery used to achieve an unfair advantage in a retail sale. In popular usage, many consider any bad buying experience to be a consumer fraud (Norrsgard and Norrgard, 1998, p.8).

The above definitions are more comprehensive as they locate the organization and process in which the activity occurs. The intention is to underscore the fact that the party normally at risk is the consumer (the buyer) and the party normally doing the defrauding is a business representative (the seller), as reflected in the use of the terms transaction, trade or retail sale. Or to put it another way, consumer fraud is an activity that involves the putative sale of an asset (tangible or not) and/or commodity. A further intention is to demonstrate the ways and means by which perpetrators are successful. They do so largely when they intentionally “omit”, “mislead” or “suppress” information during the transaction and gain an “unfair advantage” in the course of “seemingly legitimate” business. Subsequently, consumer fraudsters use the

business arena (buying and selling) and asymmetric information to target consumers in the attempt to acquire financial assets.

Besides these two approaches, fraud has also been conventionally categorized and defined in two other ways as either organizational or occupational. Organizational frauds are customarily defined as deceitful acts for the benefit of the business enterprise where occupational frauds are customarily defined as deceitful acts committed by employees to the detriment of the business enterprise. The primary difference between them is the target. In the former the target is the consumer, in the latter the target is the business enterprise. And while occupational fraud, namely in the form of embezzlement, often does involve asymmetric information, it will not be considered a fraudulent act because it does not involve the putative sale of an asset and/or commodity. Rather it will be interpreted as a type of sophisticated theft.

This is not meant to minimize the impact of embezzlement but to maintain a focus on a particular type of behavior that occurs in a particular type of condition. It might be noted however that the distinction between organizational and occupational fraud is imperfect because occupational fraud by top executives (white-collar crime) can and often does affect counter-parties. In some cases, it can even affect the macroeconomy. To clarify this problem, only those top executives and upper management that work in publicly held companies will be considered fraudsters rather than embezzlers because their ultimate goal is to inflate the company's stock price which involves the buying and selling of an asset. Moreover, it appears that opportunities for fraud are the greatest in those occupations that are directly involved with the buying and selling process, either as a salesperson or as an upper level executive (Coleman, 1987).

1.2 Reporting and Frequency of Fraud

By identifying the organization in which the fraudster operates, the consumer fraud definition, as opposed to the more common individualist one, captures some of the institutional conditions. In addition, it allows one to address the frequency question. But herein lies a problem. Because there is a lack of official statistics, severe amounts of under-reporting due to possible shame or guilt, and less awareness of victimization unlike that of forceful crimes, the report rates on fraud are deficient. Historically, the primary agency intended to protect consumers in the United States from scams as well as business monopolies is the Federal Trade Commission (FTC). Unfortunately and despite the fact that it maintains a comprehensive fraud database called Consumer Sentinel, it is not accessible to the public. Information about fraud however can be found in the FTC's annual report and in the three surveys it has conducted over the years, the most recent in 2011. Notably, the annual reports only have information on consumer complaints. The total complaint count in the previous three years from 2014 – 2016 were: 1.579 million, 1.273 million and 1.294 million respectively (FTC Data Book, p.7, 2017). Yet the amount of fraud estimated by the FTC's most recent *survey*, found that there were 37.8 million incidents of fraud in 2011 alone (FTC Survey, p.17, 2013). When comparing this number to the complaint count of 2011 (990.242 thousand) there is an astonishing difference (FTC data book, 2011, p.7) and a 2011 under-report rate of 97.4 percent. Clearly, complaint counts do not accurately reflect the prevalence of fraud.

Two other public agencies that investigate and/or regulate fraud, the Department

of Justice's (DOJ) White Collar Crime Unit located inside the Federal Bureau of Investigation (FBI) and the Securities and Exchange Commission (SEC), also have databases but they are likewise not accessible to the public.² Nevertheless, and similar to the findings of the FTC, the FBI's website and their annual reports generated by its Internet Crimes Complaint Center (IC3) state that millions of Americans are defrauded annually.³ Quite remarkably, the DOJ estimates that only 15 percent of fraud is actually reported to a public agency.⁴

More recently, and as a response to the 2008 financial crisis, a new agency, the Consumer Financial Protection Bureau (CFPB), was created in 2011. It was specifically designed to protect consumers against *financial* fraud and has, for the moment, the only database accessible to the public that tracks complaints and provides the names of the institutions that have been so charged.⁵ As of April 2017, the CFPB has registered 1.163 million complaints (p.3). According to its website it has provided \$11.9 billion in compensation to 29 million defrauded consumers.⁶

²These databases are the Internet Crimes Complaint Center (IC3) and the Tips, Complaints and Referrals Portal respectively.

³FBI, Accessed October 3, 2017. <https://www.fbi.gov/stats-services/publications/mass-marketing-fraud> and <https://www.ic3.gov/media/annualreports.aspx>.

⁴DOJ, Accessed October 3, 2017. <https://www.justice.gov/usao-wdwa/victim-witness/victim-info/financial-fraud>.

⁵There are currently several bills in the U.S. House and Senate that are designed either to eliminate the database, limit the power of the CFPB and/or eliminate the agency altogether. The bills in the House and Senate, H.R. 1031 (2015 version H.R. 3118) and S.370 (2015 version S.1804) respectively, repeal title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act and thus would effectively eliminate the bureau. The bills, H.R.Res 111 and S.J.Res 47, would repeal a CFPB rule barring companies from blocking class-action lawsuits through pre-dispute arbitration clauses. Another bill, H.R.10 (2016 version H.R.5983), would place final control and funding in the hands of the executive and legislative branches and would prevent the CFPB from publishing its database among other amendments deregulating the financial industry. As of October 28, 2017, both H.R.Res 111 and S.J.Res 47 have passed the House and Senate, awaiting the president's signature. While neither H.R. 1031 nor S.370 have passed their respective chambers, H.R. 10 passed the House June 8, 2017.

⁶CFPB, Accessed January 28, 2018. <https://www.consumerfinance.gov>.

Private institutions have likewise reached similar conclusions regarding the prevalence of fraud. In 2010, The National White Collar Crime Center (NW3C), sponsored by Bureau of Justice Assistance (BJA) and a partner of the FBI, conducted a sample survey of 2,503 participants and found that 17 percent of individuals and 24 percent of households had experienced at least one type of fraud (p.8).⁷ One explanation from the several provided in the study was that there are simply more individuals with “easy access to corporate information” and that by 2009, “86 million Americans were employed in management, professional, sales, and office professions, out of the total workforce of almost 140 million” (p.23). Three years later, a survey conducted on behalf of the self-regulatory agency the Financial Industry Regulatory Authority (FINRA), found a higher frequency of fraud. Their research showed that eight out of the ten consumers surveyed had been solicited to participate in a financial fraud and that over 40 percent could not even identify *classic* red flags (2013, p.3). Of those that lost money in a scam, only four percent admitted that they had been defrauded. Consequently, the research found an under-report rate of over sixty percent (Ibid.). Similarly, a 2017 survey on financial fraud, conducted jointly by the Stanford Center on Longevity (SCL) and the FINRA, found that half of the participants had been subjected to a scam (p.9). If one includes the array of extremely minor everyday frauds, frauds that several of these studies ignore, it would perhaps increase the rate of deception substantially. In view of these findings, there appears to be a high frequency of fraud although no consensus has yet emerged. Conceptualizing and defining

⁷The more common types of fraud reported were credit card fraud, price misrepresentation and unnecessary object repairs. The survey also observed that even with a likely under-report rate, the 24 percent of households that experienced fraud in the previous year was greater than property and violent crime combined (NW3C, 2010, p.22).

fraud then will likely need to be quite broad but specific where it counts. But before a definition of fraud is proposed, a review of fraud theory will be considered first.

1.3 Modern Theories of Fraud

The majority of modern fraud theories and criminal behavior more generally were developed within the disciplines of sociology and criminology. In a 1939 address to the American Sociological Association, Edwin H. Sutherland introduced the concept of white-collar crime (1940). He “approximately” defined this type of crime, in *White Collar Crime*, as “a crime committed by a person of respectability and high social status in the course of his occupation” (1983 [1949], p.7). By creating this new concept, Sutherland effectively brought attention to a group of people that had been neglected by sociologists and criminologists in their efforts to understand fraud. Attention, it might be added, that was largely unwelcome as the first edition of *White Collar Crime* was censored and forced to remove the names of business institutions.

Some of the more frequent abuses by businessmen, according to Sutherland, were: misrepresentations in financial statements, manipulations of stock, bribery of public officials, commercial bribery, misrepresentation in advertising and salesmanship, misapplication of funds, short weights and measures, misgrading of commodities, tax frauds and misapplication of funds in receiverships and bankruptcies (1940, pp.2-3). His explanation for fraudulent behavior was that it was “learned in association with those who define such criminal behavior favorably and in isolation from those who define it unfavorably, and that a person in an appropriate situation engages in such criminal behavior if, and only if, the weight of the favorable definitions exceeds the

weight of the unfavorable definitions” (1983 [1949], p.240). He called this theory differential association (1947 [1924], 1983 [1949]). Crucially it a theory of behavior that locates cause within social organizations and through the capacity of individual learning.

In the 1950s, Donald R. Cressey, a former student and collaborator of Sutherland, developed his own theory of fraud (1950, 1953), known as the fraud triangle. Cressey argued that for fraud to occur, three criteria must be present: (1) perceived pressure, usually in the form of a financial problem that cannot be shared with others, (2) perceived opportunity and (3) rationalization. By logical extension, all three criteria must hold for a fraudulent act to take place. The first of the three criteria, perceived non-shareable financial pressure, represents both a conditional but external factor and an unexplained motive. That is, the pressure is exogenous to the work environment and the motive, money, is simply given. The second criteria can be interpreted in one of two ways, one, as a specific but internal conditional factor to the individual or two, as a characteristic of the individual.

In the case of the first interpretation, perceived opportunity occurs when an individual happens upon some information and/or situation within an occupational setting that if acted on will be financially advantageous. It is implied that the recognition of the situation came by way of a clue or trigger. In the case of the second interpretation, the individual is presumed to be opportunistic. Here the individual is actively searching for opportunities. These two distinctions were not made clear in the original fraud triangle but have been elaborated upon, as will be reviewed below, when considering the distinction between *accidental* and *predatory* fraud. Cressey’s

observations further led him to the conclusion that fraudsters, as a rule, do not wish to be perceived by others as trust violators, thus the need for the third criteria, rationalization.⁸ This mental trick is the human's ability to alleviate cognitive dissonance (Festinger, 1957).

It is important to stipulate that the identification of a mental ability that alleviates unwanted emotional and intellectual conflict is not the same as addressing where the conflict came from. Furthermore, if one has come to identify completely with deceptive and manipulative practices, it is unlikely that they will attempt rationalization. A final shortcoming of the model that may explain, in part, these two failings, is its individualistic analysis. The fraudster, in the fraud triangle, appears to operate independently of any structural or institutional considerations. The singular motive, financial pressure (money), is simply given and presumed to be unique to the individual. And while opportunity may be a necessary condition, it is not sufficient to explain *systemic* behavior.

One account that may perhaps explain this approach is the fact that Cressey's research focused on low-status, small-time or minor embezzling females not "elite" or "white-collar" crime. Further, he often conflated the two and consequently directed the majority of new criminology research towards minor occupational crime (Black, 2010). In doing so it excluded an entire array of frauds and ones that can be far more damaging. On a more fundamental level and germane to the above, embezzlers here are taken as sophisticated thieves not fraudsters. Despite the fraud triangles

⁸It might be suggested however that this need not always be the case as the rationalizing processes may be activated by something more than concern over how one is perceived. It may also be done, in part, because of a moral and inner belief that their behavior is somehow ethically wrong.

shortcomings, it has a wide acceptance among the anti-fraud community like the Association of Certified Fraud Examiners (ACFE), a factor in Auditing Standards (SAS) 99, research that *partially* supports the theory (Bell and Carcello, 2000; LaSalle, 2007; Hogan et al., 2008), and a place in most auditing textbooks.⁹

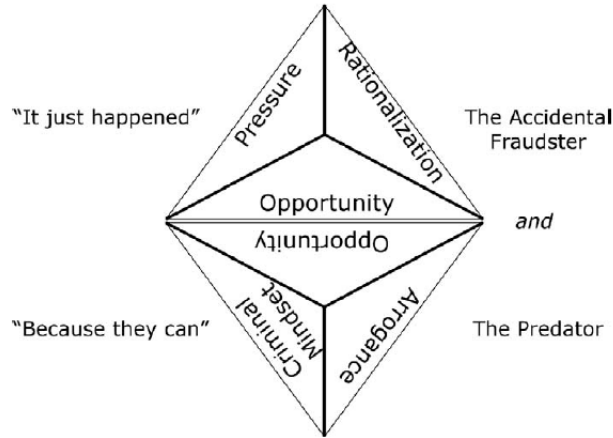
Although the fraud triangle is still widely used, in the past three decades there have been several attempts to modify it. Two such modifications were the fraud scale and the fraud diamond. Accountants W. Steve Albrecht, Marshall B. Romney and Keith R. Howe developed the former in 1984 by making one modification to the fraud triangle — it substituted personal integrity for rationalization. It was thought that the measure of personal integrity was a better predictor because it could measure past behavior but also because it determined whether or not one would rationalize non-normative behavior. The second modification, the fraud diamond, was developed by accountants David T. Wolfe and Dana R. Hermanson in 2004. In their version, they maintain the original triangle but add a fourth dimension, capability. This additional quality is added to the opportunity side of the triangle to illustrate the fact that frauds cannot be committed if the individual actually lacks certain capabilities to take advantage of control weakness. One organizational capability along with five traits were identified by Wolf and Hermanson: first, the fraudster occupies a position of power and information, second s/he is crafty, third s/he is egotistic, fourth s/he is manipulative, fifth s/he is a liar and sixth s/he is calm under pressure (2004, pp.39-40). These qualities help to explain the predatory, opportunistic or control fraudster,

⁹SAS 99 is a statement on auditing standards issued by the American Institute of Certified Public Accountants. Its most recent issued occurred in 2002, replacing SAS 82 after the string of U.S. accounting frauds.

a type of con artist that is quite distinct from the putative accidental fraudster.

The accidental fraudster is usually portrayed as a middle aged, first-time offender that holds a top occupational position and is commonly perceived as a model citizen of the community (ACFE, 2009). This is the good person stuck in a bad situation parable. When and if the accidental fraudster continues to deceive and remains undetected, at some point they will evolve into the predatory or opportunistic fraudster. In other words, after a fraud has been committed and financial gain and rationalization achieved, the perpetrator does not usually cease their deceptive practices. Rather, he or she will continually engage in the act until such time as they are detected (Association of Certified Fraud Examiners, 2010; Beasley et al., 1999, 2010). According to Dorminey et al. (2012), once the transition from an accidental to predatory mindset has occurred, the “predator seeks out organizations where he/she can start to scheme almost immediately upon being hired...[here] pressure and rationalization play little or no role...Instead, arrogance and a criminal mindset [dominate]” (p.566). Drawing on the work of Wolfe and Hermanson, Dorminey et al. updated the fraud diamond by incorporating both types of fraudsters with opportunity as the common factor, see Figure 1.

The fraud diamond is an improvement over the fraud triangle as it captures both minor and major frauds. It does this not only by making opportunity and opportunism (the opportunistic or predatory fraudster) a common factor but by also making it the dominant factor in the model. However, two fundamental questions remain: (1) how exactly does the transition from accidental to predatory fraudster happen? and (2) is it necessarily valid to assume that all predatory fraudsters begin their double-dealing



Source: Dorminey et al. (2012).

Figure 1: Fraud Diamond

accidentally? Dorminey et al. answer the first question by suggesting that repeated criminal acts tend to be desensitizing and thus, the more one deceives the more capable and the more likely they are to deceive again (Ibid.). This explanation however is inadequate because, one, it is circular (it explains behavior by behavior) and two, the phenomenon of desensitization is not a motive but an amplifying effect. In regards to the second question, it goes unanswered by assuming that all frauds begin by mere circumstance. Interestingly, they correctly identify that deceitful acts are not always committed by individuals but can be committed by organizations such as mafias, gangs and terrorist financiers (Ibid., p.567) as well as use the terms collusion, culture and control throughout the paper but no link between these and predation are drawn, perhaps because the second question was not addressed.

If, however, one begins the analysis by postulating that the *expression* of predation, as defined as an act of violence or manipulation intended to exploit another, is learned through institutions, connections between the two might be drawn. The

point of emphasis from this perspective is squarely on institutions not intrinsic behavioral features like the conventional wisdom of the “good” or “bad” person. While it is likely true that in order to *express* a behavior there needs to be a capability to do so, the *expression* of that capability is always and everywhere beholden to the structural and institutional conditions in which one is born. Identifying human behavioral capabilities are important, but the structures and institutional conditions appear to be more so if one is to understand why specific behavior is more pervasive in one period and not another. To this end, an inquiry into the history of institutions and their structural organization as well as a biological and behavioral account of human *learning* would expand the analysis beyond an individual interpretation and effectively address the two fundamental questions above.

One attempt to answer these was made by Sridhar Ramamoorti, Daven Morrison and Joseph W. Koletar (2009) in their A-B-C model of fraud, a model that is both an analysis of fraud and taxonomy of it. The analysis begins with the individual, or in Ramamoorti’s et al. terms, the Bad Apple but is then broadened to include the group or Bad Bushel, that is, “a duo or team of ‘bad boys’ who push ethical envelopes” and then broadened again to include society or the Bad Crop, that is, “a culture of passivity, or worse a criminogenic culture like ENRON’s” (Ramamoorti et al., 2009, p.11). The Bad Crop scale gives some explication to the phenomenon of fraud waves or epidemics, the most recent example being the fraudulent behavior leading up to the 2008 financial crisis. This type of fraud also implies that the activity is sustained within a culture and thus, is a deep-rooted problem of the business world not an outlier. Their conclusion, after extensive fraud research, is that the motivational

factors of the fraud triangle are under-hypothesized and other motives such as revenge, status-seeking, crimes of passion, mastery of a situation or technique (the catch-me-if-you-can game) and self-interest or group interest should be considered (Ibid., p.2).¹⁰ They attribute many of these motives to Michael Apter's reversal theory, a theory that explains the ability to change behavior when the setting changes (2007 [1989]).

The Bad Crop model is also similar to the control fraud analysis used by William Black (2013 [2005]) in his book *The Best Way to Rob a Bank is to Own One*. Following Wheeler and Rothman (1982), Black defines control fraud as a “company run by a criminal who uses it as a weapon and shield to defraud others and makes it difficult to detect and punish the fraud” (2013, p.1). The primary apparatus in many control frauds is the manipulation of financial accounting. Notably, the use of the qualifier “control” is linked not only to asymmetric information but also to the exercise of power. It is expressly because top executives and managers sit in positions of power (hierarchical organization) that they have the ability to actively shape and transform their environment through management override. Managers are, in the words of John Kenneth Galbraith (2004), “the effective power in the modern enterprise” (p.3) To keep employees in line, they may hire yes-men, increase pay, inflate egos or use terror tactics; to keep regulators in line they may hire accountants and appraisers that support their fraudulent activity (Black, 2013 [2005], p.2). Black identifies two types of control fraud, opportunistic and reactive. While the former represents generally

¹⁰Another approach similar to this is the M.I.C.E model originally developed by Jason Thomas (2010) as presented in the textbook *Forensic Accounting and Fraud Examination*. The M.I.C.E acronym stands for the motives of money, ideology, coercion and ego. The central purpose of this model was to expand the types of motives that a fraudster may have. To a degree, it also brings back into focus some organizational factors because coercion and ego tend to be associated with power, white collar crime and structural conditions of the business enterprise.

the same concept as the predatory fraudster above, reactive control fraud refers to control frauds that take place when the business is failing (Ibid., p.5). According to Black, two primary characteristics of a successful control fraudster are cunning and audacity.

Connecting Sutherland's definition of white-collar crime, his theory of differential association, Wolfe and Hermanson's opportunistic fraudster, Ramamoorti's et al. Bad Crop and Black's use of control fraud, is the central idea that fraud is systemic to the business world. Indeed, many have identified corporations as criminogenic. This does not imply that all business culture is crime-ridden but that the enterprise has particular structural characteristics capable of fostering duplicitous behavior. If this is an accurate assessment, then theories of fraud will need to explain the structural conditions and values within the business enterprise that give rise to manipulative and underhanded culture. It will also need to explain how individuals, with perhaps different values, come to learn and reproduce such behavior. Thus a two-fold approach, one of a structural nature, the other of an individual behavioral nature, will be necessary to explain why the behavior is *systemic*. The institution, as a unit of analysis, will be used to integrate and bridge these two.

Importantly, the disposition of greed, the traditional scapegoat, will not be identified as a first order cause because the behavior is merely a human capability that owes its expression to human-made social organizations, values and institutions. Excessive levels of acquisitiveness can, nonetheless, amplify duplicitous behavior, but again is not a primary cause in its expression. The violation of community trust will also not be identified as a central feature in its definition. While it is undeniable that fraud vi-

olates trust, a successful swindle is possible even when there is distrust in the victim, as it might be recalled that most frauds involve the use of asymmetric information. A successful con will depend on the victim's *level* of distrust but it will also depend upon the position of power, level of intelligence, cunning, sophistication, charm and use of the law on behalf of the perpetrator. Counter-intuitively, societies that have high levels of general distrust might actually amplify, though not cause, deceptive behavior — a view that goes against the grain of conventional wisdom regarding prevention, deterrence and the tactics of law enforcement — because it generates a level of cultural acceptance.

A working definition of fraud might now be suggested. Fraud is an act involving the use of asymmetric information that directly or indirectly exploits and harms another for personal or organizational financial gain in the day-to-day course of competitive business transactions. Because this specific type of fraud operates within the realm of buying and selling, the modifier transaction will be used throughout the inquiry. More pointedly, transaction fraud is predominantly a function of business, involves possessing minority legal control and using this to one's financial advantage. To this end, transaction fraud may also be thought of as a sophisticated lie linked to the sale of commodities or assets (tangible and intangible) and assisted by the use of abstract forms (documents) and impersonal relations (money). Though it is recognized that a lie can occur outside the arena of business and even in other primate species, these types of lies are simple and more readily found out. On the other hand, sophisticated lies that use abstract mediums and impersonal relations often go unnoticed and thus can be sustained much longer. This working definition of transaction

fraud functions in three distinct ways. First it is broad enough to capture the spectrum of fraudsters, from white-collar to the small-timer. Second, it can accommodate the entire range of fraud schemes such as accounting fraud, internet fraud, insurance fraud, pharmaceutical fraud, mass marketing fraud and many others. Lastly, and perhaps most importantly, it locates the structural and institutional conditions — competitive economy, business enterprise — that give rise to the behavior.

Given the working definition, this study will undertake an analysis of transaction fraud from the perspective of the Bad Crop analogy. In so doing, it will not focus on a history of fraud cases or deterrence and regulation.¹¹ Instead it will focus on identifying the historical but dominant institutions of West, their structural properties and the values that developed from them. It is believed that the study of past institutions will aid in forming a more complete and comprehensive understanding of the current institutions, particularly regarding the institutions that not only support and animate transaction fraud but makes the “opportunity” (not the act) for it so prevalent. Moreover, studying medieval institutions will also help in determining

¹¹For an excellent and thorough account of this, see Edward J. Balleisen’s (2017) *Fraud: An American History from Barnum to Madoff*. Other historical accounts of fraud can be found in John L. Thomas’ (1900) *Lotteries, Fraud and Obscenity in the Mails*, Arthur Kallet and Frederick John Schlink’s (1933) *100,000,000 Guinea Pigs*, Lydia Kang and Nate Pedersen’s (2017) *Quackery: A Brief History of the Worst Ways to Cure Everything*, Warren G. Magnuson’s (1968) *The Darkside of the Marketplace: The Plight of the American Consumer*, Philip G. Schrag’s (2012 [1972]) *Counsel for the Deceived: Case Studies in Consumer Fraud*, Ruth Lamb and Royal Copeland’s (1936) *American Chamber of Horrors: The Truth about Food and Drugs*, Robert Heilbroner and Others’ (1973 [1972]) *In the Name of Profits*, David Maurer’s (1999) *The Big Con: The Story of a Confidence Man*, Paul Blumber’s (1989) *The Predatory Society: Deception in the American Marketplace*, James Young’s (1975 [1967]) *The Medical Messiahs: A Social History of Medical Quackery in 20th Century America*, Larry Olmsted’s (2016) *Real Food Fake Food: Why You Don’t Know What You’re Eating and What You Can Do About It* and Edward Henry Smith’s (1922) *Confessions of a Confidence Man*. For a history of consumer activism see Matthew Hilton (2009) *Prosperity for All: Consumer Activism in an Era of Globalization*, Lawrence Glickman (2012 [2009]) *Buying Power: A History of Consumer Activism in America* and Robert N. Mayer and Stephen Brobeck (2015) *Watchdogs and Whistleblowers: A Reference Guide to Consumer Activism*.

whether or not the modern era represents a *general* continuity with the past or is the product of a *general* break. While the past institutions and temperaments provide a mirror in which to measure modern counterparts, the question of *general* continuum or break can assist in directing the inquiry and hopefully provide clues for a theory of systemic transaction fraud. Lastly, a biological theory of the species will be linked to the structural and institutional variables in the attempt to make a more complete theory.

CHAPTER 2

MEDIEVAL EUROPE AND THE RULING TEMPERAMENT OF VIOLENCE

Before the prevalence of modern transaction fraud there was the prevalence of force. Underscoring the Medieval era's extensive use of force and violence is however to say nothing but what is already known as conventional wisdom; it is a testament to this observation when scholars often refer to the Middle Ages as a warrior culture and on occasion as a barbaric or uncivilized culture. *Recognizing* the permanence of some type of behavior captured in a habit, such as aggression or duplicity, does not explain how that habit perpetuates itself, how it formed or what purpose it serves. For this, an analysis of society's structure and organizational forms is needed as well as a behavioral theory of learning. Because habits and culture tend to change when and if conditions change, studying the conditions of the pre-modern era is helpful in determining the current state of affairs. Some broader questions of concern are: what conditions fostered the medieval culture of violence?, what was the purpose of this violence?, what was the state of technology, of education and the creation of money?, what were the economic conditions, how did religious institutions affect everyday lives and to what extent did religious law temper various forms of behavior? what was the degree of relationships between individuals in communities, and how prevalent, given

a hierarchal organization, was idol worship?

These conditions, along with others, can help explain why the warrior mentality formed, became habitualized and simultaneously minimized other forms of behavior. Tracing the medieval conditions will also provide a well constructed picture to compare and contrast when turning towards a modern era with minimal force among regional or associated groups and increased transaction fraud among individuals, particularly in corporate life. Of significance will be the differences between community and association, of obligation and trust, of force and law and of corruption and fraud. Surely all of these existed to some extent throughout the Middle Ages but that is not the point. Rather, the central question of concern is which among them ruled. It can generally be said that the first belong to the Middle Ages while the second to the Modern Age. Again, this is an analysis of degree not of absolutes as it is clear that both force and fraud exist in the modern world. But when we look at these two historically, we find that fraud is more endemic now relative to force than in times past. The evolution of these behaviors, as determined by the conditions of their time, will be reviewed below.

2.1 Early Conditions

The early Middle Ages was an era rife with petty kings, warfare and brute force. From the Roman Empire's decline to approximately AD 750, degeneration and warfare reigned across the West as lack of a centralized rule presented opportunity for petty kings and great lords. The fallout would leave a patchwork of kingdoms pre-

dominately under the control of Germanic tribes.¹ The continual march West was in part, necessitated by another invading people — the Huns. It has recently been suggested that an exogenous force, drought (Cook, 2013), was the initial impetus of the Hun invasion. Whatever may have been the cause to drive the Huns westward (c. AD 370), the affect on the provinces of the West were great as it left the conditions poor for centuries.

This has led some to qualify this period of time as the ‘dark ages’. Agricultural productivity declined, flooding and famine were prevalent, infrastructure, such as Roman roads were neglected, towns emptied, and many currencies were hoarded and/or debased.² If these factors were not enough to atrophy populations, the West was also hit with a series of epidemics that did not completely subside until 750. From 500 to 650, it had lost almost half its population decreasing from nine million to five and a half million (Russell, 1972, p.36).

Against these deleterious conditions, kings were nevertheless tasked with preservation of their kingdoms. This was initially more arduous given the fact that the Germanic tribes were in the minority, that is, they were but a fraction of the overall population.³ Such a circumstance could potentially put the Germanic kings at a disadvantage. As it turned out, none would be undermined by their lack of num-

¹Italy came to be ruled by the Ostrogoths, Gaul the Franks, Britain the Anglo-Saxons, Provence the Burgundians, Spain the Visigoths and in North Africa the Vandals.

²Recently, these conditions have been linked to environmental changes. Current research shows the region undergoing a period of rapid cooling and in 535 experiencing a dramatic climate event causing massive crop failures. Geologists have postulated that the extreme weather was due to a volcanic eruption in South America blanketing the atmosphere with dust. See Bjorn E. Berglund (2003), M.G.L. Baillie (1994) and Larsen et. al (2008).

³Josiah C. Russell (1972, p.38) puts the German number at less than a million. With approximately sixteen million Romance peoples, Germans comprised just a little over six percent of the total population.

bers. Rather than enforce new institutions and laws on the population, German kings and their courts, in the main, borrowed and used the Roman ones already in place including the official language, Latin. The Anglo-Saxons in England were the one exception, but here the settled people fled rather than fought, leaving the Germans to move forward on new lands with their culture intact.

What came to pass on the continent on the other hand was the amalgamation of Roman and German culture.⁴ The integration primarily occurred at the higher levels of the political-social sphere, leaving the larger population their customs. It is of note however that while many kings and their courts used what was readily available, they did not fully integrate, develop and refine the Roman laws and customs making them their own. This state of affairs left many kingdoms without fully working administrative institutions. Moreover, one barbarian custom, brutality, was never entirely subsumed. While the Imperial administrative scaffolding and resources were *partially* adopted, a very different Germanic habit of thought, violence, remained. Even with an allowance for excess, the contemporary historian Gregory of Tours (c.538 – 594) chronicled and corroborated the terror and savagery of the Germanic tribes. The historian Henri Pirenne observed:

Perhaps there has never been a more depressing spectacle than that which was offered by the Western world during the two centuries that followed the Germanic invasions. Brought too suddenly into contact with civilization, the Barbarians, in their haste to enjoy its advantages, adopted its vices, and the Romans, no longer restrained by the strong hand of the State, acquired the brutality of the Barbarians. There was a general unleashing of the crudest passions and the basest appetites, with their inevitable accompaniment of perfidy and cruelty (1955 [1938], p.36).

⁴For a fuller exposition about the merging and integration of the Romans and barbarians see Patrick J. Geary (2002).

The violence and decadence would, as with most hierarchies, stem from the top and filter down. Local governing, having little if any oversight, was left to paid officers (counts, dukes and prefects) and conformed to the standards of the court. Contrary to the old Germanic tradition where kings were elected to the position, the new kings of the West took a page from the Roman Empire and decreed absolute authority. The territory over which the barbarian kings came to rule were not barbaric states but barbarized Roman kingdoms (Ibid., p.37). The state of affairs for centuries following the invasions then was one of arbitrary abuse of power and corruption.

Primary among the causes was the simple fact that force and violence was a way of life practiced and sanctioned by the king and his military. In other words, violence had become a custom where “brutality was legalized and encouraged by being made profitable” (Bloch, 1961, p.115). Along these same lines, because violence is a highly effective method, other means to attain ends, will, in a culture of force, be underdeveloped or unused. That is, its effectiveness assures its use and diminishes that of others. Furthermore, and similar to other forms of human behavior, continual use tends towards habitualization which in turn amplifies and perpetuates its expression. Finally, brute strength was highly esteemed and nowhere was the demonstration of this more acute than on the battlefield. A warrior’s record could bring him great reverence. From this, the psychological ramifications are not difficult to derive – hubris, invidiousness, vanity, ostentation, domineering and autocratic inclinations. The social ramifications of a warrior culture are similarly not difficult to derive – honorific attitudes and *idol* worship.

What was the initial aim and cause behind the extensive use of force in the early

Middle Ages? While it is difficult to say conclusively, five factors stand out as primary. First was the hierarchal organizational form. The second was the political competitive atmosphere among the aristocracy. The third was the shortage of land and resources *befitting one's rank*. The fourth was a general lack of knowledge and learning.⁵ And the fifth was the fear of losing rank or in the most severe case, life. The first, second and fifth explanations are more of proximate rather than first causes as they are of circular reasoning. Be that as it may, the line of argument has to begin somewhere and as this is not an explanation on the full history of human civilization, they will have to suffice. From the five, the hierarchal organization, shortage of land befitting rank and educational factors are of a structural nature, while the competitive temperament and fear are responses to them.

Together these conditions, by means of force, drove two forms of expansion in the Middle Ages: inward and outward.⁶ While raiding, a form of outward expansion without the intent to control, was more common in the early Middle Ages, expansion to settle or control proliferated thereafter. Many historians describe this tendency as one towards consolidation or unity. The impetus to expand though was not driven

⁵This is not necessarily required as a deterrent to force nor does it necessarily mean that it will be effective in this purpose. What it can do nevertheless is provide a template for other means of resolving disputes. If done correctly it can foster and develop the art of deliberation, nuance and discourse. These attributes can, *in part*, contribute to the deterrence of violence.

⁶The two types of expansions are qualitatively different from one another. Inward expansion is the appropriation of territory in the aggressor's settled region. This type of expansion would generally be fought among known warriors. Outward expansion is the appropriation of territory outside of the aggressor's settled region. Here warring groups had little knowledge of one another. In addition, there are two types of outward expansion: one, intent to settle or control by extension new territory and two, no intention to control. The latter's purpose was simply to gain material wealth or honor and nothing more. For roughly three hundred and fifty years following the deterioration of the Roman Empire, force and violence was driven by this form of expansion as historian Helen Nicolson (2004) notes: "Much of...[early warfare] can be characterised as essentially raiding without any long-term aim of permanently acquiring territory or any obvious motivation other than gaining booty and honour" (p.3).

by the desire to create a large unified territory like the nation-states of today but was initially driven by the desire to elevate one's rank and/or to preserve it. It was this impetus, along with the state of conditions – rigid class lines, minimal technology, shortage of land and resources *befitting one's station* and non-existent or poor educational institutions – which prompted heightened military competitiveness among lords, nobles, knights and kings. Thus, the consolidation, where it occurred, was simply a by-product of the process as a “ruler's chief concern was not national or territorial unity and centralization” (Ladner, 1947, p.408), but security and power. As a noble or lord of a small principality appropriated another lord's territory by means of force, it brought him increased status and a little more security. Or when the sons of nobles and knights conquered land abroad and began their own expansion due to the shortage of land *befitting their station*, the result was the same.

The affect of the Germanic invasions not only ushered in centuries of violence in the early Middle Ages, but it also set the tone for the centuries to come. “From the broadsword, the long sword of the great invasion, later to be used by the knights, stretched a murderous shadow over the west. Before the work of construction could slowly begin again, the west was gripped for a long period by a frenzy of destruction” (Jacques Le Goff, [1964] 1989, pp.16-17). In these conditions the use of force became the principal mean to attain ends, where the principal end or aim was the elevation of rank and/or its preservation. Together these characteristics, along with the general impulse of the era – expansion – will be used as an analytical construct in assessing whether or not there was a general continuum or general break between the epochs of the Middle Ages and the modern era. Before this however, an inquiry into

the dominant institutions and narrative(s) along with their evolution will be briefly undertaken. Such a sketch will aid as a comparison to the preeminent institutions of today – the business enterprise, the secular state and the secular legal system.

2.2 Competitive Force, Status and its Preservation

“Chief among the honorable employments in any feudal community is warfare; and priestly service is commonly second to warfare” (Veblen, 1934 [1899], p.1).

“Peasants, the sons of bondsmen, were certainly involved in one way or another in the struggles for colonization, but the main impulse came from the knights’ shortage of land. New land could only be conquered by the sword” (Elias, 1982 [1932], p.41).

In the initial stages of the High Middle Ages (c. 1001 – 1300), variance between it and the preceding age was slight. In both, lords, in contention with kings, controlled tracts of land and its accompanying resources leaving a perforated political and social structure. Such conditions made it difficult to centralize power after the Germanic invasions had ceased.⁷ In addition to this, both ages were heavily reliant upon the use of force as a principal means to resolve conflict and acquire or maintain rank. For many centuries, force, if it could be mustered, was open to all. That is, it was not a monopoly of the king but a competition among feudal lords. Given that land control was greatly prized for both practical and invidious reasons, force or violence was naturally applied to its acquisition as well as its production. “For all warrior societies...the sword is a frequent and indispensable instrument for acquiring means of production, and the threat of violence an indispensable means of production”

⁷The West, as is common knowledge, continued to endure invasions after the original Germanic expansion. Among them were the Vikings, the Muslims, the Hungarians or Magyars and the Mongols.

(Elias, 1982 [1932], p.149). Nevertheless, certain changes began to take shape around the tenth century that would distinguish the past several centuries from the ones to come. Among the most significant were the changes in relationships between kings, nobles and peasants and the change in the relationship between kings and the papal Church. The former can be chronicled through the feudal institution and the latter by the papal institution.

2.2.1 Feudalism and the Warrior Class of Knights

Until Charlemagne consolidated the West through military force in AD 800 and became the Holy Roman Emperor, kings of the region before him had only aspired to do so. There were many reasons for his success but chief among them was the use of a new political and social arrangement between kings, aristocrats and aristocratic knights—commonly known as feudalism.⁸ As was the general trend of the time, armies were traditionally built and sustained through a draft.⁹ Such criteria posed several problems for the Merovingian dynasty (c.500–800 AD), the empire preceding Charlemagne’s, as peasants were poor and had little access to materials or the

⁸How the feudal arrangement was originally instituted is still debated, some attributing it to the Germanic tribes others to prior Roman institutions. From a structural standpoint, feudalism represented a lack of resources and ability on the part of the king and his administration. “In their [monarchies] lack of salaried officials and full-time soldiers, above all in their implicit compromise with the powerful subject [the aristocrat], these monarchies are feeble creatures beside the Leviathans of the sixteenth and seventeenth centuries [of which were still to come]” (Waley, 1964, p.21). Despite the on-going debate over feudal origination, one aspect of the implementation is clear: feudal arrangements were a method to create allegiances, albeit temporary ones. Land grants in rental form (known as *precarium* and later *beneficium*) were a technique to convince warriors, *particularly well-trained mounted warriors*, to fight on behalf of the king. Land grants to friends, family and trusted military servants were also used to monitor and supervise territories. In return for the grant of land, vassals would then have to swear an oath of fealty and homage to the lord. By and large, this process was done in verbal form only; it would not be until the thirteenth century that written documentation became the norm (Le Goff, 1988 [1964], p.92).

⁹In the kingdom of the Franks, all free people with Frankish residency were obligated not only to serve but to come equipped with arms (John Beeler, 1971, p.9).

knowledge to make armaments. In addition, neither conventional nor new fighting techniques were well known to peasants. Regardless of these conditions, a king's need for infantry and beginning around AD 800, cavalry, was immense as his position was dependent on not only the sheer number of warriors he could induce to serve but also on the quality of training a warrior received.

For a king to induce a well-trained warrior to fight however meant remuneration, something which kings of this era *partially* lacked on the account of the tendency of the Church and lesser territorial lords to hoard; a problem that would continue well into the eleventh century (von Werveke, 1932, p.468). Imported luxury goods from the East would also drain the West of gold and silver coin (Le Goff, p.4). Because war was persistent and an expensive enterprise requiring heavy armaments and victuals, kings were faced with the task of building, maintaining and strengthening armies.¹⁰ To remedy this, kings turned towards new technologies and techniques. Some of the more common were new siege technologies, updated logistics and later mounted troops.¹¹ They would also exploit the resources of ecclesiastical institutions.

As early as AD 751, the Carolingian king had the Churches and monasteries inventoried in an effort to better exploit them (Bachrach, 2001, p.61). Just as important however, kings also began to turn to a new method of political and social arrangement, feudalism. The main advantages of the arrangement were two: first it created a much needed funding source and second it deepened a prevalent but crucial social

¹⁰The medieval knights were weighed down with one hundred pounds of plate or chain link armor (Friedel, 2007, p.81).

¹¹There has been some debate over just how extensive the use of mounted troops were in the following centuries after the introduction of the stirrup into the West, see Bowlus (2006), p.49 and Lynn White (1962).

habit of the times – duty or fealty to a god-ordained king. Feudalism, or rental land granting, gave a king an additional option when building his army.¹² And because knights, as specially trained warriors, were in great demand, some were also recruited from the lower classes, which were generally perceived as inferior.¹³ Despite the hostility towards the knights drawn from the lower barrels, collectively, the warrior class was too important to arrest the trend. Beginning their training at a young age, they became *the* elite group of warriors that represented, valued and upheld the behavioral code of devotion and fealty, something that played no small part in fixing the social-political order.

However, the *majority* of knights were not kept on as retainers of kings. Rather, knights were in large part, independent of them having their own castles and fiefdoms. They swore allegiance to the king and periodically paid a tax on granted land, although this was usually waived in exchange for military service. They also con-

¹²As is well known, feudal arrangements went beyond the relationship of kings and warriors but also to the relationship between lords (including warriors, the clergy and aristocrats) and peasants; it also became hereditary. Because feudalism was an institution of reciprocal interpersonal relationships in an era dominated by force, cases were also found where peasants sought protection of marauding knights from other marauding knights. As Marc Bloch observed, “Everywhere, the weak man felt the need to be sheltered by someone more powerful. The powerful man, in his turn, could not maintain his prestige or his fortune or even ensure his own safety except by securing for himself, by persuasion or coercion, the support of subordinates bound to his service. On the one hand, there was the urgent quest for a protector; on the other, there were usurpations of authority, often by violent means. And as notions of weakness and strength are always relative, in many cases the same man occupied a dual role—as a dependent of a more powerful man and a protector of humbler ones” (Bloch, 1961, p.148). Some scholars date the full scale land appropriation to Charles Martel, grandfather to Charlemagne, when he forcefully appropriated Church lands for the benefit of raising an army. The fact that the land appropriation was taken from the Church is an indication of its accumulation of wealth in early stages.

¹³This necessitated that the aristocrats and ecclesiastical magnates, i.e. military households, be responsible for their provisioning. Much of the early power of the aristocracy, before the full development of feudal arrangements, was not derived from any judicial or religious precedent but from their historical fortune. During the Merovingian period, the Gallo-Roman landowners had been able to preserve their domains despite the collapse of the Roman Empire. Some members of clergy and nobility nevertheless saw bestowing knighthood on the lower classes as a disgrace. That is, they were viewed as inferior, likened to workers in the “vile mechanical arts” and should be barred at all costs (Cipolla, 1972, p.18).

tributed to the councils from which the king took heed. Moreover, when warriors or knights were called to arms to battle in a campaign, they were not required to serve for extended periods of time. And although the length of service varied from region to region, the average amount of time a knight might have had to serve was anywhere from 40 to 60 days in the course of a year (Beeler, p.29).¹⁴

In time distinctive behavioral patterns (codes) and rules developed for proper “knightly” behavior. The formation, codification and development of a knightly class independent of the king’s army was likely the product of two factors. The first and most obvious in terms of organization was a king’s lack of a *large standing* army. From the immense particularism of the Medieval era, the inability of kings to build and maintain *large* professional armies was one, out of only a few, common characteristics. Arguably an independent knightly class would have been immaterial if not for the lack of the king’s ability to build such an army. Some explanation can be found in the fact that kings lived off the productive land and resources of their own feudal domain and did not have the capability of extracting enough taxes nor an advanced administrative unit to support a large standing army.¹⁵ Such changes did not begin

¹⁴In comparison, Roman soldiers in the professional army would serve up to six consecutive years.

¹⁵Other characteristics contributing to this inability, especially early on, might have been: a lack of monopoly control over coining and the ability to tax regularly and circulate the coins broadly, a developed administrative institution capable of advanced accounting, a large agricultural surplus upon which the entire population could draw, a large or growing population, a relative period of stability (limited wars, famines and epidemics), an ability to militarily train a relatively large proportion of the population and an established form of deliberative Royal law. For all of the early Middle Ages and for much of the High Middle Ages, kings had a difficult time in meeting the above criteria. The German kingdom on the other hand may have been the exception as it appeared to meet several of the above criteria becoming by far the strongest kingdom in West during this time. Among the criteria met was the claim to the Holy Roman Empire with its established religious codes, the opening of silver mines in the Harz mountains and a series of military reforms enacted by Henry I (876 – 936) and carried forward by the succeeding Ottonian kings. For a more detailed analysis of the German kingdom see Bowlus (2007).

to appear until the thirteenth century and notably among the French and English crowns.¹⁶ Before this change would occur however meant that to fight wars the king needed to recruit a large number of trained warriors. And these warriors were found in the military households, in both secular and religious houses, that scattered across the land. Thus, for centuries there were no large centralized professional armies but smaller warring groups. This dispersion of warriors contributed to the development of a knightly class.

The second and sometimes neglected factor, due to its ubiquity, in the development of the knightly class was the widespread use of force as a principal means to resolve disputes. That is, the class of knights and their codes of behavior were an outgrowth of violence rather than the converse of this. As with the early Middle Ages, the High and Late Middle Ages also displayed similar traits when it came to the frequency and extensiveness of the use of force.

Feudal society as a whole...scarcely altered its habits and manners since the ninth century. Almost everywhere the lord of the manor remains a brutal and rapacious cutthroat; he goes to war, fights at tournaments, spends his peacetime hunting, ruins himself with extravagance, oppresses the peasants, practices extortion on his neighbors and plunders the property of the church (Luchaire, 1909, p.265).

The territorial power of the feudal princes was no more scrupulous in the choice of means than that of the absolutist monarchs or the tyrants of the Renaissance; it was merely more brutal. Each sought to increase his power to the detriment of his neighbor, and any weapon was permissible. The passion for land ruled the actions of all these feudal magnates, and

¹⁶Of the several contributing factors to the unification and monopoly control of force by the French and English monarchies was the spread of nationalism as a consequence of The Hundred Years War, the development of universities, the refinement of secular law and the beginning of monopoly control over the currency. For most of the period prior to the thirteenth century, magnates not only governed their local demesnes but also minted their own coin and implemented *fixed* dues (Pirenne, [1938] 1955, p.152). This gave the magnate a regular flow of financial resources and the ability to circulate money, which in turn contributed to a principality's stability.

as there was no one to stop them, they struck at each other with all the brutality of their instincts (Pirenne, 1955 [1938], p.150).

Violence was official as well as individual. Torture was authorized by the Church and regularly used to uncover heresy by the Inquisition. The tortures and punishments of civil justice customarily cut off hands and ears, racked, burned, flayed, and pulled apart people's bodies. In everyday life, passers-by saw some criminal flogged with a knotted rope or chained upright in an iron collar. They passed corpses hanging on the gibbet and decapitated heads and quartered bodies impaled on stakes on the city walls" (Tuchman, 1978, p.135).

Among these feuds, the chronicles have recorded especially the conflicts of the great noble families, as for example the 'predicable hatred', mixed with abominable treacheries...In the tales chanted by the minstrels, the nobility found the echo of their passions, elevated to epic grandeur...It is true that when in the thirteenth century the nobility had finally become a hereditary body, it tended to reserve for itself as a mark of honor any form of recourse to arms. Legal doctrine and the public authorities...readily followed suit, partly from sympathy with the prejudices of the noble class...Thus violence became a class privilege—at least in theory. (Bloch, 1961, p.127).

Here Bloch indirectly identifies the codification process of knights when he states that force became a class privilege. Privilege as it were, is a byproduct of codification and acts as a marker or a method to distinguish one group from another. Along with the importance of legal recognition, privilege generally operates most effectively when the group in question is successful at excluding other groups from emulating their behavior. The more codified, the more ornate and more elaborate these behaviors become the more difficult it is to emulate. The evidence of this can clearly be seen as knights went on to develop ever more elaborate behavior in the form of chivalry. It is also of note however to take account of the final words of Bloch's sentence, 'at least in theory'. While the warrior class for centuries did its best to claim exclusive use of

force, the pervasiveness of violence was too great as even the Church, an institution, ‘at least in theory’, of forgiveness and peace, perpetrated or encouraged violence.

It is worth re-emphasizing that fighting in battle was seen as a glorious enterprise even more so when victorious. Among the several virtues of this age, valor was highly regarded. This virtue was esteemed from the very apogee of the hierarchy as the “nature of Germanic kingship was such that whatever other admirable qualities a king might have, his ability as a great warrior would gain him enormous admiration and loyalty among lay lords who could respect no other qualities except proficiency on the battlefield” (Cantor, 1993, p.179).

What behaviors did knights cultivate? The three most primary were prowess, devotion (sometimes referred to as duty or fealty) and honor. The Song of Roland, a widely known *chanson de geste* written sometime between the late eleventh century and early twelfth century, captures many of the sentiments of the knightly class. From the descriptions of chivalric behavior found within the text are words such as valour, faith, honour, fealty and vassal (Sayers, 1965). Moreover, and likely more important, was that the use and codification of prowess, devotion and honor had secondary effects, namely the fortification of social rank and reinforcement of violent tendencies. The Chivalric code of battle, as it is often misconceived, was only applied when fighting other knights not to the peasant population.

Chivalry then was not, as popular belief would have it, about restraining the horrors of war but rather it was about propagating them in the attempt of validating the behavior. The benefit and purpose of which was to strike fear into the majority of the population thereby controlling, setting and preserving the order of the political

and social hierarchy (Gillingham, 1988; Keen, 1984; Strickland, 1996; Kaeuper, 1999). Knights on the whole, were “the most turbulent of men, furiously destroying one another in the private wars and family vendettas in which they were continually involved. In vain did the Church, from the close of the 10th century – first of all in France, and later in Germany – restrict the days of battle by the ‘peace of God’; *custom* proved to be too strong for it” (Pirenne, [1938] (1955), p.158-159, emphasis added). Consequently, knights’ behavior lent itself towards force and violence.

The actual process of cultivating and codifying the knightly class was significantly aided by the concurrent development of feudal relations. For what was the feudal relation if not the explicit recognition of a superior to an inferior? It might be mentioned that the modern concepts of human equality and liberty were foreign to this time period. In its stead was a “right” order with service a central tenet. Though such stratification was to the benefit of the superiors who were in the minority, the relationship was not one sided. If it were so, feudalism (notably with great assistance from the Church) would have been hard pressed to last close to six hundred years. Up and down the feudal ladder, all, including kings and popes, swore allegiance and pledged fealty to a higher rank.¹⁷ Oaths and their ever more elaborate ceremonies were in no small part central to the entire feudal enterprise. “Men and women admired

¹⁷It might be asked what peasants, who far outnumbered the ranks above them, received in exchange for their devotion? For one, protection from *other* marauding knights and for another, someone in close proximity to serve and worship outside of the Christian god and the pope, as it should go without saying that the Medieval era, relative to our modern times, was more superstitious and more prone to *idol* worship. Surely this does not imply that modern women and men have forsaken such habits but that they have been reduced. A testament to modern *idol* worship can be found throughout “pop” culture, as well as in sports figures and Hollywood “stars”– going so far as making physical imprints in concrete. More recently, and with the advance of the computer and internet connectivity, fame has come in the form of “online” celebrity. Be that as it may, *idol* worship now takes something of a backseat to a more prevalent type of worship – pecuniary emulation.

lords, feared them, and aped what they took to be their manners and mode of life. The nobility set the tone, even while they changed it” (Boulay, 1970, p.133). Yet this feudal set of arrangements came at a cost; local lords also accumulated secular power undermining the power of the king. When a local lord’s power grew strong, the king could replace them with trusted servants and/or enter into battle either on the frontiers of their territory or beyond where a victory would temporarily solidify the king’s position.¹⁸

From a political and organizational perspective this era appears to be built on a poorly constructed latticework. Some have even termed this period of time as one dominated by “centrifugal forces” (Elias, 1982 [1939]). That is, endogenous forces that drive centralized power to fragment. And while there is little doubt that land grants undermined the control and power of the king, this was merely an initial solution to the problem of funding, underdeveloped administrative and legal institutions and the lack of a *large standing* army. Part of Charlemagne’s success in uniting most of Western Europe was the result of addressing some of these problems. He did so through the creation of new regulations and through new reforms and policies particularly directed towards military training. The latter of which grew and solidified a relatively large army.¹⁹

¹⁸In the German Empire, another approach was taken. Instead of family or trusted military servants, kings installed clerics in positions of local power. “The appointment of high ecclesiastics without heirs was intended to put a stop to the tendency of functionaries of the central authority to turn into a ‘hereditary, landowning aristocracy’ with strong desires for independence” (Norbert Elias, 1982 [1939], p.20). But this, in time, also proved to be ineffective as the clerics eventually sought secular power.

¹⁹Some such regulations were that all who held benefices must fulfill military service, that every horseman should have a shield, lance, sword, dagger, bow, quiver and arrows, that every man owning twelve *mansi* should own a mail shirt, that if called to a campaign each infantryman should bring enough rations to last three months and enough clothes for six. Reforms that offered some relief from these demands on many of the poor and disciplinary measures were also instituted. See Beeler

Feudalism, as it would turn out, was not the best option in the long run for order and stability in a society ruled by competitive force. However, what the feudal system lacked in organization it gained in the crystallization of institutional order through the power of fealty and honor, two of the primary behaviors cultivated by the knightly class. “We must not say, therefore, that the feudal system broke down the State, for the truth is the reverse of this. It still maintained a bond – or at least a formal bond – between the king and those parcels of the kingdom of which the great functionaries who had become princes had possessed themselves, and whose feudal oath made them vassals” (Pirenne, [1938] 1955, p.150). In this way it can perhaps be said that there were two forces, as opposed to one, arising from the feudal arrangement — one of a centrifugal tendency and the other of a centripetal tendency. Moreover, while land grants made violence more *accessible* to lesser lords, the act itself did not necessarily precipitate the use of force. Force was precipitated primarily by the five above explanations and through the *culture* of violence that inundated the epoch. Force then became the principal mean to attain the principal aim of the age: elevation and/or preservation of rank.

Thus society was predominantly ruled by expansion and competing military forces. These conditions were so great that discord between the papal Church and monarchs also appeared. For the most part however, the relationship between these two pre-eminent institutions had a stabilizing effect on the system. Along with the binding arrangements of feudalism, the unity between the two set and sustained the political-religious order through the Church narrative. The Church accomplished this through

(1971), pp.14-15.

the promotion and proselytization of its belief system, the principles found therein and the habits arising from their use. This stability was not so much from the effectiveness of the Church curbing violence, although it did from time to time attempt to do so as the Peace of God and Truce of God attest to, but that it created a singular belief system, religious laws and tried cases in its own court system.²⁰ The relationship between the papal Church and the monarchy as well as the Church's role in preserving the hierarchy will be explained below.

2.3 The Role of the Church in Feudal Warrior Society

Among the more significant developments in the Middle Ages of the West was the *co*-evolution of the Church and the monarchy. In time these institutions came to have a special relationship. Given the political and intellectual conditions, it is hardly surprising that the two joined forces. What the monarchy lacked, a political doctrine of the likes of Confucianism or Aristotelian Ethics, the Church provided. And what the Church lacked, military strength, the monarchy provided. Individually and collectively these two preeminent institutions created counter-forces that pushed back against the centrifugal political tendencies of feudal *organization*. Of the two, the papal Church, its belief system and its own rituals were perhaps an even stronger centripetal force.

The union was by no means predetermined but the outcome of particular circumstances, the most urgent being the extensive and competitive use of force. Once

²⁰The Peace of God stipulated that knights were forbidden to attack peasants while the Truce of God forbid fighting on holy days and during Lent.

united, they increased their chances of maintaining superiority over their rivals. The religious ceremony of coronation and unction was, at its core, a practice legitimizing the Church as much as it was the king. The ceremony ordained the king into the priestly order but because this was done at the hands of the pope or clerics it, at the same time, legitimized the Church's position. In the world of ideas, the union created a vision of harmony between Heaven, Church and Kingdom. Once anointed, the king was brought into the heavenly hierarchy. In exchange he became *the* defender of the Church. Books, known as the *Mirrors of Princes*, were written for this explicit purpose. Together, the monarchy and the Church, served to define group boundaries and fortify social rank. However, it must be made clear, that the union was a union of religious doctrine not a union of organization.²¹ In other words, temple and palace remained separate. While they shared and practiced Christian theology and while the king through coronation and unction entered the priestly order, the two were separate entities. On the ground, they were not only located in different regions, but also altogether organized and operated independently. The pope resided in his domain, mostly in Rome and St. Peters, while kings resided in theirs. The pope had his "vassals" – cardinals, bishops, abbots, monks, and priests – and the kings had their "vassals" – nobles, knights and lords.

The union was also the product of conscious effort and took centuries to develop. In the early stages, many German tribes either practiced paganism or Arianism (a form of Christianity that was considered illegitimate by the papal Church). The

²¹The German kingdom may be, in degree, an exception to this rule as it was common practice for German kings to appoint bishops making them beholden to the pope *and* the king. A full integration however was never fully accomplished due to the fact that the papal Church contested this practice.

process of full integration began when the pagan born Merovingian king, Clovis I (466-511), converted to Nicene Christianity in AD 496.²² For the empire and the surrounding areas, his conversion would prove to be significant on many levels. First, it deviated from other Germanic tribes that had converted to Arianism. Second, it led to the unification of religious belief and practice throughout France and Germany as many Franks followed their king and converted. Third, it was the “official” doctrine of the papal Church. And finally, the monasteries and local Churches were the sole source for education and knowledge at the time, making an alliance critical for the aristocrats and the king’s administration. As monasteries and Churches grew and gained power throughout the West, other Germanic kingdoms such as the Visigoths, the Lombards and the Anglo-Saxons converted to official Church doctrine. When Charlemagne was crowned Holy Roman Emperor by the pope (800), the alliance reached an apex. It also established the *regularity* of investiture.

2.3.1 The Growth of the Papal Institution

As with the union, the growth of the Church was not a forgone conclusion. Its development was thwarted at every turn. For close to three hundred years following the putative death of Jesus, Christianity or Christian thought was comprised of many small sects, each with their own particular beliefs and practices and all vying for legitimacy. These varied from the Essenes, the Gnostics, the Marcionites, the Docetists, Arianism, the Cathars and many others (Martin, 2014 [2005]). It was not until the Church convened the First Council of Nicaea (AD 325) that official doctrine was es-

²²Although Emperor Constantine had officially sanctioned Christianity at an earlier date (c.313), it was not until the conversion of Clovis I that the religion became widespread.

established. And naturally, with an official declaration of faith also came an official declaration of blasphemy. The Church from its earliest stages then was beset with rivals for authoritative rule. When pope Gregory I (c.540 - 604), two hundred and seventy-one years after the First Council, saw to it to convert the people of England, known as the Gregorian Mission (AD 596), he was responding to the same tendency addressed in the Council – usurpation of religious power.²³

Given however that Church was not a military institution and the fact that its belief system had yet to gain widespread adoption, it was effectively compelled to appeal to military monarchies in the effort to bolster its standing.²⁴ Characteristically of the times, many of these appeals were made to military monarchies that had attained their power illegitimately (through force) rather than legitimately (through election or blood-right) (Kern, 1956, p.28). The implication of such a choice is that it did not matter much “how” a king attained power but whether he would support the principles of the Church, subsequently the “Church allied itself with force, and sanctioned force by this very alliance” (Ibid.).

²³Among the early churchmen and political figures contributing to the rise of the Catholicism and its institutions was the above mentioned pope Gregory I. He played a prominent role in shaping the Church, and thus the West, as he was the first pope to fully grasp the capacity of Christian theology and papal rule as well as the scope of the changes of the times. To him, Europe was more than its geographical borders. Instead it was an interwoven Christian culture (Cantor, (1993) [1963], pp.158-159). What Pope Gregory had that other popes before him did not was a vision of Europe. To what degree this can be attributed to him personally or to the broader circumstances of the time is difficult to tell. As with many things, it was more than likely a combination of the two. In any event, one of pope Gregory’s more significant visions was the unity of the Church and monarchy notwithstanding the latter’s general state of disrepair and rampant corruption. To this end he wrote several deferential letters to the Merovingian king, Childebert II (570 - 595), in an attempt at alliance. Although Pope Gregory I was not effective in his endeavor during his lifetime, his influence over other churchmen was great enough to eventually bring the vision to fruition under the Carolingian dynasty.

²⁴Constantine I himself played an integral role in ending the violent persecutions of Christians as well as in convening the First Council of Nicaea. Charlemagne some four hundred years later would also support the Church. Through a series of reforms he unified cannon law, enforced the payment of the tithe (a 10 percent tax that helped finance Church activities) and elevated Church status.

Growth came to the papal Church in two non-mutually exclusive paths. One was through the physical expansion of monasteries and churches the other was through the accumulation of monetary wealth. Beginning with the first, kings and nobles aided the growth of physical monasteries through endowments as well as through missionary work.²⁵ In return for the endowments, prayer was conducted on the behalf of their souls and that of their relatives. Papal wealth accumulation on the other hand was largely accomplished by collecting tithes, tributes and by selling indulgences (a partial reduction for sin). It also used various taxes such as St. Peter's Pence, annuities, reservations, dues of the Pallium (a neck garment) and indult (a grant of exception) to fill its coffers (Pirenne, 1955 [1938], p.293).

It is interesting here to briefly remark upon the similarities between the selling of indulgences and modern transaction fraud. Both involve the selling of an asset, if indulgences are thought of as an object of value or as an intangible asset, in exchange for money and both share the condition of asymmetric information, which is an indication of the exercise of power. Where there are major distinctions, they may lie in the absolute amount and types of assets for sale as well as the quality and degree of control over the law.²⁶ This then directs attention to an inquiry of jurisprudence,

²⁵As early as the ninth century, many monasteries had become extremely wealthy controlling large estates. These monasteries amassed such sufficient wealth that they acted as credit establishments by the time of the eleventh and twelfth centuries (Genestal, 2012). And while an abbot's local judicial and political power increased, they, like other groups of the time, could not escape the snare of feudal obligations. Abbots, following the contemporary political arrangements, became vassals to lords and kings. This meant providing religious, political and in some cases military services. By the ninth century serfs did much of the work in large monasteries. In this way monasteries were no longer completely self-sustaining, self-contained units. Instead, they were integrated into the social-political apparatus. The corollary to this change was that monks became free to dedicate much of their time to education and liturgical work (Cantor, 1993 [1963], p.154).

²⁶A minor distinction, in respect to the position of the buyer, might lie in the level of belief regarding the quality and effectiveness of the asset as well as the ability to discover (in the here and now) whether the exchange value is actually worth what it was sold for. Other minor distinctions

a topic discussed in the following chapter.

Whatever the similarities or differences, they no doubt contributed to the monetary growth of the papal Church. This growth brought with it a multiplication of administrative positions, more elaborate habits and rituals, more control over the faithful and eventually an increase in corruption and abuse. Surely there was a difference in experience in the lives of popes in the sixth or seventh centuries with the lives of the popes of the eleventh, twelfth or thirteenth centuries. A secondary development arising from the Church's increasing strength was that it put it on a collision course with the monarchy. Pope Nicholas I (c.800 – 867), who held the papacy from 858 – 867, was among the first of the popes to explicitly challenge the power of secular kings, regarding himself “as the judge and the director of the depositories of the temporal powers, whether kings or emperors” (Pirenne, 1955 [1938], p.118).²⁷

Why the Church felt it necessary to build great wealth can, *in part*, be attributed to the same general aim of the era – preservation in the face of authoritative challenges.²⁸ In a social world of material shortage, localism and force used as the principal mean to ends, the papal Church was similar to any other kingdom of the Middle Ages. As kings in the political realm looked towards further expansion as a means for preservation, so too did the papal Church in the religious realm. And like monarchies,

might be found in the motive and end in view of the buyer. Where primarily fear-driven purchasers of indulgences did so to reduce the punishment of their sins and ultimately to gain entrance into the kingdom of heaven, this is not the case for buyers of modern day assets. The latter, primarily driven by necessity or status-seeking, do so either for sustenance or the elevation of rank.

²⁷The contest between pontiff and monarch would drag on for centuries and direct the course of Western history. Viewed from a distance and in lieu of their organizational independence, the contest over supremacy that built up over the centuries between the two appears to have been unavoidable. More will be said of this in the proceeding chapter.

²⁸Popes were also continually besieged with adversaries from the Eastern Byzantine Empire to the Celtic Church of Ireland.

it was not immune from challenges to its position. Yet despite the fitful pattern of gaining and losing believers, by the turn of the millennium, an entire host of new Christian states were converted – Poland (966), Hungary (986), Denmark (950-986), Norway (995-1000) and Sweden (Le Goff, 1989, p.63). While the Church would not fully achieve the pinnacle of power for another two centuries or so, it had nevertheless, by this time, amassed enough influence to control much of the behavior of the laity.²⁹

Purpose and Control

The Church's central aim was to directly guide Christian souls through the hazardous and corrupt terrain of physical life. In other words, its "stated" purpose was to determine and shape the conduct of society. Success relied upon the ability to instill a value system as well as a way to enforce or control it. The value system itself relied upon a well constructed narrative that would provide a set of theological principles. These principles in turn would give an explanation for the political-social order. The Church, unlike the monarchy, nobles and knights, which compelled behavior through force, *first* compelled behavior through its belief system. It goes without saying that the Christian narrative had and still has a profound impact throughout the West as much of the modern value system stems from this very narrative.

The Christian belief system was, and is, a system that primarily directs behavior through the emotions of fear and guilt. Two fundamental concepts drawn from the narrative that encourage these emotions are the idea of heaven and hell and the

²⁹The conventional wisdom regarding the height of Church power dates it between pope Innocent III (1198 – 1216) and pope Boniface VIII (1295 – 1303).

idea of original sin.³⁰ To gain access to the kingdom of heaven and avoid eternal damnation, the faithful are required to undertake good deeds and practice penance as a consequence of man's original sin. The role and effect of the Christian doctrine on Western society cannot be overstated. In the face of what, for all intense and purposes, was disorder and the gross facts for much of the era – violence, brutality, material inequalities, corruption and abuse – it structured, ordered and gave hope to the destitute masses. What is more, it sanctioned the hierarchy and curbed social movement.

Mechanisms for Control

There were three primary mechanisms the Church used to achieve the goal of behavioral control. First among them was the development of a set of morals or behavioral codes known as the scriptures. This also included the ceremonies and rituals administered by churchmen. Second was the development and refinement of religious law (Canon law). And third, was the use of force. Although the Church, in comparison to the crown, did not have the same military capacity, they did have the religious and moral authority to direct it. The crusades and the persecution of heretics, i.e. the Inquisition, are evident of this fact. The timing in which these three were employed is also indicative of the medieval culture of force. In the early stages the Church sought the military protection of the monarchy and undertook missionary work to convert heathens.³¹ Simultaneously the Church also saw to it to create documents

³⁰Despite the fact that the latter idea was the creation of Saint Augustine, this did not hinder belief in it. It might be noted that Christian doctrine (not necessarily practice) also encouraged the ideas of “brotherly love”, “peace” or non-resistance and renunciation or piety.

³¹The principal actors in early missionary work were the Irish and English monks as they were relatively more fervent and better educated.

legitimizing its position and that of the pope as the Vicar of Christ on earth. As its strength and power grew, it refined these documents into Canon law. But it would be only at very end of the twelfth century, a period of time in which the Church had gained enough power over a broad swath of people, that it could effectively use its power and influence to manifest physical force on a large scale. By the time of the crusades, the pope no longer had to limit himself to missionary conversion. Instead he could issue a call to arms to forcefully convert, or kill outright, heathens.

All three mechanisms were integral in ossifying the social-political order of the time but more importantly, and in respect to the general thesis at hand, by identifying and then noting their transformations, it will be possible to see more clearly how the Church lost its “monopoly” power to sanction the behavior of the masses. Its ecclesiastical courts, once prominent throughout Western lands, slowly diminished (c. 1200) and gave way to their political counterpart. Despite evolving to meet the new conditions, once it also lost its control over the dispersion of knowledge, the monarchy and the nobles no longer had to solely rely on the papal Church for learned men. The Investiture controversy and the Reformation further weakened its position by splintering the Church’s once unified belief system. As Europe moved into the sixteenth century, the Church’s influence lost ground while the influence of the monarchy and its legislative bodies grew. The center of battle ultimately rested over the control of the courts once violence was tempered or in another way of saying, once the monarchy gained monopoly control over force. Of the three mechanisms, it was the control over legal institutions that would have the most long lasting affect on the conditions of today as they have become the primary institutions, along with

the business institution, directing behavior. Moreover, the “idea” of a social order determined through the law, acts as a fundamental value-claim reinforcing that order.

The turn towards jurisprudence however was not a forgone conclusion. Rather, it arose from a particular set of circumstances. These circumstances will be addressed in the following chapter as they are elemental to the transition of a modern order based on a monopoly state and the widespread dispersion of business and transaction fraud. The other two mechanisms, the development of moral codes and the use of force, will be briefly explained.

Morals and Behavioral Codes

The morals and behavioral codes sanctioned by the Church were, in one respect, similar to those sanctioned by the kings, nobles and knights, in that they were of a deferential character. The three most prevalent forms were: idol worship, honor and devotion. Idol worship could be found in the worship of popes and kings but it could also be found in the worship of lesser figures such as barons and monks.³² The behaviors of devotion and honor could also be found extensively throughout the ranks. Devotion in particular played an important part in the order as it guaranteed

³²Monks in particular were imparted with great esteem, some even achieving considerable notoriety as miracle workers (Cantor, 1993 [1963] p.148). It is probable that one explanation for the popularity of monks was that they symbolized the spiritual attainment of salvation, then regarded as the consummate goal of life. The symbolization was captured in the practice of self-denial, abstinence and piety. These represented the denial of material life altogether with the exception of the most basic needs. That a person may secure salvation through abnegation of material wealth likely resonated with many serfs and peasants of the time as they had little access to material surpluses. The disparagement of the material world can, in part, be attributed to the influence of Platonist dualist viewpoint of body and soul, a viewpoint that influenced early Christian doctrine. The body, being of a physical nature, was conceived of as a temporary vessel subject to decay and dissolution. The soul on the other hand was eternal. The body then was representative of the material world in general. Upon death all of this was left behind; the material world ceased to have any value. From here it is not difficult to understand why the more zealous among them left society to forge a life of asceticism in the desert or other places free of human civilization.

everyone within it a person or deity, in the case of the king or pope, immediately above them to which they swear allegiance. The value of this temperament to medieval life should not be minimized. When compared to the current era and the extensive use of contracts and the belief and practice in the idea of individualism, the difference is stark. The former unites or binds, for good or for ill, while the latter disunites or unbinds for good or for ill. Devotion or fealty, in respect to the permanence of a community, is a reinforcing attribute; contracts and individualism are not. In addition to the temperaments of idol worship and devotion, two of the other more fundamental behaviors of the epoch were piety and asceticism.³³ If these two were practiced regularly, the original sin that all women and men inherited at birth would not prevent them from entering the kingdom of heaven no matter the station.

The Church was not blind to the continual lapses in “proper” behavior but conceived of these lapses as a process rather than a mark of complete failure. So long as one was striving day-by-day to right their wrongs, to receive communion, to offer tribute, to confess their sins, to undertake penance, they were on the right and holy path. This meant that any proximate ends arising from daily life would need to be reconciled with the final end – eternal salvation. Additionally, the order was framed in functional terms giving value to all groups and thus giving each a critical role in maintaining the next, at least in theory. Under this guise, the peasants and serfs saved the stomach, the kings, nobles and knights saved the community and the popes and clerics saved the soul.

³³The confluence between this type of behavior (devotion, piety and asceticism) and the behavior found in the merchant class (wealth seeking) would present the Church with a most serious dilemma. The solution to the problem did not so much come from a one time decretal but from a slow and evolving ecclesiastical shift in attitudes as will be explained in more detail below.

It is important to remark on the way in which Christian theology regarded the activity of labor. It believed it to be instructive for the development of self-discipline and saw in it the virtue of dignity. As Cunningham (1914) observed: “Human work of every sort may be regarded, from a Christian standpoint, as the privilege of sharing with God in His work of carrying out His purpose for Man...[while] affording opportunities of self-discipline. Christianity teaches that idleness is a sin; it is a form of self indulgence which prepares the way for many temptations to vice; and therefore work was valued as a means of keeping men occupied and well employed so that they were less likely to drift into evil” (pp.25-26).

Valuing *all* labor, although some more than others, gives one explanation for the effectiveness found in the idea of the functional order.³⁴ Other reasons may have been the use of fear and force. It was unlikely however that many entertained visions of other orders primarily due to the harsh realities of the time – shortage of food and resources, rigid hierarchal order, unending wars, an all powerful and wrathful god, slow technological change, and the commonplace of violence and brutality – but also due to the added advantage that such a functional vision has, namely the idea of a just society.

St. Thomas Aquinas (2010 [1265]), offered his account of the order this way:

For as many things are needed for man’s livelihood, for which one man is not suffice by himself, it is necessary for different things to be done by different men: for instance, that some cultivate the land, that some have charge of animals, that some build houses, and so forth. And since man’s life demands not only goods of the body, but also, and still more, goods of the soul, it is necessary form some to be busy about spiritual things for

³⁴This general view of labor is not currently found in the modern era. In its place is the general view that work is irksome. And while there is another lesser view that hard work has value, it is done so usually in respect to its monetary payoff. Chapter four will address this in more detail.

the betterment of others: and such must needs be exempt from the care of temporal things. This division of divers duties among divers persons is made by divine providence, according as some are more inclined to one duty than to another (*Summa contra gentiles*, iii, ch. 134, p.80).

The general temperament of this functional society was obedience and adherence to tradition. Life, thus conceived in the cloak of Catholicism, did not fail to touch most other human activities. That is, proper moral behavior circumscribed economic, political and social behavior. “More exactly, we might say that such a concept transforms all activity into moral activity, and every act into a religious act. And thus man’s ultimate end, whether he prays, works, studies, does business, eats, or amuses himself, is always God, and every means that leads him to study, work do business, eat, and so forth, must at the same time be such as to lead him towards his attainment of Beatific Vision. In other words, human action should be continual prayer. God is the rationalizing term of human life; all human means will appear rational or irrational just in so far as they lead man towards the attainment of God” (Fanfani, 1935, p.122).

For the Church, the point was to always move towards grace, the completion of which was to be found in the afterlife not the here and now. This is an important distinction because a concern with the afterlife virtually inhibits social and intellectual movement; it slows or arrests change. Speed or rapid transformation, from the perspective of the Catholic doctrine, was seen as an offense and disturbed the order. Salvation was not gained by accumulating wealth or creating something novel but by fulfilling your functional role and by a constant and steady religious practice com-

prised of piousness and asceticism. When the towns in Italy and in Flanders began to “bustle” in the thirteenth century, such a static terrestrial view would demand some adjustments.³⁵

Church Reforms and the Use of Force

The reinforcing mechanism, force, was employed reactively in response to a growing displeasure with Church abuses. The corruption and abuse was also a sign that the Church was approaching the summit of power. Such a state of affairs inevitably triggered rounds of reforms. It was around this time that the Church took an aggressive turn using religious propaganda, the practice of extreme piety and “holy war” to further its ends. The two greatest Church sins of the time were simony and clerical marriage, both of which impeded Church income. There were other abuses to be sure, but when the reform movement took hold in the beginning of the eleventh

³⁵There is some debate whether the papal Church actually discouraged or encouraged economic growth. It is clear that the ideas supporting the functional order of society however are of a static nature. Then again, these were ideas and theory not reality and practice. Any institution of power, if it is to remain in power in changing times, will need to make adjustments to their ideas. And this is exactly what the papal Church proceeded to do once commerce grew. Nonetheless, there was not a distinct break between the Church doctrine of the previous centuries and that of the centuries moving forward from the thirteenth. Such a view is a presupposition of those on either side of the debate. While it is evident that the papal Church fostered economic progress during the “vital period of growth” (Gilchrist, 1969, p.38), it is also evident that the functional order of society was still propagated. In addition, Bruce Bueno de Mesquita (2000) argues there were other factors that could cause the Church to discourage economic growth. According to Mesquita, in the intervening period between the death of a bishop and the consecration of a new one, the revenue of the bishopric fell to the kingdom whereupon the king had a right to its income, though he could not sell the right nor could it be inherited. Whether a monarch delayed in approving the pope’s appointment of a new bishop hinged upon the amount of wealth of the bishopric; if great or growing, a king had an incentive to delay, if small or declining, the king would have an incentive to approve. To prevent the delay of the approval of a wealthy bishopric the pope’s hand was forced to choose a bishop who favored the king above the pope. Thus to maintain loyalty, the pope had an incentive to discourage growth. Mesquita provides empirical evidence for this conclusion. It is likely then, given the evidence, that popes may have *avored* slow growth during a vacant period. On the other hand, it is also just as likely that the pope may have favored economic growth in the same bishopric while it was filled as the wealth would then accrue to the pope.

century, some 130 years after Pope Nicholas' I reign and the first pope to incite religious supremacy over the Emperor, these were viewed as the most detrimental to its standing both politically and financially.³⁶

Although the reform movement began with pope Leo IX (1002 – 1054), whose primary objective was the abolishment of simony (the selling of Church offices) and clerical marriage, it took its most ardent turn with pope Gregory VII (c.1015 – 1085).³⁷ Under Gregory VII, and following the theocratic hegemony set by pope Nicholas I, the reforms sought nothing more than outright supremacy over all subjects including god appointed kings. His claims list upwards of 27 and can be found in the *Dictatus Papae* (Dictates of the Pope).³⁸ Following Gregory VII's death, Urban II (c.1042 – 1099) was elected pope of the anti-Imperial line. Despite having to contend with Clement III for supreme authority and spending most of his time outside the city

³⁶One common explanation surrounding the shift in attitude was the increasing influence of the Cluny Abbey, one of the most reputable and well endowed monasteries of the time. It was also known for having an advanced administrative structure, well educated abbots and for adapting and closely following the Benedictine Rule. Its goal was to restore the ancient traditions of St. Benedict, which provided a simple and clear belief system. The Benedictine Rule gave monks, nuns and lay people alike a “way to live”, a supreme being (god) to “labor” for and a directive on one's responsibilities and obligations, i.e., stability-community, conversion and obedience. The influence of the Abbey was accompanied by religious fervor. Another explanation was that the Church was developing increased anxiety in regards to the rise in commercial activity in northern Italy and Flanders. It is safe to assume that both contributed to the Church's reactive stance but one could also make the additional case that the rise of the Cluny Abbey was a response to the growing abuses found within the Church itself. The many religious orders that sprang up around this time, such as the Carthusians, the Cistercians, the Premonstratensians, the Gilbertines and the mendicant orders of the Franciscans and the Dominicans, give some validation to this argument. Franciscans were especially concerned with the problem of corruption and took poverty vows. They also seemed to represent the opposite spectrum to that of the Church in terms of organization as they were primarily egalitarian and communistic (Beer, 1929 [1924], p.95). The desire for these reforms then can be found, one the one hand, in the growing corruption of the Church due to the expanse of power and wealth. On the other hand, it can also be interpreted as the inclination to harness and capture this power in one supreme but earthly being.

³⁷Clerical marriage not only broke the papal Church's rule of celibacy but also often reduced its income and wealth.

³⁸Two of the more striking of these claims were, (1) that all princes should kiss the feet of the pope and (2) that the pope alone may absolve the fealty owed to “wicked” men.

of Rome, Urban II was influential in establishing an administrative institution (the Roman Curia) and in instigating the first crusade then called a pilgrimage. The pilgrimage (crusade) was monumental in the evolution of the Church because it reflected the pope's ability to personally direct extensive use of force independent of the Emperor and represents the strength of its belief system.³⁹

Although pilgrimages to the Holy Land were not novel and can be found as early as AD 333 (Hans Eberhard Mayer, (1972) [1965], p.13), the call from pope Urban II was categorically different. Pilgrims were not meant to simply visit the Holy Land but were instructed to kill the heathens outright and regain control over it.⁴⁰ Moreover they were granted by the pope special privileges such as fulfilling a penance for their sins. Naturally this provided an incentive for knights, peasant, and serfs, but it was not this incentive alone that drove thousands to take up the cause. The influence of the Cluny Abbey and the religious fervor that surrounded it played a role in driving many to undertake an *armed* pilgrimage. Given the warrior culture, it is hardly surprising that contemporaries did not distinguish a pilgrimage from a crusade. It was only in the mid-thirteenth century that a Latin word was created to distinguish one from the other and even then it was still not often used (Ibid., p.15).

The Church's reform movement and its call for crusades were symbols that it had closed in on the summit of power.⁴¹ Throughout, it was competing with an institution

³⁹This may have been the most extensive use of force at the time by any one pope but it was not the first. In AD 1059, pope Nicholas II (990/95 - 1061) granted the feudal rights of Sicily to the Normans if they forcefully took it from the Muslims (Partner, 1972, pp. 118-120). And the succeeding pope, pope Alexander II (? - 1073), supported William the Conqueror in his military campaign to acquire the English crown, then held by Harold II (c. 1022 - 1066) (van Houts, 1995).

⁴⁰Hospices and monasteries were built to aid these pilgrims along their journey. And while they were not done on a regular basis, they continued irregularly even when the Arabs conquered the Holy Land in the seventh century (Mayer, 1972 [1965], p.13).

⁴¹From this moment forward however the Church would gradually see this power diminished by

(feudal monarchy) that propagated violence. As such, it was also not immune to using such techniques and did so on larger scales the greater its power grew. This was the result of the general impulse, aim and means of the era – expansion, elevation of rank and/or its preservation and competitive force. Because the final goal of the Church’s belief system could only be attained in the afterlife it made one’s rank and material conditions in the here and now, theoretically at least, mostly immaterial. The emphasis on the afterlife intellectually arrested thoughts of social mobility among the majority, i.e., the serfs and peasants. Of the three mechanisms of Church control – (1) moral and behavioral authority, (2) Canon law and the ecclesiastical court system (detailed in the next chapter) and (3) the use or call for force – only the former remains viable today. This is not to say that this set of circumstances is unalterable, but that our current conditions and dominant institutions preclude the other two mechanisms from currently re-emerging.

Summary

The structural and institutional conditions of the Middle Ages were comprised of two hierarchal and dominant institutions — the papal Church and the feudal monarchy. As pre-eminent institutions, they determined the general conduct and dispositions of the medieval world. The most prevalent among them were force (violence), deference, fear, superstition, devotion, piety and idol worship. While it was the monarchy, the nobles, the lesser lords and the warrior class of knights that more fundamentally reproduced the first of these dispositions, as the papal Church grew in power, it too

the rise of the monarchy and ultimately the secular state.

began to directly encourage and propagate the use of force, where it became, for all intents and purposes, the primary method to obtain the general aim of the era, status.

Although the papal Church and the monarchy united to define group boundaries and buttress social rank, they did so through religious doctrine only leaving an organizational separation between temple and palace. From roughly AD 400 to 1200, the Church created and refined the intellectual narrative over and above the monarchy. In the process, it expanded its administration and extended its legal system through decretals, Canon law and the ecclesiastical courts. Because it was also the institution that created proper behavioral codes (values) and reinforced these through ceremonies, rituals and its own legal system, the papal Church effectively had a monopoly over the narrative.

Given the general aim, impulse and means (status, expansion and competitive force) of the era, as well as the separation between temple and palace, the church-monarchal relationship was tenuous at best. And as the Church's power grew, corruption and authoritarian tendencies on the part of popes increased beyond previous levels. Naturally, kings were neither blind nor immune to these developments. The following chapter will address the question of how the Church lost its jurisdictional powers to the state and in so doing ushered in a new ruling temperament – deception (fraud).

CHAPTER 3

JURISDICTIONAL RIGHTS, SECULAR LAW AND THE TRANSFORMATION FROM OBLIGATORY TO CONTRACTUAL RELATIONS

Introduction

As detailed above, Medieval life was local and ruled by custom. Control largely came in the form of force, fear and ritual. The same however cannot be said about modern times where control more generally comes in the form of the law. How this transformation occurred and its relation to transaction fraud is the aim of this chapter. Following Tierney (1982), the five hundred year span between 1150 – 1650 will be assessed as one of continual development in the relations between the papal Church and the monarchy and the political and legal ideas expressing that relationship. But more pointedly, the Investiture Controversy (c. 1073) will be signaled out not only as an initiating factor to the developing political theories but also as a symbol of a fundamental problem of the Medieval era (aside from the glaring problem of competitive force and violence), namely a social order constructed by one narrative (belief system) but with two competing jurisdictional powers, i.e., the papal Church and the monarchy.

By using the Investiture Controversy as a model to compare and contrast the cur-

rent age, it may assist in identifying markers of change. Where once two preeminent institutions (papacy and monarchy) and their corresponding but separate and customary legal systems (explained below) dominated under one narrative based on the ideas of fear, compassion and the idea of a functional order, now two different preeminent institutions (representative government and the business enterprise) with one secular legal system of a customary and deliberative nature dominates under three competing narratives: one based on the ideas of fear and compassion (the Christian doctrine), one based on the idea of popular elective governance and private ownership (the Constitutionalist doctrine) and one based on the idea of meritocracy (the Techno-individualist doctrine).¹ What has aided the transition between the two eras, apart from the consolidation of competitive force, was the use of law in theory and practice. In this way, the Investiture Controversy might also be said to have sparked the secular, quasi-deliberate legalizing process of the West and in so doing initiated structural changes in jurisdiction but also in the character of everyday relationships that had and continues to have consequences for fraudulent activity.

¹By Techno-individualism it is meant that Western society, possibly more so in the United States than other countries in Europe, is now ruled by an almost complete belief in the power of technology to provide solutions to most contemporary problems (as if all technological developments should be streamlined into production without a thought to their consequences) and a strong belief in the idea that increases in material well-being, i.e., increases in wealth, takes place through an individuals own initiative without the assistance of others. Despite the fact that these two ideas are contradictory, as all technological advances are built upon past knowledge or as Thorstein Veblen (1898a) phrased it, on the “common stock of knowledge”, and besides from the basic fact that humans as a species evolved in groups, both are nevertheless widely held beliefs and have been merged under the blanket idea of meritocracy. Furthermore it should not be presumed that the identification of Techno-individualism implies a position against technology. This is not the case. Rather, following the precautionary principle, advances in knowledge and technology should be appraised first before decisions are made to put them into use.

3.1 Governance Before Secular Law

“Canon law, unlike Roman law, flourished in late antiquity and the early Middle Ages” (Hoeflich and Grabher, 2008).

Over the protracted time that brackets the Middle Ages, much of the legal governance of Christendom occurred by and through the papal Church under its laws (Canon) and ecclesiastical courts.² The behavior of everyday relations on the other hand took their guide from the traditions of the preceding centuries; traditions that were primarily determined by pagan customs, Christian customs and local rituals. Canon law was a law that had by AD 1000 centuries of development.³ Although the purpose of Canon law and early canonical collections was to direct behavior, its formation, that is the “process” in which it came into being was, in part, determined by the very customs it was attempting to direct with the exception of then established ethical codes of the Holy Scriptures. This type of legal genesis is known as customary law. It speaks to law’s origination and not a specific “type” of law, such as Positive (Human), Natural or Divine. It is also distinct from the legal genesis of deliberate or quasi-deliberate law.⁴

As customs developed and changed, canons were created in response. They regulated the liturgical calendar, prescribed the details of food ceremonies such as fasting and feasts, regulated marriage and family relationships, perceptions towards slavery,

²Canon law and the ecclesiastical court system were also supported by religious ceremonies such as baptism and the Eucharist.

³The construction of Canon law began almost at the inception of Christianity. The first surviving handbook of laws, the *Didache* or *Doctrine of the Twelve Apostles*, dates to the late first century. Many more would be written in the following centuries. Some of these were the *Traditio apostolica*, the *Didascalia apostolorum*, the *Constitutiones apostolicae*, the *Dionysiana* and the *Hispana*. The *Hispana*, written in the seventh century, was received as an authoritative collection and drew its list from an array of councils and decretals.

⁴These two legal geneses will be examined in more detail below.

military service, economic affairs, relations between Christian and non-Christians and structured the hierarchal order of the Church (Brundage, 1995, pp.11-13). When monasteries and Churches grew in wealth and increased their landholdings, Canon laws were drawn up to regulate these as well. And as Canon laws multiplied so too did ecclesiastical litigation placing great strain on bishops and the pontiff.⁵ Moreover, it was not merely an increase in volume that caused a burden but also an increase in the complexity of the cases. Among the various steps taken to remedy this problem was to have direct legal advisors in service to the pope and to use cardinals as legates. In AD 1099, pope Paschal II took a new measure and appointed legal assessors (sometimes directly from the College of Cardinals). These assessors assisted him in decoding some of the more complex cases. In the process they questioned witnesses, tested the truthfulness of the testimony, examined documents, deliberated on the legal issues and advised the pope on a resolution (Brundage, 2010 [2008], p.130). Several decades later when pope Innocent III set out to appoint five new cardinals, all five had some form of legal training (Ibid., p.131).⁶

When canonists began in earnest the compilation process, it was a clear sign of the Church's legal dominance. The first notable collection, the *Decretum Burchardi*, was produced in the first quarter of the millennium (c.1023) by Burchard of Worms.⁷ The

⁵It is presumed that the influx in cases was the result of the litigant's genuine inclination to settle their disputes through the ecclesiastical legal process rather than an effort on the part of the Church to drum up interest in their court system. In the very early stages most ecclesiastical courts were concerned primarily with arbitration, although some canonical judges used them to enact punishments when moral lapses were taken too far (Brundage, 2010 [2008], p.12 and p.127). In particular, penalties were dolled out to the many heretics of the fourth and fifth centuries. Again this is a reflection of the general aim of the era, preservation and/or elevation of rank. Heretics challenged the authority of the Church and if successful they could undermine the Church's status.

⁶It has been suggested that Pope Gregory VII even owned a copy of the *Corpus Luris Civilis* or the Code of Justinian.

⁷Burchard's collection, likely assisted by other clerics, consisted of 1,785 Canons and was orga-

Decretum of Ivo of Chartres (c.1094) and the *Decretum* of Gratian (c.1150) followed. Of the three, Gratian's *Decretum* prevailed as the authority on Canon law as it provided the Church and its court system what the earlier two lacked – a succinct guide amenable to application.⁸ It became the authority for the new Canon law schools, for the decretists and it was used by the ecclesiastical courts (Gilchrist, 1969, pp.12-13). Gratian's central objective can be found in his original title: *A Harmony of Conflicting Canons (Concordia discordantium canonum)*. To accomplish this harmony, he used a dialectical style that attempted to explain or interpret Church laws (Ibid., p.13). Gratian was not alone however in desiring to bring into alignment hundreds of years of ostensibly conflicting ideas and rules of behavior because his work was a reflection, in large part, of his time. That reflection, aside from ideas found in the Christian doctrine, was an interest with the method of reason; an interest that was initiated by the rediscovery of Roman law but also likely by the increasing complexity of Canon law. For the latter's evolution did not end with the *Decretum*, but continued as new social problems arose requiring new decretals, new procedural rules and the issuance of new compilations.⁹

nized into twenty books. It was a theologian tour de force. The books spanned topics from Church structure and jurisdiction to the sacraments, from individual regulations of Churches to homicide, from incest to monastic life, from the legal issues of single women to magic and sorcery and so on. And while it covered many of the important topics as well as grouped these within individual books, it was nevertheless unwieldy. The same can be said of Chartres' *Decretum*. It had three less books than Burchard's but it had many more Canons; 3,760 to be exact. It too was bulky and complex, offering little in systemization and application to the courts.

⁸The antecedents of Gratian's manuscript are to be found in the New Testament, the Church fathers and the economic legislation of the Carolingian Empire. In addition, it was also influenced by the writings of the legalists, who followed Roman law and the *Corpus Juris Civilis* of Justinian (Body of Civil Law, 529-534).

⁹Pope Boniface VIII issuance of the *Liber sextus* (1298) followed the *Decretum*. After which several other compilations appeared. The standard compilation, the *Corpus iuris canonici* was produced in the 1580s (Helmholz, 2008, pp.78-79).

As early as the latter part of the twelfth century, “church officials emerged as both the new legislators and new judges of Western Christendom. Church authorities issued a steady stream of new canon laws through papal decretals and bulls, conciliar and synodical decrees and edicts and more discrete orders by local bishops and abbots. And Church courts adjudicated cases in accordance with the substantive and procedural rules of the canon law” (Witte Jr., 2008, pp.12-13). Life in general during the High Middle Ages and into the late Middle Ages then was subordinated to the Christian narrative where Canon law and the ecclesiastical court system controlled and directed the majority of behavior. This control, as is now evident, did not last but would be undermined by the developing secular state, secular law, new secular ethical codes and by the development of empiricism. How the West evolved from the universality of Christian theory and practice to one founded on putative natural rights and the separation of Church and state is of interest to this study because within it one can find the development of *quasi-deliberate* secular law, constitutional thought and the idea of individualism—ruling ideas that appear elemental to systemic transaction fraud.

3.2 The Ascent of Secular Law

“Custom had become the sole living source of law, and princes, even in their legislation, scarcely claimed to do more than interpret it” (Bloch, 1961, p.111).

Prior to the turn of the millennium, as noted, communal life was ruled by custom and Canon law. Active and deliberate Royal law was rare. There were secular laws enacted in various kingdoms, particularly in the Carolingian dynasty (AD 800 - 924),

but these were not exactly new. Rather they were mostly the documentation and recording of changing customs and norms. In other words, customary laws were determined by the community as a whole and not from on high, for “the general medieval conception was, that law was custom, the expression rather of the habit of life of the community than of a conscious and deliberate will” (Carlyle, 1963 [1941], p.28).¹⁰

Customary law, a somewhat democratic if non-deliberative legal genesis, was the general, although not the only view of political rule of the age. A competing view, absolutism, a less democratic and quasi-deliberate legal genesis, developed alongside customary law and came into sharper relief in the sixteenth century as did the view of civic humanism.¹¹ The concepts of natural rights and individualism followed in the proceeding two centuries. Yet before these political and secular ideas could take hold (not develop), the Church’s position would require weakening. Given the immense institutional power it had built over the preceding centuries and its relatively advanced legal system, it was unlikely that any one blow would substantially affect it. Indeed, it took many strikes from within and without the Church over many hundreds of years to dissolve some of its power. The first substantial blow occurred with the Investiture Controversy (c. 1073). This was then followed by the Papal Schism (1378 –1417), the Conciliarist movement and the Reformation. It might be said that these events

¹⁰Because monarchs of the time did not use legal prerogative to validate their station, they were forced to turn to other authoritative texts to legitimize and reinforce the order. Some of the common standard texts of the time were the Theodosian Code, the Decretals, the Salic Law and the Edict of Rothari (Lopez, 1966 [1962], p.148). When and if this failed to hold, the recourse was often to violence.

¹¹One of the most widely read humanist books of the sixteenth century was Desiderius Erasmus’ (1509) *In Praise of Folly*; a book that not only attacked the Church for its abuses but contained within it the seeds of civic life.

collectively contributed to the Church's descent and subsequently to the ascent of the monarch and the use of secular deliberate or quasi-deliberate law. In this way it may further be said that the particular relationship between the two preeminent institutions was not simply a historical fact but played a crucial role in shaping what was to come.

Jurisdictional Struggles and the Turn Towards Jurisprudence

As the title alludes to, the point of contention in the Investiture Controversy was who had the authority of bishopric investiture, king or pope? While this might appear to the modern reader as a minor affair, to the Church and the monarchy it was most serious.¹² When pope Gregory VII in his *Dictatus Papae* (c. 1075) asserted that only the pope could appoint or dispose clergymen, among many other assertions, the Holy Roman Emperor, Henry IV (1050 – 1106), did not take kindly to such reforms. Clerical appointments were an integral part in the maintenance of the Empire's administrative structure. Moreover, this was a German practice that dated back to early feudalism with the ascendancy of Charlemagne and something the Emperor was not willing to relinquish.¹³

¹²The serious nature stemmed from two primary causes: one, the desire for supreme control in a world of competitive force and two, financial gain which also assisted the former. Where a bishop's loyalty fell was usually dependent upon whether the pope or the monarch did the appointing. Bishop's also controlled large tracts of land which, were in turn sources of tax collection.

¹³Henry IV's response letter (1076 [1076]) illustrates this point. In it he accuses the pope of being a false monk, of malediction and likens the treatment of bishops and priests by the pope to slaves: "Henry, king not through usurpation but through the holy ordination of God, to Hildebrand, at present not pope but false monk. Such greeting as this hast thou merited through thy disturbances, inasmuch as there is no grade in the church which thou hast omitted to make a partaker not of honour but of confusion, not of benediction but of malediction. For, to mention few and especial cases out of many, not only hast thou not feared to lay hands upon the rulers of the holy church, the anointed of the Lord-the archbishops, namely, bishops and priests-but thou hast trodden them under foot like slaves ignorant of what their master is doing. Thou hast won favour from the common herd by crushing them; thou hast looked upon all of them as knowing nothing, upon thy sole self, moreover, as knowing all things" (pp.372-373).

In the effort to counter the pope's decree, Henry IV inaugurated the Investiture Controversy and withdrew his support for the Church. What ensued was a protracted back and forth of papal disposal, the excommunication of Henry IV, the revolt of the German aristocracy and potential election of an anti-king after the excommunication, secular re-instatement, a second excommunication, another papal disposal and the appointment of an anti-pope, Clement III (c.1029 – 1100). The struggle continued with Henry IV's son, Henry V (1086 – 1125) and it was not until the Concordat of Worms in AD 1122 that this specific matter was resolved.¹⁴

In many respects, the Controversy was a reflection of a fundamental problem of the era, separation between temple and palace. And although the battle itself was not necessarily unique given the nature of the problem, the climate in which it took place was. This was the climate of the revival of Roman law, i.e., the reemergence and study of Justinian's Body of Civil Law (529 - 534) (*Corpus Juris Civilis*).¹⁵ Originating in Bologna, Italy around the eleventh century, it had become by the mid-twelfth century the foremost center for legal teachers and students.¹⁶ Roman

¹⁴The resolution of the initial Investiture Controversy however did not ultimately resolve the power struggle between the papacy and the monarch. This contentious battle continued on for centuries due to the separation between temple and palace and to the fact that each competing preeminent institution had their own distinct laws and court systems. When the contest was revived again, this time between Philip IV of France (1268 – 1314) and pope Boniface VIII (c. 1230 – 1303) over the right to tax clergy, it was not a symptom of a new condition but a continuation of an old one. It is also plausible that pope Boniface VIII and pope Gregory VII shared similar personality traits. Boniface VIII's papal bull *Unam sanctam* of 1302, like the *Dictatus Papae* of Gregory VII, claimed absolute supremacy over temporal monarchs.

¹⁵It should be mentioned that Italy of the time of this rediscovery was very much altered in form from the time of which the Code was compiled (some six hundred years earlier). Many towns and cities of c.1100 had their own courts and were, in the main, self-governing. In addition, the relationship between judges and the Emperor was strained or non-existent. Towns and cities then were largely independently run but ruled by custom and vulgarized Roman law (Dawson, 1968, p.124); a veritable difference from the unified Imperial form of the Roman Empire.

¹⁶Their standing would be greatly reinforced when the Holy Roman Emperor, Frederick Barbarossa (1122 – 1190 AD), published a decree, *Authentica Habita*, granting them protection and a unique jurisdictional arrangement. Legal students were to answer only to academic and ecclesiastical

law was unlike the current customary laws in two fundamental ways. First, Roman law was *usually* interpreted as a strict authoritative law. In this the Roman emperor expressed his will above the community. Phrases like ‘The Prince is not bound by the laws’ and ‘What has pleased the Prince has the force of law’ became well known and often applied to those arguments advocating on behalf of papal supremacy (Tierney, 1982, p.14).¹⁷ Moreover, there was little in the entirety of the *Corpus Juris Civilis* to contradict Justinian’s maxim: ‘decisions should be rendered in accordance, not with examples (judicial decisions), but with the laws’ (*non exemplis sed legibus iudicandum est.*) (Dawson, 1968, p.123).¹⁸

The second distinction between Justinian’s Code and customary law was that it initiated an increasing awareness of logic and reason. It did so because the Code was predominately constructed through the use of empirical and logical methods. Such rational methods were rarely used in the early Middle Ages, especially when it came to the formation of customs and their legitimization. Although there was no overarching theoretical systemization nor *complete* consistency of Justinian’s Code, the differences between the two laws (custom and Roman) were striking. Of particular interest to Romanist legal scholars of the time, the Glossators, was the *Digest*. The purpose of the *Digest*, which numbers 2,734 pages when translated into English, was to treat the legal system in a consistent case by case approach. “The intricacy and ingenuity

authorities exempting them from the rule of local control.

¹⁷Support for the concept of papal sovereignty was also drawn from an ancient maxim of pope Leo I (c.400 – 461), *that the pope was called to the plenitude of power, other prelates only to a part of the solicitude* and from the parts of the New Testament, particularly the texts that supported the authority of Peter over the Church (Tierney, 1982, p.14).

¹⁸There were also passages in the *Corpus Juris Civilis* that reflected rule by community but these were very few when compared with the more authoritarian views (Dawson, 1968, p.123).

of the legal reasoning represented in the Digest exerted a powerful attraction on the minds of those familiar with legal problems. Without the Digest, the legal revival simply could not have taken off as it did in the twelfth century” (Brundage, 2010 [2008], pp.77-78). Thus the revival of Roman law brought to the fore the significance of the use of reason as well as a development of and reverence towards Natural law, of which even popes were not immune (Figgis, 1960 [1907], p.11). It was in the midst of this revival that the contest over supreme jurisdiction unfolded.

By some accounts, the Investiture struggle can be seen simply as a response to the growing power of the Church. While kings had larger armies than popes and usually more resources, by the time of the mid-eleventh century the Church controlled and directed the dominate narrative, it controlled and directed a large percentage of habits and rituals, it had several methods to accrue wealth independent of force and it had at its disposal a relatively systemized legal system. In other words, the Church was the first institution, not the monarchy, to emerge “in the form of a state” (Berman, 1983, p.553).¹⁹ Kings, *in relation* to the papal Church, were inadequate in the area of law. Moreover, a king’s power was granted to him through unction and administered by a cleric. In theory this made kings beholden to papal rule and dictated that they govern under Christian doctrine and customs. A king’s coronation oath was meant to enforce this relationship (Reynolds, 1981, p.211).

In the battle over supreme jurisdiction and because of its legal advantage, the Church did not shy away from using law in attempts to discipline monarchs. In fact

¹⁹John N. Figgis (1960 [1907]) called the medieval kingdoms the “police department of the Church” (p.8).

the papacy “invoked...[Canon] law as a means to drive home its attack”, a law that was viewed by most Christians as the authoritative ‘right law’ and the only one with ‘celestial origins’” (Ullmann, 1977, p.35).²⁰ But with the rediscovery and growing interest in Roman law and law in general, kings now had a legal counterattack. When a legal scholar supporting kingship interjected into a forged decretal (c.1080), “the transfer of power from the people to the monarch is irrevocable...[whereupon] the people cannot take away the power of a king once established”, he was borrowing from the Roman idea of *Lex Regia* found in Justinian’s *Institutes* (Kern, [1939] 1956, p.117).

It is debatable exactly what level of awareness, especially early on, that kings, their administrators and the nobles had when it came to using law and reason to their own ends in the centuries leading up to the Modern Age.²¹ The same question might also be asked of the papal Church. Nonetheless it is still possible to develop some criteria that could instigate a shift from customary to quasi-deliberate law. A few of these criterion might be: one, a competitive climate, two, an existential threat, three, the legal volume and level of sophistication of the law, four, the volume and level of sophistication of the legal institutions or institutions that teach jurisprudence such as

²⁰The papal Church not only had the ultimate appeal in the deity, but the “law invoked by the ecclesiastical side was law based on a sophisticated exposition of the Bible by scholars in the preceding centuries, beginning with the Cyprian and Tertian, above all the writings provided by Jerome, Ambrose, Augustine, and the numerous decrees and statements of popes, councils and so on, down to the late eleventh century. Against this highly rationalized system the royal side had nothing to set except the law based on unreflective practices and on tradition. Above all, the royal law did not mirror any cosmology or ideology, but was conditioned by time and space” (Ullmann, 1977, pp.34-35). Popes also used the tools of excommunication and interdiction to discipline kings.

²¹For instance, it may have been that the English king, Henry II (1133 – 1189), did not see himself as an innovator when it came to the legal reforms he implemented. Despite Henry’s well known interest in the law, his motive may well have been merely status preservation or in another way of saying heritage protection (Berman, 1983, p.439). His motive may also have been pushed by the jurisdictional struggles between pope and king.

the nascent universities developing at the time, and five, the psychological character of the person(s) in the position to direct and shape it. It should be stipulated that this set of criterion begins from a position of a well-established process of customary law.

While not all of these appear to apply to the Investiture Controversy, for instance neither pope Gregory VII nor his administrative staff directly commissioned compilations (Brundage, 2010 [2008], p.79), the jurisdictional struggle does seem to appear to have operated as something of a catalyst and thus propelled the legal awakening of the West. Leyser (1965) and Berman (1983) go so far, with what appears to be good reason, to call this event in history the Papal Revolution.²² At stake was a central component of rule – law and the court system. Such an institution had advantages in that it could control behavior without direct force.

The fallout from this great crisis would drive both the Church and the monarchy to further codify their respective positions on legal grounds. Despite lacking a political concept of the secular state during this period, the struggle would propel monarchies to shore up their own legal institutions. This process would be carried much further over the course of many centuries but “as a result of the great crisis...[secular political ideas were] all ready to be born” (Leyser, 1965, p.60). Or as Berman (1983) expresses similarly: “[t]he eventual settlement [over the Papal Revolution] in Germany, France, England, and elsewhere was reached by hard negotiations in which all sides renounced

²²For Leyser (1965), what makes this contest revolutionary was that the Gregorians actively shaped the world in their image. Or as he put it, “one must make it one’s business to transform what exist in order to make it prevail” (p.59). Berman (1983) distinguishes revolution from reform by the “totality of transformation” and distinguishes revolution from evolution by the “rapidity and violence” (p.106).

their most radical claim. What can be said for force is that it took the experience of civil war in Europe to produce the willingness of both sides to compromise. The balance was struck, ultimately, by law” (p.106).

Subsequently, the central question of jurisdictional supremacy, who had *merum imperium?*, was fought not only on physical grounds but more and more on intellectual and legal ones.²³ So long as the papacy however had an administrative and legal mechanism, the ecclesiastical courts and Canon law, to *enforce and support* its belief system and so long as it did not have to compete with a different but fully articulated belief system, it would continue to have a claim to jurisdictional supremacy in the temporal world. The struggle between temple and palace was a question determining *who* should govern but it was also a question of *how* one should govern. In this, it birthed the two central questions, the who and how of governance, of the High and late Middle Ages. It was a question of law, it was a question of reason and it was ultimately a question of right.²⁴ It was a question that began exogenously as a contest between pope and monarch and then turned inward, requiring that each institution ask similar questions of itself. And it was a question, that however answered, would require some form of legitimatization if the answer were to endure.

The Church not only had an arsenal of Canon law at the ready and the claim to omnipotence but it also had control over knowledge and an organized institution to create, implement and enforce new Canons. Nor did it shy away from using Roman

²³Gilmore (1967) has documented in great detail the centuries long question of *merum imperium* or jurisdictional supremacy.

²⁴It is possible that the perpetual debate over jurisdiction, if interpreted as a debate over abstract “rights”, may have been the forerunner or at minimum set the ground in which the natural rights theory of the seventeenth century developed.

law, a secular form of law, as an additional line of defense. “The church and its clergy were said to ‘live by the Roman law’...Whether it was Gratian himself or one of his followers who inserted extracts from the Roman law into the *Decretum*, the fact remained that the ancient law filled many of the gaps in the canon law. Both were taught in the European universities, although normally in separate faculties, and lawyers who served the church were normally trained in both laws...[Roman law was] used to augment, explain, and interpret the texts of the canon law itself” (Helmholz, 2008, p.78). Thomas Aquinas (1225 – 1274), a Doctor of the Church and renowned theologian, priest, friar and philosopher, was a master at amalgamating and rationalizing Divine, Natural and Positive (Human) laws.

The monarch on the other hand, along with his administrators and the learned men trained in theology and law who worked on his behalf, while lacking in authoritative claim to spiritual matters, would likewise gradually begin to use the tools of the law more and more as a means of resolving disputes. The same may be said of the free towns and the territorial lands controlled by princes and dukes. Yet as already stipulated, the level of awareness surrounding the law may not have been great. It might be said however, of those more actively involved with the law, albeit a small fraction of the overall population, as either a jurist, a teacher, a notary, a clergyman, a merchant, a banker, town magistrates, territorial lords, or secular and religious sovereigns and their staff, that law was at minimum practiced as quasi-deliberate. For many people who were immersed in legal activity they could not have formed a view of law that was *wholly* static. It is probable that many laws were viewed as immutable or universal, but they may not have held so strongly to that view for laws

of a minor or practical affair. Even so, at the highest secular level, the crown was still bound by the Christian norms and customs of the land. In the king's process of establishing greater control he would not only be competing with the papacy but also with the nobles; first by force then through parliamentary litigation.

3.2.1 Intellectual Foundations of Western Social Order

Given this turn towards jurisprudence the most important issue for legitimate governance when ruled by law depends ultimately on how it is interpreted, regardless of its religious or secular nature. For interpretation implies a value-claim and a value-claim implies an idea of order. Furthermore, ideas that structurally support governance through law are necessary components to any social system where the rules of law are recognized and upheld. This might also explain the popular contemporary idiom, “law *and order*”. In regards to the law, though there are many minor forms of interpretation and validation, it may be classified and interpreted in two general forms either as the *law as justice* view or as the *law as instrument* view. Both general forms answer the two fundamental questions of law – how it comes into being and how it is validated or upheld – differently.

The intellectual concept of the first general form, *law as justice*, in contemporary terms, the “rule of law”, has inscribed within it a teleological and normative end, fairness or equity.²⁵ “Just” law as opposed to “unjust” law is normally considered so

²⁵While the idea of law as justice here is similar to John Rawls' (1971) conception, it diverges in that it does not presuppose the state as the final arbitrator of distribution. Rather the concept is meant to represent a justifiable symbol of social order. Law, as *law as justice*, is an “idea” supporting a social legal order not its actual practice. One can believe in a social order built on laws because one believes laws are about justice but that does not mean those laws are actually ‘just’ from a community wide perspective nor from competing communities for that matter. Therefore there will

first by how it is formed and second by how closely it aligns with accepted doctrine. Beginning with the formation (the way in which a law comes into being) of the conceptual idea of *law as justice*, throughout much of the Middle Ages this view was realized when a law aligned with the settled habits (customs) of a community.²⁶ Where settled habits or customs of a community are largely determined, by definition and even if blind, through the majority of that community. This process of legal genesis presumes that the first movers are the community habits and that the law bends towards them and not vice versa. During this period laws were largely oral and existed in a tangled network of multiple “degrees of subdivision”, contracts were binding by gesture and memory was the guardian of tradition (Bloch, 1961, pp.113-114).

Subsequently, customary laws were personal, concrete, well known and long established. This is probably why the ordeal by battle, by water, by boiling oil, by fire and many others, could be viewed as an *ethical* method for proof or disproof as these reflected the centuries old violent temperament found in societies ruled by competitive warfare. It is also likely that this is a reason for its persistence as the practice

need to be some type of litmus test of which the “idea” of *law as justice* will have to meet. This is the purpose of the second fundamental question of law, on what validity does it stand? The same may be applied to the “idea” of *law as instrument* in both its strong and weak forms. Again, these views of law are abstract justifications of legal social order. Law, as a mechanism for control, may be used for good or for ill but questions remain. Who’s good? Who’s ill? By what standards? It is with the use of these two theoretical views of law that these questions are meant to answer.

²⁶Baldwin (1972 [1959]) remarks upon the concept of medieval justice thusly: “the concept of justice was one of the dominating principles of the Middle Ages. Discovered in the revered writings of Antiquity, pronounced from the pages of Holy Scripture, depicted vividly in works of art of churches and cathedrals, the demands of justice were ever present to the medieval world. The word *justitia* implied an all-inclusive concept and could be applied to many levels of existence. It represented the theological justice of God, which was the supreme pattern for all earthly justice. It laid the basis of political theory, for without justice the commonwealth could not exist. Rulers and judges did justice in courts of law. Justice, along with prudence, fortitude and temperance, formed the four Cardinal virtues of the good life on earth. Finally, *justitia* represented the personal righteousness and holy piety of the Christian experience” (p.59).

continued into the early sixteenth century and was briefly revived as the solution to trying putative “witches”.²⁷ One cannot however overlook the superstitious character of the epoch, which most assuredly contributed to its intransigence.

Law as justice in its formation then is a more or less non-deliberate form of law. As Reynolds observes (1981): “[t]he character of communities in the central middle ages was rooted and grounded in older traditions, traditions which simply assumed the existence, rights and duties of collectivities large and small: responsibilities were owed collectively to collectives and decisions of every sort were made by groups...It is the nature of custom that it presupposes a group or community within which it is practised. Any statement of law will therefore be made in some sense on behalf of the community, and government is likely to involve some kind of consultation with it” (p.206, p.211).²⁸

The widely divergent local legal norms, what Bellomo (1995 [1988]) terms the *ius*

²⁷Brown (1975) and Baldwin (1961) both attribute the decline in the use of the ordeal to the actions of pope Innocent III when in 1215 he forbid clerics from participating in them creating a strain on the crown. Following the pontiff, secular rulers soon banned its use. Among some of the first were the Holy Roman Emperor, Frederick II (1194 – 1250) and the French king, Louis IX (1214 – 1270), with the latter denouncing it as irrational. In England, Henry II enacted the Assize of Clarendon (1166), an Assize that began the transformation of English law from trial by ordeal and trial by compurgation to an evidentiary model, in which evidence, inspection, and inquiry was made by laymen, knights or ordinary freemen under oath. This act greatly fostered the methods that would eventually be known in common law countries as trial by jury. And while the pope’s ban had an immediate effect on the decline of the ordeal, the outward expansion of unclaimed lands by the peasants beginning around the second millennium also contributed. As Brown (1975) notes, as a result of the movement, “[t]he growing impersonality of a larger, more fluid group made less necessary the theatricality of an ordeal or of a public renunciation; it dissolved the sharp memories of local breaches of the accepted code of conduct on which the previous genre of miracles of the saints had depended. Men who needed to care just that little bit less about their neighbors no longer had to go through the more difficult maneuvers of their life in a limelight of supernatural rituals” (p.143). In other words, a weakening of bonds and a decline of communal pressure was set in motion once peasants began to expand their boundaries.

²⁸When the secular law compilers such as Ranulf of Glanvill (c.1112 – 1190), Henry of Bracton (c. 1210 – c. 1268) and Philippe de Beaumanoir (c. 1247 – 1296), began their work in the High Middle Ages and inevitably served to bring new concepts to bear, legitimacy still rested in part on how well they fit with the then practiced customs (Reynolds, 1981, p.212-213).

proprium to distinguish it from Roman (*ius civile*) and Church laws (*ius canonicum*), are illustrative of this type of law formation. The uniqueness of the conceptual idea of *law as justice* is that within its very formation lies an endogenous validity claim. That is, the legitimacy of a “just law” is often tested on whether or not it fashioned itself to the customary activities and relations of the locality and specific time period. Yet this appears to be something of a tautology. In the last instance a “just” law will have to meet some agreed upon standard or principal value-claim. To do so is to answer the second fundamental question of law: how closely does it align with the given and legitimate doctrine? To this and throughout much of the Middle Ages, the idea of *law as justice* view had to answer to the Christian doctrine encapsulated in the Holy Scriptures and Canon (Divine) law. Whatever the heterogeneous local juridical norms might have been over the centuries, they were inevitably meant to bend to these standards.

[T]hroughout Europe men of the early Middle Ages were constantly involved in evaluating the actions that created custom, and in evaluating them according to divine laws, deciding whether they were just or unjust, and discussing them...In short, the juridical realm took on a more varied coloring and became equated with the realms of ethics and theology...Within the communities of the time it seemed natural to turn to the parish priest, the bishop, the monk or the canon not only for [the] soul’s salvation but also for protection of one’s more terrestrial interests or for help and moral support in mundane business affairs (an opinion on the ‘just price’ of a sale or the ‘just’ choice of an heir, for example) (Ibid., p.47).

For the keepers and proselytizers of the social order, the canonists and theologians, their task was even greater as they not only had to reconcile the *ius proprium* (Positive customary law) with Divine law but they also had to reconcile Natural law and reason to it as well once the revival of Roman law had come into full effect.²⁹ In some

²⁹For the papal Church, this process, as mentioned in footnote 61, culminated with the *Corpus*

ways, these activities can be seen as the great intellectual and rationalizing project of the High and late Middle Ages. All sorts of learned men, including some popes, were involved with the reconciliation of Positive law to Natural law and Natural law to Divine law. What made this intellectual rationalizing project so persistent and problematic was that they were tasked with squaring reason to divine will; a very formidable task indeed. By the mid-thirteenth century and after the work of the Glossators, Accursius's standard gloss (*Glossa ordinaria*) and Aquinas' *Summa* (1265 –1274), a general consensus had been reached where Roman and Canon law collectively became the sacred standards (known collectively as the *ius commune*), at least on the continent, of which the *ius proprium* would be meant to bend.

Yet even with this consensus, local life was still dominated by heterogeneous customary law. Of benefit to the *ius commune* however was that many of the local customs already closely aligned with it. Law was found “just” ultimately because local customs closely followed Christian doctrine but also because they had the majority support of the community. The view of *law as justice* then becomes twice validated when custom and doctrine are in accord. Any legal society that exhibits this general form of law and where the customs closely align with given doctrine usually do not require further appeals to its legal existence. But laws are not always formed from community-wide customs nor are customs always aligned with given doctrine. When this arises another general form of the law is needed as explanation. The formation and the use of this type of law is known as quasi-deliberate law or *law as instrument*.

The law under the intellectual concept of *law as instrument*, unlike the first general *iuris canonici* (1582) of which it stood until the twentieth century.

form, does not have inscribed within it a teleological and normative end. Instead it has a particular, targeted and circumstantial end. That is, the law as an abstract tool becomes free-floating and imprintable like clay. It is precisely this property that makes it available to all variety of minority groups. While each targeted end of each minority group is normative, the law, as a free-floating abstract instrument is not. Thus, the question of “justice” in terms of it being representative of the community is not consequential to its birth. Moreover, there is a strong and weak version of the *law as instrument* view. The former is seen in absolute rule while the latter can be seen in either constitutional monarchies or constitutional representative governments. As these two versions imply, the formation of the law then occurs either through the single initiative of absolute ruler (strong version) or through the initiative of a minority (weak version). In either event, exercise of this general form of law requires the person hold a position of power. If an individual is lacking in power she or he may join others of like mind to gain it. Power may also be achieved by educating oneself of the law and/or employing someone who already has this knowledge. Power becomes a necessity because these laws are only determined by some fraction of the population and therefore begin their lives tenuously. As a general rule, the greater the power the greater the exercise and control over the law as instrument. It might be pointed out however that regardless of the level of control, even in its most severe form, it does necessarily imply perfect application.³⁰

Because monarchal power was diffused for most of the Middle Ages due to com-

³⁰There are many ways in which law can be interpreted and enforced. Furthermore, depending on the institutional organization and history of a given area, pushback may be inevitable.

petitive force, because the papal Church had monopoly control over knowledge and was persistently making claims to supreme jurisdiction and because the king's administrative institutions were relatively weak, his ability to use this general form of law was curbed.³¹ This is not to say kings did not make attempts to use law to their own ends but that they were often unsuccessful or if successful they were usually short-lived. The checks and balances on a king's prerogative cannot only be seen in the continual wars but also in legal documents as early as the twelfth century England, such as the Charter of Liberties (1100) and later the passage of the Magna Carta (1215).³²

Arguably, neither the strong nor weak version of the *law as instrument* view ruled *above* customary law until the Reformation, the consolidation of monopoly force, the consolidation of secular courts, the dispersion and growth in knowledge and science and the discovery of other lands. That is, the ascendance of the *law as instrument* view came about after a major disturbance to long practiced habits of thought and action. Where the major disturbance was, in the main, a product of increasing competition between religious beliefs largely as a consequence of the increasing corruption of the papal Church. Nonetheless, once the practice of the *law as instrument* view had gained traction, it too would require a form of validation if it were to persist.

³¹One exception earlier on may have been the body of laws, the *Liber Augustalis*, conceived by Emperor Frederick II in 1231.

³²Although the Magna Carta is often interpreted as representative of "individual" liberties, it along with its earlier rendition, were emblematic of the received approach towards the law – that it should be formed by the community. While it is true that from the perspective of a baron, community meant those of high rank, the Charter of Liberties and the Magna Carta did not exclude lower ranking groups such as widows, free men, Jews, persons in debt and merchants. Moreover, the concepts of consent, justice and custom (benevolent and evil alike) can be found throughout.

From the strong and weak versions, the validity of the former is the most well known – the appeal to God. And while both pontiff and monarch often appealed to authoritative texts, final appeal was always to the all-powerful, all-knowing Deity. In the lexicon, these concepts were known as the vicar of Christ (supreme pontiff) and the divine right of kings.³³ In this strong version of the *law as instrument* view, pontiff or monarch alone could determine the law and thus determine what was just. Other lesser appeals, such as the appeal to tradition, the appeal to natural reason and the appeal to maxims, would also be employed to support or refute secular absolutism depending on one’s position (Berman, 2006 [2003], pp.231-260). If the higher appeal to the Deity however is accepted whether it be through force, fear tactics, customary practices or a person’s own volition, the law will have the capacity to stand over some course of time.

The validity of the lesser-known version of the *law as instrument* view, the weak version, took several guises in its early stages. At that time, those who practiced this view, that is, applied this belief to their everyday affairs, primarily consisted of townsfolk and long distant merchants.³⁴ Later, as guilds, intermediate trade and manufacturing developed, people within these groups also exercised the law to their own particular ends. And because towns were filled with competing interest groups, the use of secular law was a necessity for success. Early appeals for legitimacy were

³³Before the doctrine of the divine right of kings was fully articulated, those who defended kingship in the Papal Revolution often borrowed from the Church the idea of passive obedience in attempts to claim absolute control (Kern, p.110).

³⁴In the early stage there was little intermediate trade. Consequently most of the goods traded consisted of luxury items of which only the aristocrats could afford. Many long distance traders followed the rule to buy near and sell dear. Some would also make attempts to capitalize on natural calamities. See Wallerstein (2011 [1974], p.19).

often made to the relatively nascent minority customs of the minority group by codifying them (Berman, 1983, p.355). But more often than not, mercantile law appealed to the concept of the pledge of good faith, also known as reciprocity of rights, equity, equality and fairness. This concept was originally developed in Canon law and had instilled within it a notion of *sanctity* for contractual arrangements (Ibid., p.345).³⁵ The various laws developing in the towns came in the form of statutes and charters. These usually appealed to rights, liberties, privileges and *duties* but importantly they were meant to adhere to an entire group and exercised “communally or corporatively” (Lindemann, p.15). This also explains why many townsfolk did not conceive of rights as individual rights but as civic rights (Ibid., pp.6-15) – an entirely different notion than the modern day rights founded on the individual.

Such ideas as the pledge of good faith and corporate governance however follow more closely the idea of the *law as justice* and thus are not congruent with the above argument. So what made these new laws of merchants, townsfolk and nobles an instrument view as opposed to a justice view if they appealed to the customs of Christian doctrine? The answer lies in how these laws were formed and originally received. First and unlike the *law as justice* view, mercantile activities and their legal development were diverse, largely spread out, constrained by time and isolated from both the agrarian and royal form of activity and legal development. This meant that mercantile law was largely shaped independently from the general customs of agrarian and royal life. The second component was that mercantile law was largely

³⁵Given that Christian customs ruled so pervasively, it is not surprising that even the early rationalists and probability theorists relied on the appeal to equity in their assessments, largely in the realm of annuities and in the process of determining risk or expectation. They also drew heavily upon legal doctrine and practice in their understanding of probability (Daston, 1988).

self-regulated in that the court system was run by the merchants themselves (Berman, 1983, pp. 346-347).³⁶ Mercantile law then had a level of autonomy from both royal and ecclesiastic courts that other common laws did not. This was also mostly true in the independent towns.³⁷ In this way mercantile and city law may be classified under the *law as instrument* view despite the fact that they often appealed to custom and to Christine doctrine as means of validation.

It is usually suggested that here marks a turning point between the Medieval and modern epochs — a turning point where the *law as instrument* view in its weak form first gains a foothold. And while it is true that merchants and townsfolk began to develop legal codes that were outside the daily practices of agrarian and royal life, that they came to have a separate identity though not necessarily desired, that their legal codes were meant to ameliorate their specific disputes and not the disputes of the larger community and that with some obvious exceptions, were largely left to their own devices to self-regulate, a complete break between the habits of these minority groups and the habits of others such as the aristocracy, the lesser aristocracy and the peasants and serfs, did not occur. Instead a strong continuity remained as many still shared and practiced the same ceremonies and rituals created by the papal Church. The doctrine so permeated the medieval world that it infused itself into almost every form of social organization. Kurth's (1943) description of early guilds

³⁶For instance, a law enacted in Milan (1145) stipulated that merchants should sit on commercial cases and in England the Statue of the Staple (1363) was passed where merchant activities were to be adjudicated by mercantile law and not the common law of the land. Similar situations were found in local maritime courts (Berman, 1983, pp. 346-347).

³⁷Some of the early republics however had less control over their town than others. For instance, when the city of Antwerp was incorporated into the Spanish Netherlands and later into the Austrian Netherlands it lost some of its independence (Lindemann, 2014).

gives one example of the extent of permeation:

It was a society composed of people of the same profession who, animated by feelings of fraternal charity as members of Christ, banded themselves together to practise their craft honestly, to watch over the interests of their members, and to give loyal service to the public. Born of the solidarity of the Mystical Body of Christ, the workingmen's guilds carried the imprint of their origin. Membership of Christ through the Catholic Church was required for entrance, as also the fulfillment of the duties, religious and moral, that go with the Catholic name. Every guild was under the protection of a saint, whose feast was celebrated with great solemnity, and to whom it dedicated a chapel, if possible, or, its means did not allow of that, at least an altar, in the parish church. All guilds considered it an honor to figure in a body at the great religious feasts, especially in the processions, wherein they unfurled their banners, and had their position assigned, according to an unvarying tradition. The patronal feast usually came to an end with a merry banquet, at which all the guildsmen met in friendly companionship, and from which license was excluded, but jollity never lacking (pp.42-43).

Thus it is not quite possible to argue that the formation of new groups (merchants or townsfolk) and their new legal codes was enough to set the West upon a new path of instrumental law exercised in its weak form. Rather it is more likely that the weak version only existed in an incipient form until a new secular doctrine and new institutions that supported that doctrine were cultivated. In other words, the *law as instrument* view in its weak form needed more permanent intellectual reinforcements if it was to endure. It would also need to untether reason and secular law from Christian ethical claims.

What might be said however is that the increasing use of the law as a means to settle competing claims had a secondary effect, namely the reduction of the use of competitive force. The increase in the use of the law was likely instigated by the Investiture Controversy that was in turn a product of the separation between temple and palace. During this continual contest, the crown worked to establish its own legal

administrative institutions. Throughout it also sought to increase its military might over and above the nobility. Both movements contributed to the decrease in the use of competitive force and effectively closed down its use as a means to gain rank. The papal Church, not being a military institution but a legal one, generally did not use force to attain its ends. Instead it used fear, endowments, taxes and eventually came to sell intangible assets (indulgences, indult) in exchange for money. Some clergy were also known to sell false relics, an act forbidden by the Canon law of 1190.

While the latter activities can broadly be considered as fraudulent, it is probable that fraud was not pervasive in Europe for three reasons. First, there were a limited number of Church positions available, second, there were limited types of assets for sale (relative to today), and third, until roughly 1500, force was the principal means for those groups in positions of power to attain wealth and rank. It is worth recounting Bloch's observation that violence had become a custom and that brutality had been "legalized and encouraged by being made profitable" (Bloch, 1961, p.115). For transaction fraud to become pervasive all three factors would need to change and in particular the production of material objects would require not only a substantial increase in absolute amount but also an elevation in reverence. This further implies that the papal Church's ceremonies and rituals along with its doctrine and the emphasis on the afterlife be diminished.

Although the *law as instrument* had seen an increase in use during the High Middle Ages, it was still nevertheless tethered to the Christian doctrine where the doctrine itself was aligned with Europe's centuries long traditions. For the material conception of life to emerge meant that these traditions and the law supporting them

be upended, at least in degree. This necessary transformation becomes more clear when the intellectual reinforcements for the *law as justice* view are analyzed. What eventually came to shape the new narrative, although not predetermined, was the struggle over supreme jurisdiction and the lingering question of governance.

Christian and Legal Concepts Supporting the *Law as Justice* View

Throughout much of the Middle Ages the *law as justice* view ruled, although it was increasingly challenged by the instrumental legal view. During the course of the Papal Schism (1378 – 1417), which was instigated by the Papal Revolution, and the transfer of the papal court’s headquarters from Rome to Avignon in 1309, the contest between these two interpretations of law were the central topic of the intellectual movement known as Conciliarism. Conciliarism was an idea that the Church council, its members and its collective decision-making held jurisdiction over and above the pope.³⁸ In this the pope could err or even sin but not the collective decision making of the ecumenical council. In support of this perspective, canonists and theologians appealed to authoritative texts and the ideas found within them.

Many of these concepts were analogous to the idea of *law as justice* and together they represented the major theoretical current of the era.³⁹ Two ideas of particular

³⁸The question over legal genesis was not unique to the papal Church although the outcome of the dispute had greater ramifications than those occurring in the kingdoms “because the Church was the only political organism which, however feebly and spasmodically, ruled all of Latin Christendom and commanded the spontaneous allegiance of all the Christians of the West” (Mattingly, 1960, p.xiv).

³⁹It might be difficult to see how ideas of justice, unity and solidarity not only existed in a society organized in a hierarchy, legitimated by an omnipotent Deity, sanctioned on functional terms and ruled by authoritative, violent, duty-bound and deferential habits, but that these ideas of community rule were the major currents and not the minor ones of the era. This is primarily due to the fact that the human life process during the Middle Ages was reproduced in largely unfettered local communities held together by kinship relations, slow growth in new knowledge, minimal travel and ruled by customs. They were unfettered in the sense that much of the peasantry were left to their

importance were the doctrine of Church indefectibility and the Roman law idea of corporation or *universitas* (Tierney, 1982, pp.19-20).⁴⁰ The former was expounded and broadly conceptualized as the holistic Church, as the Universal Church and as the Church of the *corpus mysticum* (mystical body). Implicit within the description of the Church as a mystical body were further ideas of solidarity and unity.⁴¹ But it was only when the canonists applied the latter idea (corporation) to the concept of the *corpus mysticum* that a more fully attenuated and structural model of Church governance appeared (Ibid., p.20).⁴²

The *corpus mysticum* concept interpreted through the idea of a Roman legal corporation was designed to capture all action, both individual and collective alike, under one divine heading. Hence, each individual as well as group organizations were

own devices; they had a degree of local autonomy. Before peasants began to move in numbers, either forcefully or from their own volition, rule by community was the dominant view. Rule by community did not necessarily mean the *entire* community, as the social order was still a hierarchy. Rule by community usually meant certain designated persons that would speak on behalf of other community members. Nevertheless when these ideas were applied to the monarch they went against the then minor current — the idea of force and absolutism. This latter view was largely expressed, maintained and propagated by monarchs, nobles, the warrior class of knights and some popes but generally not by the serfs and peasants. This is not to say that the majority were unaffected by such a temperament, as they took up arms as mercenaries, fought in Holy Wars and carried out many violent revolts, but that they were not collectively from the group of which this aggressive and absolute temperament emanated. Rather hundreds of thousands of peasants locally exercised the idea of authority by community, which was expressed in the common laws. Moreover, many theologians and canonists prescribed to the Conciliarist view. For these reasons, it is argued here that the *major* current, until roughly the sixteenth century, was the *law as justice* view and not the *law as instrument* view.

⁴⁰It is interesting to point out that the idea of corporation was used by Imperial Rome, by the imperial papal Church and is now currently used by the business enterprise as a conceptual tool for legitimization.

⁴¹Such ideas were not necessarily new as their roots can be found in the Scriptures and in the writings of St. Augustine (Gierke, 1900 [1881], p.2, footnote 5).

⁴²In addition to the ideas of corporation or university that the general term *corpus mysticum* represented, it was often also similarly compared to an organic body (Kantorowicz, 1957). The metaphor of the organic body also follows the same line as the idea of a ‘functional’ society. Where the priesthood “resembled the soul in the human body, officials and soldiers the hands, husbandmen the feet, and cohesion in each depended on all parts performing their proper functions in a graded hierarchy of subordinate and superior ranks” (Eccleshall, 1978, p.51). Interestingly, the organic body metaphor could be used, depending on emphasis, to support either the authority by community view or the authority by absolutism view. The same might be said of the idea of corporation.

believed to be “incorporated” into one body of Christ. “To the mediaeval mind in general the destiny and the preordained end of Christendom was always identical with that of mankind at large....Christendom, therefore, was primarily one single ‘*corpus mysticum*,’ a single indivisible and indissoluble *universitas*, a spiritual as well as temporal kingdom under the rule of God” (Chroust, 1947, pp.430-431).

Or as Gierke expressed it (1900 [1881]):

Therefore in all centuries of the Middle Age Christendom, which in destiny is identical with Mankind, is set before us as a single, universal Community, founded and governed by God Himself. Mankind is one ‘mystical body’ ; it is one single and internally connected ‘people or ‘folk’ ; it is an all embracing corporation (*universitas*), which constitutes that Universal Realm, spiritual and temporal, which may be called the Universal Church (*ecclesia universalis*), or, with equal propriety, the Commonwealth of the Human Race (*respublica generis humani*). Therefore that it may attain its one purpose, it needs One Law (*lex*) and One Government (*unicus principatus*) (p.10).

The model of a legal corporation then, first developed by the Romans, gave an intellectual understanding to the practical organization of the Church. But this concept also stirred debate over its legal nature and interpretation. Were the papal Church and its lesser bodies real or legally artificial? The jurists who took the realist position generally supported the *law as justice* view as the office of rulership gained its power by and through the “real” collective group. On the other hand, the jurists who held the latter position generally took the *law as instrument* view in the strong form and advocated on behalf of the ruler. These jurists argued that corporations, as fictions, were granted legal status by and through the sovereign only. By and large those advocating the realist position were sometimes successful in theory but more so in practice. That is, in practice for much of the Middle Ages, the *law as justice* view

prevailed and it was only in the sixteenth century that this idea came to lose both the theoretical and practical battle as the king's power grew.

Given this, the corporate Church was by its own definition an organization with one preeminent ruler but governed by the many. Although the Roman adaptation was new, historically many Church decisions were made jointly both by pope and council. Therefore, it may not have been so much that the idea of joint decision making was new in the High and late Middle ages, but it was rather, as detailed in the previous chapter, that popes were extending their power relative to the council as well as to the monarch and consequently new supporting ideas for joint rule were needed if the council was to continue to have partial control.⁴³ The intent that lay behind the ideas of *corpus mysticum* and corporation was to provide an intellectual justification of a certain organizational form.

Other Church institutions such as monasteries, schools, poor houses, parishes or bishoprics, were also legally interpreted as corporations. When disputes arose, as they often did, means of remediation would need to be found that aligned with the idea of Church corporation and applied to the relationships found in land tenure. Throughout much of the Middle Ages, Church property was held in what was known as free alms (land held in tenure). Consequently, clerics did not own land or buildings yet they were inhered with their charge and were the possessors and users of it.⁴⁴ How then to resolve disputes independently of ownership claims? For this the Church devised the

⁴³Something similar might also be the case with the monarch and his lords as the king's decision was not usually taken independently of the nobles. Naturally, as will occur in most positions of leadership and power, the relative degree of power will be mitigated by the strength of the institution and the temperament of the leader. And in this, the papacy and the crown were no different.

⁴⁴This type of relationship was also true of lord-serf relationships.

Canon law of *actio spoli* (action of spoliation). The law stated that whatsoever had been despoiled shall be restored. The law also discouraged one from taking action to recover their possessions as they too would be found as despoiling another. This was to apply equally to the officers. According to Canon law, the officers acted as trustees or stewards, and were presumed to use the property conscientiously and to serve those for which it was built (Berman, 1983, p.239). This law was a means of protecting the thousands of clerics rights of possession, both corporeal and incorporeal alike, under the heading of the corporate mystical body and was emblematic of the *law as justice* view.

Turning to the secular realm, similar ideas were developed and expressed. In England, a secular law that resembled the Canon law of *actio spoli*, the assize of novel disseisin, was enacted in 1166 by Henry II permitting legal action against a dispossessor that was entirely independent of ownership (Berman, 1983, p.455). This then new secular law soon found its way across Europe. Notably, the legal action was to be heard in the royal rather than the lord's court, effectively changing jurisdictional control from the latter to the former. The purpose, as with the *actio spoli* in Canon law, was to balance the scales and provide a method whereby peasants could generally maintain their livelihoods. Milsom (2003) concludes as much when we wrote: "But if one reads the writ of novel disseisin side by side with the handful of surviving cases in which a defendant lord expressly relies on the due process of his court, one can only conclude that the king meant precisely to hold lords to their own customs of a tenure which could be disturbed or ended only by that due process" (p.106).

The assize of novel disseisin was also indicative of the medieval obligatory temperament as it was, in essence, about *obligatory* rights. These were rights in the sense that one had the right to legally enforce a defendant to honor an obligatory relationship. To say that one has a right of obligation is also another way of saying that relations between individuals are near. One significant medium whereby various obligatory (near) relationships were expressed was through land. When nobles abused land obligations, it was in the interest of the monarch as well as the papal Church to intervene and make attempts to preserve the feudal order. In spite of the monarch's attempt at preservation, the transfer of secular jurisdictional control with the assize of novel disseisin had an unforeseen consequence, the extinction of the obligatory relationship between lord and tenant (Ibid., pp.64-65).⁴⁵

Following similar principles of the seisin doctrine and under common law was the concept of a subjects right to resist the king (Kern, 1956). Generally, validation of resistance depended upon the actions of the king himself. In most circumstances besides tyranny, he was to be obeyed. But, in the circumstance of tyranny, revolts were presumed warranted. And as already mentioned, local customary laws and courts often prevailed over royal ones implying community control.⁴⁶ Lastly, the

⁴⁵Milsom makes a further argument that it was the jurisdictional shift that brought about a new but blind concept of abstract land ownership. “[S]eisin of his tenement depended upon his lord's authority and nobody could be seised without that authority. Within the closed world of the lord's court any seisin was by definition rightful. Antithesis between seisin and right came when the tenant in seisin in his lord's court could be ousted by the superior jurisdiction of the king's court” (2003, p.90). In other words, when the royal court established its control over this process with its ‘writ of right’, the relationship between lord and tenant ceased to exist and without that relationship the legal ideas of seisin, which was really an idea about an obligatory relationship, gradually turned into an abstract idea of ownership. One might add that the growth in the use of the abstract relationship, money or other credit instruments, also contributed. This additional factor will be addressed in the following chapter.

⁴⁶In England and despite the early attempts at centralization, it continued to have many active local courts in manors and towns; this was also true of France although it was quicker to loose

debate over jurisdictional sovereignty proved that many scholars still advocated on behalf of community rule as Positive and Natural laws were still made to align with Divine law albeit with assorted twists and turns.⁴⁷ This was also the general case after the Reformation although with decreasing frequency.

Thus, in both the spiritual and secular realms there was a tendency towards community rule and away from absolutism or the *law as instrument* view in its strong form. The laws of the time bent towards obligation and duty as reflected in the concept of the *corpus mysticum*. For the most part, the laws were meant to preserve the customs. Suffice it to say, there occurred a reversal of course, though not total, between the *major* and *minor* theoretical currents sometime around the sixteenth century. The theoretical major current of solidarity, unity and custom both in the secular and religious realms was, in time, overtaken by the then theoretical minor current of absolutism and quasi-deliberate law which oversaw the rise of the supreme pontiff and the divine king. Following Gierke (1913 [1866]) as well as Black (1980), it appears that “social atomism espoused by the jurists, and with increasing frequency

wide participation (Dawson, 1968, p.152). Likewise for Germany and Italy. “The private law of the German territories before 1400 took the form of local custom. Its origins were Germanic and it was almost wholly untouched by Roman law” (Ibid., p.153). In Italy, the Roman law scholars developed a theory of custom to align Roman law to the needs of locality as well as a way of subverting “Justinian’s prohibition, *non exemplis*” (Ibid., p.133).

⁴⁷Martin Luther, wrestling with the role of Positive and Natural law in society developed his own distinct twist. Diverging from the usual practice of elevating reason as a corrective to a defective human will, Luther subordinated reason to conscience while simultaneously confining all three types of law (Positive, Natural and Divine) to the terrestrial plane. This put something of a divide between secular law and God. It also made salvation wholly reliant on a person’s individual faith. When it came to explaining the purpose of secular laws however, Luther reintroduced God into the equation by giving law a theological purpose. Accordingly, “[d]ivine and natural law as well as civil laws derived therefrom, serve to make people conscious of their duty to give themselves completely to God and their neighbors and, at the same time, of their utter inability—without divine help—to fulfill that duty” (Berman, 2003, p.76). Secular law for Luther had the additional advantage as operating as a deterrent for wicked behavior (Ibid.). Due to human sinfulness, precise rules and maxims were required as a measure to deductively apply the law of which the Ten Commandments were inferior to none.

adopted by others, was part of an intellectual strategy leading towards absolute state sovereignty, and often towards absolute monarchy” (1980, p.156) — a contrast to the current conventional wisdom that social atomism or individualism leads towards popular sovereignty.

The reversal of course occurred despite the fact that the general Council of Constance (1414) effectively and through its organizing body disposed three competing popes and ended the Papal Schism by installing a collectively agreed upon new pope.⁴⁸ One explanation for the reversal might be that in hierarchal legal societies ruled by competitive force, the concept of absolutism may be ever present but the specific conditions many not exist for its full expression. Some such conditions could be monopoly control over the legal apparatus, new forms of intellectual support or the monopoly control over force. Be that as it may and because the reversal was not total and because much of the West had been ruled under two pre-eminent institutions as well as under prescription to local custom (even in a world of competitive force and violence), monarchal absolutism did not have the necessary and sufficient conditions to persist at that time.

Not long afterwards, the West experienced yet another reversal of course between its major and minor theoretical currents. This second reversal however, while carrying the centuries old traditions of custom and obligation, had sprouted new secular ideas — the natural and individual rights doctrine. By natural was meant primordial or universal and by rights was meant the legal prohibition from infringement of

⁴⁸The Fifth Lateran Council (1512 – 1517) reversed this position by condemning the Conciliarist movement and favoring the institution of the papacy. The issue however was not firmly established within the Church until the First Vatican Council of 1870 in which the concept of papal infallibility was ensconced.

individual body and property (ownership). These types of rights are distinct from obligatory rights because they do not operate as relational attractors but as relational propellants. Stated another way, the natural and individual rights doctrine had, and still has, exclusionary properties as well as the propensity to stretch distance between human relations. The shift towards exclusion over inclusion might be explained in several ways.

From a practical matter, and following the Black Death, many regions across Europe experienced commercial and secular legal (the weak version of the *law as instrument*) expansion.⁴⁹ Subsequently, impersonal contractual relations grew and obligatory relations declined. Another likely factor in the shift was the abuse of power by many a monarch, as denouncing tyranny was a preoccupation for scholars in the seventeenth and eighteenth centuries. Lastly, the arrangements and attitudes following the religious wars in the late seventeenth century gave an additional impetus for the creation of new non-religious but authoritative principles. Their development, ironically perhaps, appears to have been inspired by the centuries long question over legal control and then from a specific religious concept: toleration as a “natural right”. Toleration in the name of religion was a claim against state intervention and control. Figgis (1960 [1907]) argues that this religious claim became the “basis of the modern theory of toleration, as developed by [John] Locke, [Bishop Benjamin] Hoadly, [Bishop William] Warburton and the ordinary Whig writers of the eighteenth century. Its distinctive note is its firm insistence on toleration as a natural right...The originality of [Robert] Brown, [the architect of the religious claim], consists in his recognition of

⁴⁹The following chapter will address this in more detail.

the futility of expecting his own religious system ever to be universally imposed (this separates him from the ordinary Puritans), and in his clear enunciation of the private and individual nature of belief” (pp.132-133, emphasis added).

However and similar to the first reversal, this second reversal of theoretical currents was not total. Rule by community again returned as a major current in the West but because it was supplemented with the *secular* ethical text of natural and *individual* rights, community rule was in large degree obfuscated. It was obfuscated because it had defined participatory governance in individual property terms rather than obligatory or communal terms.⁵⁰ This had the practical effect of removing community rule without having to relinquish a claim to its ideal. Furthermore, the *law as instrument* in its weak form is a type of law that explicitly speaks for minority groups and as such is not concerned with larger community interests. In time public managerial bodies were created to mediate the tension between societies propounding both natural-individual rights and community rule doctrines, reincarnated as participatory but representative governance. These problems and their relation to fraudulent activity, along with the development of the business enterprise will be addressed in the following chapter but first an amendment to the analytical construct developed in the previous chapter – general impulse, aim and means of an era – will be proposed and a link drawn between the *law as instrument* view and the behavior of deceit.

To the analytical construct will be added the role and function of belief systems of any given social order. As this chapter is concerned with the secular legalizing of

⁵⁰It is acknowledged that this does not represent the full extent of Western constitutional and representative governance. Other principles that limit the power of the state and govern behavior between individuals are also relevant to the narrative.

the West and its implications for transaction fraud, it is also then concerned with the structural and fundamental ideas that support a secular legal society, that is, the belief system upholding it. Structural ideas as it were are representative of the social order. In a theocratic society, it is easier to identify the fundamental concepts that serve a strict supportive role as theocratic societies usually make these ideas explicit. When turning towards legal and secular societies however, this is another matter altogether because law as a ruling concept is susceptible to imprint. Moreover secular rulers that rule by law can make imprints into the law from any variety of doctrines. They may borrow doctrine from religion, from tradition, from other countries or they may make them from whole cloth. The point is that if they are to remain in power and if the *legal* order is to endure, a narrative about it will need to form. The originally indeterminate legal narrative that did develop in the West was the natural-individual rights doctrine, a belief system that is arguably highly attuned to the *law as instrument* view due to the fact that each are concerned with minority interests.

3.3 Legal Society, the Law as Instrument View and its Significance for Fraud

The legalizing of a lawless society can be a long and protracted process. By lawless, it is not meant barbaric but simply at the most elemental level, undocumented. Of a matter of course, literacy is the first phase in its development. It is difficult to say if any society once set upon a certain legal path (religious or secular) will continue upon that path if uninterrupted by exogenous forces. Milsom (2003), supposing that such a path might exist calls this a legal life cycle and consists of two stages: (1) procedural

and (2) substantial. According to Milsom, changes in English law throughout most the Medieval era were procedural in nature, for instance when the Church banned ordeals, when the Royal courts of England centralized, when cases began to be settled through jury trial or when Royal courts began hearing tort cases under the pretense that the action was against the king's peace.

In the first procedural stage of the legal life cycle as argued by Milsom, cases are settled by superstitious tests (ordeals) or by compurgation (the swearing of oaths) if there was no witness. Usually to swear alone did not suffice so others, compurgators (oath-helpers), would swear to the character of the defendant to help determine the case.⁵¹ Such a legal system can operate for centuries without producing any substantial law, that is, without producing new rules for behavior. It is safe to say that the first stage of the legal life cycle follows closely the *law as justice* view. Yet at some point along the way, the procedural changes will lead to discussion, which in turn will generate a transformation to substantive law. Milsom argues that this fundamental procedural change in England was the change from compurgation to trial by jury — a change, that might be mentioned, necessitated by the papal Church banning the use of the ordeal in 1215 — or in his own or in his own words: “the generation of a system of substantive rules was a function of jury trial, or rather of the emergence of questions when inscrutable modes of decision were replaced by human deciders” (Ibid., p.19). He also suggests that something along the same lines may have occurred in Rome with the development of Roman law.

⁵¹In Finland as many as 36 oath-helpers could be required depending on the crime (Pihlajamaeki, 2001, note five).

And while there is little doubt that the introduction of a jury system played a role in bringing deliberation to the fore, it seems probable that other factors might have also contributed to this process.⁵² The most apparent among them, as already discussed in detail above, was the struggle over supreme jurisdiction. Consistent with the epoch and among the earlier issues addressed by king Henry II of England (1133 – 1189) during his thirty-five year reign, was the issue of Church-monarch relations. In 1164 he crafted legislation known as the Constitution of Clarendon, which attempted to place clerics under civil jurisdiction. Not only was such legislation meant to minimize the power of the ecclesiastical courts, it represented Henry's own jurisdictional conflict with the pope and was, in essence, a continuation of the Investiture Controversy c. 1073.⁵³ Only two years after the Constitution of Clarendon, Henry II implemented a series of Assizes that expanded the role of royal justice by creating the General Eyres (c. 1166) and thus began the process of centralizing the courts.⁵⁴

Similarly on the continent, changes in discretionary (deliberate) control in the form of judicial discretion over criminal punishments appears to have been the product of the newly formed professional judiciary and the state's more complete centralization.⁵⁵

⁵²Milsom argues that with the move towards trial by jury and because there were special pleadings in civil cases, judges did not always have ready answers, this in turn led them to consultation and to debate.

⁵³It also led to the infamous Thomas Becket affair.

⁵⁴The Assizes established by Henry II, along with the nobles, were a grand jury system where only the royal justices could try criminal and property (freehold) cases. The justices traveled around the country hearing cases. The Westminster Courts (Kings Bench, Common Pleas and Exchequer) were also established whereupon one could travel to have their case heard. Like most social developments however the formation of these courts naturally did not arise without antecedents. Some of these can be found in ancient Saxon laws and courts and quite possibly to the laws of the time of Roman Britain. See Kurt von S. Kynell (2000).

⁵⁵The system of statutory evidence that had long followed the laws and practices of the *ius commune* (Roman-canon law) and that found full proof of innocence or guilt either by confession or by a statement of two eye-witnesses, came to be subverted when the subjective theory of proof, the *poena extraordinaria* (judicial discretion over criminal punishments), was adopted. This granted a judge room to use circumstantial evidence something he was forbade to do under the *ius commune*

“In Europe the early modern absolutist states eliminated the remnants of private, feudal jurisdiction over serious crime; they rid the public courts of lay judges; and they subjected the professionalized public courts to central review” (Langbein, 2007 [1977], p.56).

Because monarchs and their royal courts sat at the top of court hierarchy, their greater and more deliberate exercise over the legal system is not that surprising once centralization occurred. Nonetheless, the procedural changes did not have immediate effects. As Milsom (2003) notes, although trial by jury was introduced in England in the thirteenth century, the practice of compurgation was widely used throughout Europe until the sixteenth century (p.10). So why did it take so long for compurgation to cease in practice? One possible answer may be found in the fact that compurgation is in essence both an obligatory and honorific process. And these characteristics are byproducts of structural and institutional relationships. It would follow that when both structural and institutional relationships change, new habits would emerge.

Given the above, it appears as if the concept of *law as instrument* in its weak form remains in abeyance so long as institutions that support obligatory or honorific attitudes prevail. When new institutions and intellectual supporting concepts of order are created that diminish these attitudes and amplify others, such as a secular legal system that appeals to reason, procedural changes can facilitate substantial changes. One significant consequence of developing a secular legal system predicated in large part on reason is that it becomes much more likely that reason will, at some point,

as it was seen as making God subservient. Furthermore, the method (torture) of coercing a person into confession in the attempts at gaining full proof, began to decline thereafter. In the case of petty crimes, the use of torture was exempted under the *ius commune* as the latter was generally seen as a punishment in and of itself (Langbein, 2007 [1977], p.58).

be decoupled from God. Edward Coke (1552 – 1634) was one of the first to make an appeal to God-less reason. Whereas for most of the Medieval era ideas of Natural law and reason were meant to bend to Divine law, Coke saw in the law not natural reason but artificial reason. Law, and specifically for Coke, English common law, was to be apprehended by a cumulative measure; the reasoned working out of thousands of disputes and cases over hundreds of years. Hence, according to Coke, “the reason of the law is not the natural reason of any person but rather the artificial reason of the law itself” (Edward Coke, as quoted in Berman, 2006 [2003], p.242). With this seemingly benign interpretation, he effectively decoupled Natural law and reason from the moral value-claims of the papal Church and opened the door for substantial legal changes.

It took centuries for trial by jury to be adopted in England and centuries for the rational adjudication of the *ius commune* to be accepted before the substantial idea of the law of proof would be accepted. The formation, growth and establishment of the secular legal courts, parliament and the judiciary were several of the institutions amplifying new attitudes towards God-less reason and discretionary control. Moreover, these institutions had an exogenous support mechanism as the practice of law in the sixteenth and seventeenth centuries was not only financially enriching but carried great standing as it was among the few professions of the time to have a level of prestige. In a social world where the general aim is preservation and/or elevation of rank, perceptions of prestige tend to also carry validation of the office and institution. And so new secular legal institutions formed that simultaneously diminished obligatory relationships and heightened impersonal ones.

In its wake the concept of the *law as instrument* in its weak form grew. But it grew not only because the use and practice of secular law had become legitimated, it also grew because new self-identified groups were using the law as a tool to carve out a position in the stratified society. Parliamentarians also employed it in a similar way; to bolster their position and challenge the crown. In the two hundred years between 1500 – 1700, kings, parliamentarians, landed gentry, merchants, bankers and territorial lords competed through and by the law. Appeals to the divine right of kings were often made but just as often refuted.

Throughout this period however the *law as justice* view did not completely disappear but remained in the background. The governance question lingered, if not absolute monarchy but under secular community rule and reason, then by what principles? In another way of saying, if Natural law, reason and the state of nature arguments that it inspires would no longer be required to align itself with Christian norms and doctrine, then where would its final authority come from? Who was to have ultimate controlling authority and on what grounds? A lesser but growing debate over commerce and virtue that had begun sometime around the late seventeenth century bled into this larger concern of Western governance, a concern that has its roots in the Papal Revolution. What was needed was a new set of universal behavioral codes that were secular in nature. This was eventually found in the natural rights doctrine and was usually tied to property or ownership.

Thorstein Veblen (1898a) has traced ownership back to the habits of warfare and marriage. He also cites Locke's theory of ownership as the modern ground on which natural property rights rest and finds its development in the outgrowth of "mercantile

traffic [and] of the prevalence of purchase and sale in a ‘money economy’” (1915 [1904]), p.77). Tierney (1997) traces the rights doctrine back to William of Ockham, Jean Gerson and Hugo Grotius. Milsom (2003) has suggested that the abstract idea of ownership formed mainly by happenstance when the royal court seized the lord’s jurisdiction. And John R. Commons (1970 [1950]) has suggested that the idea of ownership formed when the sovereign was split into two personalities, one a figurehead the other a proprietor (p.78). While there may be some truth in each of these accounts, the relevance of the ownership concept is that it is applicable in legal terms to the individual and not to the community or to obligatory notions.⁵⁶ What made the natural-individual rights doctrine accommodating to the *law as justice* view however was that it did not exclude, in theory, any high ranking men. Yet in practice, the natural-individual rights doctrine with its focus on the individual is, at its core, an exclusionary concept as it devalues personal relationships and operates through impersonal contracts and documents. It is at this intersection of the *law as instrument* view in its weak form and the impersonal relationship that transaction fraud finds an opening. Specifically, by reorganizing society on individual terms and inserting property qualifications in order to access and participate in political and economic (not civic) liberty, it began a process of reducing the centuries, if not millennia, long

⁵⁶Private property as a concept and practice did not exist in much of the Middle Ages because land and other material objects were believed to be God’s creation. The same however cannot be said of Classical Antiquity. Thus, the beginning of the property concept pre-dates Classical Antiquity per Veblen (1898), and though it largely ceased to operate in the Middle Ages it has re-emerged as a consequence of structural and procedural changes per Commons (1970 [1950]) and Milsom (2003). It is a curious phenomena that emerging structural or principle ideas, that is, ideas that give order and finality to human life, appear to exist in strange combination with traditional ones until such time as circumstances change enough to allow not only their full expression but become so ingrained that they are taken for granted. In point of fact, the common acceptance of property rights as it stands today would most assuredly not have been accepted in the time of William of Ockham, nevertheless his idea of nominalism is related to, albeit tangentially, individual rights.

tradition and practice of Christian paternalism and in so doing initiated the new vision of *caveat emptor*.⁵⁷

Law as Instrument View and Fraud

The relevance of the development and evolution of law in relation to transaction fraud rests on two grounds. The first is that the two views of law at each polar end represent supporting and functional ideas of specific forms of order; one that bends towards community rule the other that bends towards absolutism. In an attempt to explain an endemic behavior, such as fraud, the enduring order and its supporting ideas will need to be made explicit because endemic behavior is a symptom of the social order and not the other way around. In the modern period the social order is constructed and justified through secular law. Again the phrase, *law and order* comes to mind rather than *force and order* or *God and order*. Currently, as it was in much of the Middle Ages, the idea of *law as justice* prevails over the idea of *law as instrument* in its theoretical form as the idea of participatory governance remains a predominate value-claim. But in practice, and unlike much of the Middle Ages, the view of *law as instrument* in its weak form has endured and become more dispersed. This is likely due to the above mentioned five criteria, though it also appears that its special properties have also contributed.⁵⁸

⁵⁷The transformation from paternalism to buyer beware (*caveat emptor*) varied across Western countries but perhaps flourished in the U.S. like no other due to its expansive frontier and weak community ties as well as the rapid growth of centralized (factory) work in the latter half of the nineteenth century. The evolution and history of market societies is addressed in the following chapter

⁵⁸Competitive climate, existential threat, the legal volume and level of sophistication of the law, the volume and level of sophistication of the legal institutions or institutions that teach jurisprudence such as the nascent universities developing at the time, and the psychological character of the person(s) in the position to direct and shape it.

One of its unique properties is imprintability or the susceptibility to impression in the way that clay is. It is imprintable because abstractly this view is detached from moral claims. It does not have a moral anchor. This is not to say that value-claims cannot be grafted onto instrumental law, as is often done, but that in its abstract form as an abstract tool, it is free of these claims. The decoupling of moral value-claims to instrumental law is another way of saying that obligatory relationships have been diminished in the secular legal code. The decoupling also facilitates a broader use of the law instrument as moral claims fail at restraining it at its inception.

A second property of the *law as instrument* view is that it generally requires the attainment of special knowledge. To use law to a particular end implies that one must know the current law in the first instance. The more complicated the law the more difficult it will be to attain the knowledge needed in fulfilling that end. As it is modern practice for business to employ lawyers, with larger corporations generally employing more of them, they have an advantage over families, workers and individuals when it comes to using the law to particular ends.

A final property, although not necessarily innate, is that it appeals to natural rights, specifically ownership, for validation. As mentioned, ownership is an exclusionary concept, it “is created by sovereignty, by keeping other people off, by preventing robbery, trespass, stealing secrets, or preventing ‘infringement’ upon one’s opportunities to buy, sell, or compete” (Commons, 1970 [1950], p.81). In a status-seeking and economically competitive society with laws of ownership and monopoly force, the creation of law becomes essential in gaining higher ranking positions. It might be emphasized that manipulation of the law does not necessarily imply the

breaking of the law.

Given the above, the restriction of suffrage to white males of qualified property in the early history of the United States (and elsewhere) was not out of character. This is the outcome of building a legal code based on individual rights decoupled from community based moral claims because various groups are easily excludable by simply demarcating who is deemed to be an “individual” under the law rather than building a legal code that begins with obligatory relationships. Apart from the property as well as poll tax qualifications, individuals were also defined by the level of “civilization”, sex or skin pigment. If one just so happened to be indigenous, of the female sex or of darker pigment, they were denied legal status. Consequently, they did not have the same “natural-individual rights” as propertied white males (Losurdo, 2011[2006]). Instead the indigenous were seen as barbaric while women and humans with darker pigment presumably lacked rational faculties. The *law as instrument* view and its practice remains an impersonal tool of which to gain individual or minority group advantages. Its three properties effectively insert distance between groups as well as the people who regularly practice it. That is, separation between (not necessarily within) groups is further extended.

The second ground for which the evolution of law and specifically, the *law as instrument* view in its weak form is relevant to transaction fraud relates to the medium in which both are usually found. For a practice to endure and be widely dispersed requires an institution to give it reinforcements. The dominant and modern institution that expresses and uses the *law as instrument* view is the business enterprise. Robert Heilbroner (1973 [1972]) described the relationship between secular quasi-deliberate

law and business as “[a] thousand laws and regulations hedge business behavior about, offering at the same time a thousand interpretations of what it can get away with” (p.194). And because the particular view of instrumental law is impersonal, relations are conceived in a contractual not obligatory nature. The common parlance “it’s not personal, it’s business” reflects this claim. The impersonal character of relations (distance) also contributes to the psychological character of a person or minority group who regularly seeks to use this form of law. Psychological studies are beginning to bear this out. The more removed one person and one group from another, particularly those in positions of power, the greater the likelihood that the latter will express unethical behavior (Piff et al., 2010, Piff et al., 2012).⁵⁹

While other groups likewise use the law instrument to their particular ends, such as labor unions and civil rights groups, they tend to do so reactively and not proactively like the business enterprise.⁶⁰ To use law both proactively and instrumentally also has the secondary effect of creating unique perceptions about business, specifically the perception of business as a sport, a game or as a hustle. Such a state of mind develops under these conditions because there is little in the way of sanctity and respect towards fellow humans as they relate to obligatory notions. Instead, business executives that consistently use the law proactively and instrumentally typically, and especially in the business arena, grant respect only to their equals or to those that

⁵⁹Piff et al. (2012) contribute unethical behavior to the increase in resources and independence of groups with higher income and wealth accumulation (p.4086). It is argued here that it is precisely through the law that such accumulation is made possible where a vicious cycle occurs as more individuals and minority groups use the law to further not only wealth accumulation but to further isolate themselves from other groups.

⁶⁰This is a major distinction between the two. For those that use the law reactively, they have little of the psychological and structural tendencies that are found with those who use the law proactively. Furthermore, many of the reactive legal movements begin with some vision of community coherence.

are superior in their ability to vanquish their competitors or rivals. While the degree to which executives view their counterparts or consumers as rivals or dupes varies widely, the more they do so the greater the degree to which the environment may turn criminogenic. And the more the environment turns criminogenic the greater the likelihood that the underlings will exhibit similar behavior.

Of the several conclusions one may draw from the business-as-a-game interpretation perhaps the most significant among them is that the competitive game is often couched in absolutist terms. That is, it is perceived as a zero sum affair (winners and losers). For those that primarily view business-as-a-game, they are prone to view other players as separated and disconnected from themselves. This is predominately due to the fact that the game has been justified and stretched by secular law with its exclusive and individualized rights doctrine. The competitive conditions and the zero sum view is in large part an explanation for why so many presume that respect should be earned instead of given. Moreover, gamesmanship represents two values, the value of “winning” and the value of the game itself. That is, economic competition is also valued as a process and is conventionally referred to as “opportunity”.

Such a perspective is quite distinct from ones held in the Medieval era. While many popes, kings, lords and lesser lords also competed for rank they did so under one main pretense: that their actions were cloaked in a fully worked out moral system, i.e., the Christian narrative and the binding habits of honor and fealty. Their method of attaining or preserving rank, force and violence, was, from a strictly logical point of view, contradictory to many of these moral claims, but neither were these violent actions concealed. There often was intrigue and corruption but again victory usually

entailed some type of force. Because of this, it is unlikely that many saw the use of competitive force as a game. Rather it was a most serious and personal affair as their honor was at stake. One might even go so far as to say that the idea of the *law as instrument* view would have been an alien concept to the minds of medieval men and women. Custom and force ruled so pervasively that *deliberative* law was rare and might have only existed in the minds of those who had not only an advanced education but had a particular temperament, i.e. some form of narcissism and self-absorption, and sat at the pinnacle of power.

In the modern era where business is regularly viewed as a disconnected game, facilitated by the law instrument, deceptive behavior can grow. It does not take a great leap to see the connection between fraudulent activity and a hustling habit of mind when the central objective of business is the seeking of private risk and reward usually in monetary form. To be clear, the view and practice of the law as an instrument does not cause an individual to commit transaction fraud but rather it facilitates its expression because it does not begin its life from an inclusionary perspective nor does it remedy non-violent disputes in a personal and close manner. When the *law as instrument* takes on its fully authoritarian aspects (the strong version), transaction fraud is diminished because it closes down the opportunity for other minority groups to compete over its use with the common result of dictatorship and/or slavery.

In its weak version however, positioning over material claims and “individual” rights increase simply because the opportunity exists to bend the law in one’s favor. The common effect is the creation of a legal scale of control with the ideal represented

as majority-based elective democracy. When some groups are able to maintain a legal advantage, the ideal — contingent on the extent that individuals in the advantaged group are united — slides towards plutocracy and elite-economic domination (Gilens and Page, 2014).⁶¹ It is specifically the existence and use of quasi-deliberate law that makes the non-violent consolidation of political and economic power in the form of plutocracy possible and it is generally its exercise that contributes to the gamesmanship habit of thought and action as it works to bring about its own and independent targeted ends. Examples abound regarding corporate legal machinations but perhaps none so perverse and indicative of a gamesmanship attitude then the corporate appeals made in the last quarter of the nineteenth century to the Fourteenth Amendment.⁶²

Veblen, writing in the midst of this ploy (1934 [1899]) concluded that the legal profession was largely a type of occupation “immediately subservient to ownership and financiering...[and that the] lawyer is exclusively occupied with the details of predatory fraud, either in achieving or in checkmating chicane, and success in the profession is therefore accepted as marking a large endowment of that barbarian astuteness which has always commanded men’s respect and fear” (p.231). Today, the *access* theory of policing, regulation and deterrence speaks to a similar understanding of lawyers and the law. Developed by Judge Stanley Sporkin, the SEC enforcement director from 1974-1981, the goal is to hold gatekeepers (lawyers, accountants and

⁶¹Depending on the historical and institutional path of a country, the state may intervene more frequently to re-balance the scale although it appears that much of this re-balancing in the modern era occurs as a response to the struggles and pressure applied by oppressed groups and/or as a response to economic crises.

⁶²For decades corporations used the 14th Amendment as a shield to counteract regulation by individual states.

other similar occupations), i.e., those with access, accountable and in so doing prevent criminal behavior (Eisinger, 2017).

One characteristic of committing successful transaction fraud is to acquire more information than the other person of which they want to deceive. Much of this information has been historically acquired by the business enterprise through the law and through its legal resources. Specialized law for some then is not seen as justice but an instrument or tool in a game with elevation of rank as the end in view. Law as instrument is the idea that law can be used as a tool without recourse to further ideas of community fairness or for that matter constricted by moral-obligatory codes. Thus, endemic fraudulent behavior depends upon, at minimum, the development of sophisticated law and its continual use as an instrument and enters into action when relational distance is stretched physically and/or conceptually. The problem of noble imposters, sometimes referred to as false princes, in the early modern era is a vivid example. Many of these imposters used bills of credit (a legal document) and distance to perpetrate their schemes (Lindemann, 2014, p.208). They were successful in large part by the physical distance covered and by the sophistication of the legal documents used. The more sophisticated the latter, the more conceptual distance is created. Their own unique skills of charm, manipulation and persuasion no doubt also contributed.

It might now be possible to construct one aspect of a theory of systemic transaction fraud. For transaction fraud to be systemic requires, in part, the use and belief in the law as instrument view. It is an approach to the law that is mechanistic and one with narrow interests. Further, law in its more developed and sophisticated form, is a form

of highly specialized knowledge. One only needs to review current legal terminology to demonstrate this point. When law (rules of behavior) becomes more sophisticated and complicated, specialists will be required to interpret and mediate this knowledge. The more advanced it becomes the easier it is for people with the resources to take advantage and use it to their own ends. In this way, quasi-deliberate secular law has some of the characteristics of asymmetric information.

When distance between two people or between two people and a conceptual document expand, the greater likelihood that transaction fraud may occur. Furthermore, knowing and using the law to particular ends makes it easier to circumvent any unwanted consequences. This gives the upper management of corporations an effective tool to increase their rank. CEOs, CFOs and the like have more money, more resources, more legal knowledge and more lawyers to game the economic system. For the most part, they use the law to game it by skirting regulations, changing regulations, or using their power to actively sue or defensively sit on claims for years.⁶³ More recently many financial institutions have inserted arbitration clauses into contracts that effectively bar class actions lawsuits. Such legal machinations not only

⁶³Such legal symptoms are not a current phenomena but the general product of a social order that broadly favors the exercise of quasi-deliberate law. The degree of use by any one corporation will depend on, in part, the market share of that corporation and the industry's associations (a union by another name) but also upon the corporation's size, power and influence relative to local, state and federal government oversight. As the corporate form grew in the last quarter of the nineteenth century and into the twentieth, these types of results became more frequent. Delos F. Wilcox (1908) remarked on the phenomena thusly: "Under ordinary conditions a State or local administration, starting out to secure the adequate regulation of public service corporations, will go out of office long before litigation can be carried to a successful conclusion thru the Federal courts. A constituency is seldom patient enough to pay the expense and endure the delays of such litigation" (p.920). Four year earlier in 1904, when the Federal legislature was tasked with writing a law to make the production of tainted meat criminal, not only was the lawyer of the National Livestock Association, Samuel H. Cowan, asked to draft the bill but it was done so at the behest of the large meat-packers and to the detriment of the smaller ones (Kolko, 1977 [1963], pp.106-107). While these are but only two examples, they are representative of the ways and means by which corporations use the law to their own particular and targeted ends.

require knowledge of the law but a view of the law as predominately instrumental. The existence of money, resources, legal knowledge and the employment of lawyers however do not necessarily imply that upper management will engage in fraudulent activity. But what it does imply is that there is a substantial connection between the “view” of using law as a mere instrument, that is, the habit of mind in regards to secular law, and a predilection to fraudulent activity.

Summary

As a result of the centuries long jurisdictional battle — a contest that was fundamentally about governance and control — between the pontiff and crown, each was compelled to improve and strengthen their respective positions in regards to a legal system. From this pressurized environment emerged a different form of legal genesis (quasi-deliberate secular law) than the one that had ruled for centuries (customary law or community rule). What largely facilitated the new development was the re-discovery of Roman law and in particular the *Digest*. Two foreign concepts were found within: one, a strict authoritative law and two, Natural law and deductive reason. While both pope and king used Roman law to their own ends, it was the latter that ultimately gained the upper hand as many kings began to limit the pope’s jurisdictional authority.

Despite this development however, customary law still ruled much of Europe well into the fifteenth century. It was only when kings began to more effectively consolidate their power that quasi-deliberate secular law (the *law as instrument* view) had an opportunity to supersede customary law. It did so through the expression of the divine

right of kings. For the most part, this expression of authoritative rule was rejected after centuries of local customary governance. This left the West in something of a quandary. If not rule by decree and if not rule by custom, then rule by what and whom? Answers were eventually found in the Natural and individual rights doctrine.

The principles found in this doctrine made sacred individual property rights. Rights that are, by their very definition, exclusionary. Although many had renounced tyranny and advocated community rule, the new set of secular principles largely obfuscated it. The principles themselves were chiefly a product of structural and institutional changes on the ground (addressed in the following chapter). Importantly, it was the weak version of quasi-deliberate secular law that prevailed. The property of imprintability is perhaps this form of law's most distinguishing characteristic. For a law to be imprintable means it must be, at its *inception*, decoupled from morals, decoupled from obligation and decoupled from tradition. An imprintable law is abstract, it has no mooring and it can be used as a tool to further an individual or minority's interest without recourse to the opinions of the majority. The greater the ability to exercise its use reflects the level of control over and above the latter.

This is problematic when the primary value-claims of which laws must appeal, currently the Natural individual rights doctrine, are exclusionary. It is further exacerbated when law becomes more complex and sophisticated because it not only limits the individual's understanding and access to legal redress but it makes it near impossible for a mostly powerless and uneducated person in respect to the law to actively shape it. As it stands, it is predominately those working on behalf of the business enterprise that succeed in doing so. To put it simply, corporations have something

of a monopoly on quasi-deliberate secular law, where the more frequent its use the greater the likelihood that perceptions regarding the purpose of the enterprise become ever more narrow, shrewd, impersonal and calculative. And it is especially in these conditions that transaction fraud can surface. More specifically, it is especially in the conditions of monopoly force, *competitive* economy and the large business enterprise that “systemic” transaction fraud arises. It is the latter development however that still requires a fuller explanation.

CHAPTER 4

A HISTORICAL AND EVOLUTIONARY ACCOUNT OF PRIVATE RISK AND CONTROL AND ITS RELATION TO FRAUD

“In the case of England, I can tell you another very telling story. An abbot in France needed to repair the roof of the abbey. He needed lead. He couldn’t find lead on the market, so he wrote to an abbot in England. He wrote an abbot who had a manor which included a mine which produced some lead. Now interestingly again, the English abbot did not sell the lead to the French abbot. He sent it as a gift, with the assumption that the French abbot would make a gift to him. The economy between the 7th century and the 11th centuries, with the disappearance of the market and the lack of multilateral transactions, became *essentially an economy with robbery and gift-giving*. It is amazing the amount of robbery and gift-giving that went on daily in that society” (Carlo M. Cipolla, 2009, p.40, emphasis added).

In a given society, it is not an overgeneralization to postulate that varying forms of human habits and relations will be determined by its dominant institutions. It might be further deduced that relations of provisioning will naturally correspond to the various forms of economic organization and institutions as Cipolla illustrates in the above quote. Without a developed market, one cannot traffic in buying and selling and if one cannot traffic in buying and selling one must find other means to procure resources. Where procuring resources through gift-giving lead to different forms of relations and habits than those of exchange (the market).

How modern life evolved from one to the other — risk-sharing and agrarian-based versus individual-risk and factory-based — was almost assuredly multi-causal

and was, by no means a foregone conclusion.¹ The former is often referred to as a reciprocal exchange or kin society while the latter is commonly referred to as a market society. But before a brief examination of this evolution is given, it is important to provide an account of what is meant by a market society rather than say, a Christian society with market “places”. The theoretical framework developed in chapter two will be useful in this endeavor.

To recall, the framework consisted of a society’s general impulse, aim and means. In a market society these are: expansion, elevation of rank and competitive economy. Contrasting this with the past, there appears to be only one *major* break, namely in the method (competitive economy) whereby the general aim is attained.² However there are *minor* breaks as well. The first of these can be seen in competitive economy. While competitive economy is of a wholly different character than competitive force, there are also several minor differences between them. Because the former is an indirect process of elevating rank measured by monetary reward or loss, its activity is in need of rules. Brute force and violence, for obvious reasons, are not necessarily beholden to such constraints.³ The rules of economic competition can be found in

¹The particulars and casual markers surrounding the emergence of capitalism are still controversial. A partial collection of these debates can be found in two books: *The Transition from Feudalism to Capitalism* (1976) edited by Rodney Hilton and *The Brenner Debate: Agrarian Class Structure and Economic Development in Pre-Industrial Europe* (1987) edited by Trevor H. Aston and C.H.E. Philpin. Other contributions can be found by John Hatcher (1981), Mavis E. Mate (1993) and by Richard W. Hoyle (1990). It is beyond the scope of this topic to review the relevant details of these debates. Nevertheless, because this research takes an Original Institutional Economic (OIE) approach, cause, as it relates to *substantial* social change, is presumed to be located in exogenous forces that can greatly disturb institutional habits of thought and action. This further implies that institutions are mostly stable. Exogenous forces may be attributed to climate, epidemics, demographics (quasi-endogenous), foreign cultural contact, technological change (quasi-endogenous) and/or geography.

²The general impulse, aim and means of Medieval times were expansion, elevation of rank and competitive force.

³There are exceptions to this generality as rules of combat are recognized today as they were in the Medieval era. For instance, the Geneva Conventions and the chivalrous code, which applied only

the secular legal codes where they serve to validate its process.

By doing so, secular laws thereby also validate the social order indirectly. In contrast to the Middle Ages, validation was directed to ranking *positions* rather than the *process* of attaining that position. The papal Church's doctrine of the functional order of Christendom (God ordained hierarchal order) is clear evidence of this fact. It should not be surprising then that market societies are validated by secular legal codes, as the legal narrative of the natural-individual rights doctrine was identified as the belief system of market societies in the previous chapter. A second minor difference when competing commercially rather than through physical violence, is that it produces the twin pressures to develop widely circulated debt instruments and to reduce the cost of production. Both pressures contribute to the tendency to innovate and develop techniques that can mass produce money and goods.⁴

Another minor break can be found in the general impulse, expansion. While it is generally continuous with the past, it is now of a somewhat different character. Expansion in market societies is expressed through technological development and credit growth not through violent territorial conquest, as was first seen in the incessant feudal wars between magnates and then, following the crown's ability to achieve monopoly force, through warring nations. This is not to say that land and resource

to knights. Despite these exceptions it is generally acknowledge by all warring sides that victory is a product of relative body count. In the end, it does not quiet matter *how* one side won, but only that they won.

⁴Innovation may be stimulated by a variety of ways. For most of the Medieval era, innovation occurred regularly, albeit at a much slower rate, due to the pressures of war, epidemics, contact with other cultures and the growth of population. It also occurred endogenously as working with tools over extended periods of time can inspire one to improve its functional purpose. In modern times, innovation is often determined as much or more by government resources and initiative as it is by market competitive conditions (Mazzucato, 2013).

acquisition are obsolete objectives in market societies, rather it is to say that those with financial and political power do not have legal standing to independently declare war on other nations and forcefully appropriate their resources. Lastly, a minor break between the past and present can be found in the measurement of the general aim. Currently, social standing is predominantly measured through intangible assets such as fiat money, stocks and bonds. Although tangible assets are still quantified, the intangible forms have become much greater and financially extend to concepts like goodwill.

Given these similarities and differences, a more concrete description might now be ventured. A market society is one where products are competitively bought and sold using a medium of exchange (money) supported by secular legal codes that justify the process and thus indirectly the social order. As noted, one of its unique features is that the legal products for purchase and sale extend beyond tangible objects to artificially constructed concepts, like intangible assets as well as to the idea of labor “capacity”. The creation of these mental constructs is necessary to affix them with prices where the objective of the price is to guarantee a market, if not a sale. A market society then is a form of legal organization (Commons, 1924) where “man and nature are brought into [the market’s] orbit” and subjected to the forces of supply and demand (Polanyi, 2001 [1944], p.136). It is a form of organization where individuals are required to “make money” to gain money incomes in order to purchase goods “made from unknown hands” (Mitchell, 1913, p.21). And it is a form of organization where individual livelihood’s are at the whim of price movements and where status via individual pecuniary gain is among the most valued of all pursuits (Veblen, 1934

[1899], p.110).

In view of the fact that the competitive economic process is, in essence, a system driven by reward, it is also a system that relies predominately on extrinsic motivators (incentives). Incentives in market economies serve two purposes: one, as a method for action and two, as a validating frame for the meritocracy narrative.⁵ Because market societies value incentive-based structures that dictate individual action usually at the expense of others, they are also apt to value individual risk which is expressed in the economic concept of profit. It logically follows that structuring a society predicated on individual risk is the equivalent to structuring a society through individual competition. Today, this competition is largely carried out through the dominant institution of the business enterprise. And it is this dominant institution, in conjunction with the secular state, which maps the border and reinforces the narrative of a market society. Market societies then are societies that are competitive in nature, rely on extrinsic motivators, are composed of secular legal relations — distended and impersonal by definition — and where the citizenry have materialistic, self-interested and calculating habits of thought, habits, it might be added, that can be linked to transaction fraud. Naturally, the degree to which a market society demonstrates the full expression of these characteristics will vary.

⁵The meritocracy narrative (Techno-individualism) is rarely questioned in the United States from either political spectrum and it is, in large part, founded on extrinsic motivators – incentives with monetary rewards. Incentive-based action is a relatively simple idea that operates cumulatively for individuals that have managed to attain the modern marker of success, wealth accumulation. It is cumulative in that success reaffirms their belief in their incentive-based actions. Extrinsic motivators are problematic from a society-wide perspective because individuals that employ them often do so only to their advantage with little thought of others or even to the very nature of the action itself. That is, the question of whether or not to engage in an action does not typically enter into the calculation rather the assessment is determined by the weight of reward or punishment. Thus, the problem of extrinsic motivators is that one's material livelihood depends upon them not necessarily that they are *perverse*.

Moreover and continuous with the past, the degree of competitiveness in Western market societies will either inhibit or facilitate the authoritarian disposition that was prevalent with the warring seigneurs, popes and kings throughout the Middle Ages. In a market society, the higher the level of socially accepted competitiveness the more likely one will find this disposition. The level of competitiveness is subject to an entire range of institutional factors and may ebb and flow as these change. If these institutional factors fail at curbing competitive behavior, it also becomes subject to a ratcheting effect. What was once deemed socially unacceptable behavior in the pursuit of individual gain over decades becomes socially accepted. This proceeds in a forward progression so long as the political authorities are unsuccessful at re-setting ground conditions. The type of institutions, both dominant and non-dominant, and the type of political figures that Western market societies produce then are crucial in determining the level of competitiveness, the level of authoritarian dispositions and ultimately the level of predatoriness.⁶ Furthermore to the topic at hand, these levels of temperament are also linked to the level of transaction fraud.

Of significance however, habits of thought like despotism, deception, materialism and self-interest are predominately determined by the structural background (the organizational forms) of a given society.⁷ They are also determined by the type of authority symbol(s) that a society invokes, that is, the character of control. And so, while different habits of thought may assist in identifying shifts in culture, they are not

⁶For example, a recent study demonstrated that specific political organizations and their corresponding temperaments influence the psychological characteristics of the larger society (Falomir-Pichastor et al., 2005). This study is also in accord with an earlier one done by Kurt Lewin and Ronald Lippitt (1938).

⁷This view gets around the problem of making the transformation to a market society a mere epiphenomenon as Cooper (1978) criticized some historians for.

generally first causes in the emergence of *new* behavior although it should be said that habits do have a cumulative character and thus are prone to behavioral amplification. Because of this cumulative character, habits perpetuate the institutions from which they were born. Nonetheless, it is imperative that the structural background be brought to the fore in order to see more clearly how a society's organizational form(s) shapes temperament. And so, in an effort to make visible what is putatively hidden — the structural background to which both the behavior of deceit and the conditions of market societies belong — a brief account of the evolution of technology, risk and control and the extension of the market will be given. Specifically, an examination of the ways and means by which the powerful and powerless alike, in both Europe and the U.S., attempted to control the emergence of individual risk in respect to material livelihood. The effect of this process was the creation of two new dominant organizational forms (institutions) — the secular state and centralized work — that had their own secondary effects, transaction fraud being one of them.

4.1 The Evolution of the Market Society

The General State of Production in Medieval Times

For the vast majority, the life process in the Middle Ages was continuous in that there was little if any distinction between human activities with the exception of the most sacred. This included both productive and non-productive activities. In this respect, a common and collective end was served rather than an individual one. The doctrine of the papal Church along with its traditions, ceremonies, rituals and

the unifying construct of *corpus mysticum* provided the template and created the habits of thought and action by which these common ends were met. The concept of obligation, often expressed in terms of honor or duty, was instrumental to the hierarchal order.⁸ Productive activities, largely agrarian, did not deviate from the method of collective action. Moreover, *control* over the process of production (not output) was stable, individual risk was minimal and local communities were largely autonomous.

The structural and technological conditions of production were such that *sustained* economic surpluses were rare, particularly in periods of population growth.⁹ Presumably, the state of mind would have been preoccupied to a large degree with the problems of growing, harvesting and the tending of livestock. In such an economy, consumable goods become a preeminent object of worth and their production and provisioning become a daily concern. To this point, the process of production is

⁸The manifestation of honor could be identified in many ways, some of these being birthright, by ranking title, by the style of dress often enforced through sumptuary laws, by one's company, by one's mannerisms, by one's diction and by one's credit capacity. In time however honor came to be associated more and more by the absolute measure of wealth or ownership. To have honor meant a mark of distinction, a sense of worth, a high level of respect and it circumscribed one's reputation. It also meant that those that had "honor" (the upper class), set the standard for those that did not. Honor however, also represented more than a delimiting affect on status and reputation. Possessing honor also meant that one was beholden, obligated and duty-bound to perform certain behavioral patterns under certain conditions and in accordance with the relative status of the person or persons they were interacting with. Such behavior was, in part, a continuation of the medieval concept of *noblesse oblige* and its implication towards wealth and ownership had quite a distinct character from either the classical period that came before or the modern period, which came after (White, 1962). It was, by nature, a personal affair. Honor then was more than a gauge to determine rank; honorific conduct encompassed an entire range of behavioral patterns to and from individuals, which went beyond mere monetary value.

⁹Although it is generally agreed among historians that there was an increase in commercial activity accompanied by an increase in the absolute amount of goods between c.1050 – c.1320, its significance was minimal when it came to increasing living standards. Richard Britnell's (1993) conclusion was that the "chief social benefit of commercialization had been to support a growing number of people, and the effects upon standards of living had been confined to the upper ranks of society and a minority of the peasantry" (p.164). Also see Britnell (1981), Christopher Dyer (1989), Rodney Hilton (1985) and Mariane Kowaleski (1995).

almost entirely conceived of in terms of ends where the purpose of agrarian based production is for consumption and subsistence rather than say trade. Surely trade and its necessary counterpart, money, did exist but these were peripheral to the agrarian economy. Tawney (1962 [1926]) notes, “trade, industry, the money market, all that we call the economic system, was not a system, but a mass of individual trades and individual dealings [in the Medieval era]. Pecuniary transactions were a fringe on a word of natural economy. There was little large-scale organization. There was little mobility or [economic] competition. There was very little large-scale organization” (p.26).

When material shortages occurred largely due to exogenous forces (wars, plundering, change in climate, epidemics), blame was located, not with the individual, but with the exogenous event and often attributed to the wrath of God. It is worth quoting Clark’s (1994) conclusion regarding rural relations:

Tensions existed in almost every village, although by [William] Langland’s day [1330 – c.1385] rural householders had a long tradition of *working together* to mediate the effects of economic hardship and loss...Insofar as villagers had property, they *cooperated* in the *sharing* of resources and channeled the revenues derived from land toward the welfare of pensioners, orphans, and disabled folk....A great many factors contributed to the design of social welfare in the rural world. The demands of lordship, the expectations of family and kin, the requirements of religion and customary law, all enhanced an ethic of *mutual obligation* that influenced people’s understanding of the web of relationships that defined a community (pp.405-406, emphasis added).¹⁰

As late as the sixteenth century the agrarian form of productive organization along with its obligatory ethic still persisted and it consisted of “hundreds of towns with hinterlands of 50 to 100 square miles. The great bulk of all agricultural output that

¹⁰J.A. Rafts (1996) likewise came to so similar conclusions.

left the farms was disposed of within these units. That which flowed beyond these little regions was but a tiny proportion of total output” (Vries, 1976, p.32).¹¹ Given this state of affairs – shortage of goods, production for consumption and obligatory ethic – individual initiative for the purpose of individual gain was not only impractical without the use of force but within the serf and peasant communities it was often seen as destructive and regularly admonished. Moreover, deceit operating through the interplay of material goods and a medium of exchange (the idea of manipulating goods or accounting instruments for the sake of receiving a monetary value greater than the good or account itself), was principally unfeasible to say nothing of the fact that brute force or outright thievery was typically the method of choice when appropriating other people’s goods and/or resources. The primary economic task of an agrarian community then was securing and increasing their stock of food not increasing their stock of money.

Structurally speaking agrarian production and consumption are quite distinct from an economy where production and, in part consumption, are undertaken as a means. The most obvious is that the relationship between humans and consumable goods is more dear. They are precious and revered in ways unlike modern market economies where money and speculation are prized. Second, the production process employed a relatively low, although not stagnant, level of technology that primarily

¹¹More recently Bailey (1998) has come to a similar conclusion when considering English towns in the High Middle Ages: “[t]he basic requirements of England’s larger towns (i.e. those with c.10,000 inhabitants) could be provisioned within 10-20 miles, middling-sized towns seldom sought food supplies more than eight miles away, and village markets attracted regular traders over even smaller distances. Although some of the produce traded in weekly village markets must have entered regional networks, it mostly involved small transactions between local households, and the presence of a nearby market did not apparently improve the wealth of local residents” (p.305).

applied to the agrarian sector. Third, consumption was not usually delayed. That is, consumption was done immediately following the act of small-scale production. Fourth, producers and consumers were typically the same person and thus economic interests were generally aligned. Fifth, because market extension was minimal with little use of secular legal contracts, individuals tended to have considerable personal knowledge of one another creating close-knit communities.¹² Sixth, and as a consequence of the above, there was a high level of collective control over the production process. Economic risk was shared and individual risk greatly minimized. Seventh, personal identities were formed through the community and were largely influenced by Christian doctrine and Christian authority figures. And lastly, credit, not abstract tokens (money), was predominantly used when exchange took place. It should be emphasized that a person's credit in the Middle Ages relied upon their reputation in the eyes of their neighbors not in the eyes of an institution (bank).

Taken together, these conditions situate conduct under the ruling temperaments of group solidarity and cooperation, temperaments not conducive to deceit nor to individual pecuniary motives. Significantly, it is the structural conditions that determine and shape temperament not the converse of this. These eight characteristics are striking when contrasted with modern machine-dominated production systems. At the very center of the latter's physical operations is a relatively abundant amount of exchangeable goods, high levels of technology applied to agrarian and industrial pro-

¹²While this statement appears on its face simple and matter-of-fact, it nevertheless has deeper implications. A close-knit community implies that general interests are aligned and that values and habits are broadly shared. There were of course tensions in these communities, however and in line with the argument, they were generally of a different character than those arising from fully integrated market economies.

duction, expendable goods, delayed consumption via market transactions and transportation, unaligned economic interests (separation between producer and consumer) via the establishment of centralized work and managerial control, increased individual risk from loss of community control over production, limited personal knowledge between buyer and seller, personal identities largely determined by type of occupation and an accelerated circulation of widely-accepted state IOUs denominated in a money unit of account (fiat money). It might be further mentioned that market economies generally have little risk to transportation routes and that transportation cost is low or relatively low.

In comparison to agrarian societies, these conditions situate conduct under the ruling temperaments of self-interest and materialism, temperaments that are more conducive to deceit and individual pecuniary motives.¹³ The most salient features in respect to *market economies and transaction fraud* are found in, (1) fully integrated markets,¹⁴ (2) the loss of community control over production and thus an increase in individual risk, (3) rules as preminent symbols of authority and (4) distended or impersonal human relations, sometimes referred to as the *degrees of separation* (Veblen, [1904] [1914]). Two other minor features that may incite transaction fraud are an abundance of goods and the expansion of non-fiat money (credit or bank-money). Given the above features and in a competitive hierarchal environment, fraudulent activity becomes more probable. Or in another way of saying, when individuals compete

¹³These are “ruling” not “total” temperaments. Of the hundreds of millions of people that must now generate a material livelihood under the price system, some do not prescribe nor exhibit such dispositions and the ones that do typically do not express them in full or in isolation.

¹⁴The significance of fully integrated markets is that the traffic of buying and selling touches most lives.

for rank measured in monetary form and where goods and credit-money are plentiful, it is likely that some may attempt to control the risk and guarantee themselves a monetary reward at the expense of another. These features largely came about through the development of new productive organizational forms. The following section will address the first movement in this transformation, while the section on Fraud and Centralized Work will address the second and third movements.

4.1.1 Private – Legal Farming for Commerce

One of the ways in which a fully integrated market system may develop is the adoption of widespread commercial farming. More specifically, commercial farming with high yields that support large towns and cities. Increasing agricultural yields can be accomplished through specialization, through extensive methods and/or through intensive methods. To increase yield intensively however further requires technological changes in either a physical and/or organizational form. Though this was not lacking in the Middle Ages, the rate of the technological change was slow when compared to the current era. Some of the more conspicuous innovations in agricultural tools and organization can be found in the heavy wheeled plow, the two-field crop rotation, the invention of the horse collar, horseshoes and new advances in metallurgy (which reduced the costs and grew the supply of iron) and the three-field crop rotation.¹⁵

¹⁵The much earlier invention, the heavy wheeled plow *circa* 500, was suited to wetter climate and heavier soils and it would prove to be important in more ways than one. In the first instance, it increased productivity and thus increased agricultural surplus because it extended the farming cycle and made it possible to grow food further north. Second, it reorganized the community into a more communal set of arrangements among the peasants because the heavier ploughs required eight oxen to pull and very few peasants owned as many. In addition, this new ploughing tool also required that the field be plowed in narrow, long strips, which made it impractical to fence off (White, 1972, p.148). Pooling the oxen of the village resolved this problem. Hence, the heavy plow ushered in new social and governance arrangements as cultivation demanded that it be carried forward under

And while many of these innovations did contribute to a rise in yield, for most of the Middle Ages substantial increases in agricultural output were accomplished through land extension or through specialization not through intensive farming techniques (Coleman, 1977, p.41; Duplessis (2004), p.82).¹⁶ The most *consistent* pressure driving land extension, apart from the seigneur's predilection to maintain or elevate his rank, was population growth in two periods: c.1050 – c.1320 and c.1400 – c.1620.¹⁷ After which an assortment of differing circumstances conspired to redirect productive attention from extensive to intensive farming methods like alternate and convertible husbandry in Flanders, Holland and then England.¹⁸

control of the village council. As conditions and technology kept evolving however, new tools and new organizational forms adjusted social organization again from collective to individual control. It should be mentioned that some of these inventions were, in fact, not inventions proper but transplanted knowledge from other regions: the heavy plow was known to the Slavs, the horseshoe the Celts and the new methods for harnessing animals the Chinese (Cipolla, 1993, p.138).

¹⁶Land extension applied to unclaimed lands (especially after the plague) but also to land that had been hitherto uncultivable such as forests, marshes and lakes. In the sixteenth century, large projects requiring relatively large amounts of capital were undertaken to clear forests or drain marshes and lakes in the effort to bring new land into production. In the Dutch Republic, c.1650, for example, "urban investors had sunk an amount in excess of the combined capitalization of the Dutch East Indian and West India companies and had drained some 36,000 hectares in the northern peninsula of Holland alone to increase the cultivable land area by more than a quarter" (de Vries, 1976, p.37). They also became something of a speculative activity.

¹⁷There were also other pressures and conditions that hindered or facilitated land extension for commercial farming such as agricultural price movements, the relative strength of custom and then legal control over labor, the degree to which force was used, the degree to which the Christian doctrine was followed, the price movements of rent or lack thereof, the ability and success of the seigneur to tax, the location of estates and their organization (centralized or scattered), peasant kinship, access to the common fields, the relative power of the crown and likely many other minor factors. Because of this variety of factors, this research does not subscribe to a strict neo-Malthusian interpretation of change, see Thomas Malthus (1798), David Ricardo (2004 [1817]), Michael Postan (1973) and Wilhelm Abel (1980). All the same, it does not discount the fact that population can exert its own pressure on resources if productivity lags too far behind and hierarchal organization remains unchanged.

¹⁸In the main, innovating farming techniques were driven by population pressures, weak seigniorial or crown control and in some circumstances low grain prices. Alternate husbandry consisted of alternating grain, turnips and clovers with the complete suppression of fallow land. Convertible husbandry was similar, in that it did not leave land fallow and alternated similar crops, yet had a major distinction. After four or five years of alternating crops, the same land was then used as pasture after being sown with clover and other grasses. Following a few more years of use as pasture, it was then plowed again for agricultural use. The fundamental principles of agricultural intensification was something that was likely known as far back as Imperial Rome but had been lost to conventional wisdom over the preceding eight centuries or so. See Vries (1976), pp.39-41.

Significantly, this redirection reshaped the physical organization of agricultural production, contributed to the on-going enclosure movement and gave license and legitimization to the burgeoning ideas of private *legal*-control over productive resources. Prior to these changes, peasants were, in large part, able to access and use the (unfenced) common-field system.¹⁹ Yet as more and more land was fenced-off originally for the use of sheep farming and then for intensive cultivation, the size of the commons was greatly reduced.²⁰ The result was the creation of a group of successful landowners and the diminishment of an ancient way of life; a way of life that had little to do with money and much to do with husbandry, tradition and provisioning via intrinsic motives. Part of that tradition relied on pooling risk that often came in the form of rural fraternities. Richardson (2005) concludes as much after reviewing empirical evidence regarding English peasant farming:

Farmers' cooperatives existed in medieval English villages...Peasants pooled risk by forming risk-sharing cum religious societies and enacting custom-

¹⁹The communal system reduced risk for individual farmers but was regulated and managed by the village assembly. Overall it was a form of organization that worked relatively well for the peasants, making them generally reluctant to introduce wholesale changes, especially ones that required a large increase in labor like intensive farming. It should be kept in mind that growing food was but only one productive activity that the peasant had to do. They also had to tend to the upkeep of their houses, their clothes, their tools, their animals (if they had them), their children and many other tasks associated with the material life process. Dedicating many more hours a day to farming under the intensive method would logically take away hours in any of these other tasks.

²⁰In England and especially after its Civil War (1642 – 1651), transformations in farming occurred more frequently as landowners had greater success when compared to other countries on the continent at enclosing common land. In countries like absolutist France or Denmark, the monarchy was able to maintain control over the nobility, the court system and prevent individualist farming. In Denmark, King Frederick III (1609 – 1670), forbid “enclosure and demesne consolidation” in favor of royal absolutism; in France, the monarch weakened the attempts of the nobles to increase their land by the royal policy of *bauernschutz*, a policy that protected peasants from estate formation; in England at the close of the Civil War however conditions were different as the “crown lost forever its ability to resist the imposition of capitalist relations on land. Feudal tenures had been enforced by the Court of Wards. This was abolished. Enclosure schemes had been blocked by the Prerogative Courts. These were abolished. Royal courts had generally struck down entails, legal devices to insure that an aristocratic family’s lands would never be alienated. Henceforth court rulings would support these devices” (Vries, 1976, pp.59, 66, 76). It should be of note that throughout this process, new farming organizational forms were either facilitated or prohibited increasingly with the use of the secular court system rather than custom, ritual, shared habits, pledges, oaths and the like.

ary poor laws. They imbedded both of these institutions within the framework of their communities. Courts, which enforced criminal and civil codes as well as rules regarding the holding of land and the collective cultivation of open fields, also enforced customary poor laws. Fraternities, which facilitated passage through purgatory, also helped peasants beset by hard times. Neither of these institutions was perfect. Fraternities drew members from the ranks of diligent and prosperous peasants, but neglected those who did not belong to their organizations. Customary poor laws helped paupers keep flesh on their bones, but transferred nowhere near enough income to entirely alleviate poverty. But, the combination protected most villagers from the idiosyncratic shocks that occasionally afflicted the farm fields of medieval England (pp.409-410).

Consolidation of private land parcels nevertheless did contribute to the success of the intensive farming method (Duplessis, 2004, p.66) and thus contributed to an increase in goods. It also led to the separation of agricultural and manufacturing of goods. Whereas all types of production earlier took place within the manor or across the village, now they took place in distinct locations.²¹ The division allowed for the manufacturing arts to mature and progress by freeing more and more people from the land and granting them time to hone their unique skills including the skill of producing for the market. But more profoundly than this, the transformation increased a farmer's individual risk for the principle reason that production for sale is beholden to price fluctuations. Some individual farmers were able to mitigate a portion of this risk through ever larger land consolidation and/or securing seigneur or monarchical privileges although protective measures did not always guarantee one from financial ruin.

²¹Despite this divide, it is self-evident that the growth of towns relied on the ability of the surrounding agrarian communities to produce enough food not only for themselves but for the towns as well. In this way, the technological developments within towns were first supported by the technological developments (and luck of good weather) of agriculture.

The enclosure movement is perhaps the most recognized of the factors contributing to individualist farming for commercial sale which Polanyi (2001 [1944]) has described as the “revolution of the rich against the poor” (p.37).²² And while enclosures did contribute, they were not the cause of the trend. Vries (1976) notes that similar tendencies towards private *legal*-ownership and control existed in the peasantry and it is prudent to quote him at length on this point.

In England, where many historians speak of enclosures destroying the peasantry, ‘removing them from the historical stage,’ this process is well known. But the threat was not simply one emanating from enclosure-minded capitalist landowners. It also came from within the peasantry and often predated actual enclosures...Under different political institutions and different landownership patterns much the same differentiation of the rural population was underway in Germany, Holland, and France. Under princely protection a class of large hereditary tenants consolidated its hold on the land in northwestern Germany. A combination of subsistence crises and noble landowners’ leasing policies let the richer *laboureurs* of northern France become a caste of labor-hiring, money-lending grain speculators. Even in Tuscany, the classic land of the small sharecropping peasant, a rural bourgeoisie emerged from the ranks of the peasantry to run commercial enterprises reliant on the labor of an expanding rural proletariat...In all these regions, the “farmers” acquired a mental outlook characterized by an interest in material comforts, status and even urban influences plus a familiarity with the written word as it was used to formalize contractual and market relations. The gap between these relatively secure cultivators and the supporting cast of rural dwellers was now such that the village and parish ties linking peasants together ceased to hold the moral authority they once had. And as industrial employment rose to become the chief support of many of this supporting cast, or caste, the poor too, elaborated a way of life foreign to the peasant culture of earlier generations (pp.82-83).

²²From the outset, petitions and statutes were passed against land enclosures, 1459 and 1489 respectively (Coleman, 1977, p.36). The twin evils of enclosure and engrossing (monopolizing) in England were condemned by contemporaries in the “proclamations of 1514 and 1528, the Act of 1533, the proclamation of 1548, the enclosure commission of the same year, the proclamation of 1551, and the enclosure commission of 1607” (Thrisk, 1984, p.74). Pamphlets of the time also directed attention to this movement in attempts to arrest it. Thomas More’s *Utopia* (1904 [1516]) is possibly the most renowned but there were many others such as the sermons of Hugh Latimer and Thomas Lever, see Thrisk (1984). Furthermore, it should be noted that the enclosure movement did not occur all at once but was spread out over many centuries. As late as the eighteenth century, half of all agricultural lands in England had yet to be enclosed (Vries, 1976, p.43).

It might be suggested then that enclosures represented one method, specifically used by the seigneur, to gain private control over the process of individualist farming or sheep rearing that was designed for commercial sale. In Thirsk's (1984) assessment, the two most central reasons for enclosures, among several, were increasing grain prices and population (p.71). Under competitive pressures, and where the latter causes or contributes to the rise in the former, the secondary effect of the trend was the creation of extrinsic motives, namely profit.²³ Other factors that likely contributed to the trend in individualist commercial farming was the growth of towns and the need for small holders to procure coins so that they might pay rent or seigniorial dues (Hatcher and Bailey, 2001, pp.143-144).

Shifting claims of land control were, as remarked above, not new. Monarchs, nobles and knights had been warring over land for centuries. However, there were several novel aspects to these changes. First, the consolidation process was validated more and more through secular legal mechanisms producing individual ownership claims on land.²⁴ Second, it redirected the *ends* of farming from consumption to

²³A competitive economy implies that supply and demand forces have the capacity to push price around. It further implies that buyers and sellers have little in the way of control over these price movements. And while there is little controversy that market forces exist (although there is controversy over the mechanism whereby the forces come into affect), because of its inherently competitive and risky nature, wherever price fluctuations occur, control is never far behind. How much control, whose control and by how long, is of course, variable. In Spain for instance, the monarchy, attempting to mitigate the risk of fluctuating grain prices, controlled them for two hundred and seventeen years, from 1539 – 1756 (Vries, 1976, pp.48-49). It should be mentioned that control in one variable does not necessarily equate to control in all variables, as the crown's depression of grain prices had the effect of discouraging farmers, who were now farming for commercial sale, to stop growing grain. It is also self-evident that control over some variables are better suited to the end in mind as the Spanish crown may have considered a policy of controlling the output, that is using a subsidy, rather than price. In this way they may have ultimately been more successful at curtailing some of the more severe famines it witnessed.

²⁴While this may not appear to be significant to the modern reader, private ownership of land sanctioned by secular law is remarkably different from collective land use controlled by an appointed figure and sanctioned by rituals and/or force.

exchange, transforming it into a *risky, privately-competitive* legal activity. Third, it had the tendency to induce and then magnify the ideas of productivity and cost. Fourth, many peasants were, throughout the process, displaced creating what would ultimately become a “workforce” which, although a market for labor had existed for centuries if not millennia, its absolute size, extension and secular legal sanctioning, either through the state or the town, was unique.²⁵ And fifth, as a result of the above, farming for commercial sale became diffuse which created ever more conflicting relations.

Before discussing similar changes in trading towns, it is constructive to call attention to Vries’ (1976) other observations in the above passage as they speak to the transformative character of the period. These are the activities of money lending, speculation and the thinking in terms of material comforts and contracts (formal by definition). He also observed that as individualist farming matured, a change in relations and consequently a change in perception occurred, namely the weakening of moral ties and the inability for one group to see or understand the thoughts and actions of another group. Such habits of thought and action can perhaps help explain

²⁵Control over wage-labor can be dated to the passage of the Ordinance of Laborers (1349) in England and then not long afterward with the Statute of Laborers 1351. In the sixteenth century the Statute of Artificers (1563) was issued which set conditions on employment, including apprentices that worked in the guilds, it restricted the mobility of labor (meant to prevent the flow of labor from the farm to the town) and it constructed mechanisms whereby it could determine wage rates at the local level. A series of poor laws soon followed as displacement increased. When peasant farmers of smaller parcels of land lost control of their land or access to the common-field, whether through an internal process or an exogenous one (enclosures and the state legal sanctioning of individualist farming), they had but one recourse for survival without access to the commons, namely the selling of their labor capacity. And when some could not find employment, they were forced to steal or beg to stay alive. The alleged “problem” of the poor was a phenomenon that directly correlates with the above structural changes in land ownership. Despite the fact that jurisdictional control was continually contested between local and national levels, they were nevertheless “united in their firm belief that all aspects of the labour market should be controlled closely and that the rewards to labour should be subject to a wage ceiling” (Woodward, 1980, p.42). The effect was the unification of locally diverse means of control (Snell, 1996, p.304).

some of the motives behind the endogenous process of private ownership and control but they can also help illuminate the changing organizational forms and the new relations arising from these structural changes. Importantly, it was the extension and social elevation of a group of farmers, via legal means as well as force, farming and sheep rearing for commerce rather than consumption that redirected the ends of production and turned the process into a *risky, privately-competitive* legal activity. The transformation had the distinction of distending or separating relations and can effectively be thought of as the *first degree of separation*.²⁶ Where the *degrees of separation* have three foremost properties: one, the introduction of conflicting claims between individuals and/or groups, two, increasing individual or minority control via secular law, and three, the formation of opposing habits. *Risky, privately-competitive* farming for sale represents the first movement in new productive organizational forms and contributed to a gradual change in general disposition originally attuned to tradition, piety, duty and the afterlife to a general disposition attuned to freedom, flippancy, pecuniary interests and the here and now, usually represented in economic terms as relative price movements or by that catch-all word, efficiency.

4.1.2 Risk and Control in Competitive Trading Towns

Much like the trend found in rural areas, similar occurrences transpired within towns. Trading ports surfaced across the West and eventually, following the Black Death, grew in greater numbers.²⁷ Waves of emigrants grew town populations, often due

²⁶This is a variation on Veblen's (1966 [1904]) first and second *degrees of separation*. Further explanation and elaboration will be given in the section on Fraud and Centralized Work.

²⁷The principal trading cities were Venice, Amalfi, Pisa and Genoa in Italy; Ghent, Bruges and Ypres in Flanders; and Cologne, Hamburg, Lubeck and Bremen in Germany. Visby, a town located

to loss of land access (tenured or commonly held) or in search of better prospects (Hatcher and Bailey, 2001, p.206). But town growth was also accommodated by land extension, agricultural developments and increasing trade, where trade was accommodated by monetary innovations.²⁸ The Italians, *circa* 900, were the first to develop new financial instruments. Some of these innovations consisted of the *contratto di commenda*, a type of contract that was somewhere between a partnership and loan, the *compagnia*, an unlimited liability company and bills of exchange, which functioned as an international credit and transfer instrument (Cipolla, 1993 [1976], p.161).²⁹ The Italians also became the first to develop double-entry bookkeeping (Lee, 1977; Gleeson-White, 2012) and were the forerunners in the development of banking institutions and the center of financial enterprise until the latter half of the

on the island of Gotland as well as the town of Novgorod also became central trading centers for many of the German trading towns.

²⁸By and large monetary innovations were necessary because merchants lacked a widely accepted means of exchange. That is, they needed to find a way to get around the problem of *artificially* scarce money. Money, when defined by its nature and not by its function (means of exchange and store of value), is simply a “record” of the relation between creditor and debtor. Or put another way, it is human-made relational-sign which is symbolic in its origination. Defining money by its function, particularly as a store of value, has the tendency to prescribe the “thing” itself with some kind of inherent worth and is a logical fallacy (reification). Fundamentally, money is an abstraction or an intellectual construct. In this way money cannot be “naturally” scarce. It is only when money is linked to a physical object or fixed to a foreign currency, that it may become scarce. Thus money, when defined by its nature, is the product of social institutions (Dillard, 1980) where the “thing” representing money can be a variety of material objects so long as it is widely accepted (Minsky, 1986, p.228). It logically follows that a society based on exchange would want to create money from materials that are easily reproducible, portable and not tied to anything that may be scarce or have the potential to be scarce. In the United States and many other Western nations, money has been decoupled from metal. Consequently, this gives the treasury the power of the purse and the ability to pursue many commonweal agendas, employment one of the more important among them, see Forstater (1998, 1999), Nell and Forstater (2003), Burgess and Mitchell (1998), Mitchell and Wray (2005), Wray (1998) and Wray and Forstater (2004). For the origin, history and role of money see Ingham (2004), Bell (2001) and Wray (2004, 2012).

²⁹In the north of Europe, various types of pooling techniques and partnerships were also used such as the *vera societates* (one party provided capital, the other did the transportation and exchange; profit and loss was equally divided), the *contrapositio* (profit and loss distributed according to the amount of capital invested) and the *complete partnership* (where each partner pledged most of their fortunes to each other) (Dollinger, 1970 [1964], p.167). These arrangements, in one form or another, were ways to drum up capital and/or reduce risk.

sixteenth century when the Dutch and English supplanted them.³⁰ In addition to these new financial instruments, mines for minting coin (commodity money) were expanded or new ones discovered to keep up with the demand for currency where availability encouraged and facilitated trade.³¹

Each new financial instrument greased the wheels of commerce but they did more than this alone. They also compounded risk and contributed to the ascendance of the impersonal relation. What was at first family enterprises of limitless liability morphed into extended enterprises that eventually came to take the form of joint-stock companies with monopoly rights. As Cipolla (1993 [1976]) noted:

[The] involvement of shareholders unrelated to the original family marked the end of the first phase in the history of the company. It was a development that coincided with a general loosening of family ties. As long as companies had operated with nothing but family capital, they had

³⁰Double-entry bookkeeping, as is sometimes assumed, was not a necessary condition in the development of capitalism and a market oriented society because many early enterprises, such as the Fugger conglomerate of Augsburg and the Dutch East India Company, operated quite well without its use long after its technique was known (Yamey, 1996). Nevertheless double-entry bookkeeping had certain advantages and has since been adopted by almost all contemporary business enterprises. These benefits were known at a very early stage as Luca Pacioli (1914 [1494]) would write in his *Summa de Arithmetica*, “But if one of the grand totals is bigger than the other, that would indicate a mistake in your ledger, which mistake you will have to look for diligently with the industry and the intelligence God gave you and with the help of what you have learned. This part of the work, as we said in the beginning, is highly necessary to a good merchant, for if you are not a good bookkeeper in your business you will go on groping like a blind man and may meet great losses” (p.73).

³¹See Cipolla (1993 [1976]), especially pp.165-182. Also see Cantor (1993) p.277. For most of the Medieval era monarchs, while striking their own royal mints or coin, did not always have “monopoly” control over commodity money. After central banking was introduced, first in Sweden (1664) and then in England (1694), states eventually acquired legal monopoly rights over issuance in the course of the nineteenth century. Though it took some central banks a century or more to legalize monopoly notes, for instance it took the Bank of England 229 years to monopolize its notes whereas the Austrian central bank was established and monopolized its notes at inception (Capie et al., 1994, p.6), this did not prevent monarchs and parliaments from using central banks as a funding source. That the English government had one of the first central banks and used it to build its navy is not coincidental to the rise of its political and military might. In fact, the establishment of many central banks was motivated, in part, by the desire for state funding particularly directed to the war effort. The evolution and history of money is longer and more complicated than this short description, see footnote 28 for additional sources. Nevertheless, these transformations reoriented the creation of money from a predominately joint enterprise (private and public) to a singular enterprise (public) where paper money became a national monopoly resource essentially giving states the ability to create money without limit although not without consequence.

concentrated on trading activities. But once they were operating increasingly with deposit capital, their activities broadened out to cover a mix of banking, commerce, and manufacturing that inevitably exposed them to greater risks and to major insolvencies. This trend was compounded by the spread of bills of exchange, in theory a mechanisms for transferring money from one market to another. In practice, however, bills of exchange became the preferred means of money-lending and speculation...(p.163).³²

The trend towards increasing risk and speculation under competitive conditions could be arrested, temporarily or otherwise, by a collapse or through an extension of control. And unlike the contemporary debates surrounding the level of control within the market and its purported value, in the High and late Middle Ages control as a means to an end was broadly esteemed. Least one is reminded of the honor received by warring kings, baronages and knights who gained control through force. In respect to sea-trade, control was largely accomplished through combination otherwise known as merchant guilds. One of the largest of the era, the Hanseatic League (c. 1250), grew in size by uniting whole cities and raising its own armies. The primary purpose of the League as well as many more lesser merchant guilds was that combination offered a means to protect and control their interests under competitive pressures.³³ They were pervasive and long-lived not because they were efficient at trade per se but because they “offered a very effective way for two sets of powerful beneficiaries — rulers and guilded merchants — to redistribute larger slices of the pie to themselves, even at the cost of diminishing its overall size” (Ogilvie, 2011, p.188).³⁴

³²See De Roover (1953) on the use of bills of exchange.

³³The competitive conditions not only generated internal and political conflicts among the different merchant but also among merchants and pirates, monarchs, craft guilds and town oligarchs. In Italy, a few cities went so far as to relinquish their communal liberty to an aristocratic dictator (podesta) in the hope of preserving order and control (Cantor, 1993 [1963], p.471).

³⁴The Hanseatic League for example was successful at acquiring monopolistic trade in the Baltic,

The need for control, when confronted with increasing levels of competition and risk, however was also paramount to the well-connected townspeople who were not involved directly with sea-trade.³⁵ Many of these people were either aristocrats or artisans. For the latter, and like the merchants, control was realized through combination. Consequently, town handicrafts were, from the outset, linked to guilds, which reached their height in the sixteenth century. Although craft guilds formed around occupations with productive objectives, it is important to emphasize that they were not necessarily economic engines but were principally a means of organizing production that reduced risk and uncertainty for their members, particularly the masters.³⁶

Many have remarked upon the nature of craft guilds:

The guilds generally performed the functions of privilege, regulation, and control and were considered to be typical of medieval sustenance and handicraft economy (Baldwin, 1972 [1959], p.6).

Their [guilds] most potent economic function was to control entry into the craft or 'mystery', thereby preserving a local monopoly and, by the enforcement of apprenticeship, maintaining both the standards of work and the level of wages (Coleman, 1977, p.74).

In lieu of the important role guilds played in the development of specialization and in raising living standards, they were nevertheless cartels with the ability to slow down production rather than speed it up (Tawney, 1962 [1926], pp.26-27).

shared municipal authority in London via the secular court system and became financiers to English monarchs. One German merchant was even successful at gaining control, for a period of years, over the lucrative tin mines of Cornwall (Palais, 1959, p.855).

³⁵Because the latter's interests were generally at odds with the interests of the merchant guilds, regulations were often created to control long-distance trade where possible. "As to food supplies, regulation involved the application of such methods as enforced publicity of transactions and exclusion of middlemen, in order to control trade and provide against high prices. But such regulation was effective only in respect to trade carried on between the town and its immediate surroundings. In respect to longdistance trade the position was entirely different" (Polanyi, 2001 [1944], p.67).

³⁶Craft guilds were initially governed or controlled locally. Around the sixteenth century, when monarchs and parliaments began exercising their secular legal prerogatives more often, local governance began to lose some of its autonomy.

Under the guild system, as under every other economic system in previous history, the motives and circumstances of productive activities were embedded in the general organization of society. The relations of master, journeyman, and apprentice; the terms of the craft; the number of apprentices; the wages of the workers were all regulated by the *custom and rule* of the guild and the town (Polanyi, 2001 [1944], p.73, emphasis added).

The ancient craft guilds were rightly known as “mysteries.” The member of the guild learned through his apprenticeship a skill in manufacture unknown and unpracticed by outsiders (Commons, 1919, p.15).

In the popular ideal as well as in the post of particular fact the complete craftsman stood shrewdly on his individual proficiency in maintaining his own pecuniary advantage, as well as on his trained workmanship; and the guilds were organized to maintain the craft’s advantages in the market, as well as to regulate the quality of the output (Veblen, 1918a [1914], pp.211-212).

Craft guilds then, as a form of organizational production, were mechanisms to guarantee stability and curtail the extension of the market. They kept the wage level from falling, policed quality and output and instituted a series of rules, norms, regulations and ceremonies, often religious, that bound workers to each other and controlled moral and political behavior. Guild organization was, in effect, a governing organization. Moreover, they were not, to Polanyi’s point, a new form although some of the products they developed were.³⁷ Guild organization can be dated to ancient Egypt, Greece and Rome (Ogilvie, 2014).

³⁷While there is evidence that craft guilds innovated, innovation in general tended to occur in regions where guilds’ political powers were weak, in fragmented territories and where guilds were legally banned (Ogilvie, 2014, p.186). That is, it occurred in areas with higher levels of competition. Leiden in the Netherlands, Birmingham, Manchester, Leeds, Halifax, Sheffield, and Wolverhampton in England, and the Rhineland and Saxony in Germany were a few regions with innovating tendencies and weak or altogether non-existent guilds (Ibid.).

Yet as more and more peasants became detached from land, simultaneously losing their self-governing abilities, this form of organization did little to serve the needs of a larger proportion of workers. The increasing labor supply within the towns exerted pressure on the guild system to adapt and/or face extinction. Charges were also brought against them on the grounds that many were oppressive to apprentices and journeymen as well as wage-laborers in general (Smith, 2007 [1776], p.81).³⁸ In regards to the then conventional wisdom on the benefits of incorporation, Smith argued that they had no foundation and that the “real and effectual discipline which is exercised over a workman, is...his customers. It is the fear of losing their employment which restrains his *frauds* and corrects his negligence. An exclusive corporation necessarily weakens the force of this discipline” (Ibid., p.85, emphasis added).³⁹

Increasing labor supply alone however was not the only variable exerting pressure on craft guilds. Others were the increasing use of the putting-out system (also known as the cottage industry or the *Verlagssystem*), the domination of *mercantile* guilds, the increasing state grants of incorporation to trivial crafts, mostly in England (Coleman,

³⁸Speaking on the abuses of corporations (guilds), Smith (2007 [1776]) argued that their primary purpose was to sustain or increase output prices and so increase wages and profit “by restraining...free competition” (p.81). Or, as he phrased it a few pages later, “people of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices” (p.84). He located partial cause of the tendency to form cartels to the towns themselves as they made it easier to combine and went on to assert that even in the unincorporated towns had the “corporation-spirit” and thus were jealous of strangers, were averse to take on new apprentices or to share the secrets of their trades (p.82).

³⁹It is of interest that Smith finds the lack of market discipline as the determinant for fraud. This is likely due to the fact that reputation, and thus credit, was paramount to the lives of townspeople during Smith’s time (Muldrew, 1998, especially Part II). As is evident, this is not the case today because credit is determined by institutions (banks) rather than neighbors. It is also likely due to the fact that the then dominant institutions, the crown, municipalities and the guilds, were largely corrupt as well as tyrannical. While this view has merit it fails to see that market oriented societies predicated on the competitive price movements are in need of control if for the sole reason that a price collapse puts everyone at risk. Smith’s location of cause in respect to fraud will be addressed in the following section.

1977, pp.74-75) and the growing practice of centralized work.⁴⁰ It is relevant to the inquiry to draw closer attention to the way in which control was realized within the craft guilds. Phythian-Adams (1971), while reviewing local craft guild records, observed that expenditures on social activities dwarfed all others, meaning behavior was largely controlled through the exercise of shared habits. It might also be recalled from the previous chapter that many guilds were Christian guilds further implying that most craftsmen shared not only similar habits but also similar ceremonies.

Cottage Industry, Economic Competition and Town Temperament

These type of relations did not exist in the structural arrangements of the putting-out system or those found in factory work with a capital nature, the latter of which will be discussed in the following section. In respect to the former, this was a system that outsourced the manufacture of a product or a stage of its production to independent producers and its implementation was a means for merchant entrepreneurs (middlemen), who were typically artisans, to circumvent craft guild control.⁴¹ Originating in Italy or possibly the Netherlands, the putting-out system spread across the Continent

⁴⁰Beginning *circa* 1550, many merchant traders in England tried to attain exclusive privileges over trade at the expense of craftsmen. As the former grew and merchant traders were successful at elevating their rank, they also attempted similar maneuvers over retail traders (Unwin, 1904, p.77). In France and in a period of economic retrenchment, the minister of finance, Jean-Baptiste Colbert (1619 – 1683), enacted state legislation that gave the craft guilds “a green light to pursue their particular interests with a vengeance” on the grounds that artisans left to their own devices would “cheat and produce shoddy goods, workers would no longer obey their employers, and vice would proliferate” [p.707, p.706] (Vardi, 1988). Consequently the guild system in France was strengthened until it was eventually abolished in the Edict of 1791 (Ibid., p.714). In England, the opposite occurred with opposite effects: the weakening of the guild system and the encouragement of competition. Coleman (1977) attributes these actions by the Tudor and early Stuarts to their “perennial search for cash” (p.75).

⁴¹The scale of these operations was typically quite small. Some however, did manage to grow relatively large. For example the Segovia merchants had arrangements with 200 to 300 individuals, the English clothier, John Ashe, may have had contracts with 1,000 individuals and the Silesian linen merchants were said to have contracted several thousand (Duplessis, 2004, p.128).

and into England drawing more and more farmers into market activities (Braudel, 1982 [1979], p.321). There are several structural aspects about this form of productive system that are worth mentioning. First among them is that the work was done within the rural household and with simple equipment the farmer either owned or rented making it relatively easy for many to participate. Another was that though the work was labor-intensive many producers still farmed their own small parcels. The latter implying that the farmer could not be fully employed in the cultivation of land. Another feature was that there existed a general wage differential between town and village providing an *incentive* (extrinsic motive) for merchant entrepreneurs to use rural labor as opposed to town labor. When towns developed better means of provisioning, such as subsidizing grain prices and improved charity systems, hiring urban artisans became cheaper, especially so when women and girls entered the labor force (Duplessis, 2004, p.218).⁴² And finally, the system had, from the perspective of the merchant entrepreneur, low barriers to entry (low start-up costs). Taken together, these features made the putting-out system highly responsive to price and output movements while the lower wage cost *incentivized* merchant entrepreneurs to extend its use.

When comparing the arrangement of the putting-out system with those of the guild system, there are clear differences. In the former but not the latter there was little in the way of direct control over the laborer for the principal fact that the middleman did not buy labor capacity nor supervise work, but bought the laborer's *output*. Moreover, many more peasants could participate in the system as the con-

⁴²It was the usual course, as it remains today, to pay women and children less for the same work.

straints consisted only of the purchase or renting of simple machinery. In addition, each party and unlike that of the journeymen and masters in the craft guilds, were on opposing sides of the buying and selling transaction. Subsequently, conflicting interests and diverse motives for work emerged.⁴³ For the middleman, an extrinsic motive (profit) gave impetus to his buying and selling activities. For the producer, largely an intrinsic motive (workmanship and supplemental income) gave impetus to his producing and selling of output.⁴⁴ Polanyi's (2001 [1944]) interpretation on the putting-out system and in particular on the middleman's objective and motive are analogous: "The creation of goods [in the putting-out system] involved neither the reciprocating attitudes of mutual aid...nor the craftsman's pride in the exercise of his trade; nor the satisfaction of public praise – nothing but the plain motive of gain so

⁴³Despite conflicting interests and diverse motives (distinct habitual behaviors that form from diverse activities and arrangements), the putting-out system nevertheless endured for centuries and appears to have had the greatest influence in England. This was not true however of the Dutch Republic for two principal reasons: one, agriculture was highly specialized which meant little if any available time for additional handicraft work and two it enforced the constriction of entail meaning tenants could not be alienated from the land making the proliferation of smallholders unfeasible. As a response to competitive pressures and under these particular conditions, the Dutch had to find other means to drive down cost, namely the technological advancements of the Dutch loom, wind-powered fulling mills and partnerships which provided inexpensive funds for the purchase of the machines (Duplessis, 2004 [1997], p.118). Italy likewise faced obstructions to the putting-out system. It was prohibited by the politically powerful in their efforts constrain competition and many with surplus capital preferred to reinvest it in trade and/or in land that generated seigniorial dues and rents. In addition, many Italian farmers simply did not have the extra time required for putting-out work (Ibid., p.97). By some accounts, it was predominately the exercise of control by the politically powerful in the seventeenth and eighteenth centuries which preserved aristocratic values and prevented both individualist commercial farming and the putting-out system. Where ruralization was not inhibited by the law of entail, blocked by the politically powerful or inhibited by agricultural specialization which fully employed labor, the putting-out system became the preferred method to drive down cost – its high price-elasticity and wage differential playing possibly the largest role in its widespread adoption (Ibid., p.118). Land diffusion, machines that were simple and relatively low-cost and the fact that each party presumably gained some advantage from the arrangement likely played a role in its persistence.

⁴⁴While it may be more accurate to say that the producer had both extrinsic and intrinsic motives, it was largely the latter that prevailed. Veblen (1918 [1914]) has described in great detail how the disciplinary effect of small-scale production, what he termed handicraft, contributed to the intrinsic motive of workmanship (pp.231-298).

familiar to the man whose profession is buying and selling” (p.77).

It might generally be said at this point that the cottage industry, along with individualist commercial farming, not only represented new productive forms of organization but that they generated new conflictual relations as well as new temperaments.⁴⁵ The latter of which was more apparent in the towns. What were the new temperaments of the burghers, artisans, merchants and master craftsmen? Chiefly, optimism and exuberance. It is difficult to precisely locate where this outlook itself sprang in a world that had been, hitherto for, dominated by the temperaments of brute force, devotion and piety. Some contributing factors may have been an increase in religious fervor, the spread of communication through the growth in vernacular, an increase in craft knowledge as well as knowledge in general (i.e., the growth of the universities and science), the relative independence of towns and their secular legal systems and the introduction of a new kind of war, Holy War, although each of these were probably second order causes.⁴⁶ It is more likely however that the increasing activities involved with *private* legal risk associated with competitive buying and selling behaved as a first order cause in the rise of optimism and exuberant dispositions.

⁴⁵Although the cottage industry could be thought of as an additional *degree of separation*, it will not be considered as such because this form of production did not last but was eventually folded into centralized work. However, modern retailing, in the respect that it represents a middleman between producer and consumer, can reasonably be thought of as a remnant.

⁴⁶The new kind of wars, ‘Holy Wars’, served a tripartite purpose. First they united “like” Christian brothers against the “heathen other” driving up religious fervor, second, they provided an outlet for expansion and elevation of rank and third, the Church absolved people’s sins in exchange for participating. The traits of reverence and idol worship were cemented in the process. Among those to be revered were the saints, men who tamed and cultivated nature. They “conquered diseases, claimed stormy seas, saved harvests from storms and locusts, softened the fall for anyone who leapt into a ravine, put out fires, buoyed up the drawing, and guided ships in danger...Harnessing nature was not regarded as a sin; it was a miracle. A belief in miracles is the first step toward making them possible. Inadvertently, medieval man moved in the direction of making miracles less the result of the action of saints and more the result of his own actions” (Cippola, 1993 [1976], p.153).

The regular occurrence of speculation in bills of exchange and land speak to this end.

As Europe moved into the eighteenth century however, farmers, artisans, and merchant entrepreneurs alike were forced to make different choices in the face of differing circumstances. The changing conditions came in the form of rising farm prices, especially after c.1750, increasing population, constant or falling manufactured prices, increased international and intercontinental trade, the increasing presence of economic competition, the on-going enclosure movement and significantly the increasing practice of centralized work.⁴⁷ The dominance of factory organization, as it evolved in the West, was not inevitable but a product of unique circumstances and historical antecedents. Nor was centralized work a new phenomenon in the eighteenth century.

In industries of resource extraction, metallurgy, milling and construction, factory-like work appeared centuries earlier. Moreover, with the exception of milling, these industries served the interests of the state and its military.⁴⁸ Some factories were even directly created by the state as workhouses. Subsequently, state support allowed factories to remain a going-concern in periods of weak demand. Centralized workshops that lacked state support on the other hand were often forced to close in periods of falling prices because many early factories were subjected to higher levels of risk due

⁴⁷For some farmers, rising prices meant abandoning putting-out work altogether and returning to full-time farming. For other farmers it meant the loss of land or access to land (and forests, lakes, etc.) forcing them to sell their labor capacity in the village or more increasingly in towns. Where competitive pressures grew, it induced some merchant entrepreneurs to relocate to regions with lower costs, completely de-industrializing the original district. In other areas, technological changes in knitting or weaving machines put upward pressure on their costs pushing some independent artisans into dependent relations. This same process caused other merchant entrepreneurs to cluster different stages of production into the same village or consolidate workers into workshops. Centralizing work might also have occurred as responses to consumer demand, other technological changes or as a means to reduce fraud in the form of embezzled raw materials (Duplessis, 2004 [1997], p.215, p.251).

⁴⁸In the seventeenth century, France, Sweden and the Dutch Republic all increased the size of their armies fivefold (Duplessis, 2004 [1997], p.141).

to low profit rates and an inability to respond effectively to demand shifts — the few that succeeded in the earlier stages, primarily in the Dutch Republic, had productivity advantages that others did not. Other variables, such as the new export markets in the Americas, the emergence of demand-inducing conspicuous consumption (Veblen, 1934 [1899]) and secular laws that directly prohibited factory organization, such as those in Sweden and Germany (Duplessis, 2004 [1997], p.209), also contributed to the success or failure of centralized work. Given this state of affairs, it is not clear that a comprehensive, machine dominating and market society was imminent.

What might be broadly concluded however is that where competitive market conditions existed, where control was weak, where credit–money was abundant and widely accepted, where new knowledge was growing at a relatively quick rate and could be put to one’s monetary advantage and where the disciplining function of cost and profit the most felt, competitive centralized work was likely to develop though not necessarily endure. England, with its relatively weak internal state control, was a candidate for this type of development. The creation of the *stationary* steam engine by Scottish engineer James Watt (patented 1769) and initially improved upon by U.S. engineer George Corliss (patented 1849), may have also contributed in igniting the Industrial and factory Revolution as it gave steam-powered mills an advantage over water-powered ones in the form of mobility thus increasing the amount and size of private factories.⁴⁹

⁴⁹The significance of mobility was that manufacturers could build their factories in cities where labor, a large component of production costs, was relatively abundant. The growth of private factories then was made possible in part by this invention, see Hunter (1985b, p.485, 1985a, p.81), Atack, (1980, p.293) and Rosenberg and Trajtenberg (2004). One of the conclusions from this research is that the switch from water to steam was not necessarily because the latter had efficiency advantages but had economic agglomeration advantages as well as access to a large and cheap *labor*

Regardless of the contributing factors, factory work, as opposed to individualist farming for commerce, the guild systems (merchant or craft) or the putting-out system, was an entirely different form of arrangement especially so as machines became more complex, factories grew in size and workmanship became more and more obsolete. The relations and the relative remuneration that workers and owners received from this more complex form of production were unique. And it is here that Veblen's two *degrees of separation* and the modern form of transaction fraud first arose and continues to persist. It is also here that the four most salient features in respect to *market economies and transaction fraud* are found. But before an analysis of factory work in relation to transaction fraud can be undertaken, it is prudent to address the linkages between competitive buying and selling, control and fraud in general.

4.2 Fraud Before Centralized Work

Contrary to Smith's claim regarding the putatively disciplining effect of the market on fraudulent behavior, the former, in point of fact, has the propensity to engender it. This was well known, and much to their consternation, by the Church Fathers, theologians and scholastics. It was also well known to the Greco-Roman philosophers that preceded them by several centuries or more. The problem of fraud in buying

pool. A century earlier while reviewing the percentage increase of steam relative to water in the period from 1870 to 1880 — 80 versus 8 percent — William E. Worthen (1887), the president of the American Society of Civil Engineers, drew very similar conclusions: "A convenience of access to business and labor centers has tendered very largely to the increase of steam power. And although there are immense water powers yet undeveloped, and the cost of steam power is largely in excess of that of water power, yet position and its relations have decided in favor of steam. And where large manufactories have been commenced on water power, and where the water power has become exhausted, or very irregular, the business has been extended by the use of steam, rather than by a diversion of it to a new place for water (p.4).

and selling activities was recognized almost at the outset, as a handful of quotes will aptly illuminate:

Sordid...is the calling of those who buy wholesale in order to sell retail, since they would gain no profits without a great deal of lying (Marcus Tullius Cicero (BC 106 – 43), as quoted in Robert L. Heilbroner, 1985, p.24)

For actually, in accordance with the strict theological precept, all commercial profit, all successful speculation, all bargaining was to be condemned as proceeding from the sin of avarice...[The mentality of the 13th century] could hardly imagine the merchant's strongbox without picturing the devil squatting on the lid. From first to last, the Church never ceased to enlarge upon this text of St. Jerome (c.347 – 420): *Homo mercator vix aut numquam potest Deo placere* (The merchant may conduct himself without sin but cannot be pleasing to God) (Pirenne, 1955 [1938], pp.508-509).

On the next day the purchaser comes to the grounds with his friends, but finds no boat there. On asking whether perhaps the fishermen were observing a festival on that day, he is told that, with the exception of yesterday, they were never wont to fish there; but what power had he to proceed against such a *fraud*, who had so *shamefully* grasped at such luxuries (Ambrose, 1896 [c.391], p.79, emphasis added).⁵⁰

It is difficult for buyers and sellers not to fall into sin (Pope Leo the Great (c.400 – 461), as quoted in John Thomas Gilchrist, 1969, p.51).

Cheating, fraud, lying, perjury, circumvention, and deception roam through all market places (Jacques de Vitry (c.1160/70 – 1240) as quoted by Baldwin, 1972, p.67).

Now if you sell a thing for a higher price than you paid for it, you must either have bought it for less than its value, or sell it for more than its value. Therefore this cannot be done without sin...[The] latter kind of exchange [exchange for profit] is justly deserving of blame, because, considered in itself, it satisfies the greed for gain, which knows no limit and

⁵⁰Throughout *On The Duties of Clergy* Ambrose frequently commented on the link between money, traders and fraud and preached against “filthy” traders who “place all their hope of good in money, or to count up their daily gains and to calculate their savings like a hireling” (Ibid., p.54).

tends to infinity. Hence trading, considered in itself, has a certain debasement attaching thereto, in so far as, by its very nature, it does not imply a virtuous or necessary end. (St. Thomas Aquinas, 2007, [1485], p.1511).⁵¹

Sant'Antonino is at his best when dealing with concrete situations. His description of frauds committed in different trades and professions is full of unsavory details about the means used by tradesmen to increase their earnings by a few quattrini, often at the risk of losing a customer (DeRoover, 1967, p.15).

The Medieval view that merchants were generally seen as meddling in "other folks' affairs, buying one man's produce cheap in order to supply another man's wants dear. Thus they seemed to the medieval mind to be incapable of leading a truly just and righteous life (Summerfield Baldwin, 1937, p.5).

As these quotes illustrate, merchant activities of purchase and sale were regularly and roundly condemned. Merchants as well as the early bankers were perceived as dishonest, greedy and prone to fraud. The predominant and early Christian view of commerce was that it was a speculative activity (buying cheap and selling dear). Graitan's (c.1150) *Decretum*, the authoritative text on the matter, prohibited these activities, labeling them as *turpe lucrum* (filthy profit) (Baldwin, 1972, p.36). While both the clergy and the laity were forbidden to engage in speculation via exchange, the latter were also forbidden to engage in exchange out of necessity. "The general rule...was that the clergy was barred from all business enterprises apart from the management of their ecclesiastical properties. Only two exceptions existed to this principle. The clergy could manage the estates of widows and orphans as wards of

⁵¹Although Aquinas' *Summa* was published in 1485, it should be mentioned that it was written between the years 1265 – 1274. Notably, Aquinas did not condemn trade outright, but only condemned those merchants who sought gain for its own sake. In this way, he was among the first theologians to bend Christian doctrine to the practical purposes of his time.

the Church on the grounds that these classes of *miserabiles personae* merited special protection” (Ibid.). As is evident and from the perspective of the most powerful institution of Medieval times, the mere act of buying and selling was seen as morally dangerous to one’s soul. This also applied to the concept of usury, which was viewed similarly if not worse than buying and selling. For example, Canon 13 of the Second Lateran Council (1139) condemned the practice as ferocious greed, Canon 25 of the Third Council of the Lateran (1179) stipulated that notorious usurers would be excommunicated as well as forbidden a Christian burial. Ninety-five years later at the Second Council of Lyons (1274), usury was said to devour souls and swallow property.⁵²

Yet it is significant to observe where blame was located. It was not found in the individual but attributed to his specialized occupation — the converse of conventional wisdom today.⁵³ Two famous poems of the Medieval era, *Piers Plowman*

⁵²Papal Encyclicals, Accessed February 3, 2018. [Http://www.papalencyclicals.net](http://www.papalencyclicals.net). This strict view (not practice) of commerce, broadly represented in the twin concepts of usury and just price, would be forced to make adjustments in the face of expanding trade as theologians and canonists provided instruction with a practical bent. Both concepts went through several iterations over hundreds of years until such time that the debates entirely shifted ground. Rather than debating over the loan contract itself, in the case of usury, or over what was considered a “reasonable” profit/wage relative to one’s rank, in the case of just price, sometime in the second half of the fifteenth and into the sixteenth century the target of analysis shifted to the “amount” of interest in usury and to the “amount” of risk (a new measure of cost) and type of intent in just price. In each, ethical claims were removed from the argument because relational consequences lost ground to abstract concepts in the economic sphere. The offspring of this debate over relative prices, interest and bargaining is that economic transactions are today almost entirely viewed through the economic forces of supply and demand. A new theory of value — utility theory — developed in the nineteenth century was instrumental in this process (Meek, 1956; Henry, 1990). Where value had once largely been found in production costs, including labor, the new theory proposed that value was located in the subjective but equal expression of consumer preferences as worked out through supply and demand. Apart from providing merchants with a justification for their apparently un-Christian activities in a Christian world, the utility theory of value also implies that there is a lack of human control and thus a lack of power over the price formation of goods. Subsequently, furor over prices and interest arise mainly when price gauging goes beyond what the general public “believes” the market can bear.

⁵³In contemporary lexicon, misconduct and deception are commonly framed as a “few bad apples”. This interpretation directs blame towards the individual and not the structural foundations of buying

(1912 [c.1370-1390]) and the *Canterbury Tales* (1967 [c.1400]), share similar perspectives in regards to the various influences that specific occupations have on behavior. The plowman in each poem for example was seen as upstanding while merchants and millers on the other hand were cheats and deceivers. It follows then that any occupation with a secular and calculating bent might put one in moral peril as it attunes everyday thoughts to the here and now. The greater effect of these movements however was that they created a social rift within Christendom. The papal Church, not blind to this problem, attempted to Christianize occupations where it could. The feast of Corpus Christi, which eventually evolved into a procession, was designed to unify the distinctive urban occupations (Britnell, 1993, p.172). The religious character of merchant and craft guilds is also emblematic of this Christianized process.

Locating moral lapses in the type of profession rather than individual failings was largely due to the fact that an extrapolation of human behavior in respect to medieval

and selling or to the institution in which the individual is working for. Nor does it presume habit to have a cumulative and infectious character. President George W. Bush's recent explanation of corporate fraud is representative of this view: "Well, let me start by telling you that I think by far the vast majority of CEOs in America are good, honorable, honest people who have nothing to hide and are willing the true facts speak for themselves. It's the few that have stained the, have created the stains that we must deal with" (On Politics, 2002). In a remarkably similar view and under similar circumstances, President Roosevelt some sixty-nine years earlier remarked in one of his fireside chats, "We had a bad banking situation. Some of our bankers had shown themselves either incompetent or dishonest in their handling of the people's funds. They had used the money entrusted to them in speculations and unwise loans. This was, of course, not true in the vast majority of our banks, but it was true in enough of them to shock the people for a time into a sense of insecurity and to put them into a frame of mind where they did not differentiate, but seemed to assume that the acts of a comparative few had tainted them all (Roosevelt, 1933, this quote was brought to my attention by John F. Henry). It might further be noted that the current interpretation is a recent change from the longer held view that a few bad apples ruins the *entire* barrel. Examples of this view can be found in Benjamin Franklin's (1914 [1732]) *Poor Richard's Almanak* as "The Rotten Apple Spoils his Companion" (p.51) and over three hundred years earlier as a proverb in Geoffrey Chaucer's (1967 [c.1400]) *Canterbury Tales*: "It is better to cast a rotten apple out of the storehouse than to let it rot all the others" (pp.86-87).

activities begun with the Christian premises of the pledge of good faith, reciprocity of rights, obligation and duty — presumptions that are in essence about binding relations of an ethical character. This also gives some explanation for why merchant activities were not wholly denounced. So long as purchase and sale did not stray from the confines of Christian norms and ethics, they were seen in a positive light. The concept and practice of the just price was one such method to keep commerce within Christian ethical bounds. It might also be suggested that so long as buying and selling was either peripheral to the agrarian economy or served the crown or seigneur in some capacity, it would be accommodated. Many early market places and fairs, as it were, served multiple purposes of religious, legal and economic natures (Ibid., p.22). But if merchants and others involved with purchase and sale were prone to fraud because of their specific occupation, what exactly made this so?

The contributing factors can be located in the nature of the buying and selling process as well as to the authority symbol it uses as a method of validation. First, goods (tangible or not) with price attachments denominated in a money unit of account necessarily involve conflicting interests over price movements. While the buyer prefers to drive the price downward, the seller prefers to drive the price upward. Second, because money-based exchange requires rules or laws (formal rules, contracts), oaths, pledges, rituals or shared habits need not enter into the transaction (Commons, 1934).⁵⁴ The transaction then is mediated through rules and takes on a legal authoritative character. When provisioning largely becomes transactional the ordinary effect

⁵⁴Common's (1934) use of the word transaction was meant to capture the inherently legal nature of the market. His three categories of transactions – bargaining, managerial or rationing – were further meant to account for the level of control within exchange.

is a decrease in the personal or close relation and an increase in one's *susceptibility* to calculative, manipulative and at times detached dispositions.

Although this point is usually taken as prosaic, it is most assuredly not. When human interaction and communication are bracketed by rules and contracts at the expense of shared habits and when and if these rules become reified, any sort of behavior can be justified by simply appealing to the rule or contract. The Nuremberg Principles, in particular Principle IV, reflects the more extreme example of this problem.⁵⁵ Societies guided primarily by rules (especially those that are exclusionary such as the natural individual rights doctrine) and contracts will inevitably create conditions that influence individuals to think abstractly about their interactions with others. Thinking about another person abstractly also has the tendency to remove ethical and obligatory concerns. Buying and selling is a legal, abstract process based on private ownership where both the process and the foundation are, for the most part, validated by rules (law) not shared habits.⁵⁶ Given that private ownership creates boundaries, it is not surprising that rules follow thereafter. The greater the number of boundaries, the greater the number of rules defining them, the greater the degree that relations are extended (impersonal) and the greater degree unethical behavior increases.

Third, the primary motive for those in the selling position is elevation of rank in the form monetary accumulation while the primary motive for those in the buying position, if not a retailer or middleman, was largely of necessity. Fourth, buying

⁵⁵Principle IV states that a defense of superior orders (“just following orders”) is no defense for war crimes.

⁵⁶Rules, *prima facie*, are not necessarily detrimental to individuals or to groups if they are inclusive and ethical in their making.

and selling has a tendency to veer towards speculation when there is an abundance of money and goods. This tendency can be seen most notably in regions where banking institutions have developed and proliferated such as Florence, Amsterdam, London and New York.⁵⁷ Fifth, buying and selling has an additional tendency towards minority legal control as a means to minimize individual risk. And sixth, in the case of long-distance trade, personal knowledge of trading partners could be limited.

Each of these six factors assists in removing personal relations from the transaction and increase conflict. Throughout the process money operates as an end and as a medium but it also operates as an impediment, specifically an impediment between people. That is, it redirects attention from the serviceability of production to the vendibility of goods and in doing so situates price movements, denominated in a money unit of account as the superior objective. In this way, it effectively devalues the material needs of people. Fraud entered into buying and selling activity principally as a consequence of the rising conflictual objectives and impersonal relations between the parties where buying and selling activity itself was a consequence of the redirection of production for use to production for sale. This redirection has the distinction of distending or separating relations. While it does not follow that impersonal relations and conflictual objectives necessarily lead to a fraudulent act, it nevertheless makes it more palatable. Deceiving a stranger as it were, is usually easier than deceiving a

⁵⁷For many non-speculators, contempt was the common attitude towards banking and bankers. While it was the duty of the papal Church to condemn much of the speculative practices, with the rise of the secular state and the use of secular law, lawyers, politicians as well as learned men superseded the Church in this project. One Philadelphia pamphleteer expressed his view this way: “the property and rights of poor but meritorious citizens are sacrificed to wealthy gamesters and speculators; with the establishment of Banks authorizing a few men to create fictitious money by which they may acquire rapid fortunes without industry” (as quoted in Beard and Beard, 1945 [1927], p.352).

family member, close peer and/or a fellow member of one's club(s). Moreover, if one believes the counterparty to operate with similar intentions, this often provides the fraudster with mental cover, making it all the more common.

The rising level of buying and selling activities also had a secondary effect exacerbating fraudulent behavior, namely, increasing competitive pressure. By and large, this pressure was unwelcome primarily because it disrupted the functional hierarchal order. To this end attempts were made to control it either by the papal Church, the seigneurs or by the crown. The methods of control varied and ranged from customs, rituals, tolls, taxes, licenses and types of price control. The latter in particular was a method to control excessive profits rather than the control of supply (Britnell, 1993, p.93) and thus was a method to control competition and access to higher ranking positions. Where control was weak, economic competition, individual risk and transaction fraud grew. Nevertheless, transaction fraud as well as economic competition, was not widely dispersed among the majority in medieval society simply because the vast majority did not engage in buying and selling activities in any *extensive* way nor did the majority of peasants and serfs maintain their material livelihoods through secular centralized work. Rather transaction fraud was predominantly found in the peripheral activities of long-distance trade and banking.

In the event that fraud would extend beyond these minority groups required that the vast majority of individuals be absorbed into buying and selling activities. To this there were only two possible outcomes given secular legal control: extend legal land and resource rights to every individual and make all combination strictly illegal or extend legal land, *labor* and resource rights to a minority. In the former, all

individuals could enter into the two-sided nature of buying and selling as either buyer or seller. In the latter, not all individuals can enter into the two-sided nature of buying and selling although all individuals can enter into either one or the other. For example, an individual with legal rights over labor, what Commons (1934) termed a managerial transaction, can buy another individual's labor capacity or she may, if she so chooses, sell her own labor capacity. However, the individual without these legal rights can only sell her labor capacity.

The result of both cases nevertheless is that the majority is brought into the market. As it happened, it was the latter form of productive organization that prevailed. Given the institutional and historical conditions of the time, this is not so surprising. Control, in the form of force, had not only ruled for centuries on end, but its manifestation — war — was seen as an honorable enterprise. Minority legal rights were simply a new method for honorable control. The qualifier honorable however, came to lose its significance as sub-groups within the majority fought and won access to the secular legal system in the nineteenth and twentieth centuries.

Throughout these evolving conditions however, a centuries old problem remained as commerce and industry grew — the conflict between private vice, in the twin form of avarice and fraud, and the public good as it was defined by Christian doctrine. This problem was originally couched in the concepts of just price and usury. But as buying and selling expanded and impressed itself upon the lives and affairs of more and more individuals, these traditional concepts were forced to make adjustments. Along the way, other concepts, such as cost, wealth, the corporate form, individualism

and economic competition/control, also came under the microscope.⁵⁸ The conflict was eventually reconciled first with the new theories of the seventeenth and eighteenth centuries that ensconced property rights and developed “market laws”, followed by the economic marginalist theories of the late nineteenth century that effectively removed morality from the productive and distribution processes by locating value in the subjective individual and finally with the equilibrium theories developing in the U.S. after the second World War.⁵⁹

On the most basic and fundamental ground, the reconciliation revolved around the idea that self-interest under (perfect) economic competition would, counter-intuitively, generate public benefits. Colloquially known as *laissez-faire* or the invisible hand, it suffers from many faulty presuppositions.⁶⁰ Nonetheless, it is important to recognize, faulty presuppositions or no, that the reconciliation project was an *intellectual* rather than a material-practical one and cannot, by definition, eradicate unethical and unwanted human behavior. For this to occur requires the creation of new and dominant productive institutions whereby cooperative habits of thought and action

⁵⁸For instance, the concept of cost was at first conceived of as fixed mainly because the rate of technological change was low and because status was sharply defined. When technological change sped up and the demarcation of rank became blurred, the determination of cost acquired new flexible concepts of *intent* and *relative risk* (Melton, 1940, p.109).

⁵⁹Some have marked the beginning of the reconciliation process as early as the fifteenth century with the work of Leon Battista Alberti (1404 – 1472), see Max Weber (1958 [1904]) and Werner Sombart (1913). Other early and notable contributors were the theologian John Calvin (1509 – 1564) and his ideas on usury, John Locke (1821 [1689]) and his property rights theory, Charles Montesquieu’s (1896 [1749]) ideas that commerce has a civilizing effect and Bernard Mandeville’s (1806 [1714]) theory of private vices and public virtues. For the marginalist revolution see William Stanley Jevons (1871), Carl Menger (1976 [1871]), Eugen von Bohm-Bawerk (1890) and Marie-Esprit-Leon Walras (1953 [1874]). For the contemporary equilibrium theory see Arrow and Debreu (1954).

⁶⁰The critiques of this theory are too numerous to call attention to all of them. The following are representative only: Marx (1990 [1867]), Veblen (1909), Mitchell (1914), Tugwell (1922), Robinson (1964), Clark (1936), Rosenberg (1976), Davidson (1983), Davidson (1991), Mirowski (1989), Myrdal (1972), Sen (1977), Lee and Keen (2004), Lee (1998) and Davis (2003).

may be formed and reinforced. The individual vices of greed and fraud that were found in the activity of buying and selling over the past two millennia were not simply arrested once a theory of reconciliation was developed. Greed and fraud are as prevalent today or more so as they were in the eighteenth, nineteenth and twentieth centuries. The closest any contemporary intellectual movement has come in the attempt to eradicate fraud has been the corporate social responsibility movement, a movement designed to bring private virtue directly into the realm of private competition (risk) for private gain. Such efforts however will be largely ineffectual because the structural nature of buying and selling as well as its symbol of authority (the six above mentioned features), are actually pre-conditions for fraudulent behavior.⁶¹ Moreover, the structural nature of centralized corporate work generates additional layers that amplify, not reduce this behavior.

4.3 Fraud and Centralized Work

The centralized work space is a contemporary institution originating in the last quarter of the eighteenth century. It was not however until the twentieth century that it

⁶¹Corporate Social Responsibility (CSR) research begun in the 1950s yet there is currently no consensus regarding its definition (McWilliams et al., 2006). There is now however consensus regarding its applicability to business. Today the movement is largely presumed to be compatible with business practices and ethics and it has been broadly sanctioned by the business community, the general public and the state (Min-Dong Paul Lee, 2008). This was not the case in the 1970s. At that time, the business community saw the concept as an oxymoron (Lydenberg, 2005). Moreover, there was a wide spectrum depending upon the degree to which one assumed the existence and effectiveness of laissez-faire, see below. Friedman (1970), Levitt (1958), Baumol (1974) Baumol and Blackman (1991) occupied the extreme right arguing for its existence and effectiveness while Bowen (1953), Davis (1973) occupied the extreme left arguing for its non or little existence and Walton (1967), Steiner (1971) and Samuelson (1971) occupied the middle ground. As a positive action, CSR has the capability to increase inclusivity regardless of one's position towards the laissez-faire doctrine but because it does not address the organizational arrangements and legal status inside the business enterprise and because it does not address the degrees of separation, it is generally incapable of making business, at least as it stands today, a fully ethical practice. Also see Tae-Hee Jo (2011).

reached its full potential as one of two pre-eminent institutions of the modern era, the other being the secular state. Of the institution's several attributes three more noteworthy are its secular legal status as a person and its dual capacity to legally hire and control a great deal of workers while growing to very large sizes. The ways and means by which the business enterprise acquired legal minority control over labor both in Western Europe and the U.S. was varied. Nevertheless the process was facilitated by the use of individual or small group legal control (the weak view of *law as instrument*) as opposed to legal control through the community (*law as justice* view). It was also facilitated by the elimination of commonly used land or access to public land, the increasing mobility of labor and the increasing complexity of manufacture, all of which had the effect of creating a dependent and property-less workforce (Commons and Andrews, 1916, p.4). Along the way a peculiar form of contract, the labor contract, emerged. Its peculiarity stemmed from the fact that a laborer's bargaining power rests with her ability to withhold intangible labor services not actual tangible property whereas the employer's bargaining power rest upon her ability to withhold actual tangible property — a necessity for material livelihood (Ibid., p.9). In a society which values the *process* of gaining rank *more* than the actual ranking position, conventionally referred to as "opportunity", it becomes clear that the bargaining process between employer and the laborer does not stand on equal ground and thus creates additional layers of conflict independent of the conflict created by the structural nature of buying and selling itself.⁶²

⁶²This is not to suggest that modern Western societies do not value rank, rather it is only to suggest that it values the process above the position. However not all Western societies value the process equally as it appears that the U.S. and perhaps Britain place greater value on opportunity than others.

Thorstein Veblen (1915 [1904], 1918b [1914]) remarked upon these additional layers of conflictual relations with his concept of the *degrees of separation*. According to Veblen, the first *degree of separation* occurred when business commandeered the industrial process. Instead “of investing in the goods as they pass between producer and consumer, as the merchant does, the business man now invests in the processes of industry; and instead of staking his values on the dimly foreseen conjunctures of the seasons and the act of God, he turns to the conjunctures arising from the interplay of the industrial processes, which are in great measure under the control of business men (1915 [1904], pp.22-23). The second *degree of separation* occurred when corporate ownership was separated from its operation via managerial control with the extensive use and manipulation of financial instruments (stock, bonds and other financial derivatives).⁶³ In both degrees, relations between the three categorical aspects of provisioning — worker, consumer and producer — are further removed from one another. If one were to include the distended relations found in the development of private commercial farming for sale, it might be suggested that there have been three degrees of separation rather than two: the *first degree of separation* emerges when buying and selling broadly enters into communal farming, the *second degree of separation* occurs when buying and selling broadly enters into factory work (the machine process and the emergence of the profit motive) and the *third degree of*

⁶³The use of financial instruments was a much older innovation yet it was not until the turn of the twentieth century, with the conjunction of machine production, that its full impact would be felt. Smith (2007 [1776]) may have been one of the first to remark upon the problem: “directors of such companies, however, being the managers rather of other people’s money than of their own, it cannot well be expected, that they should watch over it with the same anxious vigilance with which the partners in a private copartnery frequently watch over their own” (p.700). Among other early scholars to note the change were John S. Mill (1967 [1879], pp.703-754), Richard T. Ely (1900), Wesley Clair Mitchell (1913) and the seminal work of Berle and Means (1968 [1932]).

separation occurs when managerial control and absentee ownership rules.

It is the second and third degrees which are now of primary interest. In respect to *second degree of separation*, factory work, as already mentioned, had existed for centuries. However, the conditions and relations during this earlier time were of an altogether distinct character than the conditions and relations that developed in the nineteenth century. In its inchoate phase, “[t]he majority of employers were small masters—manufacturers...who, in ideas and habits of life, were little removed from the workmen, out of whose ranks they [small masters] had risen, and to whose ranks they might return once more. There were, of course, even then capitalist employers, but on a small scale; nor was their attitude to their workmen very different from that of the little masters in the same trade” (Toynbee, 1894 [1884], p.183). Artisans, laborers and most masters alike, then worked with their hands, shared similar attitudes and had close relations (Ibid., p.184). Addressing the relation of the producer to the consumer under these conditions, Veblen (1915 [1904]) remarked:

In the older days, when handicraft was the rule of the industrial system, the personal contact between the producer and his customer was somewhat close and lasting. Under these circumstances the factor of personal *esteem and disesteem* had a considerable play in controlling the purveyors of goods and services. This factor of personal contact counted in two divergent ways: (1) producers were careful of their reputation for workmanship, even apart from the gains which such a reputation might bring; and (2) a degree of irritation and ill-will would arise in many cases, leading to petty trade quarrels and discriminations on other grounds than the gains to be got, at the same time that the detail character of dealings between producer and consumer admitted a degree of petty knavery and huckstering that is no longer practicable in the current large-scale business dealings. Of these two divergent effects resulting from close personal relations between producer and consumer the *former* seems on the whole to have been the preponderant consequence. Under the system of handicraft and neighborhood industry, the adage that “Honesty is the best policy” seems on the whole to have been accepted and to have been true

(pp.51-52, emphasis added).

As the factory system grew and machine technology became more complex and costly, both intra and inter relations of the factory began to evolve. The consequence of this evolution should not be minimized. It initiated an entire new set of social relationships and of codes of behavior. But even more profoundly than this, the evolution of the machine process created a new institution that gradually established itself as a dominant influence on the creation of values. In one sense the *second degree of separation* was an extension of the *first* in that individual risk and individual control were realized on legal grounds. But it was distinct in that this realization occurred within the factory system, a system in which the majority became absorbed into the market and where large-scale machine production materialized. Veblen, in the following page, made this clear as he explained the new form of relation between producer and consumer:

Under modern circumstances, where industry is carried on a large scale, the discretionary head of an industrial enterprise is commonly removed from all personal contact with the body of customers for whom the industrial process under his control purveys goods and services. The whole takes on something of an impersonal character. One can with an easier conscience and with less of a sense of meanness take advantage of the necessities of people whom one knows of only as an indiscriminate aggregate of consumers. Particularly is this true when...this body of consumers belongs in the main to another, inferior class, so that personal contact and cognizance of them is not only contemplated, but is in a sense impossible...Under these circumstances the adage [“Honesty is the best policy”] cited above loses much of its axiomatic force. Business management has a chance to proceed on a temperate and sagacious calculation of profit and loss, untroubled by sentimental considerations of human kindness or irritation or of honesty (Ibid., pp.52-53).

Thus, the new structural arrangements (organizational form) gave license to business captains to carry on their course unperturbed by sentiment. This did not imply

that the captains of industry were necessarily blind to conflict, but that many, though by no means all, became in large part immune to it. That is, they did not view the conflict as their personal problem. In this way, another layer of remoteness was added to productive activities. And again, a likeness can be drawn between this process and the one that occurred when farming was undertaken for commercial sale. In each case, there was not only a movement towards individual risk and individual control but there was also, simultaneously, a movement away from shared habits. This is precisely what Vries (1976) was getting at when he wrote that the peasants, the poor and the landed gentry's way of life were becoming foreign to one another.

When the legal owners of productive resources extended the use of intangible assets and created a new level of workers inside the corporation, the managerial class, yet another impediment was introduced into productive relations. Veblen (1915 [1904]; 1964 [1923]) also noted this change:

The discretionary disposal of the entire capital vests in securities representing the intangible assets. In this sense, then, the nucleus of the modern corporate capitalization is the immaterial goods covered by the common stock. This method of capitalization, therefore, effects a somewhat thoroughgoing separation between the management and the ownership of industrial equipment. Roughly speaking, under corporate organization the owners of industrial material have no voice in its management, and where preferred stock is a large constituent of the capital this alienation of control on the parts of the owners may be, by so much, irrevocable. Preferred stock is, practically, a device for placing the property it represents in perpetual trust with the holders of the common stock, and, with certain qualifications, these trustees are not answerable for the administration of the property to their trustors. The property relation of the owners to their property is at this point attenuated to an extreme degree (1904, pp.145-146).

This separation was a complete transformation of property relations and capital development and it represented an additional organizational change. Whereas

large owner managed corporations existed in the early twentieth century, these were increasingly being supplanted with absentee owners.⁶⁴ One consequence of the separation from ownership from control inside the corporation was that big business took on the character of a “quasi-public corporation” (Keynes, 2010 [1931], p.289; Adolf A. Berle and Gardiner C. Means, 1968 [1932], p.5). The enterprise now had many “faces” and many owners as the disbursement of stock became more and more diffuse. And subsequently, along with the increase in stock diffusion came an increase in the growth and size of the enterprise in general for each public offering freed the original investor to continue to use the proceeds to organize further corporations (Berle and Means, 1968 [1932], p.12).

Before discussing in detail the repercussions of these *two degrees of separation* and their relation to transactional fraud it is worth mentioning Veblen’s reference to the aphorism, honesty is the best policy. This old dictum was, in the main, the product of neighborly reputation (goodwill) but was also a means to establish credit. For the most of the late Middle Ages and early modern period when coins were still not extensively used as a medium of exchange, the bulk of transactions occurred through the extension of credit (Muldrew, 1998). Access to credit (goodwill, reputation) was open to most so long as one could remain in good standing. Benjamin Franklin’s (1898 [1748]) famous quip in *Advice to Young Tradesmen* was, in part, speaking to this end.⁶⁵ Such relations had an inherent binding effect. In England, consumption

⁶⁴An absentee owner can be broadly defined as anyone receiving an unearned income flow or “getting something for nothing” (Veblen, 1964 [1923]).

⁶⁵As Franklin (1898 [1748]) put it, “the most trifling actions that affect a man’s credit are to be regarded. The sound of your hammer at five in the morning or nine at night, heard by a creditor, makes him easy six months longer; but if he sees you at a billiard-table, or hears your voice at a tavern when you should be at work, he sends for his money the next day; demands it, before he can

via credit “bound neighbors together in thick networks of reciprocal relation” and thus dishonesty was mostly impractical (Desan, 2014, p.10). The result of using goodwill as a means to procure credit then was the preservation of personal arrangements. Personal credit at its base, as it were, is a vouching system because it operates through personal assurances.

But this form of credit system can only hold so long as relations are near. Extension and distance do not serve its purpose well because it is always possible to give the *impression* of honesty while at the same time engaging in dishonest behavior. In this instance, one may gain advantage, monetary or otherwise, if they remain free from suspicion. This particular conundrum was possibly first suggested in *The Republic* (Plato, 1892 [380 BCE]) and it begs the question, why be ethical in business dealings to begin with?⁶⁶ Answers to this question varied according to time and place. In the eighteenth and nineteenth centuries the most common response was that morality in business was an implicit duty because it was believed that people could not really own wealth. Instead, those in possession of it were only “stewards” or “trustees” — concepts that were a product of the Christian doctrine.⁶⁷ Consequently one had a paternalistic duty to behave ethically. The fact that the concept of stewardship was

receive it, in a lump” (p.154).

⁶⁶In Book II of the *Republic*, Glaucon, as a method of countering Socrates argument that one should be just and pursue justice for its own sake, suggests that even the most “just” were susceptible to deception and theft if their acts were guaranteed to remain hidden. The trick to Glaucon’s counter argument was an invisible ring. An earlier and similar story can be found in the *Histories* by Herodotus, see Laird (2001). It was also famously expressed much later in *The Prince*, “[i]t is not, therefore, necessary for a prince to have all the above-named qualities, but it is very necessary to seem to have them. I would even be bold to say that to possess them and to always observe them is dangerous, but to appear to possess them is useful” (Machiavelli, 1921 [1532]p. 70).

⁶⁷Locke (1821 [1689]), the authority on property, underscored this point: “For Men being all the Workmanship of one Omnipotent, and infinitely wise Maker; All the Servants of one Sovereign Master, sent into the World by his order and about his business, they are his Property, whose Workmanship they are, made to last during his, not one anothers Pleasure” (p.191).

primarily published and disseminated through the pulpit and early Christian periodicals and booklets shows the relative strength of the Christian institution. This began to weaken when the machine process matured, factories as well as urban centers grew in size and complexity, banking became more integral to investment for production and owners of resources became more organized.

These movements were, in the main, movements about extending control as was reflected in business consolidation (trusts, monopolies), the growth of business associations and the establishment of the first business schools in the late nineteenth century in the United States. As business more completely organized, a new narrative for business ethics, consisting of two claims, was put forward: first, a business person should be ethical because it pays in money-values (an empirical claim) and second, a business person should behave ethically on account that the first claim is true (a normative claim) (Abend, 2014, p.75).⁶⁸ Despite being circular and thus not valid from a strictly logical point of view, this mid-nineteenth century narrative, is still, in substance, the same argument advanced by many in the corporate social responsibility movement. In one sense, it is perhaps merely a reincarnation of the much older concept of “enlightened” self-interest – do well by yourself and you will do well by others – as well as the previous mentioned adage, “honesty is the best policy”.⁶⁹ Yet it appears that the new narrative as well as its antecedents has a deeper foundation:

⁶⁸Surely this narrative is not universally accepted today nor was it universally accepted at its inception, *circa* 1850. Reasons for rejection early on were perhaps many but it was likely that the Christian narrative played a large role in these views. Christian merchants and pastors of the nineteenth century often rejected claim two regardless of whether claim one was correct on the grounds that to ask such a question went against the glory of God himself. See Abend (2014), especially chapter three.

⁶⁹These older ideas can be found in Michel de Montaigne’s (1842 [1580]) *Essays*, book II, chapter 16 and Mandeville’s (1806 [1714]) *Fable of the Bees*.

the appeal to natural laws. Nowhere is this idea more apparent than in the similar economic idea, first proposed by Smith (2007 [1776]), of the invisible hand.⁷⁰

The invisible hand doctrine was and remains a theory about the self-correcting capacity of market activity. Self-correction implies that the system is intrinsically stable. In the event that market participants behave unethically, it not only has the ability to correct for this but will do so automatically. The economic system then behaves like clockwork and likewise follows immutable “laws” of nature. It is not surprising that such theories would be proposed at the time that they did as many political economists borrowed ideas from Newtonian physics (Mirowski, 1989; Galbraith, 1994). What is perhaps surprising is that this new natural law theory of the market found validation in a presumed natural “process” as opposed to specific human action. To be sure, the theory presupposes atomistic actors but these in and of themselves did not provide material justification for each actor is further presumed to have no greater or lesser control than another. Rather the *justification* was located in the “outcome” of individual actors. The effect of the invisible hand theory was to impart natural laws to human “systems”. Or in another way of saying, human systems, specifically human economic systems, operate independently of human control.⁷¹ Currently the natural law theory, a theory that is free of “human control”, still

⁷⁰Although Smith did broadly view the operation of market competition as a disciplinary function against deceptive behavior, his ideas and thoughts about intrinsic behavior are quite at odds with the *homo economicus* view of standard economics. Much of these ideas are described in greater detail in his *The Theory of Moral Sentiments* (1853), a book of which Smith believed to be his most important work.

⁷¹It might be recalled from the previous chapter that a similar though partially distinct debate had persisted — the debate over the corporate (university) form. Roman natural law jurists as well as some popes and kings argued that corporate organization was fictitious and so real power rested in the sovereign over and above the council (*law as instrument* view, strong version). The conciliarists as well as some theologians on the other hand argued that it was the rulership itself that was artificial and thus ultimate control rested in the council over and above the sovereign (*law as justice* view).

dominates much of the curriculum in the economics discipline despite all evidence to the contrary. The history of the evolution of market economies is riddled through with individuals and minority groups attempting to gain control over the risky market by the use of force, by gaining privileges from seigneurs or monarchs and/or by changing laws, some of which has been documented above.

What exactly was the “natural” transmission mechanism that made provisioning putatively free from human control? For Smith and others that followed this specific argument, the linchpin in the process was economic competition (hundreds of thousands of small-scale producers) as represented in the independent forces of individual supply and demand.⁷² For the business associations of the early twentieth century and the Chamber of Commerce (est. 1912) the linchpin, although framed somewhat differently, was fundamentally the same. Judge Parker’s (1924) comments on the *15 Principles of Business Conduct* created by the Chamber, serves to illustrate the common view on this matter.

As he wrote in the *Nation’s Business*, “[t]he policy of charging the public ‘all the traffic will bear’ if in excess of a reasonable profit, is unsound in principle; and while in isolated and unusual cases it may bring temporary prosperity, it cannot last, for

What is significant about this debate in respect to the natural law theory of the market is that at no time was a *justification* found in the “outcome” of the governance structure. Rather *justification* was dependent upon how one defined positive law in respect to the group. The central question was not so much about whether or not society should be governed, that is, controlled, but rather it was over the who and how of governance. This reverses course with the invisible hand theory where the central question is not about human governance at all. Instead, “uncontrollable” forces of supply and demand are said to rule each powerless individual equally with equitable outcomes. To some degree, the reversal of course can be contributed to the fact that Western societies began to value the “process” of rank attainment over and above the ranking position.

⁷²The history and mathematical treatment of the self-correcting economic system is long and complex and thus beyond the scope of this dissertation. See Roy E. Weintraub’s (2002) *How Economics Became a Mathematical Science* and footnotes 59 and 60 for additional sources.

sooner or later an *outraged public* will take measures to prevent it” (p.16, emphasis added).⁷³ Similar to the theory of the invisible hand, unethical business practices are assumed away because of the presumption that they will be corrected for by the public.⁷⁴ This is predicated on a further presumption that goodwill (reputation) not only remains open to all but that every individual has equal ability and capacity to vet all other individuals. This ability remains to be seen with the growth and power of the business enterprise because along with its growth it increases its ability to control and conceal information in ways that a single individual with limited resources cannot. Modern control fraud is the exemplar of this problem (Black, 2013 [2005]).

One astonishing implication of the argument is to suggest that inquiries into the causes of fraud are superfluous.⁷⁵ Moreover, this was being suggested at the very time that business was becoming “big” and extending its control over the market to a degree yet seen in history. It is difficult to view this as anything other than a conceptual

⁷³It is of interest that in the very same edition, the then Secretary of Commerce, Herbert Hoover, penned a response titled “If Business Doesn’t, Government Will” (1924). In it he makes several well known observations none more relevant to the topic at hand than his remark “[e]ver since the factory system was born there has been within it a struggle to attain more *stability* through *collective action*” (p.8, emphasis added). Because collective action is about control and control, by definition, is humanly directed, the remark thoroughly disputes the claim of an independent self-correcting economic system. Paradoxically, Hoover also advocated the efficiency of business and later spent many years denouncing big government.

⁷⁴It is of note that the linchpin, public outrage, is not explicitly specified in the conventional reasoning for business ethics — that it pays. Instead, it lies in the background as an implicit assumption. Whether ethical behavior pays or not in this narrative hinges upon four very crucial factors. First, that the public is accurately informed of the deceptive behavior, second, that the public actually makes appeals to correct it, third, that these appeals are effective and fourth, that all of these activities can somehow be quantitatively measured and tracked. Within these four factors additional sub-factors can also be identified. For instance, in the case of accurate reporting, the public relies on the ability of individuals, journalists, whistleblowers and the state to uncover fraud. But what if each of these actors fails to discover the fraud? In such a scenario, neither reporting nor public response will occur. Moreover, this type of scenario is not uncommon as the pervasiveness of fraud is much greater than the data reveal, as noted in the introductory chapter.

⁷⁵Today the same argument continuous but under a different banner — *private market discipline*. And just as in times past, it too presupposes that all individuals have the ability and capacity to equally vet one another as is indicated by the modern signaling theory (Easterbrook and Fischel, 1991).



Source: Google Books Ngram Viewer.

Figure 2: Honesty is the Best Policy

tool for legitimization on the part of the business enterprise. While there is credence to the idea that individuals can monitor one another to prevent unwanted behavior, with the onset of the machine process and the arrival of private banking institutions, this becomes increasingly impractical. As to be expected under the new arrangements developing in the nineteenth century, the proverb honesty is the best policy, began to lose its vitality as individuals lost their ability to effectively monitor big business. Figure 2, a Google Books Ngram Viewer chart, appears to give some empirical evidence to this claim.⁷⁶ Thus, the narrative that ethics pays in money values, with its implicit assumption of natural self-correction and the antecedent of honesty is the best policy, fails to fully understand the conditions and relations in which big business operates. What is more, it also fails to understand the cumulative nature of habit in general. Systemic transaction fraud is a product of learned behavior. Because this is

⁷⁶The chart shows the frequency from 1730 – 2010. One explanation for its increasing usage in the late eighteenth and nineteenth centuries might be due to the increasing reach and intensity of the market into everyday affairs. The magazine, *The Youth's Companion*, with its hundreds of thousands subscribers, used its platform in 1904 to bring attention to fraudulent schemes and urged its reader to report them to the postmaster. Underlying its call was an appeal to honesty: “[t]o do this in every suspicious case is a duty which every honest man owes to his neighbor as well as to himself” (Morton, 1904, p.222).

generally so, it is often attributed to group behavior and “criminogenic” culture not independent actors. Criminogenic culture, when successful, has the propensity not only to reproduce itself among the set of actors associated with that culture but it has the added affect of driving out good behavior, a phenomenon related to Gresham’s Law (bad money drives out good money).⁷⁷ Gresham’s law describes a cumulative process that is significantly conditioned by individual or minority group control. For example when a controlling agent devalues coin, usually the monarch, the remaining agents are left with only one recourse due to their own lack of control over its value: to immediately put it into circulation. At the same time, any coinage that has held its face value will be hoarded. As a result, bad money (debased) drives out good money. The same phenomena can also occur among traders as John S. Mill (1967 [1879]) remarked in the nineteenth century: “[t]hus the frauds, begun by a few, become customs of the trade, and the morality of the trading classes is more and more deteriorated” (p.732). But it can also occur within the business enterprise when criminogenic culture drives out good actors (Black 2013 [2005]).

The key again to the process is that some individuals have greater control and more information (asymmetric information) over others. When executives and managers, those with greater control, use their leverage to intentionally produce faulty goods, to forge accounting numbers and/or to hire or blackmail people to gain monetary advantage, ethical actors without the same level of control are often driven out of the enterprise. As this process occurs through time, the eventual result, so long as the enterprise is still standing, is to create a criminogenic culture where most

⁷⁷Aristophanes identified this phenomenon as early as the fifth century BCE (1888 [405]).

if not all the principal players are on the take. Or in a more analytical way of saying, the criminogenic forward movement does not encounter negative feedbacks. Consequently fraudulent behavior is reinforced rather than self-corrected. If the criminogenic culture breaches the walls of the enterprise and reaches the scale of industry or macroeconomy, as sometimes occurs in economic booms, a wave of transaction fraud can occur. The most recent wave and one that reached the global scale, was the banking and mortgage crisis of 2008. And while Gresham's law provides a useful description of the cumulative process it does not completely explain the ground in which the dynamic functions. This ground is composed of two factors: one, the structural conditions of buying and selling (market societies) and two, individual or minority group control. The business enterprise is a near perfect conduit for these structural conditions as will be explained in the following.

4.3.1 Veblen's Degrees of Separation and Fraud

Having established that honesty is not well served in the face of big business, one might now consider the structural conditions that make this so. Veblen's *degrees of separation* provide a template for which to begin the analysis. These degrees were brought about by the structural changes of production in the nineteenth and twentieth centuries and principally represent the rise of impersonal relations. Further, as expounded with the *first degree of separation*, where there is an abundance of money and goods and where conflict and distended relations are sown, transaction fraud has the propensity to grow. Because both the *second degree of separation* and the *third degree of separation* are, in essence, a continuation of the *first degree of separation*

they contain all but the last characteristic for transaction fraud.⁷⁸ But because distinctions exist, the latter two *degrees of separation* have additional attributes. Specifically, the development of the machine process, the incorporation of risk and control inside of it and its eventual formation as a dominant institution are paramount to the development and growth of transaction fraud. The additional seven characteristics contributing to the latter are: (7), conflict over *labor* price movements, (8) a diminishment of personal reputation from producer to consumer and vice versa, (9) calculating and shrewd habits of thought, (10) separation of ownership from control via financial instruments, (11) legal minority control via hierarchy and power inside the enterprise, (12) increased pecuniary emulation of the laborer/consumer and (13) a diminishment of the intrinsic motive of workmanship with a subsequent rise in the extrinsic motive of profit.

Fraud broadly enters into centralized work as a result of these seven unique attributes. In all but the last two, their effect, likewise with the *first degree*, are increasing levels of impersonal relations largely due to an increase in distance as well as conflictual objectives between parties. The distance created by the corporate form behaves, similarly to that of money in buying and selling, like an impediment obstructing common objectives. It is an oppositional type of production. Executives and managers are put in opposition against “labor” and vice versa not necessarily because there is a predisposition of animosity, but because wage is both a cost to the producer and a livelihood to the laborer. Executives and managers are put in

⁷⁸The six characteristics were, (1) conflict over (output) price movements, (2) formal rules (law) over habits as authoritative symbols, (3) diverging motives, (4) a tendency towards speculation, (5) tendency towards control to minimize risk and (6) limited personal knowledge associated with long-distance trading.

opposition against consumers and vice versa because the output price is both the profit of the producer and the cost of the laborer's livelihood. This level of opposition grows when the producer and consumer no longer personally recognize one another.⁷⁹ The type of tasks and the amount of remuneration that executives, managers and laborers receive further exacerbates opposition. Executives and managers are charged with overseeing the day-to-day operations and making decisions about it's future. Laborers are charged with physically or intellectually carrying out the day-to-day operations. The conditions necessarily creates an oppositional "command and obedience" relationship (Commons, 1934, p.60).

These types of tasks as well as the amount of remuneration are themselves partially determined by the hierarchal form of organization — power as represented by the use of minority legal control — and incentive-based (extrinsic) conditions. Because business operates under a chain of command, authority figures have access to information that others do not (asymmetric information) and often have the proclivity to view their type of tasks and the rewards received upon completion (salaries) as naturally validated. Appeals to *higher* authority, such as the state or even God, are not the usual course nor are they currently professed. This is largely so because the level of exaggeration to executive/manager pay and the degree to which different tasks are isolated, has a positive feedback effect further ensconcing the belief of their due rewards. For example, exaggerated executive or manager pay is typically interpreted

⁷⁹Many in public office in the early twentieth century readily acknowledged this link between distance and fraud as one solicitor to the Post Office proclaimed "the old rule of *caveat emptor* cannot apply to mail-order sales...[given that] the conditions of business in this country have been revolutionized...[with] sales being made at a *great distance* from the purchaser" (Balleisen, 2017, p.139, emphasis added).

as a reward for their skill and hard work. Every dollar “earned” then becomes a self-affirming act. Taking home three hundred times the pay of the *average* worker does not necessarily strike them as inequitable. Rather the common view is to see their pay on meritocracy grounds.⁸⁰ To a degree, this helps explain why many millionaires and billionaires often feel the desire to keep acquiring more wealth despite the fact that it no longer serves any material purpose. The consequence of exaggerated pay however, warranted or not, is broadly the same: an increase in conflictual objectives and relational distance between executives/managers and laborers/consumers often reflected in the notions of superiority and inferiority. The greater that one feels divorced from their inferiors, the more they are motivated by status and the more inclined they are to use their minority legal control to gain it, the greater likelihood that deceit will become a method to this end.

The relative strength of the final two characteristics on the other hand, pecuniary emulation and diminished workmanship, work to mediate the conflict though only superficially. The more that the laborer/consumer identifies with the general priorities and values of executives/managers — pecuniary and calculative bents — the less they are inclined to believe that there are conflicting objectives between them (Galbraith, 1967; Munkirs and Knoedler, 1987; Stevenson, 1987). This process is largely accommodated inside the corporation by the existence of the corporate ladder. It does not

⁸⁰The appeal to the meritocracy narrative is the usual coarse when discussing widely divergent wage differentials. Standard economics has a more technical term: the marginal revenue product of labor. Workers, which include executives and managers, are said to receive compensation according to the individual’s contribution to output. Like the broader theory of orthodox economics, this theory suffers from many faulty presuppositions. The most obvious indication of its inaccuracy is that it is physically and intellectually impossible to expend 300 times more effort than the “average” worker. While it might be possible to expend twice or three times more effort, numbers beyond this become more and more unfeasible.

quite matter that there are only a limited amount of top spots in any hierarchal corporate organization. What matters, for those workers that do identify with executive values, is that an “opportunity” exists. In the U.S. and apart from network effects, it is typically only the workers who demonstrate the most flexibility, subordination and loyalty to middle managers that gain access to the ladder (Jackall, 2010 [1988]). A remarkably different explanation for success than is the conventional wisdom of the meritocracy doctrine.

Yet where the laborer/consumer has obligatory and workmanship dispositions, the less she will identify with business (not industry) habits of thought, the less she will value the corporate ladder and the more likely she will put pressure on executive/manager’s behavior. The implication here is that transaction fraud does not proceed in a vacuum free of social judgment although the degree to which any single individual can do so is limited. This process however is not a one-sided affair as executives and managers with impersonal and calculating dispositions can and do influence laborers as well as the wider public. The perpetual use of motivating speeches, pamphlets, slogans, retreats and videos by business executives/managers in attempts to have their workers identify with the businesses’ core mission are at times successful in aligning the interests of workers and producers. The greater level of success in this endeavor, the greater the conflicting objectives are superficially mediated.

The increasing use of cost-benefit analysis, *circa* 1960, not only within the business enterprise but within popular culture is indicative that, at least in the U.S., this strategy has been relatively fruitful. When problems of an individual, household or

public nature are routinely couched in the costs and benefits of an action, value-claims other than money are regularly obfuscated. The effect makes putatively scarce money the pre-eminent value in which to judge social action and frames the problem as a monetary tradeoff. In other words, presumably scarce (not abundant) resources guide the decision-making process. Broadly thinking in terms of *private* (not public) risk and reward becomes a secondary phenomenon when one conflates government and private (individuals or households not financial and non-financial corporations) access to resources and in particular money (fiat).

While it is true that individuals and households have limited access to fiat money — a constraint, it might be mentioned, that is artificial — it is the government that creates it. Moreover, the idea of scarcity over abundance is instilled within individuals and single households because it is near impossible to create abundance in isolation even with access to resources. This is not the same for public or corporate bodies today for two primary reasons: first, they are group oriented at inception and second, they have specific legal attributes granting them certain activities above and beyond the average citizen. Their behavior and range of action are greatly enlarged as a consequence and in the case of government agencies, their actions are, from a practical viewpoint, limited by the level of technological knowledge (Hamilton, 1987). Yet because of the conflation as well as the increased use of the cost-benefit approach, the distinction between private and public actors becomes blurred. When this occurs, problems are ultimately understood in the terms of *private* risk and reward. Thinking in these terms has the tendency to bias one towards self-interest as well as amplify the degree to which money is valued as an end. When both characteristics propagate in

concert, the possibility for pecuniary emulation expands and workmanship diminishes. The relative strength of these two attributes (pecuniary emulation and workmanship) will, apart from business propaganda, be a function of the belief in the invisible hand and meritocracy doctrines (Techno-individualism) — belief systems that assume away power and control (Galbraith, 1973). In its stead, final value is placed on the *process* of attaining rank.

At the center of these movements sat and still sits (non-perfect) competition. And similar to the effect that competitive pressure has on buying and selling proper, the fallout in business was and still is the same — increasing individual or minority group risk and speculation and the ever present need to control prices.⁸¹ Private risk, as is conventional wisdom, is an activity that rewards or penalizes the private actor or actors and not necessarily the totality of the community.⁸² For most of the Medieval era as well as the beginning of the modern epoch, private activities that involved private risk were limited to those in trade, banking and, in time, after the untethering of feudal arrangements, large landholders that were farming for commercial sale or using land as speculative asset. This was not exactly the case for the United States. Faced with enormous risks, early pioneers had to be coaxed by fortune to cross the Atlantic (McDougall, 2004; Friedenber, 1992). But once the natives were minimized or eradicated by the colonialists, competition and individual risk could perhaps flourish in a way that was not possible in Europe due to the abundant amount of land.

⁸¹Unsurprisingly given its risky nature, business consolidates when it can as represented by merger waves (Jo and Henry, 2013). The consequence of consolidation is the appearance of large conglomerates and oligopolistic conditions. It also created more recently a minority group of speculative money managers whose sole purpose is to end up on the right side of a bet (Minsky, 1996).

⁸²This is in opposition to public risk mitigation where both risk and reward become negligible to the individual.

To a large degree, the frontier accommodated the risk-taking and speculative dispositions and in the process created something of a national ethos.⁸³ The compulsion of independent risk-taking and speculation however was present even before the expansion into the interior. One of the more infamous cases, the Yazoo land scandal, is illustrative. Involving several iterations and multiple land companies, great tracts of land were granted by Georgia to speculators in return for cash. A year following the sale, the act was rescinded due to public protests and indignation. While this move invalidated the sale, it did not stop the speculators from appealing to the courts. In 1810 it reached the Supreme Court (*Fletcher v. Peck*, 10 U.S. 87) whereupon the decision made the speculators whole. Apart from the speculative sentiments, this decision also set precedence in contract law. The historian Charles H. Haskins (1891[1890]), expressed this early American predisposition thusly:

The spirit of speculation in land was a prominent characteristic of the United States at the close of the last century [1700s]. Although the Crown had received frequent petitions for land grants in the West, there was little westward migration until the time of the Revolution. Then the number of the emigrants, the cheapness of the lands, and the lack of an established system of sale in small quantities offered many inducements for the formation of great land companies, whose opportunities for speculation were increased by the depreciated currency and the general ignorance concerning the West...‘All I am now worth was gained by speculations in land,’ wrote Timothy Pickering...many eminent men could have said the same, often with a later experience quite similar. Land speculation involved Washington, Franklin, Gallatin, Patrick Henry, Robert Morris, and James Wilson, as well as many less widely known (pp.3-4).

As the expansion of the West ensued in the nineteenth century, con men were known to roam the Western frontier. The short-con workers “liked to follow the boom-towns connected with mining and the land-openings on the westward-sweeping

⁸³Recent studies in cultural psychology tend to affirm this proposition (Kitayama et al., 2006, 2009). Although they do not explicitly discuss these specific temperaments they do attribute the strong independent ethos of American culture with the voluntary settlement of the frontier.

frontier, for there people had money and were speculation bound” (Maurer, 1999 [1940], p.8). It is noteworthy that among grifters there was a feverish propensity to elevate their rank relative to other grifters (Ibid., p.172). But preoccupation with status was not their only shared trait. Many con men also had a disposition towards thrill-seeking, “there is a thrill about big-con work which no other branch of the grift can duplicate. The confidence man extends himself fully while he works; all his faculties and abilities are called into play; each mark is a new challenge to his ingenuity; and perhaps most important, the stakes for which he plays are very high” (Ibid.).⁸⁴ When it came to identifying distinctions between the behavior of big con men and “legitimate” businessmen of the early twentieth century, there were but few to be found (Ibid., p.179). North America and its frontier then accommodated speculation and, as a result, was more prone to transaction fraud from the outset.

When the frontier had effectively closed, competition, individual risk and speculation flowed primarily into the business enterprise via the financial instruments of stocks and bonds. The level of toleration for private risk will depend upon the degree to which speculative activities are regulated by the state. This further depends upon the degree to which the public views private risk as socially harmful. In instances where both are deemed negligible not only will private risk increase, but as more businessmen adopt its creed, the view and practice will be reproduced inside corporate culture. Subsequently, individuals who may be more innately risk-averse might become risk-seekers. Or more bleakly, may participate in gamesmanship only because

⁸⁴The con man’s trickstering entered national conversation in this century and was the central topic in Herman Melville’s (1857) novel *The Confidence Man: His Masquerade*. He also made notable appearances in Mark Twain’s (1885) *Huckleberry Finn* and was the subject of Edgar Allen Poe’s (2014 [1843]) *Diddling Considered as One of the Exact Sciences*.

they see no alternative method to maintain their livelihood.

In the latter case, it is not really relevant whether one is conscious of the conditioning or whether they relish the gamesmanship. The significance rather is that they do not have any way of controlling or changing those structural conditions and so are forced to adopt the behavior. Compounding this problem further is the fact that business, not industry, is exclusively concerned with cold calculations of profit and loss. Balance sheet numbers and their movements as opposed to people become the preeminent concern. Private investment in this context then is not about production but about risk and reward. This is precisely why, in times when the community most desperately needs employment and living wages, business retracts its operations — there is simply no reward in this scenario only a sure loss.

Now, in any corporate culture that practices and venerates private risk, and like the conclusion of the use of the *law as instrument view* in its weak form, there will be a higher probability that the entire endeavor will transform into something of a sport, a game or a hustle. Crucially, the players not only equate business with games, but many also project this view on other businessmen whether they actually truly believe and follow the creed or not. It is principally under these structural conditions and with this habit of thought that transaction fraud can proliferate. The explanation lies not so much with the love of money but in its pursuit.⁸⁵ The victor, besides monetary reward, has gained two other rather important markers: “besting” the competitor and gaining status. Of course there is nothing surprising about these spoils as it is the

⁸⁵Given the fact that many businessmen view business as a game, it should not be surprising to find that the chemical dopamine has been found to be associated with the “anticipation” of reward and not the actual reward itself (Knutson, 2001). Stated similarly, once reward contingencies are learned, it is the pursuit that brings the exhilaration and enjoyment.

common result of competitive games.

When and if troubled minds appear, they can be put to ease knowing, faulty or otherwise, that the competitive player is also likely to take the same measures. Who gets hurt, largely the consumer, is mostly of little relevance to the player as they have been not only removed from contact within the production system but they have also been removed from the players' board. To many risk-seekers, speculators and fraudsters, the consumers are simply seen as spectators or bystanders of the sport. Yet for the risky game to even proceed it is necessary that there be private rewards. Without these it is improbable any would continue to play. And this is the point of private land, private resources and private financial assets including private control, via private banks, over state I.O.U.s. Although it is likely true that business is worse for wear when "enterprise becomes the bubble on a whirlpool of speculation" (Keynes, 1964 [1936], p.159), it is also likely true that institutionalized private risk and reward in the form of the business enterprise and its profit motive is itself the engine whipping up those whirlpools. The greater the separation and distance between executives/managers and laborers/consumers, the greater possibility one will find an elevation of private risk and control inside the business' operations and the greater is the possibility of transaction fraud. The latter is endemic to secular-legal market societies on the grounds that the physical act, as well as the conceptualization of private risk and reward, becomes widely reproduced and reinforced through the business enterprise. Transaction fraud is, in part, then a function of the level of veneration of private risk and reward.

The development of private risk and reward societies were not the result of some

natural process. Rather they were created and are controlled, some to a lesser extent than others. The history of price control, as documented above is evident of this fact. An increase in the level of private risk however will broadly be a function of weak community control, proactive use of the *law as instrument view* in its weak form and to the extent of the *degrees of separation*.⁸⁶ These three factors represent the structural background shaping behavior and they fundamentally increase conflicting objectives, increase relational distance and increase speculative temperaments. Where the secondary effect of this movement often leads to both the creation and validation of large wage differentials that operate as an amplifying mechanism upon the original three structural factors. The above mentioned salient features in respect to *market economies and transaction fraud* — (1) fully integrated markets, (2) the loss of community control over production and thus an increase in individual risk, (3) rules as preeminent symbols of authority and (4) distended human relations — might now be more clearly understood for it is these features that set and conditioned the ground for the emergence of the business enterprise as a vehicle to elevate one's rank through price control and monetary reward. The corollary, and given the business enterprises' seven additional features, was a growth in the behavior of deception.

Summary

Due to the continual productive changes in organization in the late Middle Ages and into the modern era, several *degrees of separation* emerged. The first transformation began with the increase of individual private-legal farming (and sheep rearing) for

⁸⁶To recall, the *law as instrument view* in its weak form has three unique properties: imprintability, special knowledge and an appeal to natural rights, particularly ownership.

sale sometime around the fifteenth century. The second transformation occurred with the extension and institutionalization of centralized work around the late eighteenth century. The third development occurred around the turn of the twentieth century when absentee ownership proliferated. In all three degrees, each retained the three properties mentioned earlier: conflicting claims, increased individual or minority legal control and opposing habits. Legal minority control in each case was acquired over land, labor and financial assets. Throughout this centuries long evolution, the general aim of the Medieval era, status, persisted although the general means in which to achieve it did not. Competitive economy, with the aid of quasi-deliberate secular law, eventually established itself as the legitimate means to attain status over and above competitive force. Because the process involves the pursuit of minority legal control and profit under competitive conditions, business operations, in the main, face pressure to eliminate their competitors through consolidation, price wars or legal machinations.

This pressure, along with the search for status, has given rise to the large business enterprise that now extends its reach around the world and uses legal courts that are independent of the domestic nation of which they are domiciled.⁸⁷ Increasing profit is accommodated, apart from acquiring new markets and consolidation, through the expansion of credit-money and technology. Where once the process of provisioning was collective and relatively stable for individuals and minority groups, it is now private and risky. Where once elevation of rank was attained through physical violence, it is

⁸⁷These courts are known as the Dispute Settlement Body and are operated by the World Trade Organization.

now attained by accumulating legal documents, i.e., state I.O.U.s. Where once the institution of the papal Church (along with the monarchy) and its narrative produced ruling habits of brute force, deference, piety, collectivism, devotion, fear, superstition and idol worship, now the institution of the business enterprise (along with the state) and its narrative, *laissez-faire*, produces ruling habits of cunning, deference, materialism, individualism, economic fear and pecuniary worship. The extent to which top executives within the business enterprise adhere and operate the institution according to the *laissez-faire* narrative, in particular the individualist credo, and to the extent to which top executives seek-status, will determine, in part, the extent to which the enterprise will devolve into something of a casino.

This tendency is ever present given the structural conditions — legal minority control over productive resources, minority power and information inside the corporation — of market societies but it is not inevitable nor must it necessarily be expressed in absolute terms alone. There are, as it is, corporations run by more scrupulous individuals. What is of substance to the notion of gamesmanship in the corporate setting and under competitive conditions however is that its practice promotes speculation, manipulation, cold calculation and invidiousness. Attitudes that align with the three features found in the *degrees of separation* but also with Wolfe and Hermanson's (2004) findings regarding the traits of corporate fraudsters: that they occupy positions of power and information, that they are crafty, that they are egotistic, that they are manipulative, that they are liars and that they are calm under pressure. What animates these human expressions is the competitive condition but what make them possible are the structural and organizational conditions of the business institution.

A second factor for a theory of transaction fraud might now be put forth, the first being the use and belief in the *law as instrument* view. For transaction fraud to be endemic requires, in part, the practice and veneration of gamesmanship as in the tendency to seek private risk and reward via economic competition and view business as a game rather than a method of material provisioning. This implies that transaction fraud is largely a social rather than an individual (bad apple) problem because the behavior is largely determined by the structural conditions of buying and selling and the exercise of legal individual or minority control via the institutions of the business enterprise and the secular legal system. Nevertheless identifying these as a partial cause in the behavior of transaction fraud does not explain exactly how the individual's thought and action becomes attuned to speculative and deceitful temperaments inside the enterprise. For this requires an understanding of cognitive and evolutionary psychology. Moreover, it is also self-evident that individuals in authoritative business positions do not behave in an identical fashion, some are more honest than others under the twin pressures of cost reduction and profit motive, nor do executives and managers have the same risk profile. Such psychological factors then will require attention in any theory of fraud and it will be the topic of concern in the following chapter.

CHAPTER 5

DECEPTION FROM A BEHAVIORAL AND THEORETICAL POINT OF VIEW

The Search for a New Order and the Birth of Psychology

After the centuries long crisis of jurisdictional governance in the West culminated with absolute monarchy in the sixteenth and seventeenth centuries, it was left in something of a quandary largely because the major theoretical current of the Middle Ages in theory and practice, the *law as justice view* (community rule), had been superseded by the minority view. The quandary not only reinvigorated old questions of governance – questions that began with the Investiture Controversy – but would eventually spark new questions of human, as opposed to divine, social order. This problem was further complicated by the Protestant Reformation and by the advances in science, both of which disturbed the narrative of the papal Church and its institutions. The eventual resolution, as previously mentioned, was found in the natural rights doctrine.

To briefly restate, the dispute revolved around who, pope or council, was sovereign. Appeals to the Roman law concept of corporate rule were routinely made from both sides. The dispute was, above all else, a type of legal dispute, namely that of legal Positive law. Throughout and in the background lay unquestioned Divine and Nat-

ural law, the latter bending to the former. Sometime around the sixteenth century, the discourse began to change and a new relationship between Divine law, Natural law and Positive law emerged. Although not yet entirely divorced from Divine law, Natural law gradually grew in stature as jurists began to use it more systematically as seen in many of the works by Jean Bodin (1530 – 1596), Edward Coke (1552 – 1634) and Richard Hooker (1554 – 1600).¹ Likewise, reason or rationality, as it was associated with Natural law, also gained value as an authoritative appeal. Although the definition of reason or rationality sometimes differed, its most common understanding at the time was syllogistic reasoning. This was a type of deductive logic that had been transmitted to the scholastics through the works of the ancient Greek philosophers, particularly Aristotle.²

The unique conditions of the period — wars of religion, scientific revolution and changing economic relations — largely contributed to this shift in appeals. In respect to the latter, regions with weak control saw an increase in small land holders, private property grew and commerce and its calculation increased. Together, these movements propelled a material and physical conception of the world. After a century of religious wars, toleration was an option worth considering for many anti-monarchialists. If society was to proceed with openly competitive religious doctrines, of which many principles were at odds, the question of governance would require

¹Among others also appealing to Natural law were King James I (1566 – 1625) and his attorney general Francis Bacon (1561 – 1626), Hugo Grotius (1583 – 1645) and Matthew Hale (1609 – 1676), see Berman (2006).

²The Greek philosopher's ability to build logical principles was likely a product of their tendency to examine the nature of an object rather than its attributes, to categorize those objects and to do this analysis in isolation of other objects or events. Of course, this is only one way to think about reason, see Nisbett (2003), especially chapter one.

new rules and principles that appealed to something other than a favored religious deity and absolute corporate rule. Furthermore, it would need to be in congruence with either Aristotelian logic (Cartesian epistemology) or the emerging empirical-probabilistic view of knowledge.³

The requirement of scientific congruence appears to be the case even for those who advocated on behalf of the monarchy such as Thomas Hobbes (1588 – 1679), Francis Bacon, Robert Filmer (c. 1588 – 1653), Rene Descartes (1596 – 1650) and Jeremy Bentham (1748 – 1832), as they often appealed to ordered nature, to mechanical laws of motion and/or to state of nature arguments, arguments that were, in substance, deductive exercises intended to express an ordered world. Throughout this era and with these new appeals, God and Divine law rescinded further into the background. This did not yet however entail an absence of God, only that he had been re-imagined as an engineer (Becker, 2003 [1932]). Such an understanding of God and nature was captured in the then growing concept of Deism, a position that acknowledges God but was skeptical of religious dogma and religious miracles. In the place of the latter, Deists advocated a belief in God-ordained reason.⁴ The scientific work of Robert Boyle and Isaac Newton, among others, of the seventeenth century contributed to this development.⁵ As a result of these shifting appeals, there occurred

³The new empirical-probabilistic view of knowledge became a central theme and method for many seventeenth and eighteenth century philosophers such as John Locke (1632 – 1704), Samuel von Pufendorf (1632 – 1694), David Hume (1711 – 1776), Adam Smith (1723 – 1790) and in the U.S., Thomas Jefferson (1743 – 1826) , James Madison (1751 – 1836) and Benjamin Franklin (1706 – 1790).

⁴Deism grew out of England around the mid-seventeenth century and its ideas can be found in the works of John Toland (1702 [1696]), Matthew Tindal (1778 [1730]), Peter Annet (1744) and Conyers Middleton (1749), among others. The movement's most popular advocate however was likely the Frenchman Francois-Marie Arouet (Voltaire) (1712 [1763]).

⁵Westfall (1973) and Force and Popkin (1990).

two noteworthy developments. First, whereas most theologians and canonists from c.1100 – c.1600 bent reason and Natural law to Divine law, a process that placed all authority and direction in the figurative hands of the omnipotent deity, early modern scholars reinterpreted reason and Natural law, including natural systems and natural rights, as largely independent of the deity. The implication of this new interpretation was that Natural law and reason no longer had to be squared with divine will.⁶

A second development was the struggle to create a universal theory of human behavior and social order. This was a necessary counterpart to the overall project because if God engineered humans and the natural world and subsequently left them to their own devices, the derivation of social order would require the discovery of those engineered laws of nature. The most commonly employed unit of analysis for this undertaking was a context and content-free individual, better known today as methodological individualism. And the most commonly employed method, especially in the eighteenth and early nineteenth century, was the calculating rational actor developed in the form of probabilistic mathematical treatments (Daston, 1988). Many of these early probability theorists did not assume that individuals necessarily came into the world as calculating machines but nevertheless upheld this form of reasoning as a norm and thus advocated for its application among the general populous. When this rationalist individualistic program failed as an application for moral and legal judgments, some sought a macro level unit of analysis and found it in society. But, and importantly, the individualistic vision remained because society was

⁶The field of physiology, under the direction of Johannes Muller (1838 [1833]), was among the first scientific programs making attempts to understand individual thought and action independent of God.

generally interpreted as nothing more than the aggregation of individuals (Bentham, 1907 [1789]).⁷ The individualistic perspective also incorporated other concepts like self-interest, subjectivity, legal rights, utilitarianism and social contract. Eventually these ideas congealed into something of a doctrine and are now referred to as Classical liberalism.

This metaphysical and epistemological shift regarding human behavior was likely the product of several factors but the advances in the natural sciences and practical engineering might have had the most profound effect. With the increased use, refinement and innovation of practical machines such as mills (water and wind), cranes, pulleys, pumps and the like in the late Middle Ages and early modern era, also came the development of mechanical figurines for popular entertainment. These automata along with the machines and clocks provided philosophers and scientists with a new way to conceptualize and model humans (Schultz and Schultz, 2008[2004]). The most common model of the time equated behavior with the mechanisms of machines and was largely reductionist and deterministic. Significantly, there was little attempt to understand the mind and its *relation and function* to the ecological and social environments. Or to put it another way, very few philosophers had a biological (evolutionary) and social understanding of the mind. Thomas Hobbes (1949 [1642]) suggested that individuals were like “mushrooms” born independently of the social

⁷Bentham (1907 [1789]) framed the argument as: “The interest of the community is one of the most general expressions that can occur in the phraseology of morals: no wonder that the meaning of it is often lost. When it has a meaning, it is this. The community is a *fictitious* body, composed of the individual persons who are considered as constituting as it were its members. The interest of the community then is, what is it? — the *sum* of the interests of the several members who compose it” (p.3, emphasis added). A partial explanation for this interpretation may lie in the probabilists shift from “measure of expectation” to “the study of distributions” (Daston, 1988, p.108).

environment while John Locke (1825 [1690]) argued that individuals were born as a blank slate. Later, James Mill (1878 [1829]) combined the blank slate concept with the machine analogy perhaps more directly than others when he argued that the mind operated in the same mechanical way as a clock. The benefit of reducing behavior and the mind to simplistic operations is that it can be characterized as ordered, regular and governed by laws (Natural or mechanical).

Despite the fact that early modern scholars interpreted and applied Natural law and reason in distinct ways from their predecessors — theologians, canonists and scholastics — it might perhaps be suggested that one critical continuity remained between such a diverse group and over such an expanse of time. That continuity is a tendency to elevate human reason and rationality. Or, in another way of saying, reason and logic became a prominent value-claim in the West. When secular scholars overtook the charge of creating theories of social order from religious ones, they drew heavily on the centuries long project of Natural law and reason (rationality).⁸ Thus, the original theologian project was, as a matter of course, supplanted by the growing strength of Natural law and reason and supported by the advancements in the natural sciences. Throughout, the degree to which these two were exalted grew.

Yet this epistemological view was challenged in the nineteenth century with the growing interest in the unconscious (Fechner 1966 [1860]; Hartman 1884), the publication of Darwin's (1909 [1859]) *On the Origin of the Species* and as physicians

⁸John Locke (1825 [1690]), a guiding figure to both English and American scholars described reason as the most clear and certain of human faculties and “therefore, nothing that is contrary to, and inconsistent with, the clear and self-evident dictates of reason, has a right to be urged or assented to, as a matter of faith, wherein reason hath nothing to do” (p.531). The Deist, John Toland (1702 [1696]), similarly remarked that “Reason is the only Foundation of all Certitude” (p.6).

began to see the mentally ill not as possessed by the devil or as simply irrational but suffering from somatic and/or psychic disease. In the place of rationality, new ideas regarding human behavior were advanced, such as the role of emotion, unconscious conflicts, instincts, purposive action, habit-behavior, apperception (emergence) and the significance of dreams. As these ideas and theories collectively grew, they simultaneously diminished, to a degree, the centuries long, God-ordained, Natural law project of social order and along with it the perception that humans are always and everywhere rational individualistic actors. Yet over a century later, there is still no consensus regarding human behavioral theory. One explanation might be found in the fact that Natural law and reason had a head-start of a minimum of three centuries giving it authoritative clout and making other theoretical developments compete with it. Another explanation might be because the reasonable and rational actor model often appeals to one's vanity and thus amplifies its use. Still another explanation might be that psychology has simply lacked the adequate tools to peer into the mind and discover its functions. And still another explanation might be that a social order that is determined by Natural laws and reason is presumed unchangeable and thus bolsters the status quo. Finally, another explanation might be that reducing behavior to calculations makes mathematical models more manageable.

Whatever the reason for the failure over the past century, there has nevertheless been an advancement in the tools available for its study. Because of this, it is possible that cognitive scientists may finally, in the decades to come, reach some kind of consensus. This does not imply however that contemporary models of the mind are necessarily new but that scientists will have the tools to measure them, bringing

a greater weight of evidence upon the model.⁹ In fact, several of the behavioral theories advanced today as well as in the immediate past directly borrow and build upon ones created either in the beginning of the modern era or the first half of the twentieth century. In an attempt to develop a *behavioral* theory of deception, it will be necessary to review these competing psychological theories. As will be shown, the rationalist individualistic project remained a force throughout the preceding century in the discipline of psychology as well as economics and has become so prevalent as to pervade the thoughts and actions of the general public. Since the 1970s however a gradual shift towards a “situated” mind has begun. In what follows will be a brief review of some of these psychological schools of thought and their relation to the behavior of deception.

Psychological Behavioral Theories and Their Explanations of Deceit

Over the past century, the discipline of psychology has not failed to produce a variety of theories of human behavior. For the present purpose, it will only be necessary to document the better received among them. In the process, three crucial questions regarding the features of the mind will be sought: (1) what is its most predominant attribute, (2) what is its primary function and (3) what is its relation, if any, to the environment. How each behavioral theory answers these questions will aid in determining whether or not it has an active or passive view of the mind and in so doing also determine whether or not the theory takes an evolutionary or situated approach to behavior. Complicating this however is the fact that there are different

⁹A process, it might be suggested, that can result in a more refined and accurate picture of human behavior.

ways to think about active or passive minds. For instance, the mind might be thought of as passive in a receiving state but active in an internal processing one, as in making sense of information once received. Or it might be passive in the former and the latter but active in a functional way when fulfilling certain internal biological goals or ends. Or more stringently, the mind might be thought of as passive in receiving, passive in processing or mediation and passive in function, as the blank slate model postulates. Lastly, it might be thought of as passive or active as an interface between it and the environment where a passive interface is unidirectional and an active interface is bi-directional.

Notably, this last conception will be especially important throughout the following review for two reasons. First, if one begins from the premise of an active interface (bi-directional), the other two conceptions are extemporaneously accounted for because implicit in this view is an evolutionary understanding of human thought and action. From such a perspective, neither biological ends (survival) nor the ability of processing or mediation can be assumed away because the species must be able to respond effectively to its environment. The mind therefore is active as an interface, it is active functionally and it is active in mediation. Second, this conception speaks directly to the idea of the mind operating with and upon the world or speaks to the idea that it operates in isolation of it. Put more simply, it either speaks to a theory of goal-oriented control or to a deterministic theory of behavior. And, as will be shown, effective and sustained behavioral change is only possible in the former theory apart from pure randomness.

5.1 Inner Biological Conflicts as Behavioral Determinants: The Psychoanalytical Approach

Sigmund Freud is perhaps still one of the most widely known figures in psychology broadly and in psychoanalysis specifically, despite the fact that several of his theories have been discredited by the scientific community and/or have been extensively modified. Nevertheless some of his theories are still widely used in psychology such as his theory of defense mechanisms, which include the ideas of repression, displacement, denial, identification and projection. Other concepts such as his concept of the unconscious and his emphasis on passion and emotion also continue to have broad appeal in the West. Moreover, Freud's competitive drive theory helped break the stranglehold that the rationalist and individualistic program had over the preceding centuries.

Freud's view of human nature was quite pessimistic. As a result, his original hypothesis regarding the formation of personality was that it formed through on-going competitive biological drives (instincts) either of a sexual or aggressive nature. These drives were considered to be the fundamental cause of much behavior and they were further associated with a person's psychic energy or what Freud called the libido. Neurosis or other similar behavioral abnormalities then were largely attributed to these sexual or aggressive drives. To illustrate where and how these conflicting drives arose Freud (1962 [1923], 1990 [1933]) devised a categorical model of the mind in the form of the id, ego and superego. The id was presumed to house the drives while the ego and the superego mediated and discharged them respectively.

The id was Freud's central analytical feature because he believed it housed the driving forces of behavior. The id was also presumed to be entirely submerged in the unconscious. The goal of the psychoanalyst was to bring these unconscious desires to the level of consciousness where it could thereupon be resolved inwardly. Of the several significant concepts Freud developed, his emphasis and use of the unconscious was perhaps the most important. It represented a simple storehouse for the sexual and aggressive instincts that were not generally accessible to conscious thought and action. In other words, the unconscious consisted merely of drives with no cognitive processes or any form of habitual behavior. Moreover, because the unconscious was presumed to completely rule behavior, Freud did not view consciousness and free will as a possibility. Instead he had a largely passive view of the mind. It was passive in the sense that unconscious instincts ruled behavior without any conscious mediation and it was passive in the sense that, as an interface between it and the environment, it operated in only one direction from the mind to the environment and not back again. In yet another sense however, Freud's view of the mind was active because the drives or instincts served an internal and functional purpose — to fulfill certain ends like reproduction and survival. Or to put it another way, the mind was presumed to have inherent biological active features that allowed an individual to act in the world but did not allow the world to act upon it. Applying Freud's psychoanalytic approach to understand the behavior of deception, unfulfilled or unmediated sexual or aggressive unconscious impulses would be identified as the culprit. Other factors, like conscious thought and action, learning theory and environmental factors (ecology and society) were largely excluded.

Freud's pessimistic view of human behavior did not resonate with many of his students and it did not take long for fissures to develop within his program. Carl Jung, one of Freud's students, was among the first to break with Freud's general theory. Jung viewed human behavior in more complex terms. Humans, according to Jung, have many instincts besides the sexual and aggressive ones. Among some of the instincts that Jung (1962 [1923]) identified were creativity, hunger, activity, power and individuation (self-actualization). Like Freud however, he contributed a lot of behavior to the unconscious, which he segmented into the personal and collective (Jung, 1972 [1917]). The latter represented potentialities of behavior while the former manifested those potentialities in the individual. According to Jung, people have either one of two innate unconscious dominant attitudes: extroversion or introversion. They also have an innate unconscious tendency to perceive events in one of four ways: sensation, thinking, feeling and intuition. Which ever is dominantly expressed will become conscious while the others will be repressed and remain in the unconscious.

If the individual's innate predisposition is modified by the environment in some way, such as when an introvert is made to become an extravert, that person will likely develop a form of neurosis in later years. This is also believed to be true when an inferior perception or attitude is repressed too strongly. The result in both cases is internal maladjustment where regression to the unconscious (a creative kind) is the usual course of remedy. Jung's understanding of the unconscious was more complex and nuanced than that of Freud's but shared two similarities, a passive mind in terms of interface and little regard for the concept of habit. But it was his understanding of human nature as both degenerate and enlightening where Jung more broadly departed

from Freud. He believed that the ultimate objective for an individual is to achieve full individuation, that is, the realization of one's innate personality. It is important to stress that Jung did not view a person's dominant attitude and perception as absolute, but existed on a continuum. Deceptive behavior from a Jungian perspective would likely be attributed to deficient or maladjusted individuation.

Jung's theories, similarly to Freud, have since come under critique. Perhaps the most damaging are his libido theory, his idea that the psyche was autonomous and his emphasis on religious experience.¹⁰ Nevertheless, he did move the field of personality development in new directions. First he argued that behavior is goal oriented and not simply a product of childhood experience. Second, he emphasized the importance of identity by elevating individuation as the ultimate goal. Third, he identified specific attitudes and perceptions, like extraversion and introversion, that acted as determinants of behavior. And fourth, he included social interaction, even if limited, as a factor in the development of behavioral characteristics.

Other psychoanalysts that did not entirely dispense with the basic premises of Freudian theory (neo-Freudians and object-relation theorists) either expanded his theories by placing more emphasis on the role of the ego or by emphasizing the relations between the individual and the object over the sexual and aggressive drives that propelled one towards those objects. Both camps more readily adopted the idea that social factors and in particular the relationship between child and parent played a larger role in the development of personality. Giving credence to outside influences

¹⁰Jung's libido theory followed Freud in the sense that mental activity was believed to be actuated by psychic energy. He differed with Freud in defining libido in much broader terms to include anything of instinctual worth or value and not simply instinctual sexual impulses.

also leant itself to the idea that behavior is, at least in part, learned. Nevertheless Freud's view of the mind as a one directional interface and his emphasis on neurotic inner conflicts remained a primary determinant of behavior for psychoanalysts. It is also significant to point out that in the case of deception, location of blame would be primarily placed upon the individual and not her circumstance as it was in the Medieval era.

5.2 Stimuli as Behavioral Determinants: Structuralism and Behaviorist Approaches

Similar views of a passive mind as interface, albeit under very different theoretical constructions, later appeared in the first quarter of the twentieth century when Edward Titchener, a student of Wilhelm Wundt, transplanted Wundt's psychological approach and experimental introspective methods to the United States. Although Wundt, a German physiologist, physician, and founding figure, had an approach that contrasted sharply with the psychoanalytic school — his subject matter was squarely about consciousness and not unconscious instincts — his partial essentialist interpretation of the mind led him to a passive understanding of it, at least in respect to how the mind interacted with the environment. Wundt (1897) had what appeared to be both a reductionist and dynamic model of the mind. Applying Gustav Theodor Fechner's (1966 [1860]) psychophysical methods, he argued it was impossible to test mental processes greater than basic elements of perception like color, brightness or shape. Consequently, his introspective experiments sought to capture only these and nothing more.

However, once these elements were received in the mind, Wundt proposed that they were reorganized into higher-orders and that upon completion have entirely new properties. He called this process of constructing wholes from parts apperception, a process it might be suggested that closely mirrors the current scientific understanding of emergence.¹¹ Titchener followed Wundt in that consciousness and its elements remained the subject matter but rejected his concept of apperception. Titchener's objective, through introspective methods, was to discover the fundamental particles of the mind and thus reveal its internal structure. His general approach, like many other social scientists before and after him, was influenced by the theories and accomplishments that were occurring in the natural sciences.¹²

Titchener's experimental and natural science approach was taken to its logical extension when a new movement, behaviorism, began to emerge *circa* 1925. This peculiarly American movement was inspired and initiated by John B. Watson (1914, 1924) but found its roots in Wundt's experimental psychology, Titchener's structuralism as well as the animal studies done in the early twentieth century including Ivan Pavlov's work with dogs. Watson, like Titchener, sought to attain scientific objectivity. To accomplish this, he rejected the study of consciousness and the introspective method. In its place he adopted an experimental technique of stimulus and response

¹¹While Wundt, his students and the laboratory contributed to the establishment of a scientific psychology, his views were contested almost from the start by Hermann Ebbinghaus who, directly refuting Wundt's claim, began conducting experiments on learning and memory (higher mental processes) in the 1870s and by Franz Brentano who sought to change the subject matter from mental content or elements to mental acts or actions. These two, along with other psychologists such as Carl Stumpf and Oswald Kulpe, became precursors to the Gestalt and humanistic movements in psychology, movements that, in general, placed greater emphasis on the whole rather than the parts as well as the process over the elements.

¹²Titchener largely adopted the logical-deductive method of natural scientists as well as their epistemic-claims. Humans were likened to machines and behavior was reduced to mechanism.

that reduced thought and action to implicit motor behavior.¹³

He did not however completely dispense with the concept of the unconscious. To bring this idea into alignment with his reductionist view of the mind, he rejected the notion of instincts and reclassified the unconscious as habitual behavior whereupon he redefined the term habit as basic physiological elements (Camie, 1986, p.1068).¹⁴ His redefinition of habit effectively eliminated purposive action whether of an unconscious or conscious type. All behavior according to Watson, including the process of reflective thinking, was a product of physiological processes that operate mechanically and respond to stimuli. Watson (1919) even defined thinking as an operation of the “tongue, throat, and laryngeal muscles...moving in habitual trains” (p.11).

Burrhus F. Skinner (1938, 1953, 1976) refined and carried Watson’s program into the 1970s. Skinner’s brand of behaviorism, operant conditioning, posited that much of behavior is a product of specific consequences and reinforcers leaving the individual bereft of goal-oriented (future) action. He also rejected any non-observable concept as a cause of behavior. This view of the mind, similar to the psychoanalytical school, is passive but it appears to be so to even a greater degree. Like Freud’s vision, it is passive as an interface because it is unidirectional and it is passive in that there is no conscious mediation but it is also passive in that the internal mechanisms of the mind serve no functional purpose other than to respond to stimuli.

To a great degree, the behaviorist perspective of human thought and action was mechanical, simplistic and has reached a dead end. It makes little if any assumptions

¹³Watson’s behaviorism followed John Locke and James Mill by arguing that humans come into the world with a blank slate (*tabula rasa*) and is thus subjected to cultural determinism.

¹⁴It should be noted that Watson initially incorporated the idea of instincts but later rejected them.

or inquires into the functions of the mind or to its *relationship* to the environment. Although, in respect to the behavior of deception, cause is located in the environment and not the individual, it cannot explain, especially those activities associated with human direction, where, why and how those activities arose, persist or change. Because of the mind's presumed passive state, behavior, including the behavior of deception, is always and everywhere a product of improper training or learning procedure and therefore is resolved by re-training with the correct procedures. This however presents a paradox. Given the assumption that individuals lack consciousness and control, there can be no capacity for change and if there is no capacity for change, one cannot change the reinforcers. Someone after all has to decide what reinforcers to use and what reinforcers to change.

Scholars have not failed to recognize this contradiction nor have they failed to recognize some of the other problems with the behaviorist approach such as the problem of behavioral persistence (Gagnon and Davidson, 1976), the problem of conscious choice and the problem of excessive generalization from nonhuman to human. Noam Chomsky's (1959) critique of behaviorism, "A Review of B. F. Skinner's Verbal Behavior", is often cited as among the first to reorient psychology away from this essentialist view of the mind and towards a more dynamic and active one.¹⁵ Yet John Dewey (1896, 1922) had persuasively critiqued the stimulus-response school some sixty years earlier as well as proposed an entirely different framework in which to understand behavior. Before a review is given about Dewey's (and others) functionalist approach

¹⁵Chomsky's argument pivoted around the idea that the pure stimulus-response approach could not account for language acquisition. Instead of the *tabula rasa* model, he proposed that the mind had intrinsic mechanisms facilitating the learning process of language.

to psychology and to the then prominent functionalist school of thought, it is prudent to include another reductionist view of the mind — the “rational” actor — that arose from an entirely different discipline, economics, but at roughly the same time. Including this approach here is prudent in more ways than one. It is prudent because, one, the rational actor model became the conventional wisdom as an explanation for behavior of all kinds and two, it entered into both the legal and political domains as an explanation and resolution for transgressive behavior.

5.3 Satiation and Calculation as Behavioral Determinants: The Standard

Economic Approach

The standard economic or orthodox approach towards behavior is to assume one superior motive — the motive to satiate consumption desires via the purchase of goods.¹⁶ But mere satiation is not enough. Instead individuals are presumed to seek the maximum amount of satiation possible. In economic terms this process is known as utility maximization where Jeremy Bentham’s (1907 [1789]) nineteenth century notion of utility as prioritizing pleasure above pain (the hedonistic principle) is generally thought of as the precursor to the modern reincarnation.¹⁷ Utility maximization re-

¹⁶This motive of however fails to consider the producer-side the economy. From the standard approach, the single motive for production is to maximize profit. But this begs the question, what is the purpose of accruing money if it does not directly serve a human function? William Stanley Jevons (1871) perhaps put it most succinctly, “[w]e labour to produce with the sole object of consuming” (p.47). Money, therefore, provides the means to consume and hence, the desire to consume remains the superior motive.

¹⁷In their effort to purge all things psychological, standard economists have made repeated efforts to dispense with the hedonistic principle. Lionel Robbins (1984 [1932]) proposed that neoclassical (orthodox) economic theory “is capable of being set out and defended in absolutely nonhedonistic terms...all that is assumed...is that different goods have different uses and that these different uses have different significances for action such that in a given situation one use will be preferred before

quires two *a priori* behavioral assumptions, (1) self-interest and (2) rationality, as well as a constraint (the consumer's budget). Given these, it is further presumed that consumer choices are stable and consistent. All other behavioral and psychological tendencies are ignored or deemed irrelevant.¹⁸ While many standard economists do not deny that humans have other behavioral attributes, they nevertheless assume them to be the province of other social sciences. A point that many have found imperative to make:

Economy investigates the relations of ordinary pleasures and pains thus arising, and it has a wide enough field of inquiry. But economy does not treat of all human motives. There are motives nearly always present with us, arising from conscience, compassion, or from some moral or religious source, which economy cannot and does not pretend to treat. These will remain to us as outstanding and disturbing forces; they must be treated, if at all, by other appropriate branches of knowledge (Jevons, 1866, p.288).

"The exact theory of political economy" is...a theory which teaches us to follow and understand in an exact way the manifestations of human self-interest in the efforts of economic humans aimed at the provision of their

another and one good before another" (pp.85-86). Later Paul Samuelson (1938, 1948) developed the concept of revealed preferences. Its purpose was to demonstrate that a theory of consumer demand "can be based solely on consistent behaviour" and as a consequence "it must be possible to explain that behaviour without reference to anything other than behaviour" (Little, 1949, p.90 and p.97). But explaining behavior without reference to anything else except that particular behavior is circular reasoning and thus illogical. This was pointed out decades ago by Amartya Sen (1973) who concluded, "the whole framework of revealed preference analysis of behaviour is steeped with implicit ideas about preference and psychology. I would, therefore, argue that the claim of explaining 'behaviour without reference to anything other than behaviour' is pure rhetoric" (p.243). Even earlier Dennis H. Robertson (1952, 1954) argued that it is inaccurate to collapse all welfare measurements to ordinal rankings as it excludes interpersonal comparisons. Much of the literature on utility theory has centered on whether or not "utils" are actually measurable. Standard economists, concluding that they are not, dispensed with psychology and assumed that prices provided the necessary information needed to analyze an array of utility outcomes. But this further assumes individual, i.e., isolated, rational and solely self-interested behavior (discussed below). On the expungement of psychology from the economics discipline see Luigino Bruni and Robert Sugden (2007).

¹⁸By excluding other psychological as well as sociological factors, this approach may appear ostensibly to some as unreasonable given the complexity of human behavior but it nevertheless serves a purpose and has a singular advantage. That purpose and advantage has been to simplify the material and make it more conformable to quantitative modeling. This explanation is broadly accepted amongst standard economists as Becker and Murphy (2000) readily acknowledge: "anthropologists and sociologists have repeatedly told economists about the importance of culture, norms and social structure. Economists have not listened, however, mainly because these other fields have not developed powerful techniques [maximizing models] for analyzing social influence on behavior" (p.3).

material needs. It is thus a theory which does not have the task of teaching us to understand generally and in their totality social phenomena or even human phenomena...It has only the task of affording us *the understanding of a special side of human life, to be sure, the most important, the economic* (Menger, 1985 [1883], p.87, emphasis in original).

This foisting of Psychology on Economics seems to me *inappropriate* and vicious...[t]o fix the idea of utility the economist should go no further than is serviceable in explaining *economic* facts. It is not his province to build a theory of psychology...[Subsequently the primary principle regarding the individual should be] a simple psycho-economic postulate: *Each individual acts as he desires* (Fisher, 1925 [1892], p.7 and p.11, emphasis in original).

Why the human animal attaches particular values in this sense to particular things, is a question which we do not discuss. That is quite properly a question for psychologists or perhaps even physiologists (Robbins, 1984 [1932], p.86).

If conscious action can be ‘explained,’ this is a task for psychology but not for economics (Hayek, 1948, p.67).

The economist has little to say about the formation of wants [preferences/taste]; this is the province of the psychologist. The economist’s task is to trace the consequences of any given set of wants (Friedman, 1962, p.13).

On the traditional view, an explanation of economic phenomena that reaches a difference in tastes between people or times is the terminus of the argument: the problem is abandoned at this point to whoever studies and explains tastes (psychologists? anthropologists? phrenologists? sociobiologists?). On our preferred interpretation, one never reaches this impasse: the economist continues to search for differences in prices or incomes to explain any differences or changes in behavior (Stigler and Becker, 1977, p.76).

In fact, many economists, well within the academic fold, would separate economics from sociology upon the basis of rational or irrational behavior, where these terms are defined in the penumbra of utility theory (Samuelson, 1983, p.90).

Despite standard economists efforts to purge psychology from the discipline, self-interest and rationality are nonetheless “behavioral” assumptions and thus it is important to take a closer look at their intended meaning. These terms are not meant

as generalizations but have specific meanings that facilitate the application of putatively specific desires, namely utility and profit maximization. To be an economically self-interested actor is to make decisions free from all outside influences and with the singular view of maximizing one's subjective preferences. To be an economically rational actor is to make marginal calculations and use all available information efficiently given a budget constraint. The deductive conclusion is that the self-interested rational actor, *homo economicus*, is free from systematic errors and without any economic power, as power would loosen, minimize or abolish the constraint. The significance for stating in more detail what standard economics means by self-interest and rationality is to underscore the fact that these terms are meant to represent a very specific decision-making process. A process that has everywhere and throughout time the same individual outcome: the supposed verification of the accurateness of their choice. Or, to put it simply, individuals know what they want and are not deceived.¹⁹

This model of the mind has not only dominated the discipline but has since been extended into domains beyond the realm of economics. It has crossed so many of these that some have come to see this movement as a form of economic imperialism.²⁰ Perhaps the first in the modern era to extend the rational actor beyond the walls of economics was Gary Becker. He has himself called this a “good description of what [he does]” (1990, p.39). Although Becker applied *homo economicus* to topics like

¹⁹This does not imply that one is free from all errors but that the errors occur infrequently and are corrected quickly. Rational choice theory (RTC) also assumes that the individual has already had sufficient time to learn by trial and error. As a result she knows what the consequences would be if she choose an alternative choice (Plott, 1996; Ken Binmore, 1999).

²⁰See Edward P. Lazear (2000) on economic imperialism. For a review and critique see, Ben Fine (2002).

discrimination, crime, democracy and marriage, for the purposes here, the focus will be on his theory of crime and punishment. At its core is the assumption that criminals of all stripes make decisions rationally in the economic marginal, full information sense. Criminality, including such offenses as fraud, occurs, according to Becker (1968), whenever the monetary value or gain of an illicit act exceeds the monetary value or loss of the punishment. This approach reduces all measurables of action to monetary units and implies that anyone can become a criminal if the gain relative to the loss is high enough. Notably, Becker describes this as a *general* theory of crime and dispenses with what he calls the psychological “ad hoc concepts of differential association, anomie, and the like” (Ibid., p.176).

Becker’s method of choice for the minimization of crime was deterrence. But it was not simply the minimization of actual criminal behavior but the minimization of the *costs* of deterrence (policing and punishment) associated with that behavior. Accordingly, if the cost of policing becomes too great relative to cost of the damages, such crimes would need to go unpunished. It might be suggested that Becker’s theory was not so much a theory explaining criminal behavior as it cannot identify a crime from a non-crime but rather a theory of the decision-making where the spectrum of human behavior has been condensed into running calculations with the sole objective of attaining more money or minimizing money-costs. It is a form of consciousness without any real volition except to increase satiation levels. Whether a salesperson is honest or deceitful is irrelevant from this perspective. What matters is if the monetary value of the deceitful sale exceeds the monetary value of the cost associated with the punishment. Thus, the model is incapable of determining what a crime is.

Nor can it distinguish between severities of crimes. To accomplish such distinctions required outside arbitrators in the form of jurists and legislators. One of the first legal scholars to make this argument and a colleague of Becker's was Richard Posner. Influenced by Ronald Coase's (1960) article on social costs and adopting Becker's rational actor model, Posner helped initiate a new direction in jurisprudence — the law and economics approach.²¹

Posner began his analysis with the same rational presumption, that individuals “exercise reasonable care” and “learn from any unhappy experiences” (1969, p.61). Hence, they know what they want and are not deceived. Applying this behavioral presumption to Coase's theory of negotiations and further claiming that judges are ill-equipped to determine alternative values, he equated justice with efficiency or wealth maximization (Posner, 1998 [1973]). Noteworthy here is that Posner turned the deductive outcome of the rational calculating decision-making process, efficiency, into an explicit normative claim. This was a necessity if he was going to argue from the perspective of a judge, for making value judgments is what a “judge” inherently does.

But just as Becker's theory of crime and punishment failed at explaining what a crime is, Posner's theory of judicial efficiency is likewise compromised. Although critiques appeared at the outset, it might be suggested that there are three fundamental errors in his reasoning.²² First, to make any ethical claim regarding individual

²¹Coase's article, “The Problem of Social Cost”, has been highly influential in legal, political and economic spheres. According to Fred R. Shapiro and Michelle Pearse, it is most cited in the history of law (2012). It has also presumably been misinterpreted, see Coase (1978), Medema (1999, 2011), Medema and Samuels (1997,1998), Klaes (2000) and Robin Hahnel and Kristen A. Sheeran (2009). For the influence that Coase's article had on Posner see Kitch (1983).

²²For additional critiques of the law and economic tradition, see, Arthur Leff (1974), Mark Kelman

behavior, that behavior must affect others in some way. Second, procedural outcomes are not normative by their nature. And third, for judges to rely on an efficiency criteria and to apply it to their real world cases means that efficiency first and foremost must exist in the real world. That is, the model of the rational actor must accurately reflect the terrain. As it turns out, none of these claims hold.

Beginning with the first claim, the rational actor, regardless of any attainment of efficiency or actual choice, is not a normative actor. *Homo economicus* makes her decisions by thinking only of what is in her best interest not what is in the best interest of others. But ethical decisions and actions, as it is, are only ethical with respect to other people. In a human population of one, ethics ceases to exist. Regarding the proposition that rational actors, whether ethical or not, lead to ethical outcomes, is also misguided because efficiency, as an outcome, is not *prima facie* normative. Rather it is the behavior and choices, not the outcome of those choices, that have *inherent* normative claims because it is only at that juncture that the actor has the ability to affect others. An outcome can neither be ethical or unethical by its nature because the outcome is not the act but a result of an act. The outcome “is” what happened, not what might “ought” to happen. And while value-claims are often ascribed to results, making an outcome socially normative requires that the community has, by some means, agreed that the outcome is something worth valuing — a process that is precluded from the rational actor model.

Lastly, to attain economic efficiency means something quite specific, much like the specificity of the economic terms self-interest and rationality. Choices become effi-

(1978), Duncan Kennedy (1981) and Robert C. Ellickson (1989).

cient if and only if the rational actor makes the most cost effective marginal decisions given *putatively* scarce resources such as money, raw materials or labor/machines (capital). Choices must be made independently, rationally (in the marginalist sense), with perfect information and under perfectly competitive conditions. Perfect information includes the idea that the actor knows perfectly the vector of market prices and that these choices are made with perfect self-knowledge, that is, after the choice has been made there are no surprises. Perfect competition includes the idea that there has been an exhaustion of all potential gains from exchange. Or more simply, no individual or firm may possess economic power. It is only when these givens hold that exchange becomes efficient. But because of computational limits and the severity of these assumptions, to say nothing of the essentialist view of the mind, which will be addressed below, the economic notion of efficiency does not actually exist in the real world.

It might also be added that because Posner's judicial efficiency takes the form of contracts measured in monetary units, this strips bare any notion of personal or obligatory relationships between individuals giving further indication that the efficiency criteria is deficient as an ethical standard for judges. Contracts and money, likewise outcomes, are neither ethical nor unethical *prima facie*. Rather they are means to ends implying that a community may choose to value them or not. Yet Posner makes money the preeminent value of which to judge behavior and makes it the end of all action.²³ That is, he reduces relationships to monetary values and makes a means,

²³This gives some explanation to some of his more outlandish extensions of the market, such as a market for babies.

money, an end. In the real world however, the on-going push to monetize everything is constantly running up against the evolutionary necessities of the species, none of which have anything to do with fiat money. In the very long-run the monetizing project *founded upon the idea of scarcity* is dead but in the short, intermediate and potentially long-run it may yet destroy much more life.²⁴

Despite all of these shortcomings, some judges, prosecutors and politicians have adopted the rational actor view and apply it in their assessments of criminal minds. One recently prominent NY state prosecutor, Preet Bharara, described white-collar criminals as “highly skilled at cost-benefit analysis” and “weigh the risk of getting caught against the potential reward, and they decide it’s worth the risk. We’re trying to tilt that equation” (Stewart, 2012). Perhaps a more significant turn is the contribution the rational actor model has made to the establishment and persistence of the Federalist Society (est. 1982), a legal club that has been instrumental in Supreme Court nominees such as Samuel Alito and John Roberts. Originating in the halls of Yale and Chicago law schools, its general purpose was to counter the then prevailing liberal doctrine of big government, regulation and the idea of community rule. It is noteworthy that two of the young law students involved with its establishment, Lee Liberman and David McIntosh, received help and council from Posner, Richard Epstein and Frank Easterbrook as well as Antonin Scalia, all legal professors at Chicago (Avery and McLaughlin, 2013, p.2). While it is beyond the scope of this inquiry to trace the connections between the ideas and theories emanating out of Chicago’s

²⁴The emphasis here is to make explicit that it is not money per se, as already noted, that is problematic. Rather the problem lies in how it is defined, understood and used.

economics department and the ideas and theories emanating out of its law school, there is without a doubt, a strong overlap.²⁵

One conclusion that might be drawn from the law and economics tradition is that the specificity of its behavioral assumptions of self-interest and rationality — bequeathed from standard economics — do not correspond to the more general understanding and practice of the terms. Instead the commonly understood idea of self-interest is volitional choice, which is generally seen, or readily admitted to, as impressionable. The commonly understood idea of rationality is the general ability to weigh various outcomes (as in contextual deliberation, imbued with value-claims, not as marginal calculations or cost-benefit analysis which automatically reduces choice to monetary values), use heuristics and learn from mistakes. Or in another way of saying, rationality is commonly understood as goal-directed cognitive control — it is “the ability to orchestrate thought and action in accordance with internal goals” (Jonathan Cohen and Earl Miller, 2001, p.167). Being that both common understandings have some self-evident merit, they cannot be wholly refuted. However, the same does not follow for “economic” self-interest and rationality.

The prevailing response to the charge that humans do not in fact make their decisions free from influence nor with marginal calculations is to claim that the two presuppositions and the derived theory are only meant to demonstrate how presumably scarce resources are allocated efficiently rather than characterize *real* decision making processes. It is a strict positive-empiricist approach to science that was em-

²⁵See, Horn and Mirowski (2009), Caldwell (2011) Horn (2010) on the history of the Chicago school.

phatically advocated by another Chicago school professor and a leading orthodox economist Milton Friedman (1953).²⁶ Although this appeal has been at the forefront at dispensing critiques of the rational actor model, another lesser known appeal has also been lurking below the surface — the appeal to evolutionary theory (Mirowski, 2011). But, and unsurprisingly, many rational actor advocates have a specific type of evolutionary theory in mind — the Spencerian type. This version associates evolution with progress, presumes nature is everywhere red in tooth and claw, and extends this to human social organization. Posner, not that long ago, made such an appeal:

Economic theory is closely related to the theory of evolution...Evolution deals with unconscious maximizers, the genes; economics with conscious maximizers, persons...Politics is about enmity, he says. It's about getting together with your friends and knocking off your enemies. The basic fallacy of liberalism is the idea that if we get together with reasonable people we can agree on everything. But you can't agree: strife is ineradicable, a fundamental part of nature, in storms and in human relations (Posner, quoted in MacFarquhar, 2001, p.82 and p.88).²⁷

Although this view appears to represent what is largely understood by evolutionary theory, that is, how the general public understands it, it nevertheless does not adequately account for the more scientific Darwinian understanding.²⁸ It is thus more

²⁶Friedman's essay, "The Methodology of Positive Economics", is perhaps one of the most influential method papers of the twentieth century, instigating a series of responses and creating a large secondary literature. Using a billiard player as a metaphor for businessmen and an as-if methodology, he argued that only predictions mattered not underlying assumptions. Although Friedman's view has apparently held up for decades within the core of standard economics, in the past thirty plus years it has come under fire with the development of behavioral economics. It was also critiqued from many other economists and scholars working on the periphery of the standard approach, see Nagel (1963), Caldwell (1980), Dennis (1986).

²⁷George Stigler, another Chicago school economist put the school's position thusly: "The extension of economic logic to all purposive human action, and to its deep affinity with the theory of biological survival is the arch on which the vast program of research rests. The theme is hardly unique or original to Chicago — [Philip] Wicksteed himself has large claims — but nowhere else is it applied with the comprehensiveness and the lack of self-consciousness with which it is pursued in Chicago. It will form the cutting edge of the Chicago school in the decade ahead" (Stigler, quoted in Mirowski, 2011, p.240).

²⁸There have been many interpretations of evolutionary theory over the years, see Hodgson (1998, 2004), Mirowski (2011). For present purposes and following Gould and Lewontin (1979) and Lewon-

of an appeal to authority rather than to an accepted scientific theory. It is a view with a conservative bent and squares with the *originalist* movement in U.S. legal circles not coincidentally forming in the 1980s. And in many ways, it is quite similar to the appeals made by medieval kings outside of those made to the deity. It is an appeal first to some traditional and revered text that is presumed to be unchangeable — the Constitution — and then it is an appeal to some transcendent order — natural law and the survival of the fittest. In respect to Friedman’s essentialist and positive approach towards science, like that of the behaviorists, it too has failed to provide explanatory or predictive power.²⁹

More relevant to the topic, the rational actor model also fails to explain the behavior of deception for two fundamental reasons. First, it does not recognize deception as a deviation from broad social norms. Consequently the model is incapable of even defining the behavior. And second, because the model assumes a self-correcting market, the behavior is presumed to be endogenously driven out.³⁰ The theoretical

tin et al. (1984), evolutionary theory will be defined as a random process of natural selection through genetic drift and mutation that is not goal directed, where the organism and the environment co-evolve and where traits may be adaptive or maladaptive.

²⁹Failure of both measures has been widely recognized. Camerer and Loewenstein (2004) remark, “the statistical evidence against EU [expected utility] is so overwhelming that it is pointless to run more studies testing EU against alternative theories” (p.20). Similarly Becker and Murphy (2000) observe, “endless examples attest to the great impact of culture, norms, and social structure” (p.3), factors that must be excluded if one is to meet the behavioral criteria of standard economics. Recognizing the explanatory failure however has not led to the widespread rejection of utility maximization as a methodological tool, rather the approach has simply been to extend it, as Becker and Murphy make clear two pages later: “[t]he analytical approach relies on the assumptions of utility maximization and equilibrium in the behavior of groups, which are the traditional foundations of rational choice analysis and the economic approach to behavior. This book shows how to incorporate social forces into this approach” (Ibid., p.5). In terms of predictive power, very few economists were successful in predicting the 2008 crisis. To a great extent, the failure was the result of faulty assumptions regarding human behavior as well as an improper understanding of money and accounting, see Godley (1999, 2012), Godley and Zezza (2006), Wray (2008, 2009, 2011), Tymoigne and Wray (2014), Tcherneva (2011).

³⁰Evidently these two reasons contradict one another. If there is no such thing as “deception” only calculating, rational actors, then there would be no need to for the market to drive the behavior

conclusion in respect to government supervision and regulation then is to scale it back (Posner, 1969, p.61). This idea of self-policing via competition and reputation is an old but faulty idea already discussed in the previous chapter and subject to the same critiques. The difference between the more contemporary interpretation and that of the early twentieth century, is merely window dressing, albeit with much more decorative mathematics.

Moreover, its understanding of the mind, similarly to the two previous schools analyzed above, is reductionist, mechanistic and deterministic. Comparatively it shares a unidirectionality feature with both the psychoanalytic and behaviorist schools as the mind is presumed to proceed from mind to environment but not back again. Its distinction from these two schools however lies in the fact that though the mind is considered conscious or active, it is a form of consciousness that does not have any real volition nor does it address any final biological ends. Its only function is to calculate independent of ethics and goals. Other aspects of mind, like the unconscious, the ability to learn or even environmental factors (ecology and society), are deemed irrelevant or ignored. Such an essentialist view of mind cannot capture behavioral change or even disparate behavioral tendencies because behavior is broadly assumed to be always and everywhere the same.

out through competitive forces. This is true so long as one does not attempt to apply the model to the real world because within the model all consequences have been collapsed into a single value and form of measurement — the money unit.

5.3.1 Heuristics-Biases as Behavioral Determinants: Behavioral Economic

Approach

As a result of these explanatory failures, some scholars working within the fold or on the periphery of standard economics however began to reconsider the rationality presumption. In the process an additional economic field, behavioral economics, was born.³¹ The forerunner of this movement was Herbert Simon (1955, 1957). Instead of beginning with the premise of rational calculation, Simon developed the concept of *bounded* rationality and emphasized the use of heuristics in the decision making process.³² Other early notable pioneers were James Duesenberry (1967), Harvey Leibenstein (1976) and the trained psychologist turned economist George Katona (1951). The point of departure from their perspective was to proceed on empirical and inductive grounds rather than begin from the ideal rational actor. Katona (1951) expressed this approach thusly:

Unlike pure theorists, we shall not assume at the outset that rational behavior exists or that rational behavior constitutes the topic of economic analysis. We shall study economic behavior as we find it. In describing and classifying different reactions, as well as the circumstances that elicit them, we shall raise the question whether and in what sense certain reactions may be called “rational.” After having answered that question and thus

³¹It might be mentioned that around the same time yet another similar economic field, game theory, was in being developed (Von Neuman and Morgenstern, 1944; Nash 1951; 1950). Game theory however is not so much a theory of behavior but a method for solving competitive interactive games. Although a discussion of its history would take this inquiry too far afield, it is worth noting that very few species exhibit the type of behavior found in these specific competitive games, rather “animals have systems of reciprocity with sensitivity to cheating” (Sapolsky, 2017, pp.351–353) not systems of cheating with sensitivity to reciprocity.

³²Simon described his principle of bounded rationality as: the “capacity of the human mind for formulating and solving complex problems is very small compared with the size of the problems whose solution is required for objectively rational behavior in the real world — or even for a reasonable approximation to such objective rationality” (1957, p.198). Although many scholars within the field of heuristic-bias research (addressed below), cite Simon as a forerunner, Lopez (1992) has challenged this perspective arguing that Simon proposed the use of heuristics not because people were irrational but because the world was too complex for rational computations (p.233).

defined our terms, we shall study the fundamental problem: Under what conditions do more and under what conditions do less rational forms of behavior occur? (p.16).

By beginning in this way, the early behavioral economists fundamentally rejected the idea that behavior was mechanical and deterministic. But what began as a move away from the imaginary world and ideal actor has come around again, albeit in a different relation, with a new vision of the mind that first appeared alongside the cognitive revolution (Neisser, 1967) *circa* 1960s. “The vehicle for the reintroduction of the mind, and a vital agent of behaviorism’s overthrow, was the idea that the brain is a computer. This assertion has become a commonplace one in the historical literature on the ‘cognitive revolution’...” (Crowther-Heyck, 1999, p.37).³³ It also brought back into vogue the study of consciousness once rejected and discarded by behaviorists. Some of these ideas, especially those about cognitive ability and skill, were first applied to a branch of psychology that studied behavioral decision making (Fischhoff 1988, Dawes 1998) and then entered into the field of behavioral economics. One of the more significant claims derived from this new direction is the suggestion that humans are incapable of responding rationally (in the classical Bayesian sense) to forced-choice experiments and are consequently irrational and pre-disposed to cognitive biases. The sheer amount of these supposed biases is staggering.³⁴

Naturally explanations have been sought by behavioral economists to explain why humans so often err in their judgments. The standard explanation, from the heuristic-

³³For a review of the cognitive revolution see Mandler (2002). For a review of the mind as computer see Gigerenzer (2000), chapter two.

³⁴For small sampling see Pohl (2004) and Robert Cialdini (2007). One criticism of this perspective is that it does not have a unifying theory. Consequently, it may be thought of similarly to early psychoanalytic theories that postulated that behavior was a product of drives which could number into double digits with the sexual or aggressive drive occupying the premiere positions.

bias approach, is that humans lack computational power and so, as a method of compensation, they use heuristics like representativeness, availability, and anchoring as a short cut to arrive at decisions and actions that are workable but not rational from a Bayesian probability standpoint. In this way the decision process is usually presented as a tradeoff between accuracy and efficiency. While this understanding of behavior seems to be more congruent with experience, it nevertheless also appears that the analysis has overvalued classical rationality. That is, there is an implied value-claim when one identifies a behavior as a bias rather than as a method of response.

It presupposes that classical rational behavior be the norm or act as a standard to which one should make their decisions. And it is here where the ideal actor has entered back into behavioral theory for it functions as a “hard target” in which to compare irrational behavior (Camerer and Loewenstein, 2004, p.6). For some behavioral economists, classical rational thought and action is the goal even if infrequent. This implicit value-claim however has not gone unnoticed (Lopes, 1991, 1992; Gigerenzer, 1998).³⁵ Wimsatt (1976) derisively likened the Bayesian rational actor to a Laplacean Demon.

Furthermore, the integrity of several of the heuristics-bias experiments has also been questioned. When some of the same experiments were run with a natural frequentist interpretation, many of the biases disappeared.³⁶ Sensitivity to various cues

³⁵Apart from questioning the validity and application of experimental logic, Lopes has also addressed the possible incentives for focusing on a subject’s performance rather than diagnosing the process.

³⁶See Fiedler (1988), May (1991), Gigerenzer (1991), Gigerenzer et al. (1991), Gigerenzer and Hoffrage (1995) and Cosmides and Tooby (1996), among others.

within the experimental studies, such as the term probability, has been identified as an explanation for why some fail in the experiments. On the other hand, the view of the irrational mind is also problematic because it suggests that “humans are hopelessly lost in the face of real-world complexity, given their supposed inability to reason according to the canon of classical rationality, even in simple laboratory experiments” (Gigerenzer, 2000, p.167).

Despite these weaknesses, this model of the mind has given many in the field a new starting position in which to analyze an entire array of behavior from cheating, to lying, to saving money, to interpreting law, to donating organs, to illusions to procrastination and many more.³⁷ Deceptive behavior has also come into its radar, notably by behavioral economists George Akerlof and Robert Shiller (Akerlof, 1970; Akerlof and Shiller, 2009, chapter three).³⁸ In their most recent book, *Phishing for Phools: The Economics of Manipulation and Deception* (2015) Akerlof and Shiller set out to explain fraud from the perspective of the consumer (the phool). Drawing on the field’s past three plus decades of research, and counter to *homo economicus*, they conclude that “every man has his weak spot, and so every one of us is oftentimes less than fully informed; and oftentimes we have difficulty knowing what we really want. As a by-product of these human weaknesses, we can be tricked” (Ibid., pp.163–164).

To their credit they propose a more inclusive and general view by way of explanation. Rather than pointing to a list of cognitive biases, they use a narrative or story approach to human understanding that corresponds to Jerome Bruner’s narrative

³⁷See Tversky and Kahneman (1974, 1979), Kahneman (2011), Richard R. Thaler (1991), Akerlof and Shiller (2009), Dan Ariely (2008, 2012) and Cass Sunstein and Richard Thaler (2008), among others.

³⁸Also see Akerlof and Paul Romer (1993).

psychology (1990). According to this view, humans are susceptible to manipulation as a consequence of the use of stories or mental frames. Throughout the book, Akerlof and Shiller provide examples of how these stories purportedly determine thought and action. For instance, one such example they offer is the competitive stories told by the Surgeon General and Big Tobacco. Despite the evidence showing the positive relationship between smoking and lung cancer, Big Tobacco was successful for many decades at sowing doubt among the public.³⁹ Many other examples involve the finance industry and the financier's manipulation of information. Of note here is that the information in the stories must resonate with the consumer otherwise it would fail to be effective. Because many consumers do, in fact, purchase dubious commodities and/or assets, clearly many of these stories are resonating.

Yet it appears as if this explanation is insufficient for several reasons. First, its location of cause seems to be misplaced. Narratives or stories are about certain values but are not the values themselves. The role of stories is to reinforce values and act as guiding frames for behavior. In this way, the story is not a first order cause. This may perhaps explain, to a degree, why Akerlof and Shiller have focused on the victims of fraud rather than the perpetrators. Their stated position is given at the outset of the book: "Whether or not businessmen have good (or bad) morals is not the subject of this book, although sometimes both of these sides will appear. Instead, we see

³⁹This business tactic is not confined to the tobacco industry but has been put into practice by many others, see Oreskes and Conway's (2010) *Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues from Tobacco Smoke to Global Warming*. This particular strategy is a response to exogenous and usually scientific claims in regards to a product's consequences on human and environmental health. Because the agencies and institutions that produce this additional information are independent of the corporation, the latter have little to no control over them. To counter such claims and control the narrative their only non-violent recourse, with the exception of the law, is to cloud the debate and delegitimize them.

the basic problem as pressures for less than scrupulous behavior that is incentivized in competitive markets” (2015, p.xi). Although they properly identify the market as a problem, they do not give a historical explanation of how the market formed and evolved, nor do they give an explanation of how it reproduces itself, nor do they give an explanation of the types of value-claims that emerge from market societies. Rather, the market is taken as given.

Accordingly, when competitive pressures arise and certain behavior is incentivized, a window of opportunity for fraud will present itself. While this account is without a doubt accurate, it is nevertheless devoid of substance and represents only the skeleton of the theory. Moreover, by framing fraud in this way, Akerlof and Shiller are bypassing the need to speak about values and goals. But to speak about the creation and formation of values and goals would also mean that they would need to address the institutions of which those values and goals form. Instead they take an “outcome” approach to fraud via narratives or stories. Because the fraudulent act is not the object of investigation but the outcome is via the victim, the narrative approach does tend to partially explain the consumer’s naiveté and susceptibility, but it does little to explain where and how those stories originated. To explain behavior by narratives alone is to assume that they are born *ex nihilo*. But narratives are co-created and reinforced through value-laden and goal-oriented institutions and it is the latter where one should seek location of cause because values and goals are the standards or reference points upon which behavior turns. This latter perspective also helps explain why some stories resonate over others for they speak directly to value systems. This is not to say that narratives are insignificant, quite to the contrary as the preceding

chapters make clear, but it is only to say that they are not first order causes.

The second and more fundamental reason why this model of the mind is insufficient is that it says little about directed conscious or unconscious action. For instance, the approach does little to explain why the consumer was purchasing some dubious commodity in the first instance. Or it does little to explain why the consumer did not take more time to make a decision. Or it does little explain why the consumer might not seek a second or third opinion. Or it does little explain why the consumer did not try to gather more information. The purpose of these suggestions is not to place blame on the victim but to situate the victim in space and time and to give her, at minimum, some amount of direction. While it is the perpetrator that bears the responsibility, the consumer does not, à la behaviorism, approach the transaction as a blank slate filled only with stories.

What is perhaps lacking in the behavioral economic approach, among possible others, is theory of learning. But because many begin from the premise of a Bayesian rational actor or value it as the norm, its consideration is largely circumvented. Instead, decision-making, though error prone, is attributed to rational and calculating thought. Within this model of the mind there is no suggestion or incorporation of context nor a consideration of social objectives or goals. Developing and incorporating a theory of learning would allow for the inclusion of these factors and would force the behavioral economist to consider the influence that the environment has on the actor in greater detail. Sensitivity cues, noted above, are an indication of a type of learning as it were. And because various types of cues are subject to various types of environments, it would be prudent to originate a line of inquiry considering why

and how people learn to perceive and interpret classes of phenomena differently. One would also want to explain why people are situated and attuned to some experiences over others. Such a reorientation would vanquish the idea that heuristics operate as a *substitute* for rational calculus and place them front and center as mental tools for *novel* encounters.

But because the behavioral economist generally models the mind as an unidirectional interface, from mind to environment, and because it has a limited view of both the unconscious and conscious processes, it is restricted to simple and individualistic explanations regarding deceptive behavior. To give another example, Dan Ariely (2012) argues in *The Honest Truth About Dishonesty* that most people are prone to cheat and that cheating is contagious. People cheat because there is a financial incentive to do so but also because they are influenced by the behavior of others, less so if the other person is a member of an outgroup (pp.206-207). Thus, if a person observes another person acting unethically, the observer will be more likely to adopt the unethical behavior. Or as Ariely expresses it: “When a few insiders deviate from the norm, they infect those around them, who in turn infect those around them, and so on—which is what I suspect occurred at Enron in 2001, on Wall Street leading up to the 2008 [crisis], and in many other cases...It is an easy process, a slippery slope. And it’s the kind of thing that happens all around us every day” (pp.207-208).

Surely Ariely’s understanding of deceptive behavior is more informed than the three schools of thought discussed above and appears to capture what is meant by criminogenic behavior but it still nevertheless framed in largely individualistic terms — like some of the criminologist’s accounts of the fraud illustrated with the fraud

triangle — and suffers from infinite regress. It is individualistic because it fails to fully consider the structural ground, which is composed of the market and minority legal control via the business enterprise, and the history in which the behavior arises. Despite their efforts to develop behavioral theories based on real world experiments, an approach that should be applauded, many of the behavioral economist's conclusions are inadequate because they lack a historical and institutional analysis.⁴⁰

Although Ariely does account for the institutionalization process, he gives no detailed explanation of how the mind interacts with that process. Nor does he address the origination of incentive structures (the economy of individual risk), ask why money is given such premiere status or why money is the unit of measurement in so many of these studies. Instead he takes the market as given and concludes that we cheat because want to “get as much money as possible” (Ibid., p.27). Nor is there a link drawn between power (minority legal control) and behavior, which would, to a degree, correct for the infinite regress problem. Power is, in large part, determined by the social structural arrangements, while the exercise of power has the tendency to decrease risk awareness and empathy (mirroring), increase impulsiveness and screen

⁴⁰To give another example, Ariely cites as study by Bateson et al. (2006) that concludes: “reputational concerns may be extremely powerful in motivating cooperative behaviour” (p.413). This study was conducted in part to find a solution to the problem of dishonesty. It tested whether or not a picture of fake eyes had any influence on people's behavior to pay in a communal tea room. They found that it did and nearly three times as much. While this finding is likely accurate, it fails to capture where and how the behavior of dishonesty forms in the first instance and thus fails to address the question from an institutional standpoint. From this latter perspective, and because the corporation is a dominant institution organized as a hierarchy, seeking profit and exercising legal minority control, particular forms of behavior arise within the corporation that are largely uncooperative, cunning, scheming and opportunistic. Consequently, no amount of fake eyes posted around exchanges is going to comprehensively reduce dishonesty. Yet Ariely's (2012) conclusion, like Bateson et al., is that individual monitoring, through goodwill and reputation, will be enough to curb unethical behavior (p.233). But as was demonstrated in the previous chapter, there is a marked difference between individuals monitoring individuals and individuals monitoring corporations. The latter is simply impractical whether warranted or not.

out peripheral information, all of which contribute to a person's ability to engage in dishonest and deceptive behavior (Hogeveen et al., 2014; Cameron and Galinsky 2006; Keltner et al., 2003). Ariely's solutions for dishonest behavior — pledges, signatures, reminders and supervision — also demonstrate a lack of institutional analysis. While these solutions would no doubt aid in correcting some level of dishonest behavior, they will only do so minimally because norms are a product of institutions not the individual.

One recent study by Greene and Paxton (2009) seems to show just this. For individuals who routinely cheated but were struggling to resist the opportunity to cheat, three areas of the brain became highly active. But for those individuals who almost never cheated, these same areas remained dormant when given the same opportunity to cheat. The conclusion, known in the literature as the Grace hypothesis, is that non-cheaters exhibit an absence of temptation and, it might be added, they have an absence of temptation because the institutions in which they were raised and in which they are apart of, instilled and reinforced in them specific habits of thought and action that did not register with the activity of cheating. This institutionalist understanding of the mind and behavior will be addressed next.

5.4 Learning Capacities, Values (Goals) and Emergence as Behavioral

Determinants — The Functional & Original Institutional Approach

What is perhaps lacking in many of the previous mentioned theories of behavior is a deeper appreciation of the evolutionary character and relation between the mind to the environment, which includes both ecology and society. Although psychoanalysis,

behaviorism, the rational actor model and the heuristic-bias approach are diverse traditions with distinct theories, there appears to be at least one significant commonality among them: the understanding of the mind as a unidirectional interface. For the psychoanalytical, the rational actor model and the heuristic-bias approach, the one-way street proceeds from mind to environment, for the behaviorist the one-way street proceeds from environment to mind. More recently however, some psychologists and cognitive scientist have begun to take a more dynamic and evolutionary approach to the mind. Known as situated cognition or the context principle (Mesquita et al., 2010), the objective is to shift the “guiding metaphor regarding cognition and action, from computation to biology” (Smith and Semin, 2004, p.53).

Such a shift allows the mind to be an active participant co-constructing day-to-day events and it keeps content and thought united. It also gets around the “essentialism error” — the idea that behavior is somehow entirely determined by “deep” and “unchanging internal forces” (Barrett et al., 2010, p.3) as well as gets around the idea that the mind is like a computer simply running computations, specifically of the Bayesian sort. Those psychologists working under the situated mind model acknowledge that behavior is determined in part by individual perceptions, beliefs and the interpretation of them, but they simultaneously emphasize how those perceptions, beliefs and interpretations are themselves a product of the social settings, relationships and group membership (Markus et. al., 1996).

Yet the understanding of a situated mind had long ago been expressed by the early American functionalist school of psychology as well as the original institutionalist school in economics (OIE), many of who were considerably influenced by Darwin’s

(1909 [1859]) evolutionary theory.⁴¹ In the last quarter of the nineteenth century however, it was largely Herbert Spencer's (1896 [1873]) concept of evolution — the application of the survival of the fittest to social organization and individual actions — that first grabbed the public's imagination. This view began to change with the publication of the *Principles of Psychology* (1890) by William James. James' understanding of evolution distinguished itself from social Darwinism (the Spencerian notion) by the active role that consciousness had on the environment. Social evolutionary outcomes were not simply the result of independent exogenous super-forces but the interplay between mind *and* the environment. Reacting to Spencer's idea of social Darwinism, James (1878) had expressed his concept of the mind as an active participant and “not simply a mirror floating with no foot-hold anywhere...passively reflecting an order that he comes upon and finds simply existing. The knower is an actor, and...not a mere looker on” (p.17).

A contemporary of James, John Dewey, argued in a similar vein. His highly influential article published in 1896, “The Reflex Arc Concept in Psychology”, took to task the reductionist and strict physiological approach to human behavior. Dewey's central point was that by reducing behavior to sensorimotor elements left humans without meaning, purpose or control. His metaphor of behavior as an active circuit rather than a reflex arc speaks directly to the mind (and body) as a participatory agent. As one takes in information through the senses, it processes it, reacts (the response) and then interprets the experience (giving it meaning) whereupon the act

⁴¹Early functionalist psychology should not be confused with sociological functionalism. The former's unit of analysis is the function of consciousness where the word function is meant to broadly represent process and purpose without predetermined ends.

of interpretation changes, at minimum, the nature of the relationship between the person and the object/event and, at maximum, has the capacity to change original conditions. The mind and body therefore are not only interacting with their environment but they are also choosing which potential environment to interact with given the physical surroundings.

George H. Mead (1967 [1934]), perhaps more than any other philosopher and psychologist working at that time, advocated for a social understanding of individual consciousness. In fact, he did not believe that individual psychology could be understood and made intelligible independently of the social process. In particular, he argued that it was the use of language or significant symbols that allows for the process of thinking in the first instance. Or in his own words, it is only “in terms of gestures as significant symbols is the existence of mind or intelligence possible; for only in terms of gestures which are significant symbols can thinking — which is simply an internalized or implicit conversation of the individual with himself by means of such gestures — take place. The internalization in our experience of the external conversations of gestures which we carry on with other individuals in the social process is the essence of thinking” (Ibid., p.47). James Angell (1904) and Harvey Carr (1925), among others, further extended and refined the general functionalist perspective in the first quarter of the twentieth century.

Beginning with the premise that mind and the environment have a bi-directional relationship meant that it was unadvisable to study behavior in isolation. It also meant that behavior was not stuck in time. Subsequently most functionalists did not abandon consciousness as subject matter. The ability to respond and interact

through consciousness represented a means to achieve proximate as well as final ends. In large part, many functionalists conceptualized consciousness as a habitual process. But unlike the behaviorists they did not reduce the habit-behavior to physiology. Instead they were conceived of as propensities or proclivities. Dewey (1922) spoke of habits as “special sensitiveness or accessibility to certain classes of stimuli, standing predilections and aversions, rather than bare recurrence of specific acts” (p.42). In regards to the power of habit, James (1890, Vol. 1) remarked:

It dooms us all to fight out the battle of life upon the lines of our nurture or our early choice, and to make the best of a pursuit that disagrees, because there is no other for which we are fitted, and it is too late to begin again...Already at the age of twenty-five you see the professional mannerism settling down...On the whole, it is best he should not escape. It is well for the world that in most of us, by the age of thirty, the character has set in like plaster, and will never soften again...The more of the details of our daily life we can hand over to the effortless custody of automatism, the more our higher powers of mind will be set free for their own proper work (pp.121-122).

Dewey (1922) likewise wrote:

Man is a creature of habit, not of reason nor yet of instinct....The medium of habit filters all the material that reaches our perception and thought...[Habits] constitute the self. In any intelligible sense of the word will, they *are* will. They form our effective desires and they furnish us with our working capacities. They rule our thoughts, determining which shall appear and be strong and which shall pass from light into obscurity (p.125, p.32, p.25, emphasis in the original).

It might be further mentioned that the general aversion often seen to this idea of habit did not escape Dewey. He surmised that many rejected habit because of self-love and/or the desire to improve their yet realized future selves (Ibid., p.24).

The Institutionalist economists of the early twentieth century also came to many similar conclusions. In a critique of the calculating hedonist, and preceding Wimsatt's Laplacean Demon by 78 years, Veblen (1898b) remarked that “it is the characteristic

of man to do something, not simply to suffer pleasures and pains...[man] is not simply a bundle of desires that are to be saturated by being placed in the path of the forces of the environment, but rather a coherent structure of propensities and habits which seeks realization and expression in an unfolding activity” (p.390). Veblen’s model of the mind consisted of an instinct-habit psychology, where instincts, such as parental-bent, idle curiosity, workmanship, acquisitiveness, self-preservation and predation, were said to be in continual flux and expression as they are worked-out through the growth of institutions. Importantly, Veblen’s characterization of the mind was active and goal-oriented or in another way of saying, it was bi-directional — it acted upon the world and the world acted upon it. This view of the mind sees no value in asking whether the mind or the environment is the first causal mover, as this is not the point of an evolutionary bidirectional mind. Rather the point is that they are co-evolving.

By situating active, goal-oriented individuals within the physical and social environment, inquires of behavior naturally began by asking about the semi-permanent conditions in which those individuals lived. Semi-permanent conditions included ecology, the structure of society (organizational form) and the institutions that were built atop of those structures. The fact that conditions were semi-permanent implied that they were subjected to inertia but could still nevertheless be modified. To a great extent, the inertia of institutions was the product of habit where habit was viewed as the dominant feature-function of the mind. While habits rule daily life they nevertheless develop via the learning process. Thus, habits are context specific and can vary widely depending on time and place. The implication here is that they are

not strictly deterministic.⁴² Nor are they simply repetitious acts, as noted by Dewey. Habits are evolutionary mechanisms that allow humans to navigate their environment with relative ease and they assist them in achieving their ends whether proximate or final.

Locating habit origination and transmission then requires locating the places where learning and reinforcement occurs. These learning-reinforcement centers refer to what is largely understood by the word institution where the larger the institution or the more accepted its practices, the more likely that it is representative of society-wide customs. Some of the more modern and common learning centers that are understood as institutions are the family unit, the school system, daycare, peer groups, media, the arts (from entertainment to fine art), the legal system, the workplace, the state and any of the hundreds of thousands of official or unofficial clubs one may be apart of. Because institutions have the potential to differ and have contrasting value-systems, the habits that one acquires may themselves be contradictory. Or as Dewey (1922) expressed it, “[a]ll of the actions of an individual bear the stamp of his community as assuredly as does the language he speaks. *Difficulty* in reading the stamp is due to a *variety* of impressions in consequence of *membership in many groups*” (p.317, emphasis added).

While variance in habits can and do lead to conflict between members of different groups, contrary to Margret Thatcher’s infamous assertion, there is such a thing as “society” and it is largely this habit mechanism, as a form of emergence, that

⁴²James (1912 [1884]) distinguished between what he called hard and soft determinism. Hard determinism is where the causes behind human behavior are mechanistic to such a degree as to eliminate free will (personal responsibility). Soft determinism is where individual cognitive processes can intervene between environmental experience and habitual behavior.

makes this so.⁴³ It is the habit mechanism that makes a group a group, that makes a community a community and that makes a society a society as opposed to a mere aggregation of individuals. When scholars assert that history matters, or that the price system is subject to herd behavior (Keynes, 1930, 1964 [1936]) or even that much of life is path dependent (David, 1985, 1994), it is primarily because of this evolutionary designed feature and it is its generality that makes possible the expression of an immense diversity of physical and mental behavior.

Applying this model of the mind to the behavior of deception, cause would be located in the institutions that teach and reinforce such behavior. The primary institution, which teaches and reinforces deceptive behavior today, is the business enterprise. And, as explicated in the previous chapter, it is its two more dominate values, (1) status and (2) gamesmanship, as in the tendency to seek private risk and reward and view business as a game, along with its false narrative of scarcity, that largely contribute to the behavior's formation. However, because there are a variety of institutions that exist in modern society with opposing habits and value-claims, deceptive behavior is often times blunted through the affiliation with other institutions. The expression of the behavior then falls across a spectrum. For some executives certain habits and values that were learned from their family, peers, clubs, or schools may inhibit them from engaging in any major transaction frauds. For

⁴³In an interview, Margret Thatcher expressed her views as: "They're casting their problem on society. And, you know, there is no such thing as society. There are individual men and women, and there are families. And no government can do anything except through people, and people must look to themselves first. It's our duty to look after ourselves and then, also to look after our neighbour. People have got the entitlements too much in mind, without the obligations, because there is no such thing as an entitlement unless someone has first met an obligation" (Thatcher, quoted in Keay, 1987).

others, it may inhibit them from engaging in both major and minor transaction frauds. And for others still, it may inhibit them from engaging in any type of transaction fraud period. Thus, society's minor institutions can act as moderating factors for the behavior of deception. Of course, they can also act as amplifying ones. This might explain why some businesses that are largely sale and commission oriented appear to have higher incidences of transaction fraud because it is likely that at least some who apply already hold such dispositions.

But for any society that values status and private risk and reward above all other goals and has a dominant institution to teach and reinforce those values, it will likely breed deceptive behavior through the learning process of habit.⁴⁴ It is important to emphasize that a habit is not a "behavior" but allows for effortless expression of behavior. The confusion perhaps lies in the fact that the word habit is often used synonymously with a particular type of behavior, usually those that are assumed to be bad, such as smoking, biting one's nails, or spending too much time on social media, among many others. And while each "bad" habit, as they are referred to, represent a unique behavior, they are nevertheless using the same mechanism to express that unique behavior. This mechanism was designed through evolution to facilitate learning, purposive action and makes the navigation of one's environment more or less seamless.

A newborn, a toddler and a young child have the most difficulty navigating their environments not just because they do not "know" what adults "know" but also

⁴⁴The degree to which deception is moderated or magnified across society will further depend upon the degree to which corporations take and practice a *law as instrument view*.

because they have yet to develop all the context specific habit-behaviors needed to attain human social and ultimately biological ends. Or put another way, “when a baby and an adult are confronted with the same problem, one has already formed habits that the other has yet to acquire; one has highly organized habits, and the other has unorganized impulses” (Sturgeon, 1992, p.352). Developing these habit-behaviors requires learning and practice where the more the mechanism is used in association with a specific context, the greater the mechanism is adapted and the easier it is to navigate or complete a specific task. Once one has reached adulthood, many of these adaptations to context-specific environments become what Dewey called “routine” habits where routine habits occur below the level of awareness. Dewey also suggested that there are some habits, what he called “intelligent” habits, that operate at a higher level. From the functionalist/institutionalist perspective then, behavior, including the deceptive kind, is largely determined by the types of habits of thought and action learned over the course of their lives through the institutions that they are affiliated with. A growing body of empirical research now appears to support this view (Bentler and Speckart, 1979; Ouellette and Wood, 1998; Aarts et al., 1998; Verplanken et al., 1994; Verplanken and Orbell, 2003; Wood and Neal, 2007; Danner, 2008). One seemingly pedestrian study found that people do the same thing, in the same location, 45 percent of the time (Wood et al., 2002). Despite its typical humdrum reception, this is nevertheless a remarkable empirical finding and it reveals one of the primary assumptions that underlie the habitual process — a relatively stable environment (semi-permanent) in terms of ecology but also human-constructed conditions.

This is not to suggest that humans operate in ergodic environments, but it is

only to suggest that habitats, whether in their natural or human-made form, are relatively stable over the course of an individual's lifetime despite their susceptibility to change. When stability holds, habit-behavior rules. What type of behavior is expressed when stability fails? Dewey would answer the deliberative kind. Dewey explained deliberation as "a dramatic rehearsal (in imagination) of various competing possible lines of action. It starts from the blocking of efficient overt action, due to that conflict of prior habit and newly released impulse [and then proceeds] in finding out what the various lines of possible action are really like [where each] conflicting habit and impulse takes its turn in projecting itself upon the screen of imagination (1922, p.190). It is a type of search process or experiment that generates a series of options from which to choose and it is what Dewey referred to as intelligent habit.

In broad terms, the functionalist and institutionalist schools appear to have what today would be called a dual-process theory or model of the mind where behavior is primarily the product of a society's institutions although it is not necessarily a slave to them. Following this line of thought, solutions for deceptive behavior would need to consider changing the institutions themselves not merely targeting individual adjustments to daily activity — a view that remains pervasive. Perhaps individualistic theories and solutions are so often suggested because Western institutions teach and perpetuate individual and analytical thinking. Over the past several decades, studies testing such a hypothesis have been carried out with the findings generally supporting the claim (Dershowitz, 1971; Witken and Goodenough, 1977).

Societies and sub-cultures that were structurally arranged in such a way that lessened the need for *close* coordination typically had a far greater amount of people who

paid scant attention to the social background. Or in the literature's terminology, they were less field dependent and thus thought and acted more individualistically. This might also explain why Westerners are more susceptible to the Fundamental Attribution Error — the tendency to attribute behavior to personal dispositions rather than the situational context (Ross, 1977). A significant implication from these findings is that a person's perceptions, interpretations and beliefs are both real and a product of their time. In other words, life experiences are shaped through the structural conditions of their surroundings and the contemporary institutions and thus determine to a great degree how an individual comes to view the world. Those experiences generate pictures, models, symbols and sculpt styles or modes of thinking to aid in the conceptualization and understanding of their environment.

Recent research by the social psychologist Richard Nisbett and several collaborators have reached similar conclusions (Nisbett et al., 2001; Nisbett, 2003). In his book, *The Geography of Thought: How Asians and Westerners Think Differently...and Why*, Nisbett concludes: "Easterners and Westerners differ in *fundamental assumptions about the nature of the world*, in the focus of attention, in the skills necessary to perceive relationships and to discern objects in a complex environment, in the character of causal attribution, in the tendency to organize the world categorically or relationally, and in the inclination to use rules, including the rules of formal logic" (2003, pp.189-190, emphasis added).⁴⁵ Interestingly, he also notes that many

⁴⁵A second implication is that field dependence exists on a spectrum. For example, Dershowitz (1971) found that boys who were raised Protestant were less field dependent than secular Jewish boys. And that secular Jewish boys were less field dependent than Orthodox Jewish boys. This can hold true if and only if the mind has the capacity to learn, adapt and also habitualize (crystallize) knowledge. For without habituation of thought and action, patterns would not be deciphered and the behavioral findings such as the degree of field dependence could not exist.

Asian and Western societies understand and use the law in a fundamentally different way than Westerners. Instead of “individual rights” and universal legal principles, many Easterners view rights as vested in the collectivity and the law as bound to the particular (Ibid., p.199 and p.194). It might be suggested that Easterners, in general, have a *law as justice view* in that it is taken as given that the law should be aligned with the settled habits (customs) of a community.

While the functionalist and institutionalist dual-process model of the mind does appear to have some explanatory and predictive power it still struggles to reach a broad audience because of the pervasive rationalist and individualistic view. It is also too general and lacks an explanation of how habits, deliberation, memory, emotions and goals (values) interact in the mind. In the past several decades, psychologists, neuroscientists and other scholars have made some inroads in this direction.

5.4.1 Contemporary Dual-Process Models of the Mind

The idea of a dual-process mind dates back well beyond the functionalist and institutional schools and can be traced to ancient Greece and Rome (Frankish and Evans, 2009). However, it has only been within the past several decades that a more empirical and elaborate model has been attempted. From the many types of dual-process theories that now exist, two representative versions will be considered: (1), the Default-Interventionist model and (2) the Controlled & Automatic Processing model. There remains some controversy over the different schemas, functions, mapping and attributes in these models. Moreover, some aspects are likely still speculative. Nonetheless, much evidence is now pointing in the direction of a general

dual-process framework.⁴⁶

Default-Interventionist

The Default-Interventionist model has its origins in the field of judgment and decision making (Wason and Evans, 1975; Evans, 1989; Evans and Over, 1996; Sloman, 1996; Stanovich, 1999, 2004; Kahneman and Frederick, 2002; Kahneman, 2011). Unfortunately, the descriptions of the model have varied over the years leading to the clustering of a variety of attributes that are not always correlated together. Some of the more common attributes that refer to the two different types of processing are: fast vs. slow, nonconscious vs. conscious, parallel vs. serial, automatic vs. controlled, associative vs. rule-based, high capacity vs. capacity and biased responses vs. normative responses (Evans and Stanovich, 2013, p.225). Given that some empirical findings do not support the full array of attributes, the theory has recently come under critique (Keren and Schul, 2009). To correct for this problem, Evans and Stanovich (2013) have opted to label this model as a *type* of processing with only one distinguishing feature between the two processes — working memory. It is presumed that only Type 2 has access to this feature.

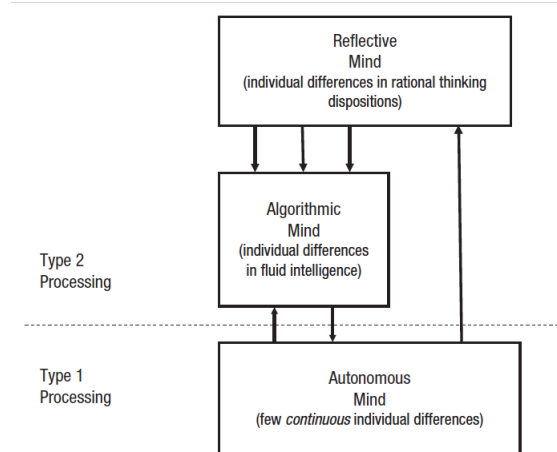
There are several key aspects of this model as it is understood by Evans and Stanovich. First, while there are many attributes in both Type 1 and 2 processes, they are presumed as correlates and not defining features. Second, although Type 2 processing involves abstraction and reasoning, it is not assumed to be context-free, instead both Types are now believed to be content-laden. Third, Type 1 (intuitive or

⁴⁶To date, three different approaches have developed to test this framework: experiments meant to test one or the other type of processing, neural imaging through fMRI and the psychometric approach which tests selective correlations. For reviews see Evans (2008, 2010) and Stanovich (2011).

habitual) processing can be optimal or non-optimal, where non-optimality depends more so on a hostile environment (Ibid., p.229). Fourth, there is a distinction between types and modes of processing. Types of processing refer to qualitative differences in the 2 Type model whereas modes, or *thinking dispositions*, refer to a style of thinking that apply to Type 2.

Modes are believed to be a product of personality and environment. Their function is to regulate higher level states within the reflective mind and they represent an individual's goals (values) and epistemic-claims. Some modes that have been identified by Evans and Stanovich are: "the tendency to collect information before making up one's mind, the tendency to seek various points of view before coming to a conclusion, the disposition to think extensively about a problem before responding, the tendency to calibrate the degree of strength of one's opinion to the degree of evidence available, the tendency to think about future consequences before taking action, and the tendency to explicitly weigh pluses and minuses of situations before making a decision" (p.230). Lastly, Type 1 processing is said to have a set of systems (autonomous set of systems or TASS) as opposed to one and operate independently of controlled attention.

Because Type 2 processing precludes any type of processing that does not access working memory, all other types of processing, such as implicit learning, emotional processing or processing that might occur in domain specific areas that were adapted to solve specific problems as posited by some evolutionary psychologists, are lumped into TASS. Figure 3 represents this model in its most simplistic form. As the schema illustrates, it is meant to represent hierarchies of control rather than "separate" sys-



Source: Evans and Stanovich (2013).

Figure 3: Stanovich's Tripartite Schematic

tems. Type 2 processing has two levels of control, the reflective and algorithmic minds, whereas Type 1 processing has only one level. Further, it is at the algorithmic level where decoupling representations from the real world occurs. Decoupling or hypothetical thinking in this model is presumed to be the foundation of rational thought because it is connected to the TASS override, that is, the “key mechanism of the reflective mind that supports human rationality is the mechanism that sends out a call to begin cognitive simulation or hypothetical reasoning more generally. It is conjectured that individual difference in the operation of this mechanism contribute to the difference in rational thinking...” (Stanovich, 2009, p.62). Decoupling or hypothetical thinking is also believed to be fundamental to long-term planning and is analogous to Dewey’s understanding of intelligent habit or probably more accurately described as deliberation.

Although Type 2 processing occupies the top tier, Type 1 processing, according to Evans and Stanovich, is the default system running day-to-day activity. “Thus, most

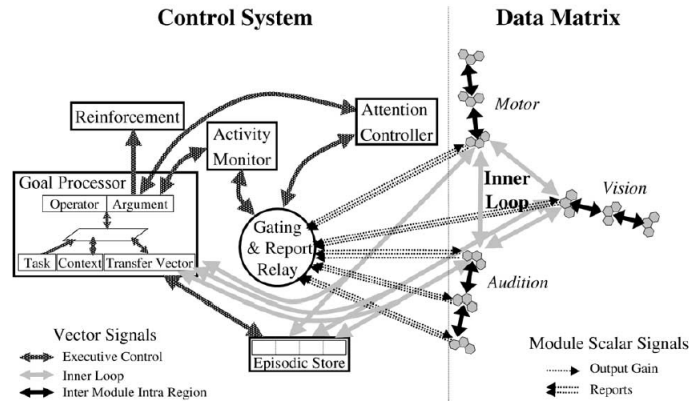
behavior will accord with defaults, and intervention will occur only when difficulty, novelty, and motivation combine to common the sources of working memory...Given the limited capacity of central cognitive resources, we believe it is inevitable that most behavior will be under autonomous control and that rapid, default responses will be prompted in most situations (Evans and Stanovich, 2013, p.237).

Controlled & Automatic

The Controlled & Automatic model was developed by Richard M. Shiffrin and Walter Schneider. In two articles published back to back, Schneider and Shiffrin (1977) and Shiffrin and Schneider (1977), they described the transition of automatism, the mechanisms that generate learning and an overall framework for conceptualizing the learning process. In doing so they distinguished between two types of processing, one controlled the other automatic. The first type of processing taxed the attentional capacity, used short-term memory, was dependent on stimulus load and could generally be controlled. The second type did not require the use of attention, used long-term memory, was little affected by stimulus load and could not generally be controlled.

Since the appearance of these two significant papers, Schneider along with several of his prior students, have continued to explore the working mechanisms and architecture of the mind. In 2003 Schneider, with co-collaborator Jason Chein, developed a more detailed model that was also mapped to brain regions. Its primary features consists of a control system with five distinct processors and a data matrix system comprised of three regions — motor, vision and auditory, see Figure 4. The top tiers of these three regions are connected on a circuit, referred to as the inner loop.⁴⁷ Each

⁴⁷The tiers are meant to represent hierarchal processing levels. For example, vision has an es-



Source: Schneider and Chein (2003).

Figure 4: Control System & Data Matrix

region in the data matrix system consists of a hierarchy of tiers where each tier consists of hundreds of modules. Each module on the micro level has three input signals, (1) the regional feedback gain, (2) the output gain and (3) the global reinforcement signal as well as two output signals, (1) the activity and (2) priority reports. The latter send information to the inner loop as a scalar to avoid combinatorial explosion.

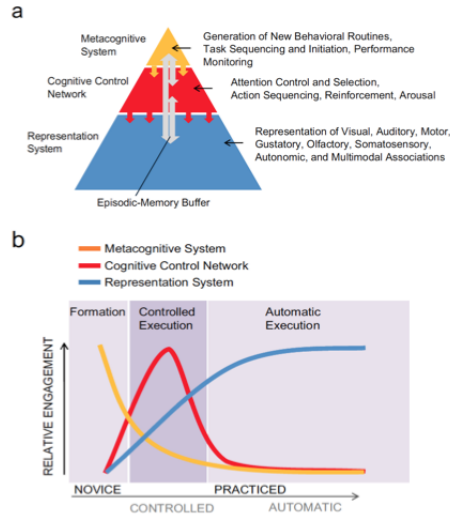
The inner loop sends “processed” information to the gating & reporting station and to the episodic store but can also transfer information to each other. The data matrix is unique in that it allows for parallel processing between regions. This is possible because it is only the top tiers that are connected. The control system directs behavior and problems solves by monitoring information via the relay station and the episodic store. The inner loop sends both a priority and an activity report to the relay station whereupon two of the control system’s processors, operating in

32 specialized cortical processing areas. Each of these areas are represented as a tier in Schneider and Chein’s model (2003, p.536).

tandem with the goal processor, receive and output information back to the data matrix. However, it is the goal processor, the highest level executive system, of the control system that conducts sequential control operations and can reconfigure the data flow into the matrix through the use of control signals. It is the highest level because it operates on “preprocessed” data only. This implies that it has no access to the processing occurring in the tiers unless it reaches the inner loop.

Learning in this model can occur in three ways, through instruction, through observation and through time consuming shaping and feedback (trial and error). The ability to learn by instruction or observation however, is said to be the product of the control system for it is the control system alone that can select stimuli and load these to corresponding modules. By doing so, it strengthens associations between arbitrary vectors and speeds up learning. Importantly, this is considered to be one of the fundamental functions of the control system. After some amount of training, a relatively permanent set of associations among connections emerge which is followed by a shift from controlled to automatic processing whereupon the task or goal can be completed much faster and independently from the control system. It is believed at this point that the priority coding within the modules are sufficiently high enough to transmit information without the help of the control system.

Chein and Schneider (2005) have since updated this model by adding a domain-general control network that utilizes working memory, attentional selection, performance monitoring and the relay station. The control network is designed to mediate the explicit learning process. In their empirical study, along with a meta-analysis of previous studies, they found that this cognitive control network was deactivated



Source: Schneider and Chein (2003).

Figure 5: Triarchic Model

or “dropped out”, with the exception of the inferior frontal junction (IFJ), once the task was learned. In 2007 Cole and Schneider identified six tightly coupled regions that together constitute the cognitive control network (CCN). When this network was compared to others in the brain, it was found to have among the highest global connectivity on average. Incorporating these findings with past research on executive control, Chein and Schneider (2012) envision a triarchic model of the mind that consists of a metacognitive system, the CCN and what they are now calling a representation system, see Figure 5. All three are linked to a episodic-memory buffer, which acts like a hub or pathway for communication among the three systems.

The metacognitive system establishes strategies and routines that support the completion of a task. Once a plan of action is determined, the CCN, through the use of attentional control, arousal and reinforcement signals, begins the process of learning that task. This is what Chein and Schneider have termed the controlled-execution

stage and corresponds to human practice. Throughout this early learning process, the representation system is simultaneously coding for stimulus-response associations that strengthen as practice continues also known as Hebbian theory (Hebb, 1949). Once these relationships and connections are sufficiently strengthened, the cognitive control resources disengage eventually producing automatic behavior. The representation system itself is widely distributed across the surface of the brain, stores memories and accrued knowledge and consists of thousands of local circuits or modules. Its primary role is to “capture the regularities and contingencies of people’s experiences by making simple associations...[and does so by operating] on the basic principle that when the brain cells fire together (because they are simultaneously activated by particular inputs), they wire together...” (Chein and Schneider, 2012, p.80). Despite the fact that the representation system of learning is slow, it is profoundly significant to the learner because it ensures that relevant information is not disturbed by random or arbitrary information (McClelland et al., 1995).⁴⁸ However, once the learning process is completed, the representation system can navigate the environment and accomplish goal-oriented tasks quickly and without intervention from the CCN.

A Dual-Process Control Theory of Deception

Although there are differences between these two models, several important features are quite similar. First, both have a hierarchal model of control that remains integrated. Second, emphasis is placed largely on connectivity rather than categorization. Third, they demonstrate how habit-behavior (reflected in the representation system)

⁴⁸It should be noted that this type of slow learning can and is often assisted by faster mechanisms in the brain such as the hippocampus (McClelland et al., 1995) and the basal ganglia (Pascual-Leone et al., 1995).

occurs and explains why the habit-behavior persists — it is generally uncontrollable as it operates independently of the higher order systems and are attached to specific tasks that are, for all intents and purposes, value-laden. That is to say, tasks are not arbitrary but chosen either by the individual or given to the individual by a parent, a peer, a teacher, the media or arts, or a boss. Thus, habit-behaviors are goal-directed though they are not done so consciously. Fourth, the highest system in each model monitors incoming information and houses the value-laden goals (values) and epistemic-claims, which act as reference points to compare the incoming information. Fifth, there is a mediating and operating structure between the highest and lowest system of control. In each model, this mediating and operational system accesses working memory which is presumed to be serial in its processing.

One important difference however may be that Schneider and his co-authors stress the connectionist approach more so than Evans and Stanovich. Consequently, they often make emergent inferences in regards to the level of connectivity between brain structures. Based on a study by Hasson et al. (2004) that evaluated brain activity while watching movies, Cole et al. (2010) conclude that “CCN and DMN [the metacognitive system] are able to utilize their extensive connectivity to integrate information from primary sensory regions and also between their own regions internally to form an internal ‘mental’ world that may characterize the core of human experience. Future research may reveal the exact connectivity patterns and neural processes that make the *emergent* properties of this internal ‘mental’ world (e.g., selfhood, consciousness) possible” (p.3146, emphasis added).⁴⁹ In the same vein, it might be suggested that

⁴⁹Hasson et al.’s study found that all areas of the brain across movie watchers were highly corre-

the strengthened connections generated in the representation system (Type 1 in Evans and Stanovich's model) also have emergent properties.

Another difference is that only Schneider and Chein (2003) explicate the precise way that the control mechanisms operate. In their explanation and drawing on the work of Anderson (1983), each micro module has two layers whereupon input and output vectors are positioned. The incoming input excites the input units that project back upon themselves (positive feedback) or in the literature's terminology have excitatory auto-associated connections and the output layer sends information to the other modules. Each module also has three input signals and two output signals that communicate with the control system. The overall configuration allows for communication to be transmitted between modules as well as between a module and the control system. Significantly, transmission of information between modules is not sent randomly but only when the output gain is high. This same process occurs with the control system as it receives information from the gating and report relay station in scalar form. If that information fails to correspond to some threshold or reference, the goal processor will send signals back for adjustments. It may also, if necessary and depending on the higher order thresholds or reference points, reconfigure the flow of data into the data matrix. But once automatic processing is learned, modules do not need to wait for the signals of the control system. In some ways, this model is similar to another control system model developed by William Powers (1973, 1998).

The three central features of Powers' model consists of, one, a hierarchy of control,

lated except the CCN and the metacognitive system (DMN or default mode network), implying that each individual constructs a mental world independent of what may be occurring in the external world.

two, reference conditions or thresholds and three, negative feedback. To date, he has proposed 11 levels of control, although he informs the reader not to take these levels “too seriously”, instead they are intended as useful starting points (1998, p.137). The process of control, according to Powers, is as follows: as an individual moves and acts in her environment, she will attempt to control objects and events around her. To do so first requires identifying what objects and events to pay attention to. This is the role of reference conditions in the model as they determine where to place focus and can be conceptualized more or less as value-markers. Some references are biological while many other are learned from the social environment. In addition, different references correspond with different levels of control in the hierarchy where higher levels direct lower levels. When the individual moves and interacts within her environment, sensory information, via the process of perception and guided by references, is received throughout the hierarchy whereupon comparisons are made between it and the reference target. If the sensory information fails to match the reference, that is, if the feedback is negative, signals will be sent to make the appropriate adjustments and bring the external and internal worlds back into alignment.

What is perhaps most insightful about control theories is that they make references the primary factor in the determination of behavior.⁵⁰ This is another way of saying that values occupy priority position. To some, this remark is blatantly obvious but to others, it is blatantly simplistic and cannot possibly explain the complexity of human behavior. There are likely two reasons for this conundrum. First, the amount of

⁵⁰Although it may be a bit of a stretch, reference conditions, particularly those of a biological nature, can be thought of as Freud’s, Jung’s or Veblen’s instincts.

contextual-references that any one person has will increase as the complexity of their culture and sub-cultures increase. And the more contextual-reference there are, the more difficult it becomes in identifying and tracing-out each and every one of them especially as each value has an unique weight that is susceptible to change. Identifying and tracing-out references of single-celled organisms on the other hand are apparently much easier. Second and following the dual-process model, most contextual-references are linked to habit-behaviors directly or indirectly because humans must move and interact in their environment and thus must perform various “chosen” tasks (goals) within it.⁵¹ To become proficient at these tasks (goals), one must make them a habit and herein lies the difficulty. As an action is strengthened through neural wiring and becomes a habit, the higher order control system simultaneously disengages. When this occurs, value-claims are driven below the surface of consciousness where they generally remain throughout the course of a person’s life. At this point, much of one’s intake of sensory information is largely attuned to their unconscious habit-behaviors and not their conscious system. This process of turning an action into a habit may also explain the old aphorism, “we [often] see things not as they are but as we are”.

Given this state of affairs, where both internal biological references and learned contextual-references (social references or values) are synced with the external world (or are trying to sync) but largely driven below the surface of consciousness through the process of the representation system, one might ask then how does behavior change

⁵¹It is quite possible that many of the deeper level biological references may not be linked to a habit-behavior and are thus a stand-alone evolutionary designed feature.

if one cannot see outside the phenomena for which they are controlling for? Two options might be suggested although there are likely other means to see phenomena anew. The first is to physically re-situate oneself in a different environment and its corresponding institutions. A second option is to engage in deliberative or hypothetical thinking proposed by Dewey (1922) and Stanovich (2009) respectively. Although both solutions are quite feasible from a matter-of-fact point of view, they are nevertheless formidable. They are formidable because habit-behavior operates below the surface of awareness but they are also formidable because references or value-claims are associated with a person's identity where the expression of that identity might possibly be the single most important goal of the human species. This is valid even in societies that are more collectivist because self-expression or Jung's individuation is not necessarily about the individual alone but can also be conveyed through the group, explaining, in part, why people are willing to give their life for a cause.

The functionalists and the OIEs were wrestling with this problem a century earlier and it was largely their understanding of human behavior that led many of them to it. On the other hand, if one assumes that instincts *alone* are the determinants, or that only stimuli direct behavior, or that humans are driven only by satiation and calculation, or even biases, it precludes arriving at this problem. To counter this, analysis should begin with an evolutionary and social account of the species. Humans, along with all other organisms, are goal-oriented, but unlike many other organisms, human goals extend well beyond biological ones and can be subject to conscious control. Beginning from this premise propels the inquiry towards three fundamental questions: one, how are social goals (values or references) determined,

two, once determined, how does one go about attaining them and three, if one does not prefer a particular social goal, how does one change it?

All three questions can only be answered with a theory of learning where the representation system plays the more significant role though this need not be the general case. Broad social goals are given at birth, are directed by the use of the mind's control system via observation and external instruction and learned by the use of automatic processing via practice. After some period of time, mastery is attained and goals achieved. Some individuals however fail at achieving a few of the given social goals, not because the individual lacks the capacity to learn how to do so, but because barriers have been placed in their way. The presumption here is that human infants have more or less the same learning capacity at birth despite individual differences. Moreover, although one is born into a variety of social goals, with the human capacity for deliberation or hypothetical thinking, also comes the capacity to weight or change these goals.

Applying the contemporary dual-process model of the mind with an emphasis on control, a behavioral theory of deception might now be suggested. A person will engage in deceptive behavior under three general conditions: one, there are particular goals generated by particular conditions that create individual striving and competition, two, that those particular goals are highly valued by the individual and three, that those valued goals become habituated. Two preeminent Western value-claims that may account for individual striving and competition are gamesmanship and status. Within the former also lies the tendency to seek private risk and reward. Attaining both goals is a signal of strength and an envy of many where the greater

weight an individual places upon them, the greater the likelihood deceptive behavior will arise.

The single most common institution associated with these two pre-eminent goals is the business enterprise itself and deception is likely to be found within it. Moreover, and following this logic, other behaviors associated with individual striving and competition, such as aggressiveness, shrewdness, audaciousness, presumptuousness, boldness and wantonness that act to amplify deceptive behavior are also prevalent within its walls. And because people do not have many options other than to work for a business enterprise, many individuals will come to value and habitualize these two claims albeit in varying degrees. To uproot deceptive behavior then requires the uprooting of these two preeminent claims which in turn further requires uprooting the institution in its current form as well as its accompanying story of *laissez-faire* and presumably scarce resources.

Summary

In an era where the Christian doctrine has diminished and science flourished, new questions and explanations regarding human behavior were likely to be sought and indeed they were. Though many psychological theories of the past century did not explicitly state the use of a mind-model, many nevertheless employed this method. Psychoanalysts did so with their categorical model of the mind, structuralists did so with their machine model, behaviorists with their *tabula rasa* model, orthodox economists with their rational model, behavioral economists with their heuristic-bias model and the functionalists and OIEs with their habit model.

What is perhaps important however is not the use of the model per se, but what it says about the schools active or passive approach towards the mind and behavior more generally. What was found was that the psychoanalytical school has a passive view of the mind in respect to interface and processing but an active view in respect to functional-biological ends. The structural and behaviorist schools have a passive view of the mind in all three respects. The orthodox economist school has a passive view of the mind in respect to interface and functional-biological ends but an active view of processing albeit in an extremely limited form. The behavioral economists view of the mind is similar to that of the orthodox economist school but with a single additive feature for processing (heuristics). Finally, the functionalists and the OIEs schools have an active view of the mind in all three respects, as interface, functional-biological ends and processing. In each of these models, only the latter takes a fully evolutionary or situated approach to human behavior. Moreover, only the latter view hypothesized a dual-process model, a model that is supported more and more by evidence.

In the past several decades, cognitive scientists have made an effort to empirically research the dual-process framework. The general consensus emerging from these efforts is that the mind is organized in an integrated hierarchy consisting of three systems (to use Chein and Schneider's terminology, the metacognitive, the cognitive control network and the representation system) and that it operates through connectivity where sufficiently strengthened connections no longer require the use of cognitive control. Instead, navigation and goal-oriented tasks are accomplished independently of conscious thought. Schneider and Chein's (2003) understanding of how

information is transmitted across the brain is complemented by the control model developed by Powers (1973, 1998). The most significant aspect of control models is the use of a reference point or threshold level. This limits combinatorial explosion and randomness as well as identifies the primary factors driving human behavior, namely values or goals. A dual-process control model of the mind was found to be useful for locating causes of transaction fraud. Through its application, deceptive behavior was generally found to be the product of greatly valuing the two pre-eminent contemporary goals — gamesmanship and status — and their habituation.

CHAPTER 6

CONCLUSION

Explaining why an individual or a group of individuals systemically engage in a particular activity is not a straightforward affair. There are both historical and structural conditions to consider as well as the behavioral features of the species. Moreover, humans in general are complex and create complex cultures that continuously change enlarging the difficulty of the task. One approach that is helpful in this endeavor, and one of three approaches taken here, is the historical comparative approach. It is helpful in that a historical analysis, with the assistance of a filtering and organizing device, throws into relief the modern period and gives one something to compare and contrast it to. The second approach, the original institutional economic approach, has assisted in locating learning centers and within them value-claims, each of which are central to the formation and determination of human behavior.

The intellectual filtering and organizing device developed in chapter two was to ask three simple questions of the Medieval and modern eras: what are their general impulses, what are their general aims and what are their general means to attain those aims. By asking and answering these questions, it is possible to determine whether or not the modern era represents a *general* continuity with the past or is the

product of a *general* break. While the past institutions and temperaments provide a mirror in which to measure modern counterparts, the question of *general* continuum or break assists in targeting those movements and developments that have led to the emergence of market societies. Lastly, the historical comparative approach has the advantage of bringing value-claims and dominant narratives into focus.

It was found that a general aim in the Medieval era was an individual's rank or status. The general impulse and means, and in accordance with this aim, was expansion and force respectively. And so the attainment of the general aim was achieved through violence, war and through land expropriation. Importantly, and throughout most of the early Middle Ages, the use of force was open to most if it could be mobilized. From roughly the fifth to the sixteenth century, Europe was, for all intents and purposes, a *competitive* warrior society, a society that by definition glorified war. Warriors proved their self and gained their rank through violence. However, the degree to which rank remains a pre-eminent value by sheer force alone in a dispersed population is difficult, especially if the authoritative figures (kings and magnates) lack an comprehensive administrative institution, a large standing army and a comprehensive narrative with corresponding rituals to support it.

To keep status as an ultimate value in a warrior society that is dispersed under these circumstances requires an institution to reproduce behavior that upholds it as a value. This was the role of the feudal institution and in particular the elaborate oaths and ceremonies that accompanied it. The emergence of the knights was also crucial in sustaining the warrior culture. This warrior group constructed their own set of moral behavioral codes (chivalry), codes that, in reality, only applied to each

other and not to the peasants or the serfs and thus operated more as an exclusionary mechanism. Knights and the feudal arrangement were essential in building a warrior class that could be called upon to fight in a king's campaign. As a high ranking order and one skilled in combat, they reinforced the value of force as well as the behavioral codes of devotion and fealty and in so doing aided in fixing the violent social-political order.

The kings, nobles and knights however were not alone in their attempts to retain status. Moreover they did not possess a narrative nor have control over the then legal system — this was the purview of their institutional competitor, the papal Church. While the latter in the early stages sought an alliance with kings, in the form of conversion and protection, after it gained a substantial amount of power itself, it entered directly into competition with it. It was successful not so much by competing in like form, via force, but through the proselytization of its doctrine, through its thousands of places of worship, through its elaborate and ubiquitous ceremonies and through the use of canon law. The doctrine established “proper” behavioral codes and instilled both fear and hope among the laity. The ceremonies unified habits of thought and action and canon law updated or reinforced them all of which made behavior more predictable. In the main, medieval temperaments were either of a violent or deferential character. Later, when the Church had effectively gained control over a large enough swath of the population, it also began to extensively participate in the use of force, first by calling for pilgrimages (crusades) and then through the use of violence during the period of the Inquisition. The central explanation for the competition between the papal Church and the feudal monarchy was certainly the fact that it never united

organizationally. But this is perhaps not the most interesting aspect about the era, especially in the *late* Middle Ages. The most interesting aspect about these roughly two hundred centuries was that it was at this time that the feudal monarchy began in earnest and largely as a consequence of the Investiture controversy, to develop its own legal system. A legal system that was not only secular in the making but began to detach itself from customary law and in this instigate an instrumental legal view.

The *full* expression of such a view could not become dominant however until the crown had accrued additional strength and the power of the papal Church had weakened. When both developments materialized in the late fifteenth and early sixteenth century, and with the aid of authoritarian Roman law and the culture of force that inundated Europe, the strong version of the *law as instrument* view could and was asserted by many monarchs. The king directed activity and obtained his objectives often through violence but also through Royal law where the final appeal rested in God. In this way, laws of the crown could not be contested but more importantly, they also need not be beholden to tradition or custom. In other words, the king, by appealing to his “divine right”, could make law from whole cloth. But because Europe had been ruled largely under the prescription to local custom and tradition, under *competitive* force, and had relative peasant community and town autonomy, this strong version of governance saw immediate and sustained resistance. More often than not, resistance came from the nobles and seigniors but as commerce expanded throughout Europe and towns grew, other minority groups, such as the townfolk and the merchants, increasingly used secular-instrumental law to their own advantage and thus were, to a great extent, operating either in direct opposition or outside the king’s reach.

The increase in competitive commerce also brought with it five new avenues to attain status — (1) individual farming or sheep rearing for sale, (2) sea or land trade, (3) banking, (4) town craft work and (5) retailing — and thus five new ways to compete with the crown and aristocrats. In the course of these organizational transformations, the ends of production were gradually transformed from production for use to production for exchange as new markets formed and old markets were extended. What largely made wealth accumulation possible for this new group of people (large land holders, merchants, bankers, master craftsmen and retailers), apart from the development of new monetary instruments, was that they operated in areas of relatively weak control, consolidated land or united together to form guilds, and extensively used the *law as instrument* to attain their ends where the more frequent its use, the more detached from customary (common) law it became. Throughout this process, individual ownership claims over land and other inanimate or animate objects emerged, while ideas of productivity and cost became more central. Subsequently, competition for rank and control over the law intensified where the tactical use of information, usually of the asymmetric kind, became somewhat of a necessity to establish and maintain status. But for an *untethered* local law to have any validity, it will need to make an appeal to authority.

The first appeals were often made to the papal Church canon law concept the pledge of good faith or to nascent local customs. The former appeal was fundamentally an appeal to Divine law and continued well into the seventeenth century. Yet as the papal Church lost ground and commerce grew, this appeal lost much of its power. Arguably, the single most influential and *intellectual* factor that directed new

appeals came from Roman law as it brought into focus the idea of Natural law and the method of deductive reasoning. While the single most influential and *physical* factor that directed new appeals was the emergence of individual risky-legal farming or sheep rearing for sale. This transformation can be thought of as the first *degree of separation*. When the ecumenical Church council advocating community rule was defeated (c.1515), the wars of religion ignited and despotic rule decreed, many a philosopher and jurist were forced to explain the social order in ways that were distinct from their earlier counterparts, the theologians and the canonists. The new doctrine or narrative that eventually formed drew upon these two factors by proposing a doctrine of “natural” (read, universal) individual rights over body and property. The “natural” individual rights doctrine was in essence about infringement and exclusion not necessarily about liberty, equality or opportunity for all because it was, to a great degree, meant to substantiate certain minority group’s level of control. Naturally, whose control and the extent of control varied among the emerging nation-states.

Notably, it was this new narrative that provided large land holders, merchants, bankers, master craftsmen, retailers and also, in time, industrial capitalists something to appeal to independently of the papal Church or crown. Later it was incorporated into constitutional representative government and might be referred to as the Constitutionalist doctrine. Throughout this process, an additional economic layer of appeals was added with the theory of *laissez-faire* economy and its narrative of putatively scarce resources, individual competition and meritocracy, a theory that effectively divorced ethics from production and distribution and which might be referred to as

the Techno-individualist doctrine. The period from roughly the 1850s through the twentieth century then could be considered as a time of fossilization for this particular intellectual construct. Despite the fact that not all emerging states held exact replicas nor were all emerging states free from imperial urges after c.1850, the use of quasi-deliberate secular law founded upon the idea of natural rights nevertheless became ingrained and in so doing became authoritative.

The increasing use of quasi-deliberate secular law and the manipulation of asymmetric information, along with the crystallization of the natural individual rights doctrine, had one primary consequence, it re-oriented Western society away from competitive force and towards competitive economy as a general means to attain ends. The two fundamental structural factors in the ascendance of a market society were one, fully integrated markets and two, individual or minority group control via secular law. The exercise of the law, though the purview of legislators, became a competition between the new group representing the business concern, the aristocrats and the crown, with the former for now winning out. The recent success of the business concern was made possible by the legal mechanisms and maneuvers of those working on behalf of the business enterprise and often, though not always, in tandem with the state.

Despite this re-orientation, a strong continuity has remained between the Middle Ages and the Modern age. Both eras share a general impulse (expansion) and a general aim (elevation and/or preservation of status). But unlike the Middle Ages, expansion now predominantly occurs through credit-money and technology as opposed to land expropriation. The *major* difference between the eras is found in the

current general means, the competitive economy. And it is not coincidental that a competitive economy emerged hand-in-hand with quasi-deliberate secular law because the latter provided a method in which to bring the majority of the population into the market and make material livelihoods dependent upon market systems and institutions. It did so with the proliferation of contracts (abstract documents) and the restriction of access to material livelihood beginning with tangible property and extending to intangible or intellectual property rights (patents, trademarks, trade secrets, industrial designs and copyrights). Quasi-deliberate secular law's attribute of imprintability greatly assisted in this process as it facilitated the creation of new rules to guide and limit individual actions, perhaps none more economically effective than the labor contract.

Once the new narrative of the natural individual rights doctrine crystallized, appeals were made to the law outright without any stipulation of its formation. For many Western states and especially the United States, secular law now operates as a free floating justification for the obedience of law despite its circularity. Or in another way of saying, the majority of people obeys and accepts the law because it is the law. The natural rights doctrine of body and property enter into discussion usually only when pressed. When, in some circles, this doctrine is itself questioned, appeals are often made to Spencerian evolution. Nonetheless, the secular law's authoritative position explains the widespread acceptance of the phrase, *law and order*.

The development of market society and the institution of the business enterprise have relied heavily upon the *law as instrument* view to adapt and continue to reproduce itself. The culmination of these movements has left Western society with

two dominant institutions, the state and the business enterprise, one dominant mechanism for control, quasi-deliberate secular law, and three competing narratives, the Christian doctrine, the Constitutional doctrine and the Techno-individualist doctrine. This is not meant to suggest that these features are all encompassing but only that they are ruling. It was found that throughout the process of re-orientation, relational distance between individuals were stretched first when buying and selling broadly entered into communal farming (the *first degree of separation*), then when buying and selling broadly entered into factory work (the *second degree of separation*) and finally when managerial control and absentee ownership became the dominant model for business (the *third degree of separation*). In each of these three degrees, it was further found that all retained the properties of conflicting claims, increased individual or minority legal control and opposing habits where minority legal control was acquired over land, labor and financial assets respectively. The increasing use of documents and financial debt instruments were pivotal for the entire transformation and also represent a *conceptual* form of relational distance.

Specifically it was found that the *degrees of separation*, as an outgrowth of particular economic organizational forms and the increasing use of the *law as instrument* view which was itself an outgrowth of two competing dominant and hierarchal institutions (the papal Church and the monarchy), accommodate the expression of deceit. To recall, the six features of buying of selling are: (1) conflict over (output) price movements, (2) formal rules (law) over ritual as authoritative symbols, (3) diverging motives between buyer and seller, (4) a tendency towards speculation, (5) a tendency towards control in order to minimize individual risk and (6) limited personal

knowledge of the trader.

The additional layers of conflict and distance found in the structural nature of the business enterprise are: (7), conflict over *labor* price movements, (8) a diminishment of personal reputation from producer to consumer and vice versa, (9) calculating and shrewd habits of thought, (10) separation of ownership from control via financial instruments, (11) legal minority control via hierarchy and power inside the enterprise, (12) increased pecuniary emulation of the laborer/consumer and (13) a diminishment of the intrinsic motive of workmanship with a subsequent rise in the extrinsic motive of profit and income. These *degrees of separation* create layers of conflict, stretch personal relations both physically and conceptually and account for the prevalence of asymmetric information inside the corporation, especially with the method of (2) and the organization of (11). Together these features produce distance, conflict and individualistic temperaments which are accompanied by a drive, sometimes feverish, to accumulate fiat money and/or other financial assets.

What makes transaction fraud endemic rather than an aberration in market economies, is that the dispositions associated with it, manipulation, duplicity, fickleness and indifference, the *degrees of separation* that bracket it, and the pre-eminent values that drive it, status and gamesmanship (private risk and reward), are upheld and reproduced within one of Western society's dominant institutions, the business enterprise. This is just another way of saying that individuals are a product of their situational context and so are a product of the various structures and types of organizational forms that they born into. Causes of transaction fraud then were sought and found, in part, by inquiring into the structural and institutional forms of both the

prior and contemporary periods. The general finding was that it was the structural productive changes and the Investiture Controversy initiated by the competing dominant institutions of the Middle Ages that generated *degrees of separation* and their accompanying three properties: conflicting claims, increased minority legal control and opposing habits.

And while this gives some explanation for the causes of transaction fraud, particularly the structural ones, it has yet to explain how an individual's thought and action become attuned to such dispositions. From the disparate behavioral theories that have developed over a century and a half, the dual-process model of the mind perhaps provides the best explanatory power for this process. To begin with, it takes a bi-directional (evolutionary) view of the mind. The premise here is that the mind and body interact fluidly with the environment and vice versa. As a consequence of these interactions learning takes place.

The kind of learning is demonstrated by the model's triarchic hierarchy of control. In the process of observing others or following instructions, the metacognitive system develops strategies for the completion of a task. Once this is determined, the cognitive control network (CCN) begins the process of learning through the use of attentional control, arousal and reinforcement signals. Throughout, another system, the representation system, simultaneously codes for stimulus-response associations. With practice, the latter neural coding becomes stronger. Once it has reached some level of sufficient strength, both the metacognitive and the CCN systems disengage. At this point, an individual will be able to successfully complete the task independent of the metacognitive structures of the brain or to put it another way, human activ-

ity will become habitual. Habit-behavior, as opposed to rational and hypothetical thought, is one of two cornerstones of the dual-process model. Its point of emphasis is the learning process and the role that habit-behavior plays in everyday activity. Where learning occurs in the hundreds of institutions that exist in society with the most dominant among them having the greatest influence.

The hierarchal control theory is the second cornerstone of the model. Its point of emphasis is to account for efficient transmission of information. It does so through the establishment of reference points or thresholds. These human references, the majority of which are a product of human-made social environments, can be conceptualized as value-markers. Different references correspond with different levels of control in the hierarchy. It is only when there is a mismatch between incoming sensory information and the reference point that signals are sent out to make adjustments and bring the external and internal worlds back into alignment. The dual-process model with its central features of the representation system and control theory reveals two critical aspects of human behavior. First, values are primary causes in the determination of human action and second, many of these values get driven below the surface of consciousness through the representation system making them difficult to recognize. And it is precisely through this process that an individual can become attuned to deceptive dispositions.

Two fundamental value-claims in particular that may reveal whether or not someone is prone to transaction fraud are: (1) gamesmanship, as in the tendency to seek private risk and reward, and (2) status. Both rely on a ground of competition to advance and both have become ubiquitous through the growth and eventual domi-

nance of the corporation. Indeed, the competitiveness that pervaded the West for a millennia remains in the form of competitive economy and aided by expansionary credit-money and technology. Moreover, these two value-claims can aid in identifying the opportunistic fraudster elaborated by Wolfe and Hermanson (2004), Ramamoorti et al. (2009) and Black (2013 [2005]).

And because these value-claims are found predominately within the business enterprise, because the business enterprise is one of two dominant institutions in the West, because it is supported by two of the three dominant narratives, the Constitutional (natural rights) and the techno-individualist doctrines, and because the majority of the population must gain their livelihoods through its organization, many will come to identify, value and habitualize these claims. Importantly, their habitualization implies that many are not aware of them but it also implies that they have come to see, conceptualize and think about the world in a particular way and where any incoming but conflicting information must contest with this way of thinking. Habit-behavior, as it is, is not relegated to physical acts alone but occupies the territory of the mind as well.

Greed, while it has the tendency to exacerbate deceptive dispositions and may be present in some, is not a necessary condition for systemic transaction fraud. Rather the necessary and sufficient conditions for systemic transaction fraud depends on (1) the level of reverence for status and individual risk and reward (expressed as economic competition or gamesmanship), (2) a dominant organization that reproduces and reinforces these two value-claims, (3) the extent to which the view and practice of the *law as instrument* is carried out, (4) the extent to which the impersonal relation

(*degrees of separation*) has advanced, (5) the strength and blind belief in the natural rights and techno-individualist doctrines, (6) the ability of non-business institutions with opposing values-claims to moderate deceptive behavior and (7) to the extent to which the value-claims of (1) are habitualized and become part of a person's identity. More succinctly, transaction fraud runs rampant when material provisioning is made the game of businessmen, where assessments are made in monetary form and under cost-benefit analysis alone, when business has minority legal control and when the pursuit of the game is prized above the well-being of the community.

The other dominant institution, the state, has the capacity to reduce the level of transaction fraud markedly by using its power of the purse to make basic necessities such as housing, food, utilities, healthcare, clothing and transportation not just affordable but cheap. It also has the power to instate regular debt jubilees to lessen financial pressure. In the process, the stakes of the business game would be driven down and the blind belief in the constitutionalist and techno-individualist doctrines would wane. In many other Western countries with stronger state support than the United States, the pursuit of status through money accumulation and business dealing is not conducted with such fervor. Subsequently, the populaces within these countries do not have the same reverence for these doctrines and likely do not commit as many transaction frauds. Of course, just because the state can intervene in this way and does so in degree in some other Western countries, it does not follow that it will or remain to do so. In the U.S., the natural rights doctrine of individual body and property enshrined in the constitution, the lobbying power of business, the revolving door between business and government and the privilege, power and asymmetric

economic and legal information held by business makes this type of solution difficult. Moreover, so long as the business enterprise persists in its current form, individuals will continue to become habituated to the culture of competition (winning), status, gamesmanship and the desire to accumulate putatively scarce rewards.

Absent a national awakening, some other gradual and more minor solutions will have to be sought. Because systemic transaction fraud is principally a function of asymmetric information in the form of business privilege, power and legal machinations and the extension of human relations, solutions should attempt to limit both. One suggestion is to create a single consolidated database accessible to the public that not only would track all complaints and fraud cases but would also provide statistics on business lobbying, the revolving door and business attempts to change laws to their benefit alone. In regards to the extension of relations, new non-legal community ceremonies and rituals could be developed to resolve disputes. Ultimately however, a dramatic reduction of transaction fraud will require the elimination of asymmetric information through a re-structuring of business. This implies that societies will require community-based conscious control not only over production and technology but also over value-claims. A tall order when the process of the representation system and the tendency to attach value-claims to individual identity is two of the hallmarks of the human species.

There is nonetheless no guarantee that these would solve the complicated re-structuring problem from blind monetary production and technology to self-aware industry, technology and provisioning. There are now, and will continue to be in the foreseeable future, conflicting value-claims among groups within large Western soci-

eties. However and despite the fact that the values of competition, status and gamesmanship (seeking private risk and reward) pervade many Western market economies, perhaps more so in the U.S. and Britain, there are still other values that stand in direct contention to these. They can be found in the moral directives told to children such as “play fair”, “be nice” and “share” but they are also found in common Christian aphorisms such as “Thou shall not kill” and “Do unto others as you would have them do unto you”. If deceptive behavior is to be effectively minimized, it is these latter values that must prevail far above the former ones. Doing so will require continual non-blind debates over values but it will also require the minimization of the *degrees of separation*.

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