

## THE PERSISTENT LIMITS OF FRAUD PREVENTION IN HISTORICAL PERSPECTIVE

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**ABSTRACT**—Fraud has been ubiquitous throughout history, and so have the methods of fraud prevention. History demonstrates that no anti-fraud measures have fully succeeded in eliminating deceptive market behavior. Instead, this Essay uses evidence from premodern England to argue that societies and individual contracting parties balance tolerating a certain amount of fraud against the costs of fraud prevention.

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### INTRODUCTION

Recently, I told a law professor that I study the history of commercial fraud. “Oh,” he said, “so you mean like the South Sea Bubble of 1720.”

“No,” I explained, “like in the Middle Ages.”

“Really?” He replied. “I thought that before the South Sea Bubble everyone was honest.”<sup>1</sup>

Fraud is not, as it is sometimes assumed, a creature of modern capitalism, industrialization, the spread of complex financial systems, or the development of the corporation.<sup>2</sup> On the contrary, many of the same types of frauds that we see today have existed throughout the history of organized society.<sup>3</sup>

In response to the ubiquity of fraud, governments, quasi-public institutions, and private transactors have for centuries tried a number of approaches to counteract it: (1) regulation, including disclosure and licensing requirements; (2) reputation policing to incentivize traders to be honest or risk losing future business; (3) public and private verification intermediaries that certify facts about goods, services, and qualifications; (4) public service information to warn people about current scams;<sup>4</sup> (5) moral training to encourage honesty;<sup>5</sup> and (6) courts and legal doctrines either granting remedies that protect consumers or putting the burden on them to beware. And for just as long, such anti-fraud measures have fallen short of eliminating deception in economic exchange, defeated by their own

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<sup>1</sup> The South Sea Bubble was one of the earliest financial crashes. It occurred when widespread speculation in the South Sea Company drove its stock price far above its realistic value. The resulting collapse of the stock in 1720 ruined investors, caused bank failures, and revealed the fraudulent base upon which the Company had constructed its financial profile. *See generally* HELEN J. PAUL, *SOUTH SEA BUBBLE: AN ECONOMIC HISTORY OF ITS ORIGINS AND CONSEQUENCES* (2011).

<sup>2</sup> *See, e.g.*, EDWARD J. BALLEISEN, *FRAUD: AN AMERICAN HISTORY FROM BARNUM TO MADOFF* 4–5 (2017) (calling fraud a problem “that US businesses, policymakers, and citizens have confronted since the advent of modern capitalism”); IAN KLAUS, *FORGING CAPITALISM: ROGUES, SWINDLERS, FRAUDS, AND THE RISE OF MODERN FINANCE* 17 (2014) (“A history of capitalism, trust, and fraud must be a history of cities and globalization, of complexity, technology, and speed.”); GEORGE ROBB, *WHITE COLLAR CRIME IN MODERN ENGLAND: FINANCIAL FRAUD AND BUSINESS MORALITY, 1845–1929*, at 1 (1992) (“The real origins of white-collar crime . . . lie almost two hundred years in the past, in the tremendous financial growth which accompanied the British Industrial Revolution.”).

<sup>3</sup> By way of example, the rather sophisticated marine insurance fraud of intentionally scuttling a ship to get the insurance proceeds is attested in the fourth century BCE, continued during the medieval and early modern periods, and still occurs today. *See* Emily Kadens, *A Marine Insurance Fraud in the Star Chamber*, in *STAR CHAMBER MATTERS: THE COURT AND ITS RECORDS* 155, 156 (K.J. Kesselring & Natalie Mears eds., 2021).

<sup>4</sup> *See, e.g.*, BALLEISEN, *supra* note 2, at 75–104 (discussing the publicizing of frauds to warn potential victims); *see also* 1 *THE COVENTRY LEET BOOK: OR MAYOR’S REGISTER CONTAINING THE RECORDS OF THE CITY COURT LEET, OR, VIEW OF FRANKPLEDGE, A.D. 1420–1555*, at 180–82 (Mary Dormer Harris ed., 1907) (presenting a bill delivered to the mayor of Coventry in 1435 outlining frauds committed by metalworkers and how that deceit impacts downstream customers).

<sup>5</sup> *See* JAMES DAVIS, *MEDIEVAL MARKET MORALITY: LIFE, LAW AND ETHICS IN THE ENGLISH MARKETPLACE, 1200–1500*, chs. 1, 4 (2012) (providing a comprehensive account of medieval moral works warning of the dangers of fraud in the marketplace and teaching that honesty, good faith, and concern for the common good represent the true Christian path—such works also alerted consumers to common scams).

inherent flaws, countered by the fraudsters, or swept aside by changing economic and social conditions.<sup>6</sup>

We might also add a seventh means of fraud prevention: the actions of the victims themselves, because the key to fraud is the victim's willingness to trust the fraudster.<sup>7</sup> When victims make use of available verification methods rather than trust blindly, when they heed warnings about swindles, when they are not themselves seeking to make a quick buck—they are less susceptible to the fraudster's cons.

But people *will* trust without verifying because trust is usually efficient.<sup>8</sup> Taking steps to protect against fraud, by contrast, can be costly.<sup>9</sup> Assessed by this metric, the trustor's incentive is not necessarily to “decrease fraud to zero.”<sup>10</sup> Achieving this goal would mean either paying for potentially unnecessary anti-fraud protections or never entering into contracts at all.<sup>11</sup> But the fact that trust later turns out to have been misplaced does not mean it was inefficient given the circumstances at the time of contracting because

<sup>6</sup> See *supra* note 2 for sources reviewing this history for nineteenth- and twentieth-century England and America.

<sup>7</sup> DAN DAVIES, LYING FOR MONEY: HOW LEGENDARY FRAUDS REVEAL THE WORKINGS OF OUR WORLD 15 (2018) (noting that in fraud situations “the victim not only consents to the criminal act, but voluntarily transfers the money or valuable goods to the criminal”); DAVID W. MAURER, THE BIG CON: THE STORY OF THE CONFIDENCE MAN AND THE CONFIDENCE GAME 1 (1940) (pointing out that in a scam, the “trusting victim literally thrusts a fat bank roll into [the con man’s] hands”); Christopher B. Yenkey, *The Outsider’s Advantage: Distrust as a Deterrent to Exploitation*, 124 AM. J. SOCIO. 613, 614 (2018) (“[L]ower monitoring in trusting relationships paradoxically increases vulnerability to exploitation.”). Trust as used here means the willingness to take the risk that the other party in the relationship will do what they promise. Cf. Denise M. Rousseau, Sim B. Sitkin, Ronald S. Burt & Colin Camerer, *Not So Different After All: A Cross-Discipline View of Trust*, 23 ACAD. MGMT. REV. 393, 395 (1998) (defining trust as “a psychological state comprising the intention to accept vulnerability based upon positive expectations of the intentions or behavior of another”). This trust can be a personal belief that the other person will perform, often because the person demonstrates certain characteristics (such as place of origin, wealth, or profession) that the trustor views as evidence of trustworthiness. Or it can be based on the belief that some existing institution will either provide the necessary verification to flag cheaters *ex ante* or will ensure trustworthy behavior by incentivizing honesty or punishing cheating. See Sheilagh Ogilvie, *The Use and Abuse of Trust: Social Capital and Its Deployment by Early Modern Guilds*, 46 JAHRBUCH FÜR WIRTSCHAFTSGESCHICHTE 15, 18 (2005).

<sup>8</sup> Yenkey, *supra* note 7, at 614 (“The economic value of trust between exchange partners is that it saves on the costs of monitoring and enforcement necessary to overcome uncertainty in the future behavior of transaction partners.”); Lynne Zucker, *Production of Trust: Institutional Sources of Economic Structure, 1840–1920*, 8 RSCH. ORGANIZATIONAL BEHAV. 53, 56 (1986) (“Trust has been acknowledged in economic and organization theory as the most efficient mechanism for governing transactions . . . .”); Partha Dasgupta, *Trust as a Commodity*, in TRUST: MAKING AND BREAKING COOPERATIVE RELATIONS 49 (Diego Gambetta ed., 1988) (“Trust is central to all transactions . . . .”).

<sup>9</sup> DAVIES, *supra* note 7, at 16–17; TAMAR FRANKEL, TRUST AND HONESTY: AMERICA’S BUSINESS CULTURE AT A CROSSROAD 55–56 (2006).

<sup>10</sup> Edward Peter Stringham & J.R. Clark, *The Crucial Role of Financial Intermediaries for Facilitating Trade Among Strangers*, 33 REV. AUSTRIAN ECON. 349, 357–58 (2020).

<sup>11</sup> See *id.*

victims may at that moment have made a reasonable cost–benefit analysis that it was safe to trust.

None of the problems of fraud prevention are new. Some contemporary scholars argue that the regulatory state is essential to control opportunism in a complex society.<sup>12</sup> Others advocate for the power of private ordering<sup>13</sup> or for improved moral training to reduce fraud.<sup>14</sup> But Western history going back to the rebirth of commercial society during the Middle Ages demonstrates that even when all of the methods of fraud prevention were in use, fraud may have become more difficult or costly to commit, but it never came close to being eliminated.

With the timelessness of fraud and fraud prevention in mind, this Essay outlines the limitations of anti-fraud measures in England during the period circa 1200–1630, with a focus on regulation and contractual relationships. Space constraints dictate leaving aside the remaining fraud prevention techniques of moral training, information, and legal liability doctrines, such as *caveat emptor*, applied by the courts, but these were certainly tried in the past.<sup>15</sup> Understanding the long history of deception gives us perspective on ourselves even though the specific types of deceit, and certainly the magnitude of the harms fraud causes, are, in some important ways, different today. No banks existed in this period in England to fail, the means of mass communication were not yet sufficiently developed to facilitate manias and bubbles, and no internet permitted fraudsters to hide behind anonymity. Nonetheless, fraud, if less financially impactful on a national or international scale, was still widespread and was no less worrisome to contemporaries.

The ubiquity of fraud in the face of fraud prevention suggests that current structural explanations for fraud, such as business being done at a

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<sup>12</sup> See, e.g., DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 35 (1990) (describing “impersonal exchange with third party enforcement” as “the critical underpinning of successful modern economies involved in the complex contracting necessary for modern economic growth”).

<sup>13</sup> See, e.g., EDWARD PETER STRINGHAM, PRIVATE GOVERNANCE: CREATING ORDER IN ECONOMIC AND SOCIAL LIFE 28, 110–12 (2015) (describing how payment processors and other financial intermediaries are incentivized to prevent fraud and that such intermediaries are the “beneficiaries of successful fraud management”).

<sup>14</sup> DAVID CALLAHAN, THE CHEATING CULTURE: WHY MORE AMERICANS ARE DOING WRONG TO GET AHEAD 281–91 (2004) (calling for training in business ethics and teaching ethics in school); RALPH KEYES, THE POST-TRUTH ERA: DISHONESTY AND DECEPTION IN CONTEMPORARY LIFE 241–43 (2004) (calling for a “post-ethics” honesty where we “reestablish that truth telling is our default setting”); DEBORAH L. RHODE, CHEATING: ETHICS IN EVERYDAY LIFE 136–39 (2018) (advocating for ethics training at school and work as a solution to the cheating epidemic).

<sup>15</sup> See DAVIS, *supra* note 5, at chs. 1, 4 (detailing a comprehensive account of the moral distress about fraud in medieval and early modern England).

distance,<sup>16</sup> the decaying power of reputation,<sup>17</sup> the complexity of modern financial systems,<sup>18</sup> or declining morality,<sup>19</sup> are enablers of certain types of fraud rather than root causes of it. Humans are evolutionarily hardwired to deceive,<sup>20</sup> and they also have a biological predisposition to trust, which they often do foolishly.<sup>21</sup> Combine those traits with greed, another timeless and pervasive human characteristic,<sup>22</sup> and savvy fraudsters will eventually find a way around the roadblocks set up to stop them.

But the ubiquity of fraud in the face of fraud-prevention measures also suggests that some amount of fraud is the price of doing business based on trust. And, indeed, when we look at history, we see that regulators and individuals entering into contracts balanced the possibility of fraud against the cost of imposing anti-fraud measures.

Part I demonstrates how royal and urban governments and guilds regulated certain parts of the economy extensively to protect consumers from deception. As the costs of prevention grew, and fraud persisted, however, these same regulators repeatedly chose to adopt a less aggressive and more flexible approach to deceitful commercial behavior. They did enough to keep fraud within boundaries, but not enough to prevent it entirely. As commerce outgrew the older forms of market regulation in the early modern period, the responsibility for fraud prevention fell increasingly on contracting parties. Part II examines how these individuals decided when to verify the trustworthiness of the other party and when to take the risk of being cheated. Finally, as Part III shows, sometimes people trusted blindly, and, unsurprisingly, that often did not turn out well.

## I. REGULATION AND ITS LIMITATIONS

Economists have argued that a “coercive third party” is essential to control opportunism in a complex society.<sup>23</sup> This association of law and fraud

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<sup>16</sup> KLAUS, *supra* note 2, at 97–99.

<sup>17</sup> JONATHAN R. MACEY, *THE DEATH OF CORPORATE REPUTATION: HOW INTEGRITY HAS BEEN DESTROYED ON WALL STREET* 1–2 (2013).

<sup>18</sup> ROBB, *supra* note 2, at 11.

<sup>19</sup> RHODE, *supra* note 14, at 1, 13.

<sup>20</sup> Carl T. Bergstrom, *Dealing with Deception in Biology*, in *DECEPTION: FROM ANCIENT EMPIRES TO INTERNET DATING* 19, 21–22 (Brooke Harrington ed., 2009) (“The living world is rife with deception . . . organisms deceive one another in every imaginable way in order to attain every conceivable advantage.”); LAURENCE R. TANCREDI, *HARDWIRED BEHAVIOR: WHAT NEUROSCIENCE REVEALS ABOUT MORALITY* 119–21 (2005).

<sup>21</sup> René Riedl & Andrija Javor, *The Biology of Trust: Integrating Evidence from Genetics, Endocrinology, and Functional Brain Imaging*, 5 *J. NEUROSCIENCE PSYCH. & ECON.* 63, 68–70 (2012).

<sup>22</sup> See, e.g., *Exodus* 20:17 (the tenth biblical commandment is “thou shalt not covet”).

<sup>23</sup> NORTH, *supra* note 12, at 35.

is not modern. Around 1500, the German poet Konrad Celtes coined what became a popular epigram:

You ask, why do the books of laws increase in abundance?

The reason is that deceit grows great in the world.<sup>24</sup>

But if the history of fraud teaches us anything, it is that attempts to regulate commercial behavior will only ever be partially successful. Enforcement will fall short. Fraudsters blocked from one avenue of deception by (effective) regulation will simply move on to another. Buyers, looking to save money, will purchase from unregulated vendors, thereby undercutting the more expensive regulated producers and ultimately leading to calls for the removal of the regulatory barriers.<sup>25</sup> We can see all of these effects in medieval and early modern England.

Between the twelfth and the fifteenth centuries, most English people became enmeshed in a commercial economy.<sup>26</sup> In other words, rather than exchanging goods by barter with their neighbors, they increasingly purchased wares for money from specialized producers at authorized weekly, seasonal, or annual markets and fairs, as well as at other informal local trading places.<sup>27</sup>

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<sup>24</sup> KONRAD CELTES, FÜNF BÜCHER EPIGRAMME 89 (Karl Hartfelder ed., 1881):

Quaeris, cur crescant numerosa volumina legum?

Est ratio: crescit magnus in orbe dolus.

This epigram made the rounds, reappearing in various permutations in texts as varied as the cover page of a 1522 Latin treatise on legal argumentation by an Italian canon lawyer (PETRUS ANDREAS GAMMARUS, *LEGALIS DIALECTICA IN QUA DE MODO ARGUMENTANDI & LOCIS ARGUMENTORUM* (Leipzig, Melochior Lottherus 1522)), a report by Sir Edward Coke on a fraudulent conveyance case heard in the English Court of Star Chamber in 1602 (Twyne's Case (Star Chamber 1602) 76 Eng. Rep. 809, 815; 3 Co. Rep. 80b, 82a ("Queritur, ut crescant tot magna volumina legis? In promptu causa est, crescit in orbe dolus.")), a French treatise on bills of exchange and bankruptcy from 1625 (MATHIAS MARESCHAL, *TRAITÉ DES CHANGES ET RECHANGES, LICITES, ET ILLICITES, ET MOYENS DE POURVOIR AUX FRAUDS DES BANQUEROUTES* 1–2 (Paris, Nicholas Buon 1625) ("Povrqvoy voit-on iournellement augmenter le nombre des loix? . . . La malice augmente tousjours en la pluspart des hommes . . .")), and a 1677 book by a German jurist on Roman law jurisprudence (HEINRICH PETER HABERKORN, *JURISPRUDENTIAE JUSTINIANEAE* 22 (Gorlice, Johan Adam Kästnerum 1677)).

<sup>25</sup> Jiong Gong, R. Preston McAfee & Michael A. Williams, *Fraud Cycles*, 172 J. INSTITUTIONAL & THEORETICAL ECON. 544, 545 (observing that "acts of fraud are met with new or modified antifraud measures, which lead to new or modified frauds, which lead to more changes in antifraud measures, and so on"). See *supra* note 2 for works demonstrating this history.

<sup>26</sup> R. H. BRITNELL, *THE COMMERCIALISATION OF ENGLISH SOCIETY 1000–1500*, at 79 (1993); DAVIS, *supra* note 5, at 9–10; Christopher Dyer, *The Consumer and the Market in the Later Middle Ages*, 42 ECON. HIST. REV. 305, 305 (1989); HEATHER SWANSON, *MEDIEVAL BRITISH TOWNS* 10 (1999).

<sup>27</sup> Dyer, *supra* note 26, at 323–24 (concerning unofficial markets); MARYANNE KOWALESKI, *LOCAL MARKETS AND REGIONAL TRADE IN MEDIEVAL EXETER* 41 (1995) ("Markets and fairs provided the main venues for the sale and purchase of goods throughout the middle ages.").

The structure of the markets and fairs should, in theory, have disincentivized fraud. Trade was public, supervised by market wardens.<sup>28</sup> The fair or market spaces were frequently organized by grouping sellers of particular commodities together in designated locations where it would presumably be more difficult to get away with selling inferior goods and where customers could efficiently comparison shop.<sup>29</sup> People also still primarily bought from traders they knew, so repeat dealing should have motivated an interest in reputation maintenance.<sup>30</sup>

Yet, at the same time that the English economy commercialized, local and royal anti-fraud regulation proliferated to protect consumers from shoddy products, cheating on quantity, and overinflated prices.<sup>31</sup> The regulations tended to fill in the gap where contractual fraud protections and information failed.<sup>32</sup> For instance, individual purchasers, whether consumer or merchant, could not assess for themselves whether the seller's weights and measures were accurate, rendering warranties unhelpful. Consequently, English kings from the Middle Ages tried, with mixed success,<sup>33</sup> to standardize and monitor weights and measures throughout the kingdom.<sup>34</sup> Legislation required sellers to have their weights and measures checked and sealed as a guarantee against fraud.<sup>35</sup> Nonetheless, such rules failed to stop creative fraudsters from finding ways to adulterate their measures, such as by inserting false bottoms, or making their sealed measures from green wood that shrank as it dried, or sneakily buying with a slightly larger measure and selling with a slightly smaller one.<sup>36</sup>

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<sup>28</sup> KOWALESKI, *supra* note 27, at 181 (“These rules ensured that all transactions took place openly, in broad daylight, under the supervision of the market wardens and toll collectors.”).

<sup>29</sup> BRITNELL, *supra* note 26, at 85; KOWALESKI, *supra* note 27, at 182–83.

<sup>30</sup> CRAIG E. BERTOLET, CHAUCER, GOWER, HOCCLIVE AND THE COMMERCIAL PRACTICES OF LATE FOURTEENTH-CENTURY LONDON 5–6 (2013); R. H. BRITNELL, GROWTH AND DECLINE IN COLCHESTER, 1300–1525, at 103 (1986) (“At the lowest levels of retail trade Colchester men gave credit to customers known to them . . .”); Dyer, *supra* note 26, at 320 (noting that the economic range of most peasants during this time was sixteen miles or less).

<sup>31</sup> SWANSON, *supra* note 26, at 59.

<sup>32</sup> BRITNELL, *supra* note 26, at 176 (observing that “the quality of manufactured goods was regulated when there were grounds for thinking that fraud was difficult to detect”); DAVIS, *supra* note 5, at 215 (noting that “many consumers may have lacked the necessary knowledge to detect low quality or even fraud”).

<sup>33</sup> KOWALESKI, *supra* note 27, at 190 (noting that long lists of violators in the medieval mayor’s court of Exeter of the regulations governing weights and measures “attest to the basic ineffectiveness of much of the regulation concerning accurate weights and measures”).

<sup>34</sup> DAVIS, *supra* note 5, at 190–93.

<sup>35</sup> *Id.* at 191–92.

<sup>36</sup> Catherine Casson, *Reputation and Responsibility in Medieval English Towns: Civic Concerns with the Regulation of Trade*, 39 URB. HIST. 387, 394 (2012); KOWALESKI, *supra* note 27, at 189–90; Joel T. Rosenthal, *The Assizes of Weights and Measures in Medieval England*, 17 W. POL. Q. 409, 418 (1964).

To ensure the purity and availability of foodstuffs, royal and urban legislation closely controlled the sale of victuals, in particular bread, ale, fish, meat, grain, and prepared foods.<sup>37</sup> And yet again the local court rolls contain repeated examples of the selling of putrid food, adulterated bread, or spoiled malt.<sup>38</sup> To protect consumers from deceptive manufacturing, towns (and from the fifteenth century, the guilds<sup>39</sup>) regulated the quality of manufactured wares to prevent such frauds as silvered copper buttons being sold as solid silver, or pots made of metal that melted when heated,<sup>40</sup> or comingling fresh spices with old ones,<sup>41</sup> or making candles or shoes with inferior materials.<sup>42</sup>

Finally, extensive regulation of cloth sales aimed to protect the reputation of a key export market. Royal legislation tried to ensure that all English cloth met certain measurements and quality standards by requiring that the cloth be inspected by royal inspectors and sealed with their seals.<sup>43</sup> But fraudsters still found ways around the regulations, such as by using poor quality wool or dyes, or by sealing cloths with counterfeit seals.<sup>44</sup>

While the fact that these fraudsters were found and brought to court marks an apparent success of regulation, that sellers and buyers continued to be penalized for the same cheats also suggests both that being found in violation of the regulations did not ruin reputations and that regulators struggled to enforce the rules reliably enough to clear the marketplace of fraud.<sup>45</sup> Enforcement ran up against four difficulties: expense, the move away from public sales, the dishonesty or incompetence of the regulators, and resistance to what were often intentionally anticompetitive regulations. Ultimately, the cost and complexity of enforcing the rules required towns and guilds to make compromises between vindicating their anti-fraud rules and permitting a certain amount of cheating.<sup>46</sup>

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<sup>37</sup> HEATHER SWANSON, *MEDIEVAL ARTISANS: AN URBAN CLASS IN LATE MEDIEVAL ENGLAND* 9 (1989); DAVIS, *supra* note 5, at 7, 221–22.

<sup>38</sup> See DAVIS, *supra* note 5, at 148–49; KOWALESKI, *supra* note 27, at 187–88.

<sup>39</sup> SWANSON, *supra* note 26, at 59.

<sup>40</sup> Casson, *supra* note 36, at 399–400.

<sup>41</sup> DAVIS, *supra* note 5, at 149.

<sup>42</sup> KOWALESKI, *supra* note 27, at 190.

<sup>43</sup> See SWANSON, *supra* note 27, at 58–59; BRITNELL, *supra* note 30, at 240.

<sup>44</sup> A.R. BRIDBURY, *MEDIEVAL ENGLAND CLOTHMAKING: AN ECONOMIC SURVEY* 75 (1982); Casson, *supra* note 36, at 399; DAVIS, *supra* note 5, at 420; JENNY KERMODE, *MEDIEVAL MERCHANTS: YORK, BEVERLEY AND HULL IN THE LATER MIDDLE AGES* 200, 203 & n.73 (1998); KOWALESKI, *supra* note 27, at 190.

<sup>45</sup> See DAVIS, *supra* note 5, at 317; KOWALESKI, *supra* note 27, at 191.

<sup>46</sup> Richard Britnell, *Urban Economic Regulation and Economic Morality in Medieval England*, in RICHARD BRITNELL, *MARKETS, TRADE AND ECONOMIC DEVELOPMENT IN ENGLAND AND EUROPE, 1050–1550*, at 6 (2009) (noting that urban courts' inability to strictly enforce regulations "discouraged



The fate of the so-called “assize of bread” offers a good example of what happened when regulatory enforcement became too burdensome. The assize was royal legislation in effect from the thirteenth century that regulated the size, price, and quality of bread sold by bakers throughout the kingdom.<sup>47</sup> While an important purpose of the assize was to ensure affordable food, it also protected consumers from underweight and inferior quality bread.<sup>48</sup> The crown left enforcement of the assize to the towns, which varied in the rigor with which they applied it.<sup>49</sup> Some, such as Exeter, enforced the assize assiduously (though Exeter apparently did not stringently enforce the parallel assize of ale, likely because it was easier to regulate “some ten professional bakers compared to over 200 part-time brewers”).<sup>50</sup> Other urban governments were more lax.<sup>51</sup>

Court rolls from the medieval and early modern periods demonstrate a relatively consistent pattern of small annual fines for breaking the assize paid by all bakers and occasional larger fines paid by only a few. Historians assume that the routine small fines represented no more than a licensing tax imposed on bakers disconnected from their actual violation of the assize.<sup>52</sup> But this interpretation does not explain how the fines came into being in the first place, since no baker would have willingly paid a tax based on a regulation he had not violated.<sup>53</sup> What became routine fines instead likely originated because bakers regularly tried to cut corners, and while the town leaders knew it, they did not have the bureaucratic capacity to hunt down and punish every violation.<sup>54</sup> From the perspective of local officials who had to balance the demands of the law against limited resources for enforcement, the fines would have represented a compromise between the ordinary bakers who cheated just a bit and the regulators who could not police their chiseling

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the draconian implementation of restrictive regulations, so that many rules were enforced only periodically, at times when courts were confronted with particularly flagrant breaches of the urban ethical code”).

<sup>47</sup> James Davis, *Baking for the Common Good: A Reassessment of the Assize of Bread in Medieval England*, 57 *ECON. HIST. REV.* 465, 465–66 (2004).

<sup>48</sup> See DAVIS, *supra* note 5, at 237; KOWALESKI, *supra* note 27, at 187.

<sup>49</sup> Davis, *supra* note 47, at 488.

<sup>50</sup> KOWALESKI, *supra* note 27, at 187 (observing that “municipal authorities scrupulously administered the assize of bread via detailed presentments in the mayor’s court”).

<sup>51</sup> Davis, *supra* note 47, at 489–90.

<sup>52</sup> DAVIS, *supra* note 5, at 298.

<sup>53</sup> See, e.g., LEET JURISDICTION IN THE CITY OF NORWICH DURING THE XIII<sup>TH</sup> AND XIV<sup>TH</sup> CENTURIES 16 (William Hudson ed., 1892) (presenting local court in 1288 finding that some, but not all, bakers violate the assize).

<sup>54</sup> DAVIS, *supra* note 5, at 348.

frequently enough to stop it.<sup>55</sup> The occasional larger fines found in the court rolls punished those bakers who exceeded this permitted margin of cheating,<sup>56</sup> thus keeping deceptive sales of bread within reasonable limits, while accepting the impossibility of eliminating all fraudulent practices.

Price and quality regulations originated at a time “when transactions occurred in predetermined locations under the watchful eyes of market wardens and other officials.”<sup>57</sup> But the repeated injunctions in urban and guild rules forbidding the conduct of business in private reveal that, over the course of the late medieval and early modern period, trade was moving increasingly away from public exchange in the open marketplaces and into shops, inns, and other so-called “secret” places.<sup>58</sup> This made enforcement of regulations more difficult and facilitated deception.

The first royal charter granted to the London goldsmith’s guild in 1327, for instance, mandated that goldsmiths keep their workshops on the main street, “in order that men may see that their work is good and suitable,” rather than “in dark lanes and obscure streets” where they could fence stolen goods and make and sell counterfeit wares without being observed.<sup>59</sup> Similarly, medieval and early modern authors accused drapers—who sold cloth—of keeping their shops dark so that they could deceive buyers into thinking that less expensive green-dyed cloth was costlier blue cloth.<sup>60</sup> And in the early seventeenth century, a London grocer jerry-rigged the scale in his shop in order to cheat customers on weight without their noticing<sup>61</sup>—a fraud also complained of three centuries earlier.<sup>62</sup>

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<sup>55</sup> Cf. JUDITH M. BENNETT, ALE, BEER AND BREWSTERS IN ENGLAND: WOMEN’S WORK IN A CHANGING WORLD, 1300–1600, at 162 (1996) (expressing a similar theory for the origin of widespread charges of breaking the assize of ale).

<sup>56</sup> Davis, *supra* note 47, at 489.

<sup>57</sup> KOWALESKI, *supra* note 27, at 181.

<sup>58</sup> *Id.* at 143–44; Alan Everitt, *The Marketing of Agricultural Produce*, in 4 THE AGRARIAN HISTORY OF ENGLAND AND WALES 466, 506, 563 (Joan Thirsk ed., 1967); Derek Keene, *Sites of Desire: Shops, Selds and Wardrobes in London and Other English Cities, 1100–1550*, in BUYERS & SELLERS: RETAIL CIRCUITS AND PRACTICES IN MEDIEVAL AND EARLY MODERN EUROPE 125, 127–28 (Bruno Blondé et al. eds., Turnhout, Brepols 2006); see also CALENDAR OF LETTER-BOOKS PRESERVED AMONG THE ARCHIVES OF THE CORPORATION OF THE CITY OF LONDON AT THE GUILDHALL: LETTER-BOOK G. *CIRCA* A.D. 1352–1374, at 240 (London, Reginald R. Sharpe ed., 1905) (“[P]roclamation made against selling wine before it has been put into a cellar, and selling it in secret places . . . in the absence of brokers of the mystery of Vintry thereto elected and sworn.”).

<sup>59</sup> T.F. REDDAWAY, THE EARLY HISTORY OF THE GOLDSMITHS’ COMPANY, 1327–1509, at 222–23 (1975); Keene, *supra* note 58, at 129–32.

<sup>60</sup> BERTOLET, *supra* note 30, at 44.

<sup>61</sup> Emily Kadens, *Cheating Pays*, 119 COLUM. L. REV. 527, 561 (2019) (describing the manipulation of the scale).

<sup>62</sup> JOHN GOWER, MIROUR DE L’OMME (THE MIRROR OF MANKIND) 336, ll. 25597–600 (William Burton Wilson trans., Nancy Wilson Van Baak rev., 1992) (discussing apothecaries).

Private exchange weakened the force of existing regulations designed for public trade because it meant the end of easy oversight. Urban governments responded by devolving most of the quality control over the manufacture of goods to the relevant guilds by empowering guild officials to inspect the work and workshops of producers.<sup>63</sup> If inspectors uncovered improperly manufactured or contraband wares and raw materials during these searches, they often destroyed them publicly and with deliberate ceremony, with offenders receiving additional punishments.<sup>64</sup> Some guild ordinances also required goods to be inspected before sale.<sup>65</sup> Amongst goldsmiths, for example, this led to the creation of the assay—a test for the purity of gold and silver—and the hallmark—a leopard’s head mark placed on the finished product indicating it had been inspected by the guild officer.<sup>66</sup> Other metalworking guilds performed similar assays.<sup>67</sup> Grocers and apothecaries, who dealt with spices and herbal remedies, were supposed to have their wares checked by an official called the “garbler” to ensure they had been cleansed of contaminants.<sup>68</sup> In the leather trade, guild inspectors examined the leather before it reached the finishing stage “so that defects could not be hidden by subsequent processing.”<sup>69</sup>

Yet these controls did not prevent common and even repeated violations of regulatory rules.<sup>70</sup> In part this was due to weaknesses inherent in the guild inspection system. Despite the fact that the guild wardens and inspectors had the duty to uncover fraudulent work and the legal right to punish it, they were also members of the organization to which the offenders belonged and paid

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<sup>63</sup> KOWALESKI, *supra* note 27, at 191; SWANSON, *supra* note 26, at 59; SWANSON, *supra* note 37, at 116 (“For both the civic authorities and the craft, one of the most useful functions of the guild was to act as a watchdog for standards.”).

<sup>64</sup> Patrick Wallis, *Controlling Commodities: Search and Reconciliation in the Early Modern Livery Companies*, in *GUILDS, SOCIETY & ECONOMY IN LONDON, 1450–1800*, at 85, 88–89 (Ian Anders Gadd & Patrick Wallis eds., 2002); John Forbes, *Search, Immigration and the Goldsmiths’ Company: A Study in the Decline of Its Powers*, in *GUILDS, SOCIETY & ECONOMY IN LONDON, 1450–1800*, *supra*, at 115, 116.

<sup>65</sup> IAN W. ARCHER, *THE PURSUIT OF STABILITY: SOCIAL RELATIONS IN ELIZABETHAN LONDON* 126 (1991).

<sup>66</sup> REDDAWAY, *supra* note 59, xxv.

<sup>67</sup> See Ronald F. Homer, *The Pewterers’ Company’s Country Searches and the Company’s Regulation of Prices*, in *GUILDS, SOCIETY & ECONOMY IN LONDON, 1450–1800*, *supra* note 64, at 101, 106 (describing assays of pewter).

<sup>68</sup> See JOHN BENJAMIN HEATH, *SOME ACCOUNT OF THE WORSHIPFUL COMPANY OF GROCERS OF THE CITY OF LONDON* 60 (London, 2d ed. 1854); PAMELA NIGHTINGALE, *A MEDIEVAL MERCANTILE COMMUNITY: THE GROCERS’ COMPANY & THE POLITICS & TRADE OF LONDON, 1000–1485*, at 337 (1995).

<sup>69</sup> SWANSON, *supra* note 37, at 58.

<sup>70</sup> See ARCHER, *supra* note 65, at 127; REDDAWAY, *supra* note 59, at 97–98; Wallis, *supra* note 64, at 93, 95.

dues.<sup>71</sup> The guild wardens and inspectors had an incentive both to portray guild members to the outside world as rule-abiding and to maintain collegial relations within the guild.<sup>72</sup> As such, the guilds tended to reduce fines to mere slaps on the wrist, seek the wrongdoer's acceptance of his punishment, and even keep the offenses secret rather than wield their enforcement power with a heavy hand.<sup>73</sup> In addition, recalcitrant offenders might push back against the guild's authority, forcing the guild either to significantly abate the penalty or back down entirely.<sup>74</sup> The necessity of having wrongdoers accept the guild officers' authority forced the guilds to negotiate and moderate enforcement, allowing a certain amount of fraudulent or substandard work to pass either un- or lightly punished—right up to the point at which other guild members or purchasers complained and put the guild's reputation in jeopardy.<sup>75</sup>

Guild officials were not the only ones who compromised their duties. During the Middle Ages, certain government officers enforced trade regulations.<sup>76</sup> For example, alnagers measured cloth to ensure it met the required measurements,<sup>77</sup> aleconners tasted ale as it was brewed by alewives to certify it was wholesome,<sup>78</sup> market bailiffs oversaw market exchanges and witnessed contractual agreements,<sup>79</sup> cornmeters made official measurements of imported grain,<sup>80</sup> and sworn weighers operated public scales.<sup>81</sup> These officials were “sometimes accused of favouritism, bribery, concealing offences and neglecting their duties.”<sup>82</sup> Evidence suggests that these were not idle charges. Among other examples, the alnager in the County of Devon

<sup>71</sup> Wallis, *supra* note 64, at 90–91.

<sup>72</sup> See ARCHER, *supra* note 65, at 127 (“Effective enforcement depended on the existence of a consensus within the company, and such a consensus was hardly ever present . . .”); Wallis, *supra* note 64, at 92.

<sup>73</sup> See Casson, *supra* note 36, at 403 (civic authorities disciplining artisans); Wallis, *supra* note 64, at 89–90.

<sup>74</sup> *Id.* at 90; see, e.g., 1 MEMORIALS OF THE GOLDSMITHS' COMPANY; BEING GLEANINGS FROM THEIR RECORDS BETWEEN THE YEARS 1335 AND 1815, at 98 (Walter Sherburne Prideaux ed., 1896) (reporting a case from 1600 in which a goldsmith sold a cup that did not meet guild standards but refused to refund the buyer's money, and “the Wardens pay in order to avoid scandal”).

<sup>75</sup> J. R. Kellett, *The Breakdown of Guild and Corporation Control over the Handicraft and Retail Trade in London*, 10 ECON. HIST. REV. (n.s.) 381, 381–85 (1958) (discussing the decline of guild control over production and the role of disgruntled individuals in enforcing regulations); Wallis, *supra* note 62, at 86–87.

<sup>76</sup> BRITNELL, *supra* note 26, at 177; DAVIS, *supra* note 5, at 167.

<sup>77</sup> BRITNELL, *supra* note 30, at 136.

<sup>78</sup> DAVIS, *supra* note 5, at 295.

<sup>79</sup> *Id.* at 293–94, 390.

<sup>80</sup> Casson, *supra* note 36, at 397.

<sup>81</sup> NIGHTINGALE, *supra* note 68, at 184–85 (mentioning the office of weigher).

<sup>82</sup> DAVIS, *supra* note 5, at 167.

committed “widespread fraud” in the sealing of cloth;<sup>83</sup> merchants who served as royal customs officials doubled as smugglers;<sup>84</sup> and London cornmeters were found guilty of measuring grain using false measures and of cheating retail customers.<sup>85</sup> Enforcement obviously suffered when the officials tasked with it embraced corrupt practices.

Finally, many of the quality regulations turned out to be more anticompetitive than consumer protective. Ensuring that fish was sold before it rotted was a public health measure.<sup>86</sup> Preventing goldsmiths or other artisans from making silver goods with gilded metal rather than solid silver or using colored glass in place of real jewels only served fraud-prevention purposes if buyers did not know what they were buying.<sup>87</sup> Often, however, production quality regulations functioned primarily to maintain guild monopolies, higher prices, and entry barriers to low-cost producers.<sup>88</sup> Such rules proved difficult to enforce in the face of increasing suburban production, which escaped guild control, coupled with expanding consumer demand for cheaper knockoffs.<sup>89</sup> These forces tended to erode the authority of the guilds as regulatory bodies.<sup>90</sup> As a result, what the guild ordinances had previously defined as fraudulent production became simply lower quality alternatives.

## II. FAILURES OF PRIVATE ORDERING: VERIFICATION AND REPUTATION

Traders in premodern England had many ways to try to protect themselves against fraud. They could insist on publicly enrolled recognizances that simplified the process of seizing a debtor’s property upon default.<sup>91</sup> They could demand a debtor provide creditworthy sureties.<sup>92</sup> They

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<sup>83</sup> KOWALESKI, *supra* note 27, at 23.

<sup>84</sup> KERMODE, *supra* note 44, at 193–95.

<sup>85</sup> Casson, *supra* note 36, at 397.

<sup>86</sup> BRITNELL, *supra* note 26, at 175.

<sup>87</sup> See REDDAWAY, *supra* note 59, at 59 n.65, 150.

<sup>88</sup> SHEILAGH OGILVIE, *THE EUROPEAN GUILDS: AN ECONOMIC ANALYSIS* 127 (2019).

<sup>89</sup> CRAIG MULDREW, *THE ECONOMY OF OBLIGATION: THE CULTURE OF CREDIT AND SOCIAL RELATIONS IN EARLY MODERN ENGLAND* 15, 18–19 (1998) (discussing the expanding market); OGILVIE, *supra* note 88, at 310 (observing that guild quality restrictions “compelled consumers to buy higher quality-price combinations than they wanted [and] they hindered industries from responding to changes in the quality demanded”); REDDAWAY, *supra* note 59, at 1.

<sup>90</sup> Forbes, *supra* note 65, at 119; Kellett, *supra* note 75, at 394; Wallis, *supra* note 64, at 86–87.

<sup>91</sup> RICHARD GODDARD, *CREDIT AND TRADE IN LATER MEDIEVAL ENGLAND, 1353–1532*, at 6–9 (2016) (explaining that recognizances were bonds recording debts enrolled with a mercantile court and allowing the creditor to go to court upon the debtor’s default, prove the default, and obtain a certificate that permitted the creditor to seize the debtor’s property).

<sup>92</sup> DAVIS, *supra* note 5, at 209, 389.

could investigate a person's reputation.<sup>93</sup> They could include witnesses at a transaction or insist that a public notary put contract terms into writing.<sup>94</sup> In the sale of goods, they could demand an express warranty,<sup>95</sup> use public weighing places,<sup>96</sup> depend upon the seals of urban or guild inspectors verifying that the goods had been approved as meeting quality standards,<sup>97</sup> or have experts evaluate the goods prior to purchase.<sup>98</sup> Of course, every one of these methods of verification incurred costs that buyers did not always want to pay. As the following cases concerning commercial fraud disputes brought in sixteenth- and seventeenth-century English courts illustrate, these fraud prevention measures could also be rather easily corrupted by fraudsters.

The first case is a story about two parties who wanted to do business together but did not want to trust each other. Francis Bolles was a citizen of London and a foreigner engaged in trade with the continent.<sup>99</sup> He had onion seeds to sell.<sup>100</sup> Thomas Hill was a London wholesale grocer who wanted to buy onion seeds.<sup>101</sup> Bolles insisted on trading only for ready money rather than extending credit (and trust), and Hill did almost everything he could to protect himself, yet he still ended up being cheated.<sup>102</sup> In this story, the verification mechanisms supposedly preventing fraud turned out to be only as trustworthy as the people corrupting them.

On February 27, 1589, Thomas Lawrence, a registered broker (and thus someone who in theory served as a trusted reputation intermediary<sup>103</sup>), came to Hill's shop to inquire whether Hill was interested in buying Strasbourg onion seeds.<sup>104</sup> According to the seventeenth-century English herbalist John Parkinson, Strasbourg onions had a "very sharpe and fierce" flavor and kept

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<sup>93</sup> *Id.* at 205.

<sup>94</sup> *Id.* at 200–01.

<sup>95</sup> *Id.* at 204.

<sup>96</sup> *Id.* at 192–93, 390.

<sup>97</sup> BRIDBURY, *supra* note 44, at 47.

<sup>98</sup> Eileen Power, *The English Wool Trade in the Reign of Edward IV*, 2 CAMBRIDGE HIST. J. 17, 25 (1926).

<sup>99</sup> Bill of Complaint, *Bolles v. Hill* (Star Chamber), National Archives (U.K.), STAC 5/B25/2 (Feb. 3, 1590).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> GERARD MALYNES, *CONSUEUDO VEL LEX MERCATORIA OR THE ANCIENT LAW-MERCHANT* 91 (London, 3d ed. 1686) (asserting one value of using brokers is that "the Commodities are . . . Bought and Sold with more credit and reputation").

<sup>104</sup> Bill of Complaint, *Bolles v. Hill* (Star Chamber), National Archives (U.K.), STAC 5/B25/2 (Feb. 3, 1590); Answer of Thomas Hill, George Rooper, and Richard Webbe, *Bolles v. Hill* (Star Chamber), National Archives (U.K.), STAC 5/B25/2 (Feb. 6, 1590).

longer than ordinary onions.<sup>105</sup> They were apparently highly valued because Hill eventually bought them at the hefty price of £12 (\$4,600 today) in cash per hundredweight when at the time ordinary onion seeds were selling in London for £6 per hundredweight and below.<sup>106</sup> After soliciting from Lawrence a promise that the seeds were “good and new” and discussing the price, Hill sent his apprentice George Rooper to accompany Lawrence to Bolles’s house to evaluate the seeds and buy a bag if he liked them.<sup>107</sup>

The bags were each printed with the date 1588 and sealed shut with a lead seal bearing the mark of the town of Strasbourg and the date 1588.<sup>108</sup> In other words, they had supposedly been inspected and certified in Strasbourg. Bolles would not permit Rooper to break the seals to examine the seeds; yet, based on the indication of place and date of origin, in addition to Bolles’s further assurance that the seeds were new and good, Rooper agreed to purchase one bag.<sup>109</sup>

Upon receiving the bag in his shop, Hill opened it in front of Bolles and observed that the seeds were smaller than those he already had in stock, which he knew to be high quality Strasbourg onion seeds.<sup>110</sup> At this point, Bolles (allegedly) expressly warranted the seeds, thus giving Hill something he could use in court should the deal go bad.<sup>111</sup> The express warranty was an important legal protection for the buyer, because anything short of this, with certain exceptions not relevant here, was considered mere sales talk, leaving the doctrine of *caveat emptor* as a default principle.<sup>112</sup>

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<sup>105</sup> JOHN PARKINSON, *PARADISI IN SOLE PARADISUS TERRESTRIS* 512 (London, Thomas Cotes, 1635); RICHARD BRADLEY, *NEW IMPROVEMENTS OF PLANTING AND GARDENING* 133 (2d ed. 1718).

<sup>106</sup> Answer of Thomas Hill, George Rooper, and Richard Webbe, *Bolles v. Hill* (Star Chamber), National Archives (U.K.), STAC 5/B25/2 (Feb. 6, 1590). A hundredweight consisted of 112 pounds. RONALD EDWARD ZUPKO, *A DICTIONARY OF WEIGHTS AND MEASURES FOR THE BRITISH ISLES* 195 (1985). For the conversion, see *Five Ways to Compute the Relative Value of a UK Pound Amount, 1270 to Present*, MEASURINGWORTH, <https://www.measuringworth.com/calculators/ukcompare> [<https://perma.cc/2RVL-QGG3>].

<sup>107</sup> Answer of Thomas Hill, George Rooper, and Richard Webbe, *Bolles v. Hill*, National Archives (U.K.), STAC 5/B25/2 (Feb. 6, 1590).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> JOHN BAKER, *Bezoar-Stones, Gall-Stones and Gem-Stones: The Action on the Case for Deceit*, in 3 *COLLECTED PAPERS ON ENGLISH LEGAL HISTORY* 1317, 1321–22, 1326–27 (2013) (writing on express warranties); 2 *BOROUGH CUSTOMS* 183 (Mary Bateson ed., 1906) (quoting an ordinance from Lancaster in 1562 providing that “they which bye any malte on the markt or elsewhere within this towne, lette their eye be their chapman for yf it prove nought, they shall have no remedie for it afterwards except they can prove the seller thereof dyd warrand the same to be good”).

Hill ultimately bought two more bags of seeds, likewise warranted and sealed.<sup>113</sup> But soon thereafter, Hill heard complaints from others who had purchased Bolles's seeds and again became suspicious that they were not as fresh as promised.<sup>114</sup> On the advice of the Lord Mayor of London, he took the seals from the bags and presented them to the deputy engraver of the royal mint.<sup>115</sup> There followed an odyssey across London, from the engraver's workshop in the Tower of London, to a foreign merchant's shop to look at verifiably genuine Strasbourg seals dated 1588, to the houses of two grocers who had also bought onion seeds from Bolles, to the workshops of private seal engravers to try to identify who had made the seals on Bolles's bags, and finally to the engraver Hans Cornelis, who admitted he had forged the seals for a grocer named Buckley, who had been fined by the Grocers Company for possessing them.<sup>116</sup>

The facts of this case demonstrate that even where contracting parties were hesitant to trust and preferred instead to rely on fraud prevention mechanisms such as brokers, warranties, and seals, they could still be cheated. Hill, for instance, could not easily protect himself against the forged seals. If he had insisted on authenticating them *ex ante*, the exchange would have become too cumbersome to complete.

It is likely that Bolles and Hill tried not to trust each other because they did not possess enough information about the other party's trustworthiness. Some modern scholars believe in the power of reputation to substitute for verification mechanisms and promote trust.<sup>117</sup> This assumes that reputation information is accurate and that inquiring into a potential counterparty's reputation is a socially neutral act. Neither may have been the case historically, however.

For example, when, in 1609, a prominent London cloth trader named Maurice Llewellyn decided to use his young former apprentice Paul Barrowe as the bait in a classic "bustout" scam, he knew exactly how to manipulate reputational information in order to gain the trust of some of the most prominent long-distance traders of the time.<sup>118</sup> In a bustout, a buyer purchases

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<sup>113</sup> Answer of Thomas Hill, George Rooper, and Richard Webbe, *Bolles v. Hill* (Star Chamber), National Archives (U.K.), STAC 5/B25/2 (Feb. 6, 1590).

<sup>114</sup> Answer of Robert Atkynson, Richard Dorington, Robert Marshe, Thomas Man, and Charles Anthony, *Bolles v. Hill* (Star Chamber), National Archives (U.K.), STAC 5/B25/2 (Feb. 6, 1590).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> See, e.g., Barak D. Richman, *Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering*, 104 COLUM. L. REV. 2328, 2335 (2004).

<sup>118</sup> Cf. KLAUS, *supra* note 2, at 5 ("The qualities that are most necessary for trust . . . are precisely the qualities a sharp swindler is most likely to fake."); see also Emily Kadens, *The Dark Side of*



goods on credit, disposes of them secretly to obtain cash, then disappears without paying his debts.<sup>119</sup> Llewellyn's plan was to make Barrowe appear so creditworthy that wealthy merchants would sell him large quantities of silk, mostly on credit. Barrowe would surreptitiously transfer the cloth to Llewellyn, then notify his creditors of his insolvency. The creditors would then discover that Barrowe had transferred all of his assets to Llewellyn in payment of an earlier, but in truth fraudulent, debt.<sup>120</sup>

To accomplish this scheme, Llewellyn went to great lengths to, in the words of early modern pleadings, give "color" or authenticity to the evidence of Barrowe's wealth. First, Llewellyn gave Barrowe a house in a fashionable area of town and two shops in the Royal Exchange, where London merchants did their business on a daily basis.<sup>121</sup> He stocked the shops with high-quality silks and gave Barrowe a sufficient supply of ready money to pay 30% down on any silk he purchased.<sup>122</sup> All of these indicators of commercial success impressed Barrowe's eventual victims, as Llewellyn intended them to.<sup>123</sup> The suppliers took them to mean that Barrowe was "a man of good Credit and abilitie" despite being fresh out of his apprenticeship.<sup>124</sup>

When the suppliers discovered that Barrowe was in fact "a man of smale or no estate, credit, or hability att all" and tried to get their money back, they ran up against a web of skillfully faked account books, forged bonds, and backdated deeds of transfer drawn up by willing notaries.<sup>125</sup> Llewellyn and Barrowe thus cheated their victims in two ways. On the one hand, the suppliers trusted what they believed they saw of Barrowe's wealth

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*Reputation*, 40 CARDOZO L. REV. 1995, 2012–13 (2019) (providing biographical information about the merchants).

<sup>119</sup> *United States v. Crockett*, 534 F.2d 589, 592 (5th Cir. 1976) (describing bustouts).

<sup>120</sup> Bill of Complaint, *Campe v. Llewellyn & Barrowe* (Star Chamber), National Archives (U.K.), STAC 8/105/5 (Feb. 8, 1610). The creditors sued Barrowe, who then countersued Llewellyn for pulling him into the fraud using coercion. Barrowe won the latter suit. See Opinion of Star Chamber, *Barrowe v. Llewellyn & Tisdall*, British Library, Stowe MS 397, fol. 38v (Michaelmas Term 1615).

<sup>121</sup> Bill of Complaint, *Campe v. Llewellyn & Barrowe* (Star Chamber), National Archives (U.K.), STAC 8/105/5 (Feb. 8, 1610); Answer of Paul Barrowe, *Campe v. Llewellyn & Barrowe*, National Archives (U.K.), STAC 8/105/5 (Feb. 28, 1610). On the Royal Exchange, see Ann Saunders, *The Organisation of the Exchange*, in *THE ROYAL EXCHANGE* 85, 87, 89–90 (Ann Saunders ed., 1997).

<sup>122</sup> Bill of Complaint, *Campe v. Llewellyn & Barrowe* (Star Chamber), National Archives (U.K.), STAC 8/105/5 (Feb. 8, 1610). This seems to have been an unusually high amount since it caught the attention of the cloth sellers.

<sup>123</sup> *Id.* (claiming that these moves were made "to th'intente that the better Credit mighte be geven unto the said Pawle Barrowe and to drawe <sup>on</sup> your said subiectes and others to truste him").

<sup>124</sup> *Id.*; Answer of Paul Barrowe, *Campe v. Llewellyn & Barrowe* (Star Chamber), National Archives (U.K.), STAC 8/105/5 (Feb. 28, 1610) (stating that Llewellyn released him from his apprenticeship two years early, prior to beginning this scam, meaning Barrowe was probably in his mid-twenties).

<sup>125</sup> Bill of Complaint, *Campe v. Llewellyn & Barrowe* (Star Chamber), National Archives (U.K.), STAC 8/105/5 (Feb. 8, 1610).

and did not inquire further. On the other hand, Llewellyn corrupted mechanisms such as account books, contracts, and notaries that were supposed to enhance the security of transactions.

We might fault the merchants in this story for relying on such easily falsifiable indices of reputation as appearance. They could, after all, have made more substantive inquiries into Barrowe's trustworthiness. Yet Daniel Defoe warned in his 1726 *Complete English Tradesman* that inquiring into a trader's credit was just as likely to return false information or silence as the truth because the informant had no reason to aid a competitor and no interest in being held liable if the recommendation turned out to be inaccurate.<sup>126</sup>

Furthermore, even questioning a potential counterparty's trustworthiness could be viewed as an affront to their reputation. In the 1607 case of *Hales v. Moxon*, a young merchant named Thomas Moxon purchased 147 pieces of cloth on credit from eighteen Suffolk clothiers.<sup>127</sup> He ultimately ran up debts to the clothiers of £1,343 (about \$392,000 today) before fleeing the country.<sup>128</sup> Moxon and his confederates encouraged the clothiers to believe (falsely) that Moxon was a citizen of London and a member of the Merchant Adventurers, an English trading organization with a monopoly on trade with northern Europe.<sup>129</sup> Both of these characteristics, plus the allegedly rich marriage Moxon was about to enter into and his purported lands in the north of England, sufficed in most of the clothiers' eyes as indications of his creditworthiness.<sup>130</sup> All of them were verifiable simply by making inquiries, but the clothiers verified none of them. Yet when one of the clothiers "spake and moved . . . certain questions and wordes importing that he had some suspycion of the estate and sufficiency of the said Moxon,"<sup>131</sup> Moxon's co-conspirators expressed great offense. They sent for the clothier and "verye sharpely reprov'd [him] for discreditinge of the said Thomas Moxon."<sup>132</sup>

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<sup>126</sup> DANIEL DEFOE, *THE COMPLETE ENGLISH TRADESMAN* 149–63 (1726); 6 JOHN BAKER, *THE OXFORD HISTORY OF THE LAWS OF ENGLAND* 773 (2003).

<sup>127</sup> *Hales v. Moxon* (Star Chamber), National Archives (U.K.), STAC 8/173/9 (1607).

<sup>128</sup> Star Chamber Cause List, Huntington Library (San Marino, Cal.), Egerton Papers, EL 2765, fol. 2r (n.d.) (consisting of court papers with notes on the oral argument in the *Moxon* case). For the conversion, see *Five Ways to Compute the Relative Value of a UK Pound Amount, 1270 to Present*, *supra* note 106.

<sup>129</sup> Bill of Complaint, *Hales v. Moxon* (Star Chamber), National Archives (U.K.), STAC 8/173/9, fol. 68r (Mar. 9, 1607).

<sup>130</sup> *Id.*

<sup>131</sup> Answer of John Skynner and William Burton, *Hales v. Moxon* (Star Chamber), National Archives (U.K.), STAC 8/173/9, fol. 67r (Apr. 29, 1607).

<sup>132</sup> Deposition of Hanamiell Wardall, *Hales v. Moxon* (Star Chamber), National Archives (U.K.), STAC 8/173/9, fol. 26r (Apr. 11, 1609) (answer to interrogatory 8); Answer of John Skynner and William Burton, *Hales v. Moxon* (Star Chamber), National Archives (U.K.), STAC 8/173/9, fol. 67r (Apr. 29, 1607).

Obviously they did this to prevent their scam from unraveling, but the deposition testimony gives no indication that this behavior was considered out of the ordinary. Their gambit worked, because the clothier backed down and sold his cloth to Moxon, ultimately to his regret.

Notably, the victims of all of these scams were experienced businessmen, not rubes, and not obviously reckless traders.<sup>133</sup> None of the cases hint that the victims were taking unusual risks in their transactions with the fraudster. The victims presumably chose to trust rather than verify, or they were taken in by falsified verification mechanisms, because most of the time in that society commercial actors were honest enough. That degree of trust created exploitable openings, such as those spotted by the early seventeenth-century serial con man Robert Swaddon.

Swaddon scammed the system of bills of exchange by which a person moved money by paying it to an agent in one place and seeking repayment from the agent's principal in another place.<sup>134</sup> Swaddon would identify provincial merchants who communicated by correspondence with their London agents, obtain a sample of the handwriting of the agent, then convince the provincial merchant to pay on a bill supposedly drawn on the merchant's agent, but that was, in fact, a forgery.<sup>135</sup>

In February 1608, Swaddon rode into Cambridge and asked at an inn whether the town had a prominent merchant who would have the wherewithal to pay out a large amount of cash in Cambridge in exchange for money paid to his agent in London. He was directed to Nathaniel Craddock, a mercer who was “by suche his longe contynued trade and dealinges & honeste behavior, well esteemed of and in good Credit.”<sup>136</sup>

Swaddon, going by the name of Mr. Johnson, and making “shewe and semblance to [be a man] of Credit and reputacion,”<sup>137</sup> told Craddock a story about needing money in the countryside but not wanting to carry cash with him on the trip from London. He flattered Craddock, saying that he had come

<sup>133</sup> Answer of Robert Atkynson, Richard Dorington, Robert Marshe, Thomas Man, and Charles Anthony, *Bolles v. Hill* (Star Chamber), National Archives (U.K.), STAC 5/B25/2 (Feb. 6, 1590).

<sup>134</sup> Bill of Complaint, *Pettus v. Swaddon* (Star Chamber), National Archives (U.K.), STAC 8/228/4, fol. 2r (Mar. 17, 1604).

<sup>135</sup> We know of at least two other similar bill of exchange forgeries Swaddon pulled off prior to the one discussed here. *See id.* (forging a letter between Pettus and his brother and using it to convince Pettus to pay on a forged bill of exchange); ROBERT TITTLER, *TOWNSPEOPLE AND NATION: ENGLISH URBAN EXPERIENCES, 1540–1640*, at 156 (2001) (telling the story of a similar scam in 1605). Swaddon also cheated his master during his apprenticeship. Answer of Richard Shepard, *Swaddon v. Shepard* (Chancery), National Archives (U.K.), C 2/Eliz/S4/41 (July 10, 1596).

<sup>136</sup> Bill of Complaint, *Craddock v. George & Swaddon* (Star Chamber), National Archives (U.K.), STAC 8/92/13, fol. 14r (May 4, 1611).

<sup>137</sup> *Id.*

to Cambridge because “he knew that ther were some great tradesmen in that towne who could” facilitate such an exchange.<sup>138</sup>

Craddock agreed to honor a bill drawn on Craddock’s London agent, Francis Martin. Swaddon wanted to deposit £80 on Friday and receive the same sum in Cambridge on Saturday,<sup>139</sup> but Craddock, despite “expectinge good and playne dealinge and thinckeinge none ill,”<sup>140</sup> did not trust Swaddon so readily. He insisted that Swaddon could not come for his money until Monday, after Craddock had received his weekly letter from Martin that would inform him whether Swaddon had deposited the money.<sup>141</sup> Swaddon agreed to these terms and showed up at Craddock’s house on the appointed day with a bill supposedly written and signed by Martin.<sup>142</sup> Craddock expressed some suspicion because Martin’s letter had not mentioned that “Mr. Johnson” had made a deposit.<sup>143</sup> Swaddon waved this concern away with the claim that he had brought the money to Martin so late in the day that the letter had already been sent.<sup>144</sup> Taken in by the forgery, and “geveinge faithe and Creditt to the saide noate and writinge and to the speches of the said” Mr. Johnson, Craddock paid over the money.<sup>145</sup>

Swaddon then rode to Huntington where he was to receive money from a merchant named Peacocke based on a bill supposedly drawn on William Turner, the brother-in-law and London agent of Thomas Kilborne, a local innkeeper.<sup>146</sup> Swaddon, still going by Mr. Johnson, arrived with Turner’s alleged bill in the evening, when Kilborne had an inn full of people. Kilborne also did not immediately trust Swaddon. Instead,

bycause the said Johnson was a stranger unto him, and that he wold be satisfied whether the *lettere* was counterfeyted or noe, he shewed the counterfeyte *lettere* with some other *letteres* which he had formerly receyved from the said Turner unto dyvers Counsellors and attorneys which then were att his house, who all

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<sup>138</sup> Answer of Francis Martin and William Brett, *George v. Martin & Brett* (Star Chamber), National Archives (U.K.), STAC 8/155/1 (Oct. 16, 1610).

<sup>139</sup> Eighty pounds in 1608 would amount to about \$21,000 today. For the conversion, see *Five Ways to Compute the Relative Value of a UK Pound Amount*, *supra* note 106.

<sup>140</sup> Bill of Complaint, *Craddock v. George & Swaddon* (Star Chamber), National Archives (U.K.), STAC 8/92/13, fol. 14r (May 4, 1611).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> Deposition of Thomas Kilborne, *Craddock v. George & Swaddon* (Star Chamber), National Archives (U.K.), STAC 8/92/13 (Oct. 29, 1612).

agreed they were one and the selfe same hand the said counterfeyte *lettere* and th'other *letteres* of the said Turner.<sup>147</sup>

It was not; it was another skillful forgery. Fortunately for Peacocke, he had tired of waiting for “Mr. Johnson” and had left for London shortly before Swaddon arrived with the forged bill, thus avoiding being swindled.<sup>148</sup>

Kilborne and Craddock thought they were being careful; they thought they had mechanisms in place to protect themselves from scams like Swaddon’s. Swaddon looked the part of an honest man and the forgeries were skillful, so Craddock and Kilborne overcame their suspicions and trusted him.

Craddock no doubt in retrospect rued his willingness to trust the mysterious Mr. Johnson. But at the time, his failure to make Swaddon wait while he verified the authenticity of the bill was not unreasonable. He had the choice to lose the opportunity to move money to London, where he or his agent could use it, or to spend time on fraud prevention.<sup>149</sup> Presumably, he had done these sorts of exchanges many times without being cheated, so he believed this transaction was likely safe. Sometimes getting the deal done will win out over taking precautions. When it does, fraudsters like Swaddon can benefit.

### III. TRUSTING BLINDLY

In the late fifteenth century, the Englishman William Caxton printed a language learning book with dialogues in French and English.<sup>150</sup> In one dialogue, a man goes into a shop to buy cloth and tells the employee to measure the cloth well. She promises to do so, and the buyer replies that he knows she will because, “[i]f I had not trusted you[,] I had called the metar (measurer).”<sup>151</sup> This moment in the contracting process neatly summarizes the risk contracting parties must evaluate: trust or verify. Sometimes people seem honest, so trustors believe they have no reason to verify. This happened to Adam Kyndt, a Dutch merchant living in the bustling Norfolk port of Cley when, around April 1570,<sup>152</sup> the elderly Norfolk farmer William King

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<sup>147</sup> *Id.* (answer to interrogatory 2).

<sup>148</sup> *Id.*

<sup>149</sup> See Stringham & Clark, *supra* note 11, at 355.

<sup>150</sup> WILLIAM CAXTON, *DIALOGUES IN FRENCH AND ENGLISH* 18, ll. 29–34 (Henry Bradley ed., 1900).

<sup>151</sup> *Id.*

<sup>152</sup> Bill of Complaint, *Kyndt v. Kyng & Kyng* (Court of Requests), REQ 2/231/62 (ca. 1570). The regnal year from which the date is ascertained is partially obscured on the document. See Bill of Complaint, *Williamson v. De Hase* (Court of Requests), National Archives (U.K.), REQ 2/165/244 (June

approached him with an offer to sell allegedly high-quality barley.<sup>153</sup> Kyndt claimed that he accepted King's description of the barley at face value because "William [was] an olde, auncient man and seemed then that he ment bothe faythfully & truly."<sup>154</sup> As a result, Kyndt agreed to buy the grain without seeing it. This turned out to have been a mistake, as the barley was spoiled.<sup>155</sup> Yet just as Nathaniel Craddock did with Robert Swaddon, Adam Kyndt may have made a rational calculation that trusting William King was safe enough to merit not making further inquiries. In this sense, Kyndt's reliance on his belief that King would likely not cheat him was reasonable.

By contrast, the case of *Lopez v. Chandler* illustrates a situation in which the victim wanted to buy the goods so badly that he was willfully blind to the obvious risks.<sup>156</sup> In September 1597, Jeronimo Lopez, a Portuguese gem importer living in London,<sup>157</sup> persuaded Robert Chandler, a Bristol goldsmith from whom Lopez had previously bought pearls,<sup>158</sup> to procure and sell him a bezoar stone.<sup>159</sup> Bezoar stones are hard masses formed in the throats or stomachs of goats. They were highly valued and costly in the sixteenth and seventeenth centuries, as they were believed to cure diseases and reverse the effects of poison.<sup>160</sup> Being very rare, bezoar stones offered for sale were also usually fake.<sup>161</sup>

The sale fell through on the first attempt because Lopez lacked ready money to pay, so Chandler instead pawned the stone to Abraham der

6, 1583) (listing Kyndt as an elder of the Dutch Church in Norwich); 3 THE PAPERS OF NATHANIEL BACON OF STIFFKEY, 1586–1595, at 345 n.292 (A. Hassell Smith & Gillian M. Baker eds., 1987) (identifying Kyndt as "an alien merchant of Cley").

<sup>153</sup> Bill of Complaint, *Kyndt v. Kyng & Kyng* (Court of Requests), National Archives (U.K.), REQ 2/231/62 (ca. 1570) (offer to sell barley).

<sup>154</sup> *Id.* (interlinear correction included without indication).

<sup>155</sup> *Id.*

<sup>156</sup> Bill of Complaint and Answer of Robert Chandler, *Lopez v. Chandler* (Chancery), National Archives (U.K.), C 2/Eliz/L4/49 (1598) (pleadings); Interrogatories and Depositions ex parte Lopez, *Lopez v. Chandler* (Chancery), National Archives (U.K.), C 24/263, no. 60 (1598); Deposition of Edward Collyns, *Lopez v. Chandler* (Chancery), National Archives (U.K.), C 24/274, no. 26 (Oct. 1, 1599) (interrogatories and depositions ex parte Chandler); see also BAKER AND MILSOM SOURCES OF ENGLISH LEGAL HISTORY 569–74 (John Baker ed., 2d ed. 2010) (reprinting the common law records).

<sup>157</sup> Lopez was also possibly the cousin of Rodrigo Lopez, Queen Elizabeth's physician who was executed for treason in 1594. See DOMINIC GREEN, THE DOUBLE LIFE OF DOCTOR LOPEZ 43 (2003).

<sup>158</sup> Deposition of Edward Collyns, *Lopez v. Chandler* (Chancery), National Archives (U.K.), C 24/274, no. 26 (Oct. 1, 1599) (answer to interrogatories 3, 4, 5, 6).

<sup>159</sup> *Id.*; Answer of Robert Chandler, *Lopez v. Chandler* (Chancery), National Archives (U.K.), C 2/Eliz/L4/49 (June 3, 1598).

<sup>160</sup> Peter Borschberg, *The Euro-Asian Trade in Bezoar Stones (Approx. 1500 to 1700)*, in ARTISTIC AND CULTURAL EXCHANGES BETWEEN EUROPE AND ASIA, 1400–1900: RETHINKING MARKETS, WORKSHOPS, AND COLLECTIONS 29, 30 (Michael North ed., 2010).

<sup>161</sup> TOM BLAEN, MEDICAL JEWELS, MAGICAL GEMS. PRECIOUS STONES IN EARLY MODERN BRITAIN: SOCIETY, CULTURE AND BELIEF 208, 229 (2012).

Kinderen, a London-born Flemish merchant.<sup>162</sup> Der Kinderen had the stone evaluated for authenticity by James Garrett, a Flemish apothecary living in London.<sup>163</sup> Garrett affirmed that the stone was “no true east Indian Bezer stone but a counterfett Bezer,”<sup>164</sup> causing der Kinderen to call in his loan to Chandler.<sup>165</sup>

At this point, knowing that the stone was a fake, Chandler nonetheless contracted to sell it to Lopez in exchange for £10 plus a gold ring set with a diamond. The parties exchanged the bezoar and ring; the £10 remained unpaid.<sup>166</sup> A day or two later, Lopez showed his new prize to Garrett, who informed him the stone was a fake.<sup>167</sup> Lopez then sought to rescind the transaction with Chandler, who refused and demanded his £10.<sup>168</sup>

Der Kinderen’s actions demonstrate how easily Lopez could have verified the authenticity of the bezoar by seeking an expert opinion without impugning Chandler’s reputation. Furthermore, although the evidence indicates that Lopez traded in precious stones,<sup>169</sup> and thus presumably would have been aware of the very real possibility of counterfeits,<sup>170</sup> he portrayed

<sup>162</sup> 3 RETURNS OF ALIENS DWELLING IN THE CITY AND SUBURBS OF LONDON: FROM THE REIGN OF HENRY VIII TO THAT OF JAMES I 165 (R. E. G. Kirk & Ernest F. Kirk eds., 1907) (listing der Kinderen under the category of “Cooplieden hier geboren van Neerlandsche ouders,” meaning “merchants born here from Dutch parents”); Deposition of Edward Collins, Lopez v. Chandler (Chancery), National Archives (U.K.), C 24/274, no. 26 (Oct. 1, 1599) (answer to interrogatories 3, 4, 5, 6) (explaining that Lopez did not have ready money to pay).

<sup>163</sup> Deposition of Abraham der Kinderen, Lopez v. Chandler (Chancery), National Archives (U.K.), C 24/263, no. 60 (Oct. 20, 1598) (answer to interrogatory 6); RAY DESMOND, DICTIONARY OF BRITISH AND IRISH BOTANISTS AND HORTICULTURISTS INCLUDING PLANT COLLECTORS AND BOTANICAL ARTISTS 245 (3d ed. 1977) (concerning Garrett’s identity).

<sup>164</sup> Deposition of James Garrett, Lopez v. Chandler (Chancery), National Archives (U.K.), C 24/263, no. 60 (Sept. 8, 1598) (answer to interrogatory 5) (interlinear correction included without indication).

<sup>165</sup> Deposition of Abraham der Kinderen, Lopez v. Chandler (Chancery), National Archives (U.K.), C 24/263, no. 60 (Oct. 20, 1598) (answer to interrogatory 6/8).

<sup>166</sup> Deposition of John Stockbridge, Lopez v. Chandler (Chancery), National Archives (U.K.), C 24/263, no. 60 (Sept. 2, 1598) (answer to interrogatory 2); Deposition of John Mounslow, Lopez v. Chandler (Chancery), National Archives (U.K.), C 24/274, no. 26 (Oct. 8, 1599) (answer to interrogatory 5).

<sup>167</sup> Deposition of James Garrett, Lopez v. Chandler (Chancery), National Archives (U.K.), C 24/263, no. 60 (Sept. 8, 1598) (answer to interrogatory 5) (“Jeronimo Lopes, the *plaintiff* Came to this *deponent* & told him that he had bought a Bezer stone of the sayd *defendant* & prayed this *deponent* to give his *iudgment* upon yt, taking forth the same stone & shewing the same to this *deponent*, which as soone as he saw, knowing yt full well, he sayd unto him, ‘Is this stone come abrode agayne to be sold for a true stone; this is not the first tyme that I have had yt in my handes.’”).

<sup>168</sup> Bill of Complaint, Lopez v. Chandler (Chancery), National Archives (U.K.), C 2/Eliz/L4/49 (May 3, 1598).

<sup>169</sup> Deposition of Edward Collins, Lopez v. Chandler (Chancery), National Archives (U.K.), C 24/274, no. 26 (Oct. 1, 1599) (answer to interrogatory 2).

<sup>170</sup> BLAEN, *supra* note 161, at 208 (noting that precious stones were “widely counterfeited” and that bezoar stones were “often adulterated and counterfeited”).

himself in his complaint as “a man without skill” and unable to judge the authenticity of the bezoar stone.<sup>171</sup> But rather than verify with Garrett, whom he had known for a long time,<sup>172</sup> Lopez placed his “trust & confidence in [Chandler], being a man[] of good estate, reputacion, & creditte, as he then seemed, soe that [Lopez] made noe doubt but that yt was a right beazarstone & of that valewe.”<sup>173</sup>

Lopez wanted that stone so badly that he let his enthusiasm for obtaining what he alleges Chandler called “the fayrist Bezer stone in the worlde” get in the way of his judgment.<sup>174</sup> This is one reason the existence of fraud prevention mechanisms will never eradicate fraud. For them to do their job, potential victims must make use of them. But often people want to trust; they want to believe in the goodness and honesty of an elderly Norfolk farmer, or they want that bezoar stone so much that they do not even consider taking reasonable precautions to protect against deception.

#### CONCLUSION

In his 2004 book, *The Cheating Culture: Why More Americans Are Doing Wrong to Get Ahead*, David Callahan argues that to solve what he perceives as the current epidemic of cheating we need to create a new “moral community” in which American society strikes “a healthier balance between humanistic values like shared responsibility, mutual respect, and compassion for the weak—and market values like maximum efficiency, individual autonomy, and admiration for the strong.”<sup>175</sup> Callahan’s “moral community” bears a striking resemblance to the supposed “moral economy” of premodern England, a time when people allegedly believed in the importance of honesty, good faith, and succeeding individually while being mindful of not harming the common good.<sup>176</sup> Yet if we believe that a kinder, gentler economy will lead to less fraud, we ought to take note of the lament of the

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<sup>171</sup> Bill of Complaint, *Lopez v. Chandler* (Chancery), National Archives (U.K.), C 2/Eliz/L4/49 (May 3, 1598).

<sup>172</sup> Deposition of James Garrett, *Lopez v. Chandler* (Chancery), National Archives (U.K.), C 24/263, no. 60 (Sept. 8, 1598) (answer to interrogatory 1).

<sup>173</sup> Bill of Complaint, *Lopez v. Chandler* (Chancery), National Archives (U.K.), C 2/Eliz/L4/49 (May 3, 1598).

<sup>174</sup> Deposition of John Mounslowe, *Lopez v. Chandler* (Chancery), National Archives (U.K.), C 24/274, no. 26 (Oct. 8, 1599) (answer to interrogatory 5); Deposition of Edward Collins, *Lopez v. Chandler* (Chancery), National Archives (U.K.), C 24/274, no. 26 (Oct. 1, 1599) (answer to interrogatories 3, 4, 5, 6) (reporting that Lopez “sayd yt was the fayrest Bezer stone that ever he had seene, and tooke suche likinge of yt that he must needes have a prize sett down of yt presently”).

<sup>175</sup> CALLAHAN, *supra* note 14, at 263–64.

<sup>176</sup> DAVIS, *supra* note 5, at 414–15.



fourteenth-century English poet John Gower, who warned that “[f]raud is everywhere” and complained<sup>177</sup>:

In olden days everyone acted well, without deceit and without envy. Their buying and selling was honest, without trickery. But now everything is entirely changed: if one speaks the truth, another lies. . . . Therefore, one sees nowadays that everything is getting worse—both trades and merchandise.<sup>178</sup>

Gower was wrong, of course. There never was a golden age when people were honest, a man’s word was his bond, and transactors could trust without worry because reputation drove access to credit.

Centuries of experience tell us that fraud will not disappear with better regulation or by permitting market forces to work their magic. Fraudsters will always find their victims in people who trust unwisely. Of course, “[r]ecognizing that dishonesty happens is not the same thing as deciding it’s acceptable.”<sup>179</sup> The various fraud prevention mechanisms may lessen fraud, and historically even those who tried to cheat them agreed that they should be maintained.<sup>180</sup> Regulations signal the society’s values, and they throw up roadblocks that may make some potential fraudsters think twice. Verification measures backstop trust for those who use them. Concern about reputation may incentivize honesty for some people. Moral training creates a culture that tries to prioritize honesty. Information about scams helps people trust more wisely.

But none of these mechanisms, nor all of them together, will eliminate fraud. The best governments and individuals can do is find the point at which the risk of fraud and the cost of fraud prevention balance each other out. That point never represents zero fraud.<sup>181</sup> Call it the Hand formula of fraud<sup>182</sup>: if the cost of fraud prevention exceeds the probability of fraud and the harm

<sup>177</sup> GOWER, *supra* note 62, at 346, l. 26353.

<sup>178</sup> *Id.* at 339, ll. 25801–12.

<sup>179</sup> KEYES, *supra* note 14, at 243.

<sup>180</sup> Casson, *supra* note 36, at 399–400; DAVIS, *supra* note 5, at 424.

<sup>181</sup> DAVIES, *supra* note 7, at 16–17:

[F]raud is an *equilibrium* quantity. We can’t check up on everything, and we can’t check up on nothing, so one of the key decisions that an economy has to make is how much effort to spend on checking. This choice will determine the amount of fraud. And since checking costs money and trust is really productive, the optimal level of fraud is unlikely to be zero.

*See also* Stringham & Clark, *supra* note 10, at 357–58 (“With risk management, the objective is never to decrease fraud to zero; the best way to do that would be to turn down all orders and do no business at all.”).

<sup>182</sup> *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (expressing the famous formula  $B = PL$ , namely that an individual’s duty to protect others against harm “is a function of three variables:” the probability of the harm (P) times the extent of the loss (L) caused by the harm balanced against the burden (B) of protecting against the harm).

caused by the fraud, then it is better to trust rather than to pay for prevention. Just as tort law recognizes that we cannot expect to live in a world without risk, so this practical balancing of fraud prevention and fraud tolerance recognizes we cannot expect to live in a world in which no one cheats.