

# ESSAY

## CHEATING PAYS

*Emily Kadens\**

*Common private-ordering theories predict that merchants have an incentive to act honestly because if they do not, they will get a bad reputation and their future businesses will suffer. In these theories, cheating is cheating whether the cheat is big or small. But while reputation-based private ordering may constrain the big cheat, it does not necessarily constrain the small cheat because of the difficulty in discovering certain types of low-level cheating and the consequent failure of the disciplining power of reputation. Yet the small cheat presents a significant challenge to modern contracting, both between businesses and in the contracts of adhesion imposed on consumers. To encourage private law scholars to address the unique governance challenges posed by low-level cheating, this Essay describes the conditions under which low-level cheating can flourish and become widespread. It demonstrates this so-called “Cheating Pays” scenario using a historical case study in which a seventeenth-century London grocer, trading under precisely those conditions that private-ordering theories predict will incentivize honesty, not only cheated extensively but also successfully remained in business after having been caught and publicly punished. Identifying the scenarios in which cheating pays has implications for how firms use contracts and how consumers might use the courts to try to reduce opportunistic behavior.*

### INTRODUCTION

On May 29, 1622, the English Court of Star Chamber found the London grocer Francis Newton guilty of a nearly decade-long pattern of cheating on the weight of wares and containers.<sup>1</sup> The court fined Newton

---

\* Professor of Law, Northwestern Pritzker School of Law, Northwestern University. The author would like to thank the many people who provided assistance, suggestions, and feedback: Brittany Adams, Douglas Baird, Daniel Barron, Lisa Bernstein, Erin Delaney, Shari Diamond, Ezra Friedman, Robert Gibbons, Philip Hamburger, Avery Katz, Sarah Lawsky, Alex Lee, Steven Lubet, Jonathan Macey, Joshua Macey, Bruce Markell, David Miller, Jide Nzelibe, Sheilagh Ogilvie, Destiny Perry, Prateek Raj, Mason Reay, James Speta, Matthew Spitzer, Joel Watson, Barry Weingast, Jay Westbrook, and William Wilhelm, Jr. This Essay draws extensively on transcriptions of archival sources prepared by the author. All quotations are of these transcriptions. Both the transcriptions and copies of the original archival sources are on file with the *Columbia Law Review*.

1. Opinion of Star Chamber, Att’y Gen. v. Newton & Herbert (Star Chamber), British Library (U.K.), Stowe MS 397, fols. 57v–59v (May 29, 1622).

the enormous sum of £1,000 and required him to make a public apology before the Grocers' Company, the London guild to which he belonged.<sup>2</sup> The men who heard this confession on July 26, 1622 were his trading partners, customers, friends, guild brethren, enemies, and neighbors.<sup>3</sup> They were part of a network that ran from the import merchants and local manufacturers from whom the grocers bought wares, to the provincial middlemen and retailers to whom the grocers in turn sold those goods. These men all knew about the allegations against Newton. Three lawsuits over the previous four years had involved deposition testimony from over 100 individuals, including some of the men in that room and many of the men and women who sold to and bought from Newton.<sup>4</sup> Gossip about his misdealing had spread through the grocer community of London and well out into the countryside.<sup>5</sup>

The organization of Newton's trade encapsulated the prerequisites of public- and private-ordering explanations for cooperation in contracting.<sup>6</sup> He engaged in repeat, bilateral transactions with a large number of other traders. All of these traders together existed within a dense network in which reputation-creating gossip could flow almost costlessly. A powerful guild could, in theory, impose and enforce boycotts,<sup>7</sup> and an extensive and sophisticated court system provided a state-sanctioned means of punishing defectors.<sup>8</sup>

And yet, despite the existence of the presumed preconditions for cooperation, Newton cheated. He cheated a lot of people, each a little bit, and he got away with it for a long time. And then, even after he was

---

2. *Id.* at 59r. This sum in 1622 is equivalent to approximately £169,000 today. See Five Ways to Compute the Relative Value of a U.K. Pound Amount, 1270 to Present, MeasuringWorth.com, [https://www.measuringworth.com/calculators/ukcompare/result.php?year\\_source=1622&amount=1000&year\\_result=2019](https://www.measuringworth.com/calculators/ukcompare/result.php?year_source=1622&amount=1000&year_result=2019) [https://perma.cc/A9XS-4BUT] (last visited Jan. 18, 2019).

3. See Grocers Company Court Minutes, Guildhall Library (U.K.), MS 11,588, vol. 3, fol. 211 (May 29, 1622) (listing those present at the reading of Newton's judgment).

4. See Pleadings, Interrogatories, and Depositions, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21 (1621); Pleadings, Interrogatories, and Depositions, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6 (1619–1621); Pleadings and Depositions, *Wall v. Newton* (Court of Chancery), National Archives (U.K.), C 2/JasI/W14/69 (1618–1619).

5. See Deposition of John Bright, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 5v (Feb. 5, 1621) (answer to interrogatory 18) (“[U]ppon a Common report *which* this *deponent* had heard in the Countrie and in and about London, that the now *Complainant* was noted and accused for using deceipts towards his Customers . . .”).

6. See *infra* section II.A (explaining how Newton's trade met the preconditions of public and private ordering).

7. See *infra* notes 117–120 and accompanying text (outlining the disciplinary powers of guilds).

8. See *infra* note 121 and accompanying text (describing the available court system).

caught and very publicly punished, he continued to do business within the same network, in the same location, for the rest of his life.<sup>9</sup> He died in 1630, a man of property, perhaps not as successful as he would have been but wealthy enough to leave land in the countryside and a going concern in central London to his heirs.<sup>10</sup> Fathers continued to place their sons with him as apprentices,<sup>11</sup> and none of his existing apprentices left him after his sentence, though they could have done so under the rules and practices of the guild.<sup>12</sup> Merchants continued to sell him expensive goods.<sup>13</sup> His old customers did not abandon him.<sup>14</sup> And notwithstanding the fact that his nephew, the eventual heir to his business, had been his apprentice during the time of his trial and punishment and testified on his uncle's behalf,<sup>15</sup> no stigma seems to have attached to him in his career. The nephew became a governor of the Grocers' Company, a knight, and a very wealthy man.<sup>16</sup>

Private-ordering theories would likely not predict this outcome. These theories hold that merchants have an incentive to act honestly because they will get a bad reputation if they act dishonestly, and this will

---

9. See *infra* notes 319–326 and accompanying text (showing that Newton remained in business). Newton's will refers to John Donne as "our Parson." Will of Francis Newton, National Archives (U.K.), PROB 11/158/347 (proved Nov. 3, 1630). John Donne was rector of St. Benet Gracechurch, the church across the street from Newton's shop, from 1592 to 1636. See Deposition of Richard Herbert, *Newton v. Wall* (Star Chamber), National Archives (U.K.), C 24/464, fol. 7r (Oct. 4, 1619) (describing the location of Newton's shop as being near Gracechurch Street); Deposition of John Phelps, *Newton v. Wall* (Star Chamber), National Archives (U.K.), C 24/464, fol. 1r (Aug. 6, 1619) (testifying that Newton lived on Fenchurch Street near Gracechurch); 1 George Hennessy, *London Diocesan Clergy Succession from the Earliest Time to the Year 1898*, at 79 (London, Swan Sonnenschein & Co. 1898) (compiling a list of rectors and vicars in various parishes). Fenchurch is the modern spelling and Gracechurch Street is the modern name for Gracious Street.

10. Will of Francis Newton, National Archives (U.K.), PROB 11/158/347 (proved Nov. 3, 1630).

11. See *infra* note 326 and accompanying text.

12. See Answer of Roger Hatcliffe, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 66r (Nov. 20, 1619) (explaining that Hatcliffe had been allowed to leave Newton's employment in 1619 because of Wall's lawsuit against Newton).

13. E.g., Answer of Henry Savage, *King's Almoner v. Savage & Newton* (Star Chamber), National Archives (U.K.), STAC 8/3/11 (July 26, 1622) (indicating that Newton bought sugar from a merchant in June 1622).

14. See *infra* notes 322–324 and accompanying text.

15. Deposition of Robert Newton, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fols. 15v–16v (Mar. 29, 1621) (answer to interrogatory 4) (testifying that he was Newton's apprentice when Newton was served); accord Deposition of Robert Newton, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 2, fols. 109v–110r (Oct. 4, 1621) (answer to interrogatory 46).

16. Will of Robert Newton, National Archives (U.K.), PROB 11/334/91 (proved Oct. 14, 1670) (listing property).

damage their future business prospects.<sup>17</sup> This Essay argues that reputation-based private-ordering theories predict the wrong outcome in the Newton case, and in similar cases of low-level cheating both historical and modern, because they fail to recognize that not all opportunistic behavior is the same. Reputation-based private ordering that creates a disincentive for individuals or firms to commit big cheats may not effectively prevent the sort of small cheats in which Newton engaged.<sup>18</sup>

The difference between big and small cheats lies primarily in the difficulty of discovery, the cheater's plausible deniability, and the victim's willingness to suffer the flawed performance in silence.<sup>19</sup> The big cheat—failure to deliver or to pay, delivery of unusable goods, hold-up, or significant misrepresentation—will rarely pass unnoticed. But victims of small cheats—the chiseling, shirking, and taking advantage at the margins—may never detect the cheating.<sup>20</sup> And if victims discover the breach, the cheat may be minor enough that they may not be sure whether a trading partner had merely made a mistake she will happily correct, committed an inadvertent breach that will never happen again, or deliberately wronged them. In addition, even if victims discover what they believe is low-level cheating, they may still prefer not to publicize it. Doing so may be too much effort; victims may want to continue to do business with the cheater; or they may not be certain that others will believe their claims that the cheater cheated. If victims do not realize they have been cheated or prefer not to impugn the cheater's reputation, they cannot leverage either private ordering or the courts to discipline the cheater.

From the cheater's perspective, therefore, honesty may not pay when one can profit from small cheats without suffering future consequences. This Essay calls this cheating-incentivized situation "Cheating Pays." Part I develops the Cheating Pays scenario to demonstrate how a cheater could engage in this sort of low-level cheating without triggering reputational sanctions.

---

17. See *infra* notes 29–35 and accompanying text (providing an overview of common private-ordering theories).

18. But see Jonathan R. Macey, *The Death of Corporate Reputation: How Integrity Has Been Destroyed on Wall Street* 24–26 (2013) (using Morgan Stanley's reputational fallout from the Facebook IPO to demonstrate that even big cheats no longer put financial firms out of business).

19. The distinction between big and small cheats may also be thought of as somewhat analogous to the distinction between material breach and substantial performance. They are both breaches, but one causes more harm than the other. And, of course, just as in practice "[p]recise boundaries cannot be drawn" between material breach and substantial performance "since the question turns on the facts of each case," neither can precise boundaries be drawn between the two types of cheating. 15 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 44:54 (4th ed. 2018).

20. See Douglas G. Baird, *Commercial Norms and the Fine Art of the Small Con: Comments on Daniel Keating's 'Exploring the Battle of the Forms in Action,'* 98 Mich. L. Rev. 2716, 2718–19, 2725 (2000) ("The best cons are the ones in which the marks never know that they have been swindled.").

Part II uses the three lawsuits against Francis Newton as a case study of Cheating Pays and shows how a merchant embedded within a densely networked, privately ordered society could nonetheless get away with extensive low-level cheating. The Newton case study was not selected because of the uniqueness of its facts. Those—a grocer who cheats on weight—were and remain quotidian.<sup>21</sup> Instead, it was chosen because the suits generated a remarkable record of over 500 single-spaced pages when transcribed and typed out, making this set of documents likely one of the most extensive commercial case files of its time. Those pages contain an abundance of information about Newton's cheats, how gossip about them spread through the network, and how individuals evaluated that gossip. If reputational sanctions had sufficed to punish low-level cheating, the 400 pages of depositions in this record would provide a front-row seat to the drama in a level of detail that few historical, or modern, cases could match. Instead they provide a how-to guide for committing the small cheat and walking away virtually unscathed.

Small cheats thus appear to raise governance challenges that neither public nor reputation-based private ordering can solve.<sup>22</sup> Today, firms with bargaining power can put monitoring and verification terms into their contracts to try to prevent shirking and punish small cheats with liquidated damages.<sup>23</sup> Consumers, by contrast, facing contracts of adhesion and unable to monitor the performance of the companies with which they transact, have limited options. They used to be able to use class actions to aggregate the small wrongs done to large numbers of individuals, but the Supreme Court has narrowed that avenue for redress.<sup>24</sup> Those trying to leverage the power of reputation by posting complaints on social media could find themselves slapped with a commercial disparagement suit.<sup>25</sup> The problem of consumer impotence in the face of low-level cheating has particular salience now that the

---

21. See, e.g., Dorothy Davis, *Fairs, Shops, and Supermarkets: A History of English Shopping 7–8* (1966) (discussing the problematic variation of weights on medieval foodstuffs, which was in part due to “false weights and short measures . . . used for deliberate fraud”); Tod Marks, *Whole Foods Under Fire for Overcharging Customers*, *Consumer Reports*, <https://www.consumerreports.org/cro/news/2015/06/whole-foods-under-fire-for-overcharging-customers> [<https://perma.cc/8VGF-W7RC>] (last updated Jan. 12, 2016) (reporting that Whole Foods grocery store was caught cheating customers on weight in 2015).

22. See Baird, *supra* note 20, at 2721 (expressing concern that the small cheat is “advantage-taking that is too small to be stopped by reputational forces and too venial to fall within criminal and regulatory sanctions”).

23. See *infra* notes 368–370 and accompanying text (describing how firms may use contractual methods to prevent small cheats).

24. See *infra* note 374 and accompanying text (citing two Supreme Court decisions that limited the effectiveness of consumer class action lawsuits).

25. See 3 Louis Altman & Malla Pollack, *Callmann on Unfair Competition, Trademarks & Monopolies* § 11:13, Westlaw (4th ed., database updated 2018) (explaining that commercial disparagement causes of action “protect[] against false and malicious representations of the title or quality of another’s interest in goods or property”).

American Law Institute is considering a draft Restatement of Consumer Contracts.<sup>26</sup> By describing the Cheating Pays scenario, this Essay aims to bring to the fore questions about what might be done to reduce low-level cheating given the implausibility of simply relying on reputation to disincentivize it.

Part III offers some preliminary observations about how such cheating might be controlled through contract mechanisms and the law of remedial procedure. Specifically, it considers using contractual verification provisions and *qui tam* actions as constraints on low-level cheating.

### I. WHEN CHEATING PAYS

Theories of private ordering that explain why humans act cooperatively rather than purely opportunistically are influential not only in economics but also in law and evolutionary biology.<sup>27</sup> Yet while scholars have celebrated the market as evidence of honesty and cooperation, they have paid relatively little attention to the role and extent of cheating.<sup>28</sup> This Essay tries to offer some insight into that neglected topic. Section I.A begins by arguing that the private-ordering assumption that reputation-

---

26. Restatement of Consumer Contracts: Comments and Suggestions Invited DD (Am. Law Inst., Discussion Draft 2017).

27. See, e.g., Jean-Paul Carvalho & Mark Koyama, Instincts and Institutions: The Rise of the Market, *in* The Social Science of Hayek's 'The Sensory Order' 285, 286–88 (William N. Butos ed., 2010) (arguing that the “rise of the market and the transition to impersonal exchange” are outcomes of the “perennial *coevolution* of cognition, culture, and institutions” which make cooperation on a large scale possible); Simon Gächter, Human Prosocial Motivation and the Maintenance of Social Order, *in* The Oxford Handbook of Behavioral Economics and the Law 28, 29–30 (Eyal Zamir & Doron Teichman eds., 2014) (arguing that social order is “sustained . . . by internalized norms of proper conduct” and “influenced by the behavior of other people,” and that “punishment or other incentives are necessary to sustain social order”); Martin A. Nowak & Karl Sigmund, Evolution of Indirect Reciprocity, 437 *Nature* 1291, 1291 (2005) (providing a review of theoretical and empirical studies of indirect reciprocity and noting that two approaches—social science and evolutionary biology—converge on the issue); Martin A. Nowak, Five Rules for the Evolution of Cooperation, 314 *Science* 1560, 1560 (2006) (“The question of how natural selection can lead to cooperative behavior has fascinated evolutionary biologists for several decades.”).

28. For examples of scholarly works on cheating, see Arthur Allen Leff, Swindling and Selling 5–6 (1976) (proposing to “tease out and display . . . the rather elegant, basic, shared structure of swindling and selling”); Baird, *supra* note 20, at 2720–25 (outlining the principles of the “small con”); Nina Mazar & Dan Ariely, Dishonesty in Everyday Life and Its Policy Implications, 25 *J. Pub. Pol’y & Marketing* 117, 118 (2006) (explaining two approaches for understanding and curbing dishonest behavior); Timothy J. Muris, Opportunistic Behavior and the Law of Contracts, 65 *Minn. L. Rev.* 521, 521–22 (1981) (examining how certain legal principles can be low-cost methods of deterring opportunistic behavior); see also Stefano de Paoli & Aphra Kerr, “We Will Always Be One Step Ahead of Them”: A Case Study on the Economy of Cheating in MMORPGs, *J. Virtual Worlds Res.*, Feb. 2010, at 3, 4–5 (surveying the literature on cheating in online games and providing conclusions for understanding the relationship of cheating to the economy of virtual worlds).

based sanctions will disincentivize all kinds of cheating is incorrect because small cheats do not have the same level of discoverability or impel the same certainty about the necessity of punishment that big cheats do. Section I.B then turns to a discussion of the Cheating Pays scenario in which cheaters in fact have a positive incentive to engage in low-level cheating because the likelihood of profit outweighs the likelihood of harm to their reputations.

A. *The Problem with Private Ordering*

Theories of private ordering in the commercial context hold that contracting parties can, in certain situations, develop their own norms of honesty and take action to penalize opportunism in others.<sup>29</sup> In bilateral contracting between repeat actors, for example, private-ordering theory predicts that the parties will not cheat, as long as switching costs are not too high, because the victim will walk away from the partnership if they do.<sup>30</sup> According to the theory of indirect reciprocity, in which individual actors may not engage in repeat business with any particular partners but in which all the possible contracting partners exist within a small and often ethnically homogeneous community, a party will not cheat if information about her cheating can flow costlessly across the community and some mechanism exists for instituting and enforcing a boycott of the cheater.<sup>31</sup> Similarly, in network theory, the spread of information within a dense network will ensure that a potential contracting partner does not

---

29. See, e.g., John McMillan & Christopher Woodruff, *Private Order Under Dysfunctional Public Order*, 98 Mich. L. Rev. 2421, 2424 (2000) (“[W]e discuss why private order is needed and why it sometimes needs to be organized, and argue that private organizations serve two functions—to disseminate information about contractual breaches and to coordinate the responses of multiple parties.”). But see Jonathan Silberstein-Loeb, *Reputation or: How I Learned to Stop Worrying and Love the Market*, in *Reputation Capital: Building and Maintaining Trust in the 21st Century* 23, 27 (Joachim Klewes & Robert Wreschniok eds., 2009) (discussing how Bernard Madoff opportunistically employed his reputation to illustrate how reputation can hinder the effective operation of the market).

30. See, e.g., Douglas W. Allen & Dean Lueck, *The “Back Forty” on a Handshake: Specific Assets, Reputation, and the Structure of Farmland Contracts*, 8 J.L. Econ. & Org. 366, 366–69 (1992) (contending, in the case of farmland contracts, that “reputations and laws effectively enforce the agreement and render detailed, long-term contracts superfluous”); McMillan & Woodruff, *supra* note 29, at 2426 (“If a buyer and seller expect to deal with each other repeatedly, each might refrain from cheating the other in order to maintain the relationship.”).

31. For examples of seminal studies of reputation-based private ordering within small groups, see Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. Legal Stud. 115, 138–43 (1992); Avner Greif, *Reputation and Coalitions in Medieval Trade: Evidence on the Maghribi Traders*, 49 J. Econ. Hist. 857, 867–68 (1989) [hereinafter Greif, *Reputation and Coalitions*]; Janet T. Landa, *A Theory of the Ethnically Homogeneous Middleman Group: An Institutional Alternative to Contract Law*, 10 J. Legal Stud. 349, 357–61 (1981).

need to work very hard to find out about another's prior bad behavior.<sup>32</sup> Additionally, the potential to have one's misdeeds revealed will keep network members honest as long as moving to a new network is difficult.<sup>33</sup>

Each of these theories of private ordering shares the premise that a contracting party will act honestly because honesty will pay and will not act opportunistically because word will get around and no one will want to do business with her in the future.<sup>34</sup> Achieving this cooperative equilibrium, however, requires making three implicit assumptions about the discoverability and nonexcusability of the cheating and the certainty of reputation.<sup>35</sup> While these assumptions may often apply to the big cheat, they may often not apply to the small cheat.

1. *Discoverability of Cheating.* — First, and most fundamentally, the success of private ordering depends on the victim identifying the cheating. The small cheat, however, is distinguished from the big cheat by the difficulty of discovering that the cheater is skimming off the top or chiseling at the margins. Indeed, low-level cheating can occur most readily

32. See, e.g., Ronald S. Burt, *Brokerage and Closure: An Introduction to Social Capital* 95–101 (2005) (finding that “trust is associated with closure,” but that “many people connected by strong relations embedded in closed networks . . . did not cite one another for trust” because of “enhanced opportunity for malfeasance”); James S. Coleman, *Social Capital in the Creation of Human Capital*, 94 *Am. J. Soc. (Supp.)* S95, S105–07 (1988) (explaining that norms arise in social structures in which there is closure, which “allows the proliferation of obligations and expectations”).

33. See, e.g., Burt, *supra* note 32, at 125 (“Not wishing to lose reputation accumulated in a longterm relationship, or built up within a group of colleagues [in a closed network], people cooperate with other people in the network.”); Coleman, *supra* note 32, at 107–08 (explaining how the “closure of the social structure” ensures trustworthiness).

34. See Abhijit V. Banerjee & Esther Duflo, *Reputation Effects and the Limits of Contracting: A Study of the Indian Software Industry*, 115 *Q.J. Econ.* 989, 994 (2000) (“[N]o one will want to contract with the guilty firm, and it will probably end up going out of business.”); Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 *J. Pol. Econ.* 615, 616 (1981) (“[E]conomists . . . have long considered ‘reputations’ and brand names to be private devices which provide incentives that assure contract performance in the absence of any third-party enforcer.”); Barak D. Richman, *Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering*, 104 *Colum. L. Rev.* 2328, 2335 (2004) (“[I]n each transaction, parties have an opportunity to cheat their counterparts; if a party cheats any other party, that party’s misconduct becomes known throughout the community; and no one will transact with any individual known to have cheated in the past.”).

35. But see Jonathan M. Barnett, *Intermediaries Revisited: Is Efficient Certification Consistent with Profit Maximization?*, 37 *J. Corp. L.* 475, 483 (2012) (“The logic of these arguments [about the function of reputation] is compelling. But this theory runs into challenges when applied to the actual world of market practice.”); Silberstein-Loeb, *supra* note 29, at 23 (“Reputation neither holds market actors to account nor is it a panacea for problems associated with tacit, or incomplete, contracts.”); Amar Bhidé & Howard H. Stevenson, *Why Be Honest if Honesty Doesn’t Pay*, *Harv. Bus. Rev.*, Sept.–Oct. 1990, at 121, 122 (“[Private-ordering theories] sound[] plausible enough until you look for concrete examples. Cases that apparently demonstrate the awful consequences of abusing trust turn out to be few and weak, while evidence that treachery can pay seems compelling.”).

in precisely those transactions in which verification is difficult or costly. When the buyer can evaluate goods before purchasing or easily assess goods or services after purchase,<sup>36</sup> the credible threat of reputational harm in bilateral contracts or multilateral networks, or even the credible threat of a lawsuit, might make the opportunistic actor think twice before cheating. But when the quality or other characteristic of the goods or services is difficult to assess before and after performance,<sup>37</sup> the victim's inability to detect the cheating means that the cheater's reputational risk is low. This suggests that the rational transactor would have an incentive to cheat.<sup>38</sup> "Doing otherwise would be strictly implausible: profit-seeking entities would be leaving money on the table."<sup>39</sup>

The daily news demonstrates that this fact is not lost on firms. In 2017, European consumers uncovered a long-running scam by multinational producers of brand-name grocery products. These corporations, including Coca-Cola, Proctor & Gamble, Ferrero, and Danone, had apparently for years sold inferior versions of their products in Eastern Europe packaged to look virtually identical to the same—higher-quality but often lower-priced—products sold in Western Europe.<sup>40</sup> The fish sticks in Poland, Hungary, or Slovakia had less fish than they did in Germany, France, or Belgium, the yogurt had less fruit, and the Nutella had less cocoa powder.<sup>41</sup> While the offenders made unsupported claims of "regional tastes," their actions nonetheless "put[] the reputation of their most important brand names at stake."<sup>42</sup> But given the unlikelihood that any individual Eastern European consumer could verify that the cookies she had purchased at home had less butter than the same cookies sold in another country, which she may never visit, the companies acted rationally in risking the potentially remote blow to their reputation in pursuit of greater profit. Similar scams in the news—such as Nike selling slightly inferior versions of its shoes in China,<sup>43</sup> or Johnny

---

36. Barnett, *supra* note 35, at 487 (discussing both "search goods" and "experience goods"); Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 *J.L. & Econ.* 67, 69 (1973) (creating similar categories of "search qualities" and "experience qualities").

37. See Darby & Karni, *supra* note 36, at 68–69 (describing these goods or services and terming them "credence goods").

38. See *id.* at 68, 70, 72 (explaining how incomplete information creates favorable conditions for fraud); Muris, *supra* note 28, at 527 ("[R]eputation provides little deterrent when potential opportunists can conceal their actions from those with whom they expect to contract.").

39. Barnett, *supra* note 35, at 495.

40. Nils Klawitter, *The Same but Different: Eastern Europeans Tired of Being Sold Inferior Products*, Spiegel Online (Dec. 13, 2017), <http://www.spiegel.de/international/business/eastern-europeans-tired-of-inferior-products-a-1182949.html> [<https://perma.cc/PDW7-QNZ3>].

41. *Id.*

42. *Id.*

43. See Li Xi, *Consumers Rebuke Nike's Apology*, Global Times (Mar. 17, 2017), <http://www.globaltimes.cn/content/1038354.shtml> [<https://perma.cc/H6MQ-BHUW>].

Walker whiskey being imported into Israel labeled with a fake kosher certification<sup>44</sup>—demonstrate the trouble those not in a position to verify performance may have in identifying low-level cheating.

Even if the victim does discover the imperfect performance, however, it may not be entirely clear to her, the alleged cheater's other potential contracting partners, or ultimately the courts whether the misbehavior represents honest but imperfect contractual performance, mistake, or devious deceit.<sup>45</sup> Such ambiguity was certainly prevalent historically, when merchants often could not achieve perfect performance. Goods were handmade, transportation and communication were slow and uncertain, and a shortage of specie meant that debts could frequently not be paid on time.<sup>46</sup> Ambiguity about performance also remains an issue today. Modern developing economies, for instance, encounter comparable problems.<sup>47</sup> If a trading partner in these markets fails to provide perfect performance, the harmed party may have "difficulty in identifying whether contractual breaches are due to opportunism, carelessness, incompetence or by events beyond the control of the traders."<sup>48</sup> Similarly, trading partners might have increased tolerance for cheating in complex certification markets in which intermediaries such as accounting, ratings, or law firms do most of their work far from the

---

44. See *Is Johnnie Walker Whiskey Still Kosher? Maybe, Maybe Not*, Haaretz (Aug. 17, 2015), <https://www.haaretz.com/jewish/is-johnnie-walker-whiskey-still-kosher-1.5388028> [<https://perma.cc/93BY-WV5Z>].

45. See *Muris*, *supra* note 28, at 525 ("[A]lthough [small cheating] is detectable, it is easily masked as legitimate conduct, and thus its opportunistic nature is discoverable only at a high cost."); *Bhide & Stevenson*, *supra* note 35, at 125 ("[W]hen a trust appears to be breached, there can be so much ambiguity that even the aggrieved parties cannot apprehend what happened. Was the breach due to bad faith, incompetence, or circumstances that made it impossible to perform as promised?").

46. See *Emily Kadens*, *The Medieval Law Merchant: The Tyranny of a Construct*, 7 *J. Legal Analysis* 251, 278 (2015).

47. See *Marcel Fafchamps*, *The Enforcement of Commercial Contracts in Ghana*, 24 *World Dev.* 427, 428 (1996) ("Late and nonpayment . . . are less the consequence of opportunism and carelessness than of poverty and unanticipated income fluctuations. Shortages of critical inputs, delays in payment by their own customers, and difficulties in transport render firms unable to pay on time or to deliver the quantity and quality promised."); *Clifford Geertz*, *The Bazaar Economy: Information and Search in Peasant Marketing*, 68 *Am. Econ. Rev.* 28, 29–30 (1978) ("The search for information—laborious, uncertain, complex, and irregular—is the central experience of life in the bazaar. Every aspect of the bazaar economy reflects the fact that the primary problem facing its participants . . . is not balancing options but finding out what they are.").

48. *Jema Haji*, *The Enforcement of Traditional Vegetable Marketing Contracts in the Eastern and Central Parts of Ethiopia*, 19 *J. Afr. Econ.* 768, 786 (2010); see also *Karen Clay*, *Trade Without Law: Private-Order Institutions in Mexican California*, 13 *J.L. Econ. & Org.* 202, 208 (1997) ("To prove that an agent had cheated, a merchant first had to determine that the agent had in fact withheld profits owed to him, possibly a difficult task."); *Darby & Karni*, *supra* note 36, at 83 ("A central difficulty with the definition of fraud is the crucial importance of intent. A particular incorrect service prescription may equally well be due to fraudulent intent or simple incompetence.").

watchful eye of their clients. In such situations, “any perceived case of certifier shirking is fairly attributable to a one-time evaluation mistake, a good-faith failure to predict future events in a complex environment, or misinformation supplied by the certified entity’s management.”<sup>49</sup>

2. *Unwillingness to Punish Cheating.* — The second assumption that private-ordering theories implicitly make is that once the victim identifies the cheating—if she does—she will take action to punish the cheater. In fact, she may prefer simply to cut her losses and walk away<sup>50</sup> rather than expend the time and expense of suing or spreading gossip or risk the disapproval of those members of the relevant community who do not interpret the cheater’s actions as opportunistic.<sup>51</sup>

Relatedly, punishment could be costly to the victim if it deprives her of her best or only contracting partner or if penalties would cause such extensive financial damage to the cheater that he would not be able to fulfill his outstanding obligations to the victim.<sup>52</sup> For example, Professor Karen Clay discovered that among nineteenth-century merchants in Mexican California, victims did not punish cheaters when finding substitute performance was difficult.<sup>53</sup> Similarly, a study of sixteenth-century Genoese merchant correspondence found “none of the airing of dirty laundry” that private-ordering theories predict.<sup>54</sup> Instead, it showed that

49. Barnett, *supra* note 35, at 494–95 (“This muted punishment for certifier shirking is compounded by the limited observability of certifier effort and the ambiguous signal transmitted by even observed cases of apparent certifier shirking.”).

50. See Bhide & Stevenson, *supra* note 35, at 126 (reporting that most business-people prefer to quietly move on from being cheated rather than punish the cheater and “seem[] remarkably willing to forget injuries and to repair broken relationships”); see also William L.F. Felstiner, *Influences of Social Organization on Dispute Processing*, 9 *Law & Soc’y Rev.* 63, 81 (1974) (discussing people’s willingness to “lump” or forgo compensation for small harms).

51. See McMillan & Woodruff, *supra* note 29, at 2439 (discussing the reputational damage that could result from reporting cheaters); Bhide & Stevenson, *supra* note 35, at 126 (“Without convincing proof of one-sided fault, the retaliator may get a reputation for vindictiveness and scare even honorable men and women away from establishing close relationships.”); see also Rowena Olegario, *A Culture of Credit: Embedding Trust and Transparency in American Business* 21 (2006) (“[Daniel] Defoe maintained that whoever ‘wounds a tradesman’s credit, without cause, is as much a murder[er] in trade, as he that kills a man in the dark is a murder[er] in matters of blood.’” (second alteration in original) (quoting Daniel Defoe, *The Complete English Tradesman*, vol. 1, letters 6 and 15 (1839))).

52. See, e.g., Answer of Martin Delafalia, *Alldersey, Bressye & Megge v. Delafalia* (Star Chamber), National Archives (U.K.), STAC 5/A4/16, fol. 1r (Feb. 15, 1582) (testifying that he refused to divulge the name of the person who had passed forged bills of exchange to him because if he did, the forger would be ruined and he would not be paid the money the forger owed him); Olegario, *supra* note 51, at 21 (“[M]ere whiff of trouble . . . could bring creditors to his door, demanding that he pay his debts immediately.”).

53. Clay, *supra* note 48, at 214–15.

54. Ricardo Court, *Januensis ergo Mercator: Trust and Enforcement in the Business Correspondence of the Brignole Family*, 35 *Sixteenth Century J.* 987, 990 (2004).

the merchants felt that relationships, even with cheaters, “were too valuable to be thrown away completely.”<sup>55</sup> Finally, in the modern certification market in which the cost of switching to a new certifier is high, “users will rationally decline to impose a draconian reputational penalty that would terminate the relationship.”<sup>56</sup>

3. *Ambiguity of Reputation.* — The third assumption underpinning private-ordering theories is that reputation can suffice to control opportunistic behavior when information about cheating can be transmitted costlessly.<sup>57</sup> This is, for instance, the basis of Professor Avner Greif’s famous study of the medieval Maghribi traders: Within that community, cheating would be foolish because word would certainly get around and no one would take a chance on employing the cheater as an agent in the future.<sup>58</sup> As a consequence, no one dared cheat.<sup>59</sup> Yet reputational information may impact big and small cheats differently. In the case of low-level cheating, the end result of the gossip might be competing reputations rather than a widely accepted bad reputation. For example, the cheater cheats one partner who discovers the cheat and gossips about it. But the many other partners whom the cheater had never cheated or who had never discovered the cheating could counter that gossip with positive gossip about the cheater’s honesty. Furthermore, given the uncertainty inherent in evaluating low-level cheating, those who hear the negative gossip may not be confident whether the cheater actually cheated or the alleged victim was complaining unjustifiably about imperfect performance caused by a mistake or some inadvertent or unavoidable situation. The end result for the cheater could be a mixed reputation but not necessarily a bad one.

The simplified constructs of private-ordering theories assume that someone who cheats will be caught and punished by reputational sanctions. But all a cheater has to do to evade the discipline of reputation is

---

55. *Id.* at 992; see also Joel Sobel, For Better or Forever: Formal Versus Informal Enforcement, 24 *J. Lab. Econ.* 271, 272 (2006) (“When it is costly to start a new relationship, individuals have incentives to remain in existing relationships even when these have gone stale.”).

56. Barnett, *supra* note 35, at 494.

57. See Mark Eisenegger, Trust and Reputation in the Age of Globalisation, *in* Reputation Capital, *supra* note 29, at 11, 15–16; Christopher McKenna & Rowena Olegario, Corporate Reputation and Regulation in Historical Perspective, *in* The Oxford Handbook of Corporate Reputation 260, 260–62 (Timothy G. Pollock & Michael L. Barnett eds., 2012); McMillan & Woodruff, *supra* note 29, at 2433; Hans Caspar von der Crone & Johannes Vetsch, Reputation and Regulation, *in* Reputation Capital, *supra* note 29, at 179, 180.

58. Greif, Reputation and Coalitions, *supra* note 31, at 867–68.

59. See Lynne Kiesling, Contract Enforcement and Legal Systems, *in* 1 Oxford Encyclopedia of Economic History 531, 533 (Joel Mokyr ed., 2003) (“[A] cheater was sacrificing so much future income that cheating *never* paid.” (emphasis added)); cf. Mark Granovetter, Economic Action and Social Structure: The Problem of Embeddedness, 91 *Am. J. Soc.* 481, 487–93 (1985) (criticizing institutional economics for the view that economic institutions make cheating “too costly to engage in”).

not get caught, and this is entirely possible when the cheater engages in small cheats. If the injured party does not know she is being cheated or does not wish to make that information public and enforce the punishment of the cheater, the cheater suffers no reputational hit. And without reliable information, the reputational sanctions underpinning private ordering will fail.

B. *The Cheating Pays Scenario*

If private ordering does not suffice to control low-level cheating, then cheating can presumably flourish even in well-functioning markets. The question then becomes how to recognize when cheating is most likely to occur. Cheating Pays hypothesizes that low-level cheating will be common in the following scenario: Cheater cheats those transaction partners whom she believes cannot or do not verify her performance.<sup>60</sup> By contrast, Cheater does not cheat those partners whom she believes could or do verify. In other words, Cheater tries not to get caught. This may mean she deals honestly with some counterparties while cheating others.<sup>61</sup>

Cheater cheats only a bit. She does not aim for the grand fraud, but rather for a slow accumulation of profit from small acts of opportunism. This low-level cheating reduces the chance of discovery. However, if a counterparty does catch her, Cheater can explain away the small discrepancy in performance as a mistake or oversight and compensate the victim while still asserting her honesty.<sup>62</sup> Cheater's claim of error is particularly believable in a setting in which contractual performance may plausibly not be perfect.<sup>63</sup> Thus, even if Cheater is trying not to get caught, the

---

60. Another situation in which Cheating Pays has purchase is the situation in which the cheater can impose such substantial costs on a victim who tries to get the cheating rectified that the victim decides to "lump it." Such may be the case, for instance, when a customer chooses to dispute an overbilling with a large company, such as a cellphone company, and finds she must spend hours on the phone trying to get the situation addressed. Rather than spend the time, and rather than change service providers, the customer may simply decide to eat the charge. See Felstiner, *supra* note 50, at 81 (discussing the concept of lumping it). This reaction, however, usually applies when the power differential between the parties is significant. That is not the case with Newton and his customers.

61. See S. Nageeb Ali & David A. Miller, Ostracism and Forgiveness, 106 *Am. Econ. Rev.* 2329, 2337 (2016) ("A guilty player may wish to slow the rate at which others learn of her guilt by employing a dynamic, history-dependent pattern of working in some interactions and shirking in others."); Peter Kollock, The Emergence of Exchange Structures: An Experimental Study of Uncertainty, Commitment, and Trust, 100 *Am. J. Soc.* 313, 335 (1994) ("In some cases, sellers were observed advertising truthfully when trading with some buyers and trying to exploit others.").

62. See Baird, *supra* note 20, at 2718–19 (telling the story of Norm, the jeweler, who repaired an inferior product he had made while blaming the "mistake" on his sons).

63. See, e.g., Haji, *supra* note 48, at 787 (observing that Ethiopian vegetable traders are flexible about breaches for bad quality because of the difficulty in assessment).

fear of getting caught does not deter her from cheating when she can offer an innocent explanation for her behavior.

Cheater knows the particular trading partner who catches her can verify her future performance and so proceeds to deal honestly with that partner going forward. But she continues to cheat other parties who have not discovered her cheating. She can go on cheating in this way for a long time provided she avoids three situations: (1) she gets greedy and cheats so much that it becomes noticeable even to nonverifying counterparties; (2) her cheating (although believed initially to be an honest mistake) is discovered so frequently that her trading partners begin to question the veracity of her excuses and spread gossip impugning her reliability; or (3) a whistleblower with inside knowledge discloses the truth.

When Cheater finds herself publicly accused, the situation can become more complicated rather than clearer. Faced with negative gossip and the concomitant hit to her reputation, Cheater can fight back by mobilizing all those contracting partners she did not cheat and those whom she did cheat but who never discovered it. These proxies can attest to Cheater's honest behavior, and their evidence is particularly strong if they had been verifying Cheater's performance all along and believe they had never uncovered any dishonesty.

Those who hear the gossip are thus confronted with conflicting information. Which side they believe depends on many factors. Have they had a good personal experience with Cheater that inclines them to want to think her innocent or a bad prior experience that the negative rumors confirm? Do they have reason to trust the bearer of the gossip, or do they suspect that he has ulterior motives—for instance, to steal their business away from Cheater? Do they want the negative stories to be true, perhaps because Cheater is a competitor? Or do they want them to be false, as when Cheater is a member of their network or industrial community and her cheating would reflect badly on everyone?

In other words, reputational information not only can itself lead to multiple conclusions, but the recipients of the information can also evaluate it in different ways.<sup>64</sup> Gossip can be true negative, or false negative; true positive, or false positive. It can also be something in between—where one party and his allies see cheating, the other party and her allies see a hard bargain or a legitimate misunderstanding. Consequently, what one hears and believes about an individual's reputation could depend on the source from which one obtained the information.

Cheater can stay in business precisely on account of this messiness. Some people never believed that she cheated, and so they continue to do business with her. Some people believe she may have cheated but that she cannot cheat in the future for fear of confirming the negative stories,

---

64. See McKenna & Olegario, *supra* note 57, at 273–74 (pointing out that reputations can be multiple—different people can attribute different reputations to the same person).

so they trust her honesty now. Others may be uncertain about her honesty and thus be willing to deal with her in the future only when they can verify her performance.

Ultimately the kerfuffle may incentivize Cheater to act honestly. Or it may not because it shows her that she can continue to cheat and suffer minimal consequences. Either way, she benefited from her prior cheating, and she remains in business, albeit with a perhaps less burnished reputation.

Put into a different context, the foregoing scenario suggests that the binary prisoner's dilemma routinely used to model aspects of private-ordering theories could benefit from some added complications. In a normal prisoner's dilemma game, each party has two choices: Honest or Cheat.<sup>65</sup> According to accepted theory, reputational sanctions will incentivize parties to play Honest in a multistage, direct relational game or in a multistage game with community sanctions because a party who plays Cheat will forgo future benefits.<sup>66</sup>

The Cheating Pays scenario, by contrast, suggests that the players in a prisoner's dilemma game actually face three choices: Honest, Cheat (a little), and Defraud (cheat a lot).<sup>67</sup> Cheating differs from Defrauding because the former is sufficiently low level to pass undetected or, if detected, is either widespread enough to be considered a cost of doing business or plausible enough to be excused as an honest mistake. Defrauding, by contrast, is cheating that is so far out of the norm of low-level cheating that it will likely be discovered, and if discovered will certainly be punished.

When playing Honest–Honest, both parties get their expected value from the transaction, and they have an incentive to continue to play. But the parties could also play Cheat–Honest and have reason to continue to transact.<sup>68</sup> That is, playing Cheat is not the sort of defection that would necessarily end the game. This is the Cheating Pays situation: The honest party does not know about the cheat; or she knows and, because the cheating is common, expects it and prices for it; or she believes the cheat is actually an error and is willing to continue to play on the assumption that the other party will play Honest in the future. She may also have

---

65. See Paul R. Milgrom et al., *The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs*, 2 *Econ. & Pol.* 1, 6 (1990).

66. See Avner Greif, *Institutions and the Path to the Modern Economy: Lessons from Medieval Trade* 430–31 (2006). But see Pedro Dal Bó & Guillaume R. Fréchet, *On the Determinants of Cooperation in Infinitely Repeated Games: A Survey*, 56 *J. Econ. Literature* 60, 91 (2018) (showing less cooperation in prisoner's dilemma experiments with imperfect information).

67. See Uri Gneezy, *Deception: The Role of Consequences*, 95 *Am. Econ. Rev.* 384, 391 (2005) (pointing out that the dichotomous models that allow only for perfectly honest or completely deceitful players do not correspond to actual behavior).

68. See Clay, *supra* note 48, at 216 (showing merchants would continue to deal with those whom they thought had cheated them).

other reasons to continue to do business with a known cheater rather than punish him. For example, Cheater extends credit to her that she cannot get elsewhere, or Cheater's prices are lower even with the cheating.

A prisoner's dilemma payoff matrix consists of four numbers: "the temptation payoff ( $T$ ), which is the payoff for defecting when the other cooperates; the reward from joint cooperation ( $R$ ); the punishment from mutual defection ( $P$ ); and the sucker's payoff from cooperation when the other defects ( $S$ )."<sup>69</sup> In an ordinary dichotomous prisoner's dilemma game, "[i]f both agents cooperate, each receives a payoff  $R$ . If one defects and the other cooperates, the defector receives  $T$  and the cooperator receives the payoff  $S$ . If both defect, each receives  $P$ ."<sup>70</sup> In such a game, " $T > R > P \geq S$ ,"<sup>71</sup> but in Cheating Pays, the payoff is more complicated. In a Cheat-Honest scenario, Cheater still gets  $T$  while the honest player gets (or believes she gets)  $R$ , making the transaction Pareto superior in the perception of the parties.<sup>72</sup>

Cheat-Cheat and Cheat-Defraud could also both plausibly lead to continued play. The Cheat-Cheat situation could arise, for example, when both the supplier sells inferior products and, unrelatedly, the buyer takes advantage of a generous guarantee to claim warranty coverage for harms not legitimately caused by product defects. Each party may view the other's low-level cheating—if they discover it—as a cost of doing business not worth punishing.<sup>73</sup> Furthermore, if they believe others in the community likely behave the same way, then switching affords them no relief. In addition, parties playing Cheat-Cheat or Cheat-Defraud may prefer to continue their relationship on something like a blackmail theory: If either party reports the other, the reporting party risks having its own cheating revealed in retaliation, and both parties could take a hit to their reputations. After all, while the community may not consider low-level cheating terrible, it is still not honest behavior. The payoffs in these two scenarios therefore include the value of not having the parties' opportunistic behavior bruited about in public.

In 2016, three European economists modeled something similar to this Cheating Pays version of the prisoner's dilemma, and their findings are consistent with the theory's predictions.<sup>74</sup> In the model, players could see a number representing the "cooperation index" of each of their

---

69. Dal Bó & Fréchette, *supra* note 66, at 62.

70. Alberto Antonioni et al., Cooperation Survives and Cheating Pays in a Dynamic Network Structure with Unreliable Reputation, 6 *Sci. Rep.*, no. 27160, June 2, 2016, at 1, 2.

71. *Id.*

72. See Richard A. Posner, *Economic Analysis of Law* 13 (4th ed. 1992) (explaining the concept of Pareto superiority).

73. See Richman, *supra* note 34, at 2358 (pointing out that an advantage of private ordering is that it can deal with situations of reciprocal harms—I harm you a little today, you harm me a little tomorrow).

74. See Antonioni et al., *supra* note 70, at 2–3.

network neighbors.<sup>75</sup> The cooperation score represented the average of each player's cooperation or defection in the last five rounds.<sup>76</sup> In between rounds, however, players could opt to purchase cooperation points to improve their cooperation scores.<sup>77</sup> Other players did not know whether their neighbors' scores were honest or faked.<sup>78</sup>

After thirty rounds, the researchers found, first, that “the aggregate cooperation level of the population does not change when reputations can be faked.”<sup>79</sup> Second, not all players cheated, and many who did cheated only a little bit (buying a point or less each round).<sup>80</sup> Third, cheaters cooperated less on average, but they kept their observed cooperation indices within the average by falsely inflating their scores.<sup>81</sup> By the end, cheaters had earned a higher total payoff than honest players despite having to pay for cooperation points.<sup>82</sup> Cheating improved the cheaters' reputations, making them more desirable partners, yet cheaters could use their faked scores to defect more often than honest players and thus earn the greater payoffs.<sup>83</sup> This experiment appears to support the assumptions underlying *Cheating Pays*: An incentive to commit disguised low-level cheating exists, and cheaters can successfully leverage false reputations to increase their profit at the expense of honest partners.<sup>84</sup>

While private-ordering theories may accurately predict that fear of the loss of reputation will keep cheaters from committing big cheats, they do not have the same disciplinary power over the small cheat. Cheaters are clever; victims can be ignorant of their victimization or unwilling to broadcast it; and gossip can be ambiguous. All of these real-life factors render reputation an imperfect policing mechanism. As a result, low-level cheating may be—and indeed is—a common cost of doing business.<sup>85</sup> Such low-level cheating certainly seems to have been embedded in the grocery market of early seventeenth-century England, as the story of Francis Newton will demonstrate.

---

75. *Id.* at 2.

76. *Id.*

77. *Id.* at 2–3.

78. *Id.*

79. *Id.* at 6.

80. *Id.* at 4.

81. *Id.* at 5.

82. *Id.* at 6.

83. *Id.*

84. *Id.* at 7.

85. See Mazar & Ariely, *supra* note 28, at 117 (explaining that “everyday deception . . . contribute[s] to the U.S. economy losing hundreds of millions of dollars in tax revenues, wages, and investment dollars”).

## II. THE CASE OF FRANCIS NEWTON

Scholars often find it useful to study historical merchant communities because they ideally set up the preconditions that private-ordering theories suggest should promote cooperative behavior: a simpler market, a less-intrusive government, and weaker public courts.<sup>86</sup> As section II.A details, Newton's trade took place within a network reflecting these private-ordering conditions. And while nothing in Newton's trials uncovered a big cheat, section II.B details how Newton consistently committed many small cheats over a number of years. As the Cheating Pays scenario predicts, and as explained in section II.C, Newton managed to avoid suffering repercussions from his cheating, even on the rare occasions when he was caught, until his former apprentices blew the whistle on him. Even then, section II.D shows how the extensive but ultimately ambiguous gossip about him only dented, rather than destroyed, his reputation and business.

A. *Newton's Trade Met the Preconditions of Private Ordering*

Newton lived and did business in a dense network of repeat players in a relatively straightforward distribution structure tethered by some regulations but not overly burdened by enforcement.<sup>87</sup> The community of grocers of which he was a part was relatively homogeneous, geographically confined, and governed by a guild to which all members belonged. As trade was done largely on trust and credit, maintaining a reputation for trustworthiness was paramount to survival.

Prosperous London grocers like Newton were wholesalers who purchased imported foodstuffs, such as spices, sugar, and dried fruits, from overseas merchants and dry goods like starch from local manufacturers.<sup>88</sup> The grocers resold these goods to smaller London and provincial grocers who did primarily retail business, to regional middlemen known as chapmen,<sup>89</sup> and sometimes directly to retail customers.<sup>90</sup> Newton traded with

---

86. See, e.g., Bruce L. Benson, *Law Merchant*, in 2 *The New Palgrave Dictionary of Economics and the Law* 500, 500 (Peter Newman ed., 1998); Bruce L. Benson, *The Spontaneous Evolution of Commercial Law*, 55 *Southern Econ. J.* 644, 647 (1989); Clay, *supra* note 48, at 202–04; Greif, *supra* note 31, *Reputation and Coalitions*, at 858–95; Milgrom et al., *supra* note 65, at 2.

87. Linda Levy Peck, *Court Patronage and Corruption in Early Stuart England* 135 (2003) (“Beginning with Henry VIII the Tudors expanded the role of the state in regulating society and the economy. They used statute and proclamation to control the use of land and capital, to support labor, to control the terms of trade both of imports and exports.”).

88. Davis, *supra* note 21, at 93; Jon Stobart, *Sugar and Spice: Grocers and Groceries in Provincial England, 1650–1830*, at 26 (2013) (“By the early seventeenth century . . . the London grocer's shop was, above all, a place to buy imported food . . .”).

89. David Hey, *Packmen, Carriers and Packhorse Roads: Trade and Communications in North Derbyshire and South Yorkshire 200–02* (1980).

90. Stobart, *supra* note 88, at 29.

chapmen and provincial retailers from Essex, Buckinghamshire, and Hertfordshire, all counties neighboring London, as well as from further afield, in the counties of Wiltshire and Cambridgeshire.<sup>91</sup>

Grocers, as most tradesmen in London, were governed by a guild—or “livery company.”<sup>92</sup> In the grocers’ case, this was the Worshipful Company of Grocers.<sup>93</sup> To have the “freedom” of a livery company in London meant a great deal. Within the protected spheres of expertise of the guilds, only livery company members could legally buy, sell, and manufacture inside the walled city of London and its suburbs.<sup>94</sup> In other words, if Newton’s misbehavior had gotten him expelled from the Grocers’ Company, he could not have continued trading within London. He did not have an alternative network to which he could easily transfer.

The entry barriers to membership in a livery company were substantial; entry to the Grocers’ Company generally required an eight-year apprenticeship with an existing member.<sup>95</sup> That relative exclusivity seems to have bestowed upon livery company members a certain automatic credibility and presumption of trustworthiness.<sup>96</sup> Newton probably benefited from this presumption. He trained with a wealthy and well-connected master, Robert Huighson, who was elected a member of the Grocers’ Company’s governing body in 1609.<sup>97</sup> By his retirement to the life of a

---

91. See, e.g., Deposition of William Dixon, Att’y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 2, fol. 157r (Sept. 26, 1621) (indicating he lives in Hertfordshire); Deposition of Robert Gallant, Att’y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 78v (Aug. 29, 1621) (indicating he lives in Buckinghamshire); Deposition of William Woodward, Att’y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 77r (Aug. 23, 1621) (indicating he lives in Cambridge); Deposition of Thomas Good, Att’y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 75v (Aug. 23, 1621) (indicating he lives in Wiltshire); Deposition of Joshua Naylor, Att’y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 66r (July 25, 1621) (indicating he lives in Essex).

92. Robert O. Bucholz & Joseph P. Ward, London: A Social and Cultural History, 1550–1750, at 77 (2012).

93. See generally J. Aubrey Rees, *The Worshipful Company of Grocers: An Historical Retrospect, 1345–1923* (1923).

94. Steve Rappaport, *Worlds Within Worlds: Structures of Life in Sixteenth-Century London* 29 (1989); Joseph P. Ward, *Metropolitan Communities: Trade Guilds, Identity, and Change in Early Modern London* 8–9 (1997); see also *Charter of the Grocers’ Company*, Guildhall Library (U.K.), MS 11,638, fols. 38, 40 (1607) (granting the Company the right to govern all grocers in London and vicinity).

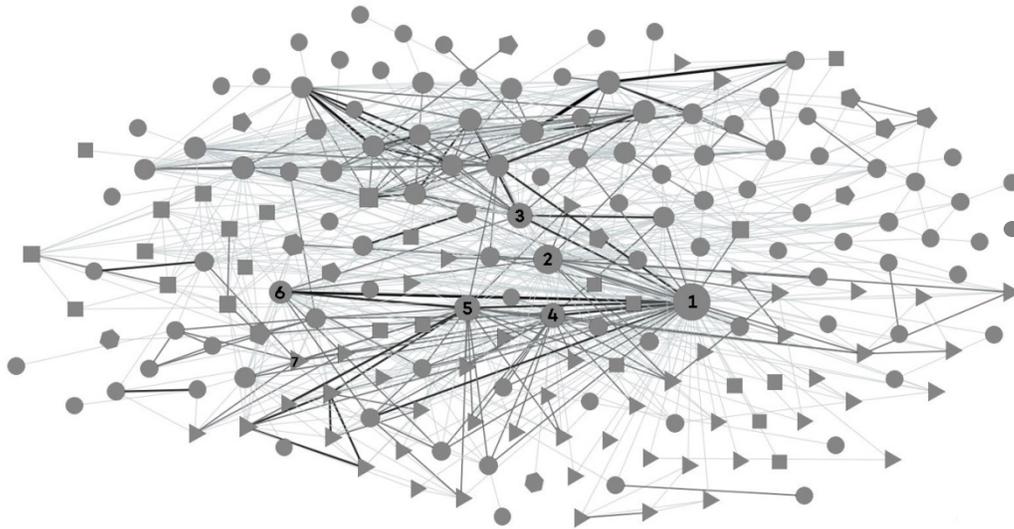
95. See, e.g., *Accounts of the Wardens of the Grocers’ Company*, Guildhall Library (U.K.), MS 11,571, vol. 11, fols. 101v, 191r, 277r (1622–1631) (indicating that all of Newton’s apprentices after his trial signed up for eight-year apprenticeship terms).

96. Cf. Emily Kadens, *The Dark Side of Reputation*, 40 *Cardozo L. Rev.* (forthcoming 2019) (on file with the *Columbia Law Review*) (discussing a seventeenth-century case in which creditors were willing to extend credit as long as they believed the debtor was a citizen of London and a member of the Merchant Adventurers).

97. *Grocers’ Company Admissions*, Guildhall Library (U.K.), MS 11,592A, vol. 1 (undated) (listing members in alphabetical order without pagination).

country gentleman in 1611, Huighson had established a substantial customer base, many of whom transferred their business to Newton.<sup>98</sup>

FIGURE 1: SOCIOGRAM SHOWING THE CONNECTIONS AMONG PEOPLE INVOLVED AND MENTIONED IN THE CASES<sup>99</sup>



Sociogram showing the connections among people involved and mentioned in the cases. Circles are London grocers. Squares are merchants. Triangles are chapmen, provincial traders, and starchmakers. Pentagons are lawyers, scribes, and aldermen. Hexagons are all others.

**Key:** 1. Francis Newton, 2. John Wall, 3. Robert Hughson, 4. Francis Hales, 5. Gryffin Smith, 6. Richard Herbert, 7. Joyce Dancey

Grocers opening a shop acquired customers in several ways. The grocer who took over Huighson's store, for instance, also took over his customer list.<sup>100</sup> For his part, Newton inherited or stole customers from his master,

98. Interrogatories for Wall's Witnesses, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 62r (June 27, 1621) (reproducing a schedule of debts owed to Huighson in July 1611); Deposition of Robert Mildmay, *Wall v. Newton* (Court of Chancery), National Archives (U.K.), C 24/464, no. 74, fol. 9r (Oct. 5, 1619) (answer to interrogatory 5) (commenting that Huighson's shop had "very good trade").

99. Figures 1 and 2 illustrate data gathered from the original archival sources. See Emily Kadens, *Newton Data Set* (2019) (unpublished data set) (on file with the *Columbia Law Review*) [hereinafter Kadens, Data Set]. This underlying data has been verified only by the author.

100. Bill of Complaint, *Wall v. Newton* (Court of Chancery), National Archives (U.K.), C 2/JasI/W14/69, fol. 1r (Nov. 13, 1618).

having built up relationships with them while he was an apprentice;<sup>101</sup> he was alleged to have pilfered customers from another grocer by offering lower prices;<sup>102</sup> he picked up young traders whose former masters had done business with him;<sup>103</sup> and he likely spread his network from retailer to retailer within individual small towns and across neighboring towns.<sup>104</sup>

We do not have a complete list of Newton's trading partners, but the trial documents permit us to identify thirty-eight chapmen and provincial retailers to whom he sold grocery wares; twenty overseas merchants from whom he purchased sugar, dried fruit, and indigo; seven local manufacturers from whom he bought starch; and twenty London grocers and other London tradesmen with whom he did business, including participating with them in buying consortia and selling them goods.<sup>105</sup> The evidence indicates that Newton was not alone in buying from, partnering with, and selling to multiple merchants, starchmakers, chapmen, and provincial retailers, who all themselves traded with numerous grocers.<sup>106</sup> In addition, he was a seemingly ordinary grocer selling the same

---

101. See Interrogatories for Wall's Witnesses, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 62r (June 27, 1621) (reproducing a schedule of debts owed to Huighson in July 1611).

102. Bill of Complaint, *Wall v. Newton* (Court of Chancery), National Archives (U.K.), C 2/JasI/W14/69, fol. 1r (Nov. 13, 1618).

103. Deposition of Robert Bowyer, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 9r (Feb. 21, 1621) (answer to interrogatory 19) (attesting that his father had done business with Newton before him).

104. For example, Newton had six customers in the small market town of Bishop's Stortford about twenty-seven miles northeast of London. The town population of the time was under 1500. He also had customers in the nearby villages of Much Dunmow (two customers), Chipping Ongar (two customers), Finchingfield (one customer), Great Parndon (one customer), Hoddesdon (one customer), Layston (one customer), and several in the nearby towns of Braintree (three customers) and Chelmsford (two customers).

105. For instance, Newton participated in a consortium to buy sugar from Thomas Leake with the London grocers William Dalton, William Grymes, and others, and from Richard Baskervyle with the London grocers Richard Woodward, William Grymes, Drew Stapley, and William Dalton. See Deposition of William Grymes, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 2, fol. 141v (Aug. 29, 1621) (answer to interrogatory 31) (Baskervyle consortium); Deposition of Thomas Leake, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 2, fol. 136r (Aug. 17, 1621) (answer to interrogatory 14) (Leake consortium).

106. See, e.g., Deposition of William Dixon, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 2, fol. 158r (Sept. 26, 1621) (answer to interrogatories 72, 73) (describing a chapman buying from multiple grocers); Deposition of John Juxon, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 2, fol. 134v (Aug. 15, 1621) (answer to interrogatory 37) (describing a merchant selling to multiple grocers); Deposition of Jaques de Rensme, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 75v (Aug. 6, 1621) (answer to interrogatory 13) (same); Deposition of Richard Leigh, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 2, fols. 123r–123v (July 12, 1621) (answer to interrogatories 37, 38) (same); Interrogatories for Wall's Witnesses, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe*

wares as other grocers in his vicinity.<sup>107</sup> Consequently, if Newton's trading behavior was noticeably out of the ordinary, his contracting partners could have changed to another grocer.

Newton's trading partners seem to have been loyal, even if they did divide their business among more than one grocer. Of the forty-five individuals whose depositions indicate the length of their dealing with Newton, nineteen claim to have been trading with him for at least ten of the twelve years he had run his own shop.<sup>108</sup> The average length of dealing was eight years.<sup>109</sup> The data reveal no patterns to Newton's cheating. He was not alleged to have cheated specifically new trading partners or old, large partners or small, provincial partners or local ones.

One possible explanation for the longevity of trading relationships in this society is the extensive use of credit. Although Newton appears to have been participating in a spot market, buying existing wares from merchants face-to-face and selling existing wares to customers face-to-face, he did not engage primarily (if at all) in simultaneous exchange. First, some of his provincial customers placed orders by letter to have goods sent to them in the countryside.<sup>110</sup> Second, and more importantly, a persistent shortage of specie meant that buyers and sellers paid only partly in cash, if at all.<sup>111</sup> For the rest, they bartered and ran tabs.<sup>112</sup> These unsecured book debts might be cleared once a year, or they might roll over annually for years on end.<sup>113</sup> Yet while the existence of a line of credit could have given customers a reason to continue trading with Newton, it did not

---

(Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 62r (June 27, 1621) (interrogatory 18) (listing chapmen who had done business with Newton and Wall).

107. For example, the grocers John Walby and Francis Hales both had shops on the same street as Newton. See Deposition of John Walby, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 18r (Apr. 13, 1621); Deposition of Francis Hales, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 53r (Nov. 22, 1619).

108. See Kadens, Data Set, *supra* note 99.

109. *Id.*

110. See, e.g., Deposition of William Woodward, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 77v (Aug. 23, 1621) (answer to interrogatory 43) (discussing dealing at a distance); Deposition of Charles Bigland, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 6v (Feb. 6, 1621) (answer to interrogatory 2) (same); Deposition of Nicholas Barnard, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 4v (Feb. 3, 1621) (answer to interrogatory 3) (same).

111. See Emily Kadens, *Pre-Modern Credit Networks and the Limits of Reputation*, 100 *Iowa L. Rev.* 2429, 2431–32, 2434, 2436 (2015) [hereinafter Kadens, *Pre-Modern Credit Networks*]; see also Olegario, *supra* note 51, at 1.

112. See Kadens, *Pre-Modern Credit Networks*, *supra* note 111, at 2431.

113. *Id.* at 2436.

chain them to him. In a society that lived on credit, any reputable trader could find another grocer willing to do business with him or her.<sup>114</sup>

The need for credit made a reputation for creditworthiness important. Newton placed great value on his good name. When, in a contract dispute before the Court of Chancery, his opponent tried to introduce evidence of Newton's cheating that was not relevant to the suit, Newton sought to have the evidence suppressed.<sup>115</sup> The Lord Chancellor granted Newton's motion for suppression, finding that "the *plaintiff* doth charge the *defendant* . . . with indirect, uniuist, and deceptfull dealinges in his trade . . . , and soe indeavoreth by examinacion in this Court to scandalize and disgrace the *defendant* in his trade by *which* he acquireth and getteth his living, *which* his *lordshipp* much misliketh."<sup>116</sup>

Nonlegal sanctions were backed by public and quasi-public enforcement. As a first line of redress, the livery companies had the power to govern their members.<sup>117</sup> The Grocers' Company, led by a master and two wardens, could discipline members for violation of the guild statutes and for disobedience to their orders.<sup>118</sup> Punishments consisted primarily of fines and imprisonment for recalcitrant wrongdoers.<sup>119</sup> The guild officers also participated in resolving private disputes between members,

114. See Olegario, *supra* note 51, at 4–5; see also Deposition of Rachel Duffield, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fols. 34v–35r (Apr. 11, 1621) (answer to interrogatory 27) (describing a starchmaker taking her business elsewhere after confronting Newton); Deposition of Thomas Good, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 10v (Mar. 10, 1621) (answer to interrogatory 28) (describing Hales trying to poach Newton's customer). For further evidence of Hales and Smith (both former Newton apprentices, see *infra* text accompanying note 125) trying to convince Newton's customers to switch to them, see *infra* note 289.

115. See Chancery Entry Books of Decrees and Orders, National Archives (U.K.), C 33/135, fol. 1276v (July 13, 1619).

116. See *id.*; Chancery Entry Books of Decrees and Orders, National Archives (U.K.), C 33/138 fol. 33v (Oct. 14, 1619) (ordering suppression); cf. Lisa Bernstein, *Beyond Relational Contracts: Social Capital and Network Governance in Procurement Contracts*, 7 *J. Legal Analysis* 561, 606 (2015) [hereinafter Bernstein, *Beyond Relational Contracts*] (noting that when one of Apple's suppliers accused Apple of mistreating suppliers in a court filing, Apple sought to have the filing put under seal on the grounds of reputational harm).

117. See Charter of the Grocers' Company, Guildhall Library (U.K.), MS 11,638, fols. 20, 22, 24 (1607); Sylvia L. Thrupp, *The Grocers of London, A Study in Distributive Trade*, in *Studies in English Trade in the Fifteenth Century* 247, 251 (Eileen Power & M.M. Postan eds., 1933); Ward, *supra* note 94, at 30–31; see also Answer of Richard Herbert, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 2, fol. 169r (Feb. 20, 1621) (pointing out that he and Newton were "subject to the correction and punishment of the Master wardens and assistautes" of the Company).

118. Charter of the Grocers' Company, Guildhall Library (U.K.), MS 11,638, fols. 20, 22, 24 (1607).

119. See *id.* at fol. 22; Rees, *supra* note 93, at 77–78; Ward, *supra* note 94, at 52–53.

whether because the members sought out guild mediation or because the master and wardens mandated it.<sup>120</sup>

For a wronged party who wished to sue and who could afford the expense of a lawyer and court fees, London offered numerous venues, including the London Mayor's and Sheriffs' Courts, the three common law courts sitting in Westminster Palace, and the equity courts, such as the Court of Chancery, the Court of Requests, and the Court of Star Chamber.<sup>121</sup> The evidence about Newton's trading network and the ways in which he cheated its members comes from three equity suits filed between 1618 and 1621,<sup>122</sup> though references in the court documents indicate that aborted attempts at resolving the matter through a suit in the London Sheriffs' Court, as well as formal and informal arbitration, occurred along the way.<sup>123</sup>

The existence of all of these facets of public and private ordering should, according to private-ordering theories, have given Newton the incentive to act honestly. If he cheated, his customers could leave him and trade with someone else. If word got out about his misdeeds, it would spread across the network, and he could be significantly hampered in his future dealings. The Grocers' Company monopoly meant he had no alternative network to switch to. His victims could use the enforcement

---

120. See Rappaport, *supra* note 94, at 201–13 (describing how guild courts settled disputes); Ward, *supra* note 94, at 83.

121. See 6 John Baker, *The Oxford History of the Laws of England, 1483–1558*, at 198, 277–78, 281–83 (2003) (describing the London courts and Star Chamber); Richard Grassby, *The Business Community of Seventeenth-Century England 215–216* (1995) (discussing the common law and equity courts).

122. See Pleadings, Interrogatories, and Depositions, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21 (1621); Pleadings, Interrogatories, and Depositions, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6 (1619–1621); Pleadings and Depositions, *Wall v. Newton* (Court of Chancery), National Archives (U.K.), C 2/JasI/W14/69 (1618–1619).

123. See, e.g., Deposition of Thomas Nutt, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 56r (Oct. 10, 1621) (answer to interrogatory 7) (affirming that the master and wardens arbitrated the dispute); Interrogatories for Wall's Witnesses, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 61r (June 27, 1621) (interrogatory 11) (suggesting that Wall had asked for informal arbitration of his dispute with Newton); Interrogatories for the Witnesses of Hales and Smith, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 47r (1621) (interrogatory 21) (suggesting that Nutt tried to mediate the dispute informally); Answer of Smith, Hales, and Thomas, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 67r (Nov. 3, 1619) (mentioning a suit in Sheriffs' Court); Reference of the Lord Mayor to the Grocers Company Mentioned in the Preceding Interrogatory, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 25r (Sept. 2, 1619) (explaining a dispute between Newton and Smith that was referred by the Lord Mayor of London to the hearing and determination of the master and wardens of the Grocers' Company).

power of the guild and courts to punish him and exact compensation. But they did not do so. No person whom Newton was accused of having cheated either complained to the guild or sued him.<sup>124</sup> Only one person leveraged the influence of any other member of the network to persuade Newton to make compensation, but that seems not to have resulted in further harm to his business.<sup>125</sup> Ultimately, the more aggressive actions against Newton's cheating were left to whistleblowers who had other, personal reasons to want vengeance.

#### B. *How Newton Cheated*

The lawsuit that first cracked open the door on Newton's cheating was a contract dispute brought against him in 1618 in Chancery by another London grocer, John Wall.<sup>126</sup> In conjunction with this lawsuit, Wall appears to have colluded with two of Newton's disgruntled former apprentices, Griffin Smith and Francis Hales, who began spreading rumors about Newton's misdealing.<sup>127</sup> Newton countered their actions with a libel suit in the Court of Star Chamber in October 1619.<sup>128</sup> This lawsuit seems mostly to have had the effect of bringing the news of the accusations against Newton to the attention of a large number of deponents. In January 1621, John Wall convinced the Grocers' Company to ask the Attorney General to prosecute Newton and his recently joined partner Richard Herbert for trade deceit in the Star Chamber.<sup>129</sup> In

---

124. Several men who had been masters and wardens of the Grocers' Company indicated that none of the people Newton was accused of cheating had complained to the Company. See Deposition of Humfrey Smith, Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 101v (Sept. 20, 1621) (answers to interrogatories 75, 76); Deposition of Lawrence Greene, Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fols. 83v–84r (Sept. 7, 1621) (answers to interrogatories 75, 76); Deposition of Roger Gwynn, Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 2, fol. 131r (Aug. 11, 1621) (answers to interrogatories 75, 76); Deposition of Henry Parkhurst, Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 2, fols. 131v–132r (Aug. 11, 1621) (answers to interrogatories 75, 76); Deposition of William Piott, Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 2, fol. 128v (Aug. 7, 1621) (answers to interrogatories 75, 76).

125. See *infra* notes 228–233 and accompanying text.

126. See Bill of Complaint, Wall v. Newton (Court of Chancery), National Archives (U.K.), C 2/JasI/W14/69, fol. 1r (Nov. 13, 1618).

127. See *infra* notes 249–251 and accompanying text.

128. See Bill of Complaint of Francis Newton, Newton v. Wall, Hales, Smith, Thomas & Hatcliffe (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 68r (Oct. 25, 1619).

129. See Petition of John Wall to the House of Lords, Parliamentary Archives (U.K.), HL/PO/JO/10/1/30, points 10, 11, 12 (Mar. 9, 1626) (stating that he was the true relator against Newton and that his expenses amounted to almost £500); Deposition of John Phelps, Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 72r (Aug. 1, 1621) (answer to interrogatory 34) (describing Wall and Newton's former apprentices as the "chief stirrers upp of this suit"); Bill of Complaint,

practice, because the frauds specifically enumerated by the Attorney General had all occurred between 1609 and 1617,<sup>130</sup> they covered much of Newton's career as a grocer, but none of them implicated Herbert. The court recognized this latter fact in its opinion, making findings only with regard to Newton.<sup>131</sup>

The Star Chamber was a court of equity that decided cases on the facts rather than on legal rules.<sup>132</sup> The court largely followed the procedure of the Court of Chancery, meaning that it normally relied on written pleadings and depositions.<sup>133</sup> The three *Newton* case files together include depositions from 116 different individuals, amounting to almost 400 pages of material. A large number of these deponents were examined two, three, even four times over the course of the three suits.<sup>134</sup>

---

Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 2, fol. 171r (Jan. 22, 1621).

130. See Bill of Complaint, Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 2, fol. 171r (Jan. 22, 1621).

131. See Opinion of the Star Chamber, Guildhall Library (U.K.), MS 11,588, vol. 3, fol. 213 (July 26, 1622) (recopying the opinion into the minutes of the Grocers' Company records).

132. The Star Chamber had jurisdiction because an important part of its docket consisted of criminal misdemeanor, fraud, and trade deceit. See J.H. Baker, *An Introduction to English Legal History* 118–19 (4th ed. 2002).

133. See Thomas G. Barnes, *Star Chamber Litigants and Their Counsel, 1596–1641*, in *Legal Records and the Historian* 7, 16 (J.H. Baker ed., 1978) (noting that the procedural rules of the Star Chamber were “very similar to the Chancery rules”); see also Thomas G. Barnes, *Due Process and Slow Process in the Late Elizabethan–Early Stuart Star Chamber*, 6 *Am. J. Legal Hist.* 221, 227–29 (1962) [hereinafter Barnes, *Due Process*] (describing the Star Chamber's procedural rules).

134. For example, Aaron Kettle deposed three times. See Deposition of Aaron Kettle, Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 3v (July 26, 1621) (on behalf of the Attorney General); Deposition of Aaron Kettle, Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 68r (July 26, 1621) (on behalf of Newton); Deposition of Aaron Kettle, Newton v. Wall, Hales, Smith, Thomas & Hatcliffe (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 16v (Apr. 10, 1621) (on behalf of Newton). Joyce Dancy deposed four times. See Deposition of Joyce Dancy, Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 7r (Aug. 22, 1621) (on behalf of the Attorney General); Deposition of Joyce Dancy, Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 2, fol. 122v (July 4, 1621) (on behalf of Newton); Deposition of Joyce Dancy, Newton v. Wall, Hales, Smith, Thomas & Hatcliffe (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 40r (June 14, 1621) (on behalf of Smith and Hales); Deposition of Joyce Dancy, Newton v. Wall, Hales, Smith, Thomas & Hatcliffe (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 9r (Mar. 7, 1621) (on behalf of Newton). Christopher Standish deposed three times. See Deposition of Christopher Standish, Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 2, fol. 110v (Oct. 5, 1621) (on behalf of Newton); Deposition of Christopher Standish, Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 31r (June 30, 1621) (on behalf of the Attorney General); Deposition of Christopher Standish, Newton v. Wall, Hales, Smith, Thomas & Hatcliffe (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 18v (Apr. 17, 1621) (on behalf of Newton). Martin Skinner deposed four

Most of the evidence for this analysis comes from these depositions. A Star Chamber suit began with an unsworn complaint,<sup>135</sup> which often told a tale of woe ranging from slight exaggerations to outright fabrications.<sup>136</sup> The depositions, by contrast, were sworn statements taken in private by a court examiner without attorneys present to cross-examine.<sup>137</sup> They generally do not represent word-for-word transcriptions of the deponents' speech; instead, the examiner probably summarized the deponents' answers, which of course raises questions about accuracy. But the depositions also provided space for serendipity and detail. While some deponents answered tersely and stuck strictly to what they were asked, others had looser lips—or better memories.<sup>138</sup>

These trial records tell us a great deal about Newton and his deceitful activities. Upon obtaining the freedom of the Grocers' Company in 1605,<sup>139</sup> Newton may have worked as a journeyman for another grocer for a few years, but by 1609 he had his own shop half a mile from his master Huighson's.<sup>140</sup> Located on the north side of Fenchurch Street almost to

---

times. See Deposition of Martin Skinner, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 44r (Sept. 28, 1621) (on behalf of Hales and Smith); Deposition of Martin Skinner, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 2, fol. 104r (Sept. 28, 1621) (on behalf of Newton); Deposition of Martin Skinner, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 8v (Sept. 18, 1621) (on behalf of the Attorney General); Deposition of Martin Skinner, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 17r (Apr. 13, 1621) (on behalf of Newton).

135. Properly speaking, the bill in the Attorney General's case against Newton was called an "information." See 1 List and Index to the Proceedings in Star Chamber for the Reign of James I (1603-1625) in the Public Record Office, London Class STAC8, at 31 (Thomas G. Barnes & Staff of the Legal History Project, Am. Bar Found. eds., 1975) [hereinafter List and Index] (concerning relator cases).

136. See Christine Churches, *Business at Law: Retrieving Commercial Disputes from Eighteenth-Century Chancery*, 43 *Hist. J.* 937, 944 (2000) (explaining that the Chancery allowed expansive storytelling in complaints "to relate how the complainant had become embroiled in the particular dilemma").

137. See Barnes, *Due Process*, *supra* note 133, at 228 (describing the procedures for depositions in the Star Chamber).

138. It seems that the best way to avoid perjuring oneself was to claim that one did not remember the answer to the question posed. See, e.g., Deposition of Francis Hales, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/22/6, fol. 53r (Nov. 22, 1619) (answers to interrogatories 1 and 2) (responding to multiple questions regarding Newton's behavior by stating that he "doth not Remember").

139. See *Wardens' Accounts*, Guildhall Library (U.K.), 11,571, vol. 9, fol. 166r (July 14, 1606) (stating the date for Newton's freedom as Sept. 25, 1605).

140. See *Bill of Complaint*, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 68r (Oct. 25, 1619) (indicating that Newton took Hales as an apprentice in 1609 and therefore had his own shop by then); see also *supra* note 9 and accompanying text (describing the location of Newton's shop).

the corner with Gracechurch Street,<sup>141</sup> Newton's shop was near the commercial hubs of the Royal Exchange and royal weigh house.<sup>142</sup> Geographically well-placed and trained by a master who could plug him into an extensive existing network, Newton quickly built up his trade, and by 1621, he was doing business worth thousands of pounds each year.<sup>143</sup> His former apprentice described him as a "rich man."<sup>144</sup>

In 1609, Newton took his first apprentice, Francis Hales, probably as soon as he opened his own shop.<sup>145</sup> In 1610, he hired a second apprentice, Griffin Smith.<sup>146</sup> Each would serve out their full terms, Hales receiving his freedom in 1615 and Smith in 1618.<sup>147</sup> These early apprentices would eventually be the instruments of Newton's undoing, for they saw that Newton had (allegedly) taken something from his own master besides customers. He may also have learned how to cheat.<sup>148</sup> For reasons selfish or pure, Smith and Hales would later make Newton's cheating public.

---

141. See Deposition of Richard Herbert, *Wall v. Newton* (Court of Chancery), National Archives (U.K.), C 24/464, no. 74, fol. 7r (Oct. 4, 1619); Deposition of John Phelps, *Wall v. Newton* (Court of Chancery), National Archives (U.K.), C 24/464, no. 74, fol. 1r (Aug. 6, 1619).

142. See Bucholz & Ward, *supra* note 92, at 46.

143. See Deposition of John Wilde, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 90r (Sept. 12, 1621) (answer to interrogatory 36); Deposition of George Clerk, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 84v (Sept. 10, 1621) (answer to interrogatory 1); Deposition of Drew Stapley, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 79v (Sept. 2, 1621) (answer to interrogatory 1); Deposition of William Woodward, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 77v (Aug. 23, 1621) (answer to interrogatory 63) (detailing Newton's business success over the course of the last decade).

144. Deposition of Frances Hales, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 53r (Nov. 22, 1619) (answer to interrogatory 4).

145. See Bill of Complaint, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 68r (Oct. 25, 1619).

146. See *id.*

147. Wardens Accounts, Guildhall Library (U.K.), MS 11,571, vol. 10, fol. 147v (noting the date of Francis Hales's freedom as July 5, 1615); *id.* at fol. 282v (noting the date of Griffin Smith's freedom as January 14, 1618). Hales had already served two years as an apprentice to John Phelps, a fellow former Huighson apprentice and likely one of Newton's good friends. Answer of Griffin Smith, Francis Hales and Edward Thomas, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 67r (Nov. 3, 1619).

148. Allegations suggested Huighson was also a cheater. See Deposition of William Dalton, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 38v (Oct. 7, 1621) (answer to interrogatory 29); Answer of Griffin Smith, Francis Hales and Edward Thomas, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 67r (Nov. 3, 1619); see also *infra* note 306 and accompanying text.

A grocer's opportunities for cheating centered primarily around weight and quality. Manipulating the quality of wares was as easy as mixing higher- and lower-grade goods while selling at the premium price.<sup>149</sup> With a small bulk commodity like dried fruit, it may have been difficult to tell the difference between pure-grade and mixed-grade fruit.<sup>150</sup> Cheating on weight simply involved telling customers that they were receiving wares of a certain weight but giving them something less.<sup>151</sup> When buying hundreds of pounds of currants, Newton's staple commodity,<sup>152</sup> the buyer would not be able to eyeball the contents of the container and know the exact weight with certainty. This allowed sellers to skimp.

Many of the goods Newton bought and sold—in particular, currants, raisins, prunes, indigo, sugar, and starch—came in wooden containers of various more-or-less uniform sizes but with allowable weight variances (a butt of currants, for instance, contained between fifteen and twenty-two hundredweight).<sup>153</sup> Buyers bought initially by the gross weight of the wares plus the container, and that weight was written on the invoice that accompanied the sale from the merchant to the grocer; it was recorded in the grocer's book; and it was often chalked—by the merchant or grocer—on the side of the container.<sup>154</sup> The intention was that the buyer would either deduct the weight of the container (called the tare) from the amount he owed the seller or receive a standard allowance from the seller for the tare.<sup>155</sup> But the buyer could lie to the seller about the tare,

---

149. See Deposition of Griffin Smith, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 5/N14/2, fol. 1r (Dec. 17, 1619) (answer to interrogatory 2) (accusing Newton of mixing in lower-quality currants and indigo in barrels sold to Robert Gallant).

150. Note that the cheating on quality would have to be done in a nonobvious and difficult-to-verify manner to be a Cheating Pays scenario. If Newton had, for instance, filled a barrel with rotten prunes and topped them off with good prunes, his cheat would have been discovered immediately, and the customer would not only have demanded compensation but also probably sued him.

151. See *infra* notes 167–178 (collecting examples of Newton's cheating on weight).

152. See Davis, *supra* note 21, at 93 (“Another recently cheapened food which the English ate greedily and the grocers did well out of was currants and raisins, the consumption of which quadrupled in the century up to the Civil War.”); Martin Devecka, *Raisins d'Etat: Trade, Politics, and Diplomacy in the History of the Levant Company*, in *Chartering Capitalism: Organizing Markets, States, and Publics* 77, 81 (Emily Erikson ed., 2015) (“[T]hese tiny fruits were a ‘necessary luxury’ in the cuisine of an age that was still, for the most part, without sugar . . .”).

153. See Ronald Edward Zupko, *A Dictionary of Weights and Measures for the British Isles* 61–62 (1985). A hundredweight of currants weighed 112 pounds. See *The Rates of Marchandizes, As They Are Set Down in the Booke of Rates, For the Custome and Subsidie of Poundage* (London, s.l. 1624) (no pagination, see under “Grocerie ware”).

154. See Bill of Complaint, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 2, fol. 171r (Jan. 22, 1621).

155. See, e.g., Deposition of Thomas Westrowe, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 18v (Oct. 4, 1621) (answer to interrogatory 78) (describing his understanding of commodity-weighing practices employed by contemporary London grocers); Deposition of William Wattee, *Att'y Gen. v.*

or the seller could knowingly grant less tare allowance than the barrels actually weighed.

Today, in an age of easily accessible technology, we might wonder why buyers and sellers did not catch on to the weight deceptions. But if the merchant sellers or retail buyers did not witness the weighing or take the return of the empty containers—both of which only some did only some of the time<sup>156</sup>—they had no way to verify the weight of the goods or the tare. Many provincial tradesmen may not have had a scale large enough to weigh the heavy barrels they bought from the London grocers. Perhaps their towns or villages had a public beam, but those likely charged a usage fee.<sup>157</sup> If the retailer trusted the grocer, paying that fee made no sense. Otherwise, the retailer would have had to divide up the wares and weigh them successively in smaller amounts suited for their smaller scales, an operation open to mistake.<sup>158</sup> The only other means a small retailer may have had to discover the grocer's cheat was if his record of the ounces and pounds he sold to individual customers did not add up to the presumed weight of the barrel.<sup>159</sup> But he could not be sure,

Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 74v (Aug. 5, 1621) (answer to interrogatory 21) (same); Deposition of John Phelps, Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 71v (Aug. 1, 1621) (answer to interrogatory 21) (same).

156. See Deposition of Thomas Bolton, Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 91r (Sept. 14, 1621) (answer to interrogatory 55) (noting that Hales weighed two chests in Bolton's presence); Deposition of Edward Grace, Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 78v (Aug. 28, 1621) (answer to interrogatory 55) (observing that weighing back the chest was done in his presence); Deposition of John Juxon, Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 2, fol. 134v (Aug. 15, 1621) (answer to interrogatory 37) (implying that sugar merchants did not take back the chests).

157. The King's Beam in London, for instance, charged anywhere from six pence to six shillings eight pence for weighing. Deposition of William Hill, Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fols. 85v–86r (Sept. 11, 1621) (answer to interrogatory 9).

158. See, e.g., Deposition of Richard Story, Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 36r (Aug. 1, 1621) (answer to interrogatory 2) (describing the efforts of another grocer to weigh goods purchased from Newton on his home scale).

159. A retailer might discover the grocer's cheat when his books did not balance year after year:

[A]lbeit he had the *said* Grocery wares at reasonable prises of the *said* Newton, yet he founde at the yeares end he gayned litle or nothing by them, albeit this *deponent* sould them at a better price then he gave for them, mervayling much in his observance of many [in margin:] yeares why he did not make *profit* or encrease his estat by Grocery weares, & could never fynde out any cause therunto untill the *said* Hales & Smyth tould this *deponent* as aforesaid he was deceived by wanting his weight.

Deposition of Christopher Standish, Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 31v (June 30, 1621) (answer to interrogatory 6); accord Deposition of Richard Story, Att'y Gen. v. Newton & Herbert (Star

and he could not prove it. Perhaps his records were inaccurate, or perhaps his family or apprentices had pilfered from his stores. Furthermore, scales, though among the most accurate technologies of the time, were still imperfect,<sup>160</sup> and the weighers, who were generally apprentices,<sup>161</sup> could make mistakes.<sup>162</sup>

In other words, Newton's customers were cheated for the same reason sellers of scrap metal are cheated today by unscrupulous buyers.<sup>163</sup> Scrap-metal dealers use standing scales to weigh up to 5,000 pounds and fifty-foot-long truck scales to weigh tractor trailers of up to 100,000 pounds.<sup>164</sup> Weighing out such large amounts piece by piece on one's bathroom scale is not a feasible substitute. Instead, sellers must trust the dealers, yet no doubt few sellers check the state inspection stickers on the dealer's scales or use a known weight to verify their accuracy. The sellers may thus suspect their loads weighed more than the dealer quoted, but they do not know for sure.

Newton began cheating early in his career. His apprentices Hales and Smith noticed it shortly after taking up their positions.<sup>165</sup> It appears

---

Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 36r (Aug. 1, 1621) (answer to interrogatory 2).

160. See Deposition of Richard Leigh, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fols. 21r–21v (Aug. 8, 1621) (answer to interrogatory 36) (testifying that Wall blamed this discrepancy in the weight of sugar he purchased on his malfunctioning scale).

161. See, e.g., Deposition of Joshua Nayler, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 67v (July 25, 1621) (answer to interrogatory 65) (testifying that Newton's apprentices weighed the goods); Deposition of Richard Smith, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 65r (July 20, 1621) (answer to interrogatory 65) (testifying that he never knew Newton to weigh grocery items himself unless they were of little value); Deposition of John Malden, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 64v (July 18, 1621) (answer to interrogatory 65) (stating that Newton's servants usually weighed his commodities).

162. See Deposition of William Dixon, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 2, fol. 158r (Sept. 26, 1621) (answer to interrogatories 72, 73) (discussing the commonality of mistakes in weighing); Deposition of John King, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 2, fol. 130r (Aug. 9, 1621) (answer to interrogatory 72) (testifying that it was common to find mistakes in the weight of grocery items).

163. See Indictment, *United States v. Cinelli*, No. 2:17-cr-00302-SDW (D.N.J. Aug. 1, 2017) (describing the fraud committed by a scrap metal dealer in New Jersey); Complaint, *State v. Kienbaum*, No. 2017CF000124 (Wis. Ct. App. Mar. 5, 2017) (alleging fraud in the weighing of scrap metal).

164. See Top 10 Things Your Scrap Metal Dealer Doesn't Want You to Know, Southern Resources, <https://southernresources.com/top-10-things-your-scrap-metal-dealer-doesnt-want-you-to-know/> (on file with the *Columbia Law Review*) (last visited Oct. 28, 2018) (detailing cheating in the scrap metal industry).

165. See Deposition of Griffin Smith, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 5/N14/2, fol. 1r (Dec. 17, 1619) (answer to interrogatory 1) (testifying that he had worked for Newton only for around six months before he noticed Newton was cheating customers); Deposition of

that Newton's approach was to entice customers by selling at low prices—although not at the lowest possible prices<sup>166</sup>—and then make his profit by fudging the weight of the wares or the tare.<sup>167</sup> One of his cheating techniques was to alter the weight chalked on butts of currants. Once, he rode up to his shop with a newly purchased butt in a cart, called for a piece of chalk, changed the “2200” chalked on the side by the merchant to “2300,” then immediately drove the barrel to his close friend George Smith, a London grocer,<sup>168</sup> and sold it at a price reflecting the higher weight.<sup>169</sup> He reportedly did the same with another London grocer, Thomas Parry,<sup>170</sup> as well as at least some of his country chapmen.<sup>171</sup> In fact, Hales and Smith reported that changing the chalk marks was a “usual thing with . . . Newton betwene the years 1609 & 1616.”<sup>172</sup>

---

Francis Hales, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 53r (Nov. 22, 1619) (answer to interrogatory 1) (testifying that he noticed Newton cheating his customers within a few months of working for him).

166. See Deposition of Thomas Good, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 10v (Mar. 10, 1621) (answer to interrogatory 28) (describing how Hales would promise to sell grocery items such as cloves or nutmeg at a cheaper price to entice customers).

167. Deposition of Peter Dawson, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 38r (Oct. 7, 1621) (answer to interrogatory 28) (testifying that customers found that Newton's goods, although cheaper, often weighed less than advertised); Deposition of Francis Hales, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 12r (Sept. 28, 1621) (answer to interrogatory 70) (stating that Newton would make his profit by selling at a lower price but delivering a less-than-promised weight of goods); Deposition of Richard Story, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 36r (Aug. 1, 1621) (answer to interrogatory 2) (testifying that Newton often sold groceries for a lower price than other grocers but often did not deliver the full weight that was advertised).

168. See Will of Francis Newton, National Archives (U.K.), PROB 11/158/347 (proved Nov. 3, 1630) (naming his “lovinge freinde[]” George Smith, grocer, an overseer of his estate).

169. Deposition of Griffin Smith, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fols. 14r–14v (Oct. 2, 1621) (answer to interrogatory 8); Deposition of Francis Hales, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 9v (Sept. 28, 1621) (answer to interrogatory 8).

170. See Deposition of Griffin Smith, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 5/N14/2, fols. 1r–1v (Dec. 17, 1619) (answer to interrogatory 2).

171. See Deposition of Griffin Smith, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 15r (Oct. 2, 1621) (answer to interrogatories 18, 19) (describing how Newton cheated Christopher Standish); Deposition of Richard Story, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 36r (Aug. 1, 1621) (answer to interrogatory 2) (describing how Newton cheated Story).

172. Deposition of Griffin Smith, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 16v (Oct. 2, 1621) (answer to interrogatory 57); see also Deposition of Francis Hales, *Att'y Gen. v. Newton & Herbert*

Not all of Newton's cheating on weight involved the reasonably large quantities involved in changing the chalked weight. Sometimes he cheated by just a few pounds: 30 pounds missing from a 500-pound cask of currants;<sup>173</sup> 3 pounds short in a parcel of figs;<sup>174</sup> "mistaking in the weight" of a barrel of sugar;<sup>175</sup> 120 pounds missing from a load of 20 frails of raisins and 14 pounds missing from another load of 3 frails of raisins<sup>176</sup> (a frail being a wicker basket holding between 30 and 75 pounds<sup>177</sup>); and another 14 pounds missing in "haulf a hundred of wares."<sup>178</sup>

Much of Newton's cheating must have been so small that it passed unnoticed, though that did not mean that it caused his customers no harm. When a chapman encountered Griffin Smith in a London tavern and asked Smith whether Newton had cheated him, Smith replied, "[Y]ow are a rich man, and cannot feele it" in your trade.<sup>179</sup> But, Smith continued, "[T]here are others that feele it."<sup>180</sup> And for some of those that did "feele it," Newton's shorting allegedly led to their being financially "undone."<sup>181</sup>

---

(Star Chamber), National Archives (U.K.), STAC 8/32/21, fol. 11v (Sept. 28, 1621) (answer to interrogatory 57).

173. See Deposition of John King, Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 35v (July 17, 1621) (answer to interrogatories 3, 6).

174. See Deposition of John Walby, Newton v. Wall, Hales, Smith, Thomas & Hatcliffe (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 18r (Apr. 13, 1621) (answer to interrogatory 29).

175. Deposition of William Porter, Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 64r (July 13, 1621) (answer to interrogatory 42).

176. See Deposition of Robert Gallante, Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 33v (July 10, 1621) (answer to interrogatories 4, 5).

177. Zupko, *supra* note 153, at 157.

178. Deposition of Peter Dawson, Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 38r (Oct. 7, 1621) (answer to interrogatory 28).

179. Deposition of Martin Skinner, Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 2, fol. 104v (Sept. 28, 1621) (answer to interrogatory 48).

180. *Id.*

181. Deposition of Robert Gallant, Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 79r (Aug. 29, 1621) (answer to interrogatory 62) (stating that Newton "had undone him . . . by delivering lesse than the true and iust weight" of the goods); Deposition of Richard Garford, Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 72v (Aug. 26, 1621) (answer to interrogatories 47, 48) (explaining that Newton's "wrong and deceit unto one Gallant" had "undone" Gallant and his family); see also Deposition of Jonas Gurson, Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 2, fol. 111v (Oct. 5, 1621) (answer to interrogatory 48) (describing how the "Starchwoman" felt that Newton's deception "had almost undone her").

Newton also commonly cheated his chapmen on tare.<sup>182</sup> His apprentices would weigh the empty vessels before he packed them.<sup>183</sup> Having established the true tare, Newton would subtract one to three pounds from that weight so that the customer who believed he or she was getting a certain weight of wares was instead buying part of the weight of the container.<sup>184</sup>

In addition, Newton cheated the merchants from whom he bought sugar in the taring back of sugar chests.<sup>185</sup> Sugar came in loaves packed in wooden chests with straw infill.<sup>186</sup> Grocers bought the sugar at a gross weight, emptied the sugarloaves out of the chests, then weighed the chests and straw and deducted that tare weight from the amount they owed.<sup>187</sup> But if they increased the tare by adding a bit of extra straw or left a sugarloaf or two in the chest when they weighed it, the sellers would

---

182. See Deposition of Francis Hales, Att’y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 12r (Sept. 28, 1621) (answer to interrogatory 65) (claiming Newton “used the *said* deceit to all or the most *part* of his chapmen he dyd deale w<sup>th</sup>hall”); Deposition of Griffin Smith, Newton v. Wall, Hales, Smith, Thomas & Hatcliffe (Star Chamber), National Archives (U.K.), STAC 5/N14/2, fols. 1r–1v (Dec. 17, 1619) (answers to interrogatories 1, 2) (describing Newton’s false taring to Robert Gallant, Joshua Nayler, William Dixon, and Margaret Standish); see also Bill of Complaint, Att’y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 2, fol. 53r (Jan. 22, 1619) (listing chapmen to whom Newton falsely tared vessels).

183. See, e.g., Deposition of Thomas Bolton, Att’y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 91r (Sept. 14, 1621) (answer to interrogatory 55) (describing Newton’s servant Hales weighing sugar chests); cf. Deposition of Martin Skinner, Att’y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 2, fol. 105r (Sept. 28, 1621) (answer to interrogatory 65) (noting that Newton “but verie seldome” weighed anything himself).

184. See Deposition of Sara Payne, Att’y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 39v (Oct. 8, 1621) (answer to interrogatory 30) (stating that she found Newton to have cheated her on tare by a substantial amount); Deposition of Francis Hales, Att’y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 12r (Sept. 28, 1621) (answer to interrogatory 65) (describing how Newton was often cheating two or three pounds on tare); Deposition of Robert Gallant, Att’y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 79r (Aug. 29, 1621) (answer to interrogatory 62) (describing accusations of false taring); Deposition of Griffin Smith, Newton v. Wall, Hales, Smith, Thomas & Hatcliffe (Star Chamber), National Archives (U.K.), STAC 5/N14/2, fol. 1r (Dec. 17, 1619) (answer to interrogatory 2) (describing how Newton cheated Christopher Standish by false taring firkins of sugar by a pound less for every firkin).

185. See Bill of Complaint, Att’y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 2, fol. 53r (Jan. 22, 1619) (listing merchants to whom Newton falsely tared sugar chests).

186. See Deposition of Peter Dawson, Att’y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 37v (Oct. 7, 1621) (answer to interrogatory 26).

187. See *id.*

rarely know.<sup>188</sup> Newton apparently did not stop with extra straw. He also swapped out lids from other chests so that he weighed with the heaviest lids.<sup>189</sup>

Even more deceitfully, Newton manipulated his scale to give false weight by about eight to thirty pounds, and he used this fraud when purchasing starch from local manufacturers.<sup>190</sup> He seems to have had an equal-beam balance scale: a horizontal beam, likely suspended from the ceiling of his shop, from which hung two pans or scales.<sup>191</sup> Newton, or his apprentices, put weights on one scale and the wares to be weighed on the other. In one iteration of his cheating, Newton nailed a bag under the scale holding the weights.<sup>192</sup> After the starch seller saw a balanced beam, someone would distract the seller while Newton inserted a twelve-pound weight into the bag.<sup>193</sup> The seller would thus be cheated by twelve pounds in every barrel.<sup>194</sup> A second version of his cheat was to “turn[] the hooke at the end of the balance to make it stand out right and so by lengthening the balance more at that end then at the other” make the wares appear to weigh about thirty fewer pounds.<sup>195</sup>

---

188. See Deposition of Richard Leigh, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 21r (Aug. 8, 1621) (answer to interrogatory 36).

189. See Deposition of Griffin Smith, *Att’y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 17r (Oct. 2, 1621) (answer to interrogatory 64) (describing Newton adding extra straw and heavier lids); Deposition of Francis Hales, *Att’y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 12r (Sept. 28, 1621) (answer to interrogatory 64) (same).

190. See, e.g., Deposition of Griffin Smith, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 5/N14/2, fol. 1v (Dec. 17, 1619) (answer to interrogatory 2) (describing Newton’s manipulations).

191. See Deposition of Robert Phipps, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 36v (Apr. 21, 1621) (answer to interrogatory 2) (describing Newton’s beam as a two-scale balance).

192. Answer of Griffin Smith, Francis Hales and Edward Thomas, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 67r (Nov. 3, 1619).

193. *Id.*

194. See Deposition of Francis Hales, *Att’y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 10v (Sept. 28, 1621) (answer to interrogatory 26); Deposition of Griffin Smith, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 5/N14/2, fol. 1v (Dec. 17, 1619) (answer to interrogatory 2); Deposition of Edward Thomas, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 63v (Nov. 19, 1619) (answer to interrogatory 8).

195. Deposition of Griffin Smith, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 5/N14/2, fol. 1v (Dec. 17, 1619) (answer to interrogatory 2); see also Deposition of Humfrey Smith, *Att’y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, fol. 34v (July 11, 1621) (answer to interrogatory 22) (describing Newton’s cheating involving the hook and beam); Deposition of Rachel Duffield, *Att’y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fols. 31v–32r (July 5, 1621) (answer to interrogatory 11) (same).

A few other cheats came out in the three trials during which Newton's dirty laundry was aired. Newton mixed lower-quality wares in with the higher-quality wares he was ostensibly selling.<sup>196</sup> He may have "colored hops," meaning that he sold a foreigner's hops as if they were his.<sup>197</sup> This violated a rule in London, also common in many premodern cities, prohibiting goods from being "foreign bought and foreign sold," meaning that buyers and sellers who were not citizens of the city had to go through a local citizen middleman who purchased the wares for resale.<sup>198</sup> Finally, he miscast accounts, which was a relatively easy cheat in a world of credit dealings recorded in the grocer's books.<sup>199</sup> If the grocer, who may have been more literate and sophisticated, slipped a few phantom purchases into his record of the customer's accounts or miscalculated by a few shillings, it could be difficult for the customer to discover or dispute the discrepancy.<sup>200</sup>

Newton could get away with many of these cheats because the system of wholesale grocers selling to chapmen and retailers was largely built on trust.<sup>201</sup> The buyer of preweighed goods took on faith that the weight written on the merchant's invoice, chalked on the barrel, or recorded in the grocer's books was accurate.<sup>202</sup> Newton preyed on this trust: If the

---

196. See Deposition of Richard Story, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 36r (Aug. 1, 1621) (answer to interrogatory 6) (claiming Newton sold him "much base and naughty wares which [Story] tooke of the *said* Newtons word for good wares"); Deposition of Griffin Smith, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 5/N14/2, fol. 1r (Dec. 17, 1619) (answer to interrogatory 2) (describing how Newton mixed in lower-quality currants and indigo in barrels sold to Robert Gallant).

197. See Deposition of Griffin Smith, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 16r (Oct. 2, 1621) (answer to interrogatory 53); Answer of Roger Hatcliffe, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 66r (Nov. 20, 1619).

198. See *The Case of the City of London* (1610) 77 Eng. Rep. 658 (K.B.) 668; 8 Co. Rep. 121a, 128a (discussing the London statute against direct sale by foreigners—meaning non-London citizens—to other foreigners in London).

199. See Deposition of Francis Hales, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 53r (Nov. 22, 1619) (answer to interrogatory 2) (stating that Newton miscast the accounts of Christopher Standish).

200. See Deposition of John Malden, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 64v (July 18, 1621) (answer to interrogatory 64) (stating that he believed Newton falsely claimed twenty shillings more in his accounts than Malden owed him); see also Bill, *Grover v. Colemore* (Star Chamber), National Archives (U.K.), STAC 8/149/1 (Feb. 6, 1614) (accusing the defendant, a grocer, of a pattern of making false entries in his shop books and charging customers for goods they did not buy).

201. See *infra* note 210 and accompanying text.

202. See, e.g., Deposition of William Dixon, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fols. 38v–39r (Oct. 8, 1621) (answer to interrogatory 3); Deposition of Sara Payne, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 39r (Oct. 8, 1621)

buyer was skeptical of the chalked weight (which Newton had falsified), Newton proffered forged invoices ostensibly from the original merchant showing the official weight at which the merchant had sold the goods to Newton.<sup>203</sup> He also kept a false set of books (or made false entries in his books that he later tore out) to show buyers as proof of the weight.<sup>204</sup>

The provincial retailers who ordered wares from Newton by letter and rarely came to London trusted that the weight and quality of the goods they received were as Newton claimed.<sup>205</sup> Purchasing at a distance, they naturally did not see the goods weighed, but even the chapmen and starch sellers who came to Newton's shop often did not bother to witness the weighing of their goods.<sup>206</sup> Rachel Duffield, the starchmaker whom Newton cheated by turning out the hook of the scale, related that she first suspected Newton was underweighing her goods because the barrels she sold elsewhere weighed more. Only then did she pay attention to Newton's weighing process and notice that he had manipulated his beam.<sup>207</sup>

Newton succeeded for many years at cheating his trading partners because the private-ordering system failed. Trust is foundational to commerce, especially when traders rely on reputational incentives to keep partners honest.<sup>208</sup> But Newton's cheats were small enough to pass largely

(answer to interrogatory 3); Deposition of Richard Woodward, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 2r (July 25, 1621) (answer to interrogatory 3).

203. See Deposition of Griffin Smith, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 15r (Oct. 2, 1621) (answer to interrogatory 20).

204. See Deposition of Francis Hales, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 11v (Sept. 28, 1621) (answer to interrogatory 55).

205. See, e.g., Deposition of Charles Bigland, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 6v (Feb. 6, 1621) (answer to interrogatory 2); Deposition of Nicholas Barnard, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 4v (Feb. 3, 1621) (answer to interrogatory 2); Deposition of Richard Herbert, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 2r (Jan. 20, 1621) (answer to interrogatory 2).

206. See, e.g., Deposition of John Walby, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 35r (July 14, 1621) (answer to interrogatory 3) (stating that Walby never saw wares weighed); Deposition of Thomas Parry, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 33r (July 9, 1621) (answer to interrogatory 7) (noting that Parry never saw Newton weighing his wares); Deposition of Robert Phipps, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 36v (Apr. 21, 1621) (answer to interrogatory 2) (describing how a starch seller dropped off barrels at Newton's to be weighed and then left on other business).

207. See Deposition of Rachel Duffield, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fols. 34v–35r (Apr. 11, 1621) (answer to interrogatory 27).

208. See Eisenegger, *supra* note 57, at 11–12.

without notice and therefore without triggering reputational sanctions. In the end, it took whistleblowing by his former apprentices to uncover the extent of his scams.<sup>209</sup>

C. *The Discovery of Newton's Cheating*

While the rhetoric of trust figures prominently in the depositions, it turns out that some of the buyers trusted but also verified. Thomas Tendring, apothecary of the village of Bishop Stortford in Hereford; Thomas Good, grocer of Salisbury in Wiltshire; Giles Walford, grocer of Finchingfield in Essex; Joshua Nayler, apothecary of the tiny parish of Great Parndon, Essex; and others of Newton's customers all attested both that it was the custom for provincial retailers to trust London grocers to sell them true weights and that they routinely reweighed the wares they received from Newton.<sup>210</sup> This was the reason such men could later testify that Newton was an honest dealer: They believed he had never cheated them. This practice of verification, however, was also a reason Newton occasionally got caught in his cheats.

Still, the cheats were innocuous enough that each time the buyers caught Newton, they were willing to believe that his shop had merely made an error in weighing, and they consequently only sought and received compensation for the difference.<sup>211</sup> None of them at the time, and some of them not even later when Newton's misdeeds had become public, seemed to have considered the possibility that he was cheating

---

209. See *infra* notes 246–251 and accompanying text.

210. Deposition of Jacob Parker, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 21r (Apr. 27, 1621) (answer to interrogatory 29); Deposition of Martin Skinner, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 17v (Apr. 13, 1621) (answer to interrogatory 29); Deposition of Joshua Nayler, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fols. 13r, 14v (Mar. 24, 1621) (answer to interrogatories 2, 29); Deposition of Giles Walford, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fols. 11v, 12v (Mar. 24, 1621) (answer to interrogatories 2, 29); Deposition of Thomas Good, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 10v (Mar. 10, 1621) (answer to interrogatories 2, 29); Deposition of Thomas Tendring, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fols. 3v–4r (Jan. 31, 1621) (answer to interrogatories 2, 3).

211. See Deposition of John King, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 35v (July 17, 1621) (answer to interrogatories 3, 6); Deposition of William Porter, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 64r (July 13, 1621) (answer to interrogatory 42); Deposition of Robert Gallante, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 33v (July 10, 1621) (answer to interrogatories 4, 5); see also Deposition of John Walby, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 18r (Apr. 13, 1621) (answer to interrogatory 29) (explaining that the difference of two or three pounds in weight was too insignificant to complain about).

them. They knew mistakes happened,<sup>212</sup> and they took his explanation at face value.

The only time Newton's excuses did not work was with two female starchmakers whom he cheated by manipulating his beam. Rachel Duffield caught Newton fiddling with the hook of the scale and demanded he turn the hook down so that it hung normally. Newton refused, making some excuse about the beam being too short on that side.<sup>213</sup> Duffield did not believe him and took her business elsewhere.<sup>214</sup> This occurred early in Newton's career when he had no established reputation to protect him, and Duffield did gossip about the matter because she learned that Newton had also cheated another starchmaker, Mary Tripping.<sup>215</sup> But Newton seemed to have suffered no ill effects from Duffield and Tripping's discovery. Indeed, he allegedly continued to use the same trick with another (male) starchmaker, who never caught on to it.<sup>216</sup>

The second time Newton was caught manipulating his beam, the matter attracted greater attention. For about eight weeks in 1614, Edward Thomas served a sort of trial period to see whether he wanted to apprentice with Newton.<sup>217</sup> During that time, he witnessed Newton cheating Joyce Dancy on the weight of her starch by putting weights in a bag nailed to the bottom of the scale.<sup>218</sup> Thomas ended up apprenticing instead with another grocer, Philip Sparkes, and there he told a fellow employee, William Smith, about Newton's tricks.<sup>219</sup> At some point Thomas

---

212. See *supra* note 162 and accompanying text.

213. See Deposition of Rachel Duffield, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 35r (Apr. 11, 1621) (answer to interrogatory 27).

214. *Id.*; see also Deposition of Rachel Duffield, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fols. 31v–32r (July 5, 1621) (answer to interrogatory 11) (narrating how Duffield took her business to a more trustworthy merchant).

215. *Id.*; Deposition of John Weedon, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 32v (July 5, 1621) (answer to interrogatories 11, 12).

216. See Deposition of Griffin Smith, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 17r (Oct. 2, 1621) (answer to interrogatory 62) (relating cheating of Aaron Kettle); Deposition of Aaron Kettle, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 68r (July 26, 1621) (answer to interrogatory 48).

217. See Deposition of Edward Thomas, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 1r (July 24, 1621) (answer to interrogatory 2); Deposition of Edward Thomas, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 63r (Nov. 19, 1619) (answer to interrogatory 1).

218. Deposition of Edward Thomas, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 63v (Nov. 19, 1619) (answer to interrogatory 8).

219. *Id.* at fol. 63r (answer to interrogatory 4).

also told the story to Sparkes,<sup>220</sup> but nothing happened until Smith was trying to convince Dancy to sell her starch to his master. She told Smith that Newton gave her a better price than he was offering, and only then did Smith explain that Newton had been cheating her for a long time by shorting her on weight.<sup>221</sup> In other words, despite knowing about Newton's cheating, Smith and Sparkes felt no need to spread the word and ensure that Newton—their competitor and member of their livery company—would be punished. Perhaps they did not care, or care to get involved, as long as Newton did not cheat them.

Dancy did not automatically believe Smith's gossip, for she had no prior inkling of Newton's cheating, so she set a trap.<sup>222</sup> She and her servant, Edward Healing, first weighed the barrels she was sending to Newton at the shop of another grocer, Roberts Phipps.<sup>223</sup> She explained to Phipps that she suspected an unnamed grocer of cheating her and wanted to check the weight.<sup>224</sup> Phipps's apprentice weighed the barrels and made a note of their weights.<sup>225</sup> Healing then continued to Newton's shop, where he left the barrels and went off to do other business.<sup>226</sup> Upon his return, Newton's apprentice gave him the weight, which was eight pounds less than at Phipps's beam.<sup>227</sup>

Dancy did not remain silent about this injustice. She complained to Phipps, Sparkes, the grocer Richard Woodward,<sup>228</sup> and her friends.<sup>229</sup> Sparkes and Woodward confronted Newton at the Royal Exchange with Dancy's accusations. In Woodward's retelling, Newton tearfully admitted his guilt;<sup>230</sup> in Dancy's, he angrily denied his guilt and accused his

---

220. See Answer of Griffin Smith, Francis Hales, and Edward Thomas, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 67r (Nov. 3, 1619).

221. Deposition of Joyce Dancy, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 8r (Aug. 22, 1621) (answer to interrogatory 42).

222. See *id.* (answer to interrogatory 38).

223. See Deposition of Edmund Phipps, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 4v (July 30, 1621) (answer to deposition 41).

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. Deposition of Joyce Dancy, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 7v (Aug. 22, 1621) (answer to interrogatory 31).

229. See Deposition of James Dancy, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 38r (Apr. 23, 1621) (answer to interrogatory 5) (noting that Joyce's husband had talked about gossiping to acquaintances).

230. Deposition of Richard Woodward, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fols. 35v–36r (Apr. 19, 1621) (answer to interrogatory 2).

apprentices.<sup>231</sup> In both versions, he promised to make restitution, ultimately paying Dancy £8 compensation.<sup>232</sup> And then . . . nothing happened. Newton did not lose his reputation, and Dancy even started doing business with him again, since he still gave her the best price.<sup>233</sup>

And here the rumors of Newton's misdeeds might have died had he not erred by making enemies of two determined and vengeful men: John Wall and Griffin Smith. The dispute with Wall sprang from an agreement Wall and Newton made in 1611.<sup>234</sup> In that year, Newton's former master, Robert Huighson, decided to retire and agreed to lease his two houses and shop to Newton and another of his former apprentices, John Phelps.<sup>235</sup> As part of the deal, Newton and Phelps would also buy Huighson's existing stock and any of the debts owed to Huighson that the buyers chose.<sup>236</sup> The value of the lease, stock, and debts were appraised by four leading men of the Grocers' Company as part of the contracting process.<sup>237</sup>

On the advice of one of those appraisers, Wall, who had decided he wanted to move from his existing shop, approached Newton and begged him to transfer his right in the contract with Huighson.<sup>238</sup> Newton agreed to assign his right to Wall for the payment of £30.<sup>239</sup> Wall, however, ended up having to agree to pay a slightly higher rent to Huighson than Newton had agreed to, and Wall believed Newton had promised to reimburse him the difference—which came to somewhat more than £30.<sup>240</sup> Wall

231. Deposition of Joyce Dancy, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 7v (Aug. 22, 1621) (answer to interrogatory 31).

232. *Id.* (answer to interrogatory 36); Deposition of Richard Woodward, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 36r (Apr. 19, 1621) (answer to interrogatory 2).

233. See Deposition of Robert Phipps, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 37r (Apr. 21, 1621) (answer to interrogatory 5).

234. Interrogatories for Wall's Witnesses, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 62r (June 27, 1621) (answer to interrogatory 17).

235. *Id.*

236. Deposition of Francis Mosse, *Wall v. Newton* (Court of Chancery), National Archives (U.K.), C 24/458, fol. 14r (June 2, 1619) (answer to interrogatories 2, 5) (providing the date of the agreement); Bill of Complaint, *Wall v. Newton* (Court of Chancery), National Archives (U.K.), C 2/JasI/W14/69, fol. 1r (Nov. 13, 1618) (detailing the terms of the agreement).

237. See Deposition of John Phelps, *Wall v. Newton* (Court of Chancery), National Archives (U.K.), C 24/464 no. 74, fol. 1r (Aug. 6, 1619) (answer to interrogatory 2).

238. Deposition of Robert Mildmay, *Wall v. Newton* (Court of Chancery), National Archives (U.K.), C 24/458, fol. 15r (Oct. 5, 1619) (answer to interrogatory 2).

239. See Bill of Complaint, *Wall v. Newton* (Court of Chancery), National Archives (U.K.), C 2/JasI/W14/69, fol. 1r (Nov. 13, 1618).

240. See *id.*

also believed that Newton promised not to entice away the customers who had done business in Huighson's shop.<sup>241</sup>

Within a few years Wall had come to regret his contract, finding the rent too steep and claiming (though others disputed this<sup>242</sup>) that the debts and stock had proven bad.<sup>243</sup> Wall complained that Newton had conned him into taking on the lease without reimbursing him the rent increase, all the while poaching Wall's customers by selling wares at cost.<sup>244</sup> In 1618, Wall brought a contract suit in the Court of Chancery.<sup>245</sup> The court ultimately dismissed his claim,<sup>246</sup> but by that time Wall had obtained testimony from Newton's former apprentices and others alleging Newton's history of cheating. The Lord Chancellor ordered this testimony suppressed,<sup>247</sup> but word leaked.<sup>248</sup>

Griffin Smith made sure the rumors spread. Numerous deponents testified that Smith was angry at Newton because he believed Newton had promised to take him on as a partner and leave him his business after a

---

241. See *id.*

242. See Deposition of Robert Mildmay, *Wall v. Newton* (Court of Chancery), National Archives (U.K.), C 24/458, fol. 16r (Oct. 5, 1619) (answer to interrogatory 2); Deposition of John Phelps, *Wall v. Newton* (Court of Chancery), National Archives (U.K.), C 24/464 no. 74, fol. 2r (Aug. 6, 1619) (answer to interrogatory 6).

243. Bill of Complaint, *Wall v. Newton* (Court of Chancery), National Archives (U.K.), C 2/Jas1/W14/69, fol. 1r (Nov. 13, 1618).

244. See *id.*

245. See *id.*

246. See Chancery Final Decree, *Wall v. Newton* (Court of Chancery), National Archives (U.K.), C 33/137, fol. 1714r (May 13, 1620).

247. See Chancery Order, *Wall v. Newton* (Court of Chancery), National Archives (U.K.), C 33/138 fol. 33v (Oct. 14, 1619) (ordering the suppression); Interrogatories and Depositions for Wall's Witnesses, *Wall v. Newton* (Court of Chancery), National Archives (U.K.), C 24/458 (unpaginated page following the interrogatories) (Oct. 14, 1619) (including an "order for suppression of certaine scandalous deposicions"). The suppressed depositions still exist at this location. See Deposition of Francis Hales, *Wall v. Newton* (Court of Chancery), National Archives (U.K.), C 24/458, fols. 6r–7r (Jan. 20, 1619); Deposition of Edward Thomas, *Wall v. Newton* (Court of Chancery), National Archives (U.K.), C 24/458, fol. 5r (Jan. 20, 1619); Deposition of Griffin Smith, *Wall v. Newton* (Court of Chancery), National Archives (U.K.), C 24/458, fols. 1r–4r (Dec. 19, 1618); Deposition of Jacob Malden, *Wall v. Newton* (Court of Chancery), National Archives (U.K.), C 24/458, fol. 13r (Mar. 4, 1618).

248. See Deposition of James Clarke, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 15v (Mar. 28, 1621) (answer to interrogatory 9) (testifying about reports of Newton deceiving customers around the same time Wall brought his suit against Newton); Deposition of George Smith, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 11r (Mar. 21, 1621) (answer to interrogatory 9) (testifying about hearing reports of Newton "deceiving . . . his Customers"); Deposition of Francis Raymond, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 9r (Feb. 22, 1621) (answer to interrogatory 10) (testifying that "some reports were thereupon spread abroad" about Newton's cheating).

few years.<sup>249</sup> Instead, Newton joined with Richard Herbert, and Smith wanted revenge. It is unclear whether Wall egged on Smith to further his lawsuit, or Smith talked Wall into suing in the first place.<sup>250</sup> Either way, Smith was in the thick of the gossip storm that hit Newton, and he talked Francis Hales and another former apprentice, Roger Hatcliffe, into joining his crusade.<sup>251</sup>

Once the rumors started, they traveled quickly. A grocer like Newton and the many buyers and sellers with whom he did business were part of a dense web of connections through which gossip could move nearly costlessly.<sup>252</sup> Buyers and sellers had multiple venues where they could encounter one another, including their shops, the commercial streets of central London, the livery company halls, the docks, the public beams, taverns, parish churches, and the Royal Exchange.<sup>253</sup> Scriveners hired to draft contracts,<sup>254</sup> weighers at the royal weigh house,<sup>255</sup> friends called

249. See Deposition of William Grymes, *Att’y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 2, fol. 142r (Aug. 29, 1621) (answer to interrogatory 32) (testifying that Smith began to “scandall” Newton because Newton failed to take Smith as a partner); Deposition of Martin Skinner, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 17r (Apr. 13, 1621) (answer to interrogatory 12) (suggesting that Smith intended to “spite” Newton); Deposition of Joyce Dancy, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 9v (Mar. 7, 1621) (answer to interrogatory 24) (stating that Smith began to “speak ill” of Newton for not keeping his promise); Deposition of Richard Herbert, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 3r (Jan. 20, 1621) (answer to interrogatories 11, 12) (testifying that Smith’s purpose was “to scandall and bring . . . [Newton] into discredit” for wronging Smith).

250. See Deposition of Richard Herbert, *Wall v. Newton* (Court of Chancery), National Archives (U.K.), C 24/464, fol. 7r (Oct. 4, 1619) (answer to interrogatory 9) (testifying about Wall colluding with Smith).

251. Deposition of John Hassall, *Att’y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 69r (July 26, 1621) (answer to interrogatories 49, 51) (describing Smith’s enticements to Hatcliffe to convince him to help defame Newton); Deposition of Francis Hales, *Wall v. Newton* (Court of Chancery), National Archives (U.K.), C 24/464, fols. 4r–5r (Sept. 20, 1619) (answer to interrogatory 12) (describing Smith’s recruitment of Hales).

252. See *supra* Figure 1 (showing the connections among the various people in Newton’s network).

253. See *infra* notes 261–266 and accompanying text.

254. Deposition of Francis Mosse, *Wall v. Newton* (Court of Chancery), National Archives (U.K.), C 24/458, fol. 14r (June 2, 1619) (answer to interrogatory 5).

255. See Deposition of John Bade, *Att’y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 88v (Sept. 11, 1621) (answers to interrogatories 14, 15) (discussing what they had heard about the weighing of sugar sold by Mr. Leake); Deposition of Richard Goodwin, *Att’y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 87v (Sept. 11, 1621) (answers to interrogatories 14, 15) (same); Deposition of William Hill, *Att’y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fols. 86r–86v (Sept. 11, 1621) (answers to interrogatories 14, 15) (same).

upon to mediate disputes,<sup>256</sup> leading commercial men used as appraisers and arbitrators,<sup>257</sup> lawyers “whoe followeth busynese in [a trader’s] behaulf,”<sup>258</sup> and innkeepers<sup>259</sup> all served as further conduits of information.

The extensive deposition evidence tells us not only where the parties gossiped but also what they said and how the recipients of the information reacted to it. Griffin Smith, Francis Hales, and John Wall were the prime “stirrers up” of the rumor mill.<sup>260</sup> They confronted grocers and chapmen in London taverns and visited them in their shops,<sup>261</sup> button-holed passersby,<sup>262</sup> harangued the customers who came to buy from

---

256. Interrogatories for Wall’s Witnesses, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 61r (June 27, 1621) (interrogatory 11) (suggesting that Wall had asked for informal arbitration of his dispute with Newton by friends of the parties).

257. E.g., Deposition of John Phelps, *Wall v. Newton* (Court of Chancery), National Archives (U.K.), C 24/464, no. 74, fol. 1r (Aug. 6, 1619) (answer to interrogatory 2) (discussing the use of appraisers); Chancery Orders, *Wall v. Newton* (Court of Chancery), National Archives (U.K.), C 33/136, fols. 1524r–1524v (June 23, 1619) (showing that Wall asked for arbitration by the master of Chancery and aldermen of London); Deposition of Francis Mosse, *Wall v. Newton* (Court of Chancery), National Archives (U.K.), C 24/458, fol. 14r (June 2, 1619) (answer to interrogatory 3) (discussing the use of arbitration by friends to resolve a dispute about rent between Huighson and Wall).

258. Deposition of Humfrey Smith, *Att’y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 34r (July 11, 1621) (answer to interrogatory 14).

259. See Deposition of Thomas Moulton, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fols. 12v–13r (Mar. 24, 1621) (answer to interrogatory 14) (reporting what he, an innkeeper, had heard discussed in his inn).

260. Deposition of William Grymes, *Att’y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 2, fol. 142r (Aug. 29, 1621) (answer to interrogatory 34) (“[H]ee hath heard it crediblie reported, and beleiveth it to bee true, that John Walle grocer and the saied Griffin Smith, Francis Hales, and Edward Thomas were the first stirrers upp, and have since become prosecutors and followers of this Cause against the defendantes Francis Newton and Richard Herbert.”).

261. Deposition of William Dixon, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 5r (Feb. 3, 1621) (answer to interrogatory 18) (tavern in London); accord Deposition of Thomas Good, *Att’y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 76v (Apr. 13, 1621) (answer to interrogatory 48); Deposition of Martin Skinner, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fols. 17r–17v (Apr. 13, 1621) (answer to interrogatory 20); see also Deposition of Thomas Bolton, *Att’y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 91r (Sept. 14, 1621) (answer to interrogatory 48) (discussing Wall and Hales coming to Bolton); Deposition of George Smith, *Att’y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 2, fol. 126v (Aug. 7, 1621) (answer to interrogatory 34) (testifying about Wall inviting him to drink a pint of wine in a tavern).

262. Deposition of Edward Grace, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 21v (Sept. 5, 1621) (answer to interrogatories 25, 26) (describing Wall calling Grace into his shop as he passed by).

them,<sup>263</sup> and spread the word to Newton's customers when they visited them in their shops and in taverns in the countryside.<sup>264</sup> From there, many of the men and women in the wider network soon heard "flicieing report[s]" about Newton's cheating.<sup>265</sup> Newton's chapmen had gossiped about his honesty in the London inn at which many of them lodged, and now they heard the reports of his dishonesty in other inns.<sup>266</sup> The chapmen returned from London to their towns and passed along what they had heard to the other local retailers.<sup>267</sup>

---

263. See Deposition of Francis Raymond, Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 2, fols. 105r–105v (Sept. 28, 1621) (answer to interrogatory 48) (Hales's shop); Deposition of Joshua Nayler, Newton v. Wall, Hales, Smith, Thomas & Hatcliffe (Star Chamber), National Archives (U.K.), STAC 8/222/6, fols. 13v–14r (Mar. 24, 1621) (answer to interrogatory 25) (Smith's shop); Deposition of Robert Kinge, Newton v. Wall, Hales, Smith, Thomas & Hatcliffe (Star Chamber), National Archives (U.K.), STAC 8/222/6, fols. 1r–1v (Jan. 19, 1621) (answer to interrogatory 10) (same).

264. See Deposition of Jonas Gurson, Newton v. Wall, Hales, Smith, Thomas & Hatcliffe (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 19v (Apr. 21, 1621) (answer to interrogatory 13) (indicating that Hatcliffe engaged in group discussions about Newton's fraud); Deposition of Thomas Moulton, Newton v. Wall, Hales, Smith, Thomas & Hatcliffe (Star Chamber), National Archives (U.K.), STAC 8/222/6, fols. 12v–13r (Mar. 24, 1621) (answer to interrogatory 14) (describing Hatcliffe talking to customers in a country inn); Deposition of Michael Hanshett, Newton v. Wall, Hales, Smith, Thomas & Hatcliffe (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 8r (Feb. 9, 1621) (answer to interrogatory 13) (recounting when Smith "came unto this deponentes shopp there and drunke a pipe of Tobacco").

265. Deposition of Sampson Cotton, Newton v. Wall, Hales, Smith, Thomas & Hatcliffe (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 6r (Feb. 5, 1621) (answer to interrogatory 10); see also Deposition of Raph King, Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 2, fol. 107v (Oct. 2, 1621) (answer to interrogatory 32) ("[I]t hath binne generally reported that the defendant Newton hath used deceipts in his trading").

266. Deposition of Thomas Bolton, Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 91v (Sept. 14, 1621) (answer to interrogatory 63) (recounting chapmen talking about Newton's honesty in Bolton's inn); Deposition of Thomas Moulton, Newton v. Wall, Hales, Smith, Thomas & Hatcliffe (Star Chamber), National Archives (U.K.), STAC 8/222/6, fols. 12v–13r (Mar. 24, 1621) (answer to interrogatory 14) (describing chapmen hearing a report of Newton's cheating in Moulton's inn).

267. Deposition of Martin Skinner, Newton v. Wall, Hales, Smith, Thomas & Hatcliffe (Star Chamber), National Archives (U.K.), STAC 8/222/6, fols. 17r–17v (Apr. 13, 1621) (answer to interrogatory 12); Deposition of Robert Kinge, Newton v. Wall, Hales, Smith, Thomas & Hatcliffe (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 1v (Jan. 19, 1621) (answer to interrogatory 20) (explaining that the "divers Chapmen of Epping . . . did report that the said Smith had disgraced" Newton).



to his honest dealings.<sup>270</sup> This strategy failed, however, and in 1621, the Attorney General agreed to the Company's request to bring charges against Newton for cheating his customers.<sup>271</sup> But even this trial would ultimately not result in Newton's ruin.

#### D. *The Ambiguity of Reputation*

For four years, from the time Wall obtained Smith's and Hales's testimony in the Chancery case until the Star Chamber found Newton guilty of trade deceit in 1622, gossip about Newton flowed through his network. The years of accusations, however, did not result in a clean denunciation of Newton. His business appears to have suffered somewhat,<sup>272</sup> but many of his customers also remained loyal.<sup>273</sup> They did so at least in part because they apparently did not believe the rumors. In addition, some evidence suggests that Newton's low-level cheating was not all that unusual and therefore perhaps not all that surprising to the people involved.

The frequently stark, binary treatment of reputation in private-ordering theories has the effect of hiding the ambiguity inherent in gossip. When a grocer denigrated another grocer to a chapman, we might well expect the chapman to react as did Allen Convers of Brentwood, Essex, when Newton told him that John Wall was a "harshe" and "very subtyll man to deale withall."<sup>274</sup> This caused Convers "to have but a bad conceyte" of Wall<sup>275</sup> and made Convers and others "afrayde to deale with" him.<sup>276</sup> Yet when the former apprentices went around to Newton's customers and told them that Newton had cheated them, the customers did not all simply accept the information as true and alter their perception of Newton from positive to negative. In fact, the reactions to the

270. See Deposition of John King, Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 35v (July 17, 1621) (answer to interrogatory 13) (describing being asked to sign this certificate); Deposition of Thomas Nutt, Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 34r (July 11, 1621) (answer to interrogatory 13) (same); Deposition of Robert Gallant, Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fols. 33v-34r (July 10, 1621) (answer to interrogatory 13) (same); Deposition of Christopher Standish, Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 31v (June 30, 1621) (answer to interrogatory 13) (same).

271. See Bill of Complaint, Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 2, fol. 171r (Jan. 22, 1621).

272. See *infra* note 320 and accompanying text.

273. See *infra* note 322 and accompanying text.

274. Deposition of Allen Convers, Wall v. Newton (Court of Chancery), National Archives (U.K.), C 24/458, fol. 17r (Oct. 5, 1619) (answer to interrogatory 7); Deposition of Griffin Smith, Wall v. Newton (Court of Chancery), National Archives (U.K.), C 24/458, fol. 2r (Dec. 19, 1618) (answer to interrogatory 7).

275. Deposition of Allen Convers, Wall v. Newton (Court of Chancery), National Archives (U.K.), C 24/458, fol. 17r (Oct. 5, 1619) (answer to interrogatory 7).

276. Deposition of Griffin Smith, Wall v. Newton (Court of Chancery), National Archives (U.K.), C 24/458, fol. 2r (Dec. 19, 1618) (answer to interrogatory 7).

gossip about Newton varied depending upon a number of factors, including who the messenger was and whether the recipient of the information trusted the messenger's motives.<sup>277</sup>

A large number of Newton's existing customers ignored or discounted the gossip when they heard it from Newton's former apprentices. The case of the starchmaker Aaron Kettle provides a particularly detailed example. Kettle lived in Wapping, a village east of London.<sup>278</sup> John Wall, Griffin Smith, and Francis Hales came to Wapping, summoned Kettle to the King's Head tavern there, and told him that Newton had been cheating him on the sale of his starch by fraudulently manipulating his beam.<sup>279</sup> They importuned him at length, assuring him that Newton had cheated many other people and encouraging him to sign a petition and join a lawsuit.<sup>280</sup> Kettle refused and walked away from the gossipmongers, telling them that he did not believe them.<sup>281</sup> He claimed that Newton had never cheated him and that "hee took . . . Mr Newton to bee an honest man then to deceive him, this deponent, in that kind."<sup>282</sup> Just to be sure, Kettle did approach Newton and question him, but when Newton assured him that he had never been cheated, Kettle was satisfied.<sup>283</sup>

Some other of Newton's trading partners reacted much the same way. The sugar merchant Edward Grace rebuffed Wall's insistence that Newton had cheated him, saying, "[H]ee never knew nor found anie ill dealing by [Newton], nor would sett his hand to anie note against him."<sup>284</sup> William Dixon, grocer of Bishopps Stortford in Herefordshire, deposed that he did not believe the impression Griffin Smith tried to give of Newton as a cheater, because he "did never find or *perceive* or *cann* Imagine or bee *perswaded* to the contrarie, but that [Newton's]

---

277. Cf. Ronald S. Burt & Marc Knez, *Kinds of Third-Party Effects on Trust, 7 Rationality & Soc.* 255, 260 (1995) (discussing how third parties will shade stories and gossip about B to fit what A seems to want to hear).

278. Deposition of Aaron Kettle, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 16v (Apr. 10, 1621).

279. See *id.* (answer to interrogatory 25).

280. See *id.*

281. Deposition of Aaron Kettle, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 68r (July 26, 1621) (answer to interrogatory 48); Deposition of Aaron Kettle, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 16v (Apr. 10, 1621) (answer to interrogatory 25).

282. Deposition of Aaron Kettle, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 68r (July 26, 1621) (answer to interrogatory 48).

283. *Id.* at fol. 68v (answer to interrogatory 62).

284. Deposition of Edward Grace, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 21v (Sept. 5, 1621) (answer to interrogatories 25, 26).

dealings with him . . . have binne Just and honest.”<sup>285</sup> John Bright, grocer of Billericay, Essex, sought out Smith to inquire about the rumors of Newton’s misdeeds but ended up telling “Smith that hee could not bee *perswaded* that [Newton] was such a man as the report went of him.”<sup>286</sup> For Thomas Bolton, an innkeeper in London who had also sold Newton sugar, Wall and Hales’s accusations did not ring true because “manie of [Newton’s] Chapmen have used to lodge at [Bolton’s] howse, being an Inne, and [he] from time to time heard them verie much mencioned of the said Newton and of his faire and honest dealings with them.”<sup>287</sup>

These customers were skeptical of the accusations in part because they did not trust the former apprentices’ motives. They thought that Smith, Hales, and Hatcliffe were trying to disgrace and discredit Newton in order to steal his customers.<sup>288</sup> The fact that the gossipers, immediately after disparaging Newton, sought the customers’ business certainly helped create this impression.<sup>289</sup>

---

285. Deposition of William Dixon, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fols. 5r–5v (Feb. 3, 1621) (answer to interrogatories 18, 19).

286. See Deposition of John Bright, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 5v (Feb. 5, 1621) (answer to interrogatory 18); see also Deposition of Thomas Good, *Att’y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 76v (Aug. 23, 1621) (answer to interrogatory 48) (indicating Good did not believe Hales); Deposition of Joshua Nayler, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 14r (Mar. 24, 1621) (answer to interrogatories 25, 26) (indicating Nayler did not believe Smith); Deposition of Giles Walford, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 12v (Mar. 24, 1621) (answer to interrogatory 27) (indicating Walford did not believe Smith).

287. Deposition of Thomas Bolton, *Att’y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 91v (Sept. 14, 1621) (answer to interrogatory 63).

288. See Deposition of Jonas Gurson, *Att’y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 2, fol. 111v (Oct. 5, 1621) (answer to interrogatory 48) (describing Hatcliffe’s attempt to discredit Newton); Deposition of Martin Skinner, *Att’y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 2, fol. 104v (Sept. 28, 1621) (answer to interrogatory 48) (describing Smith’s attempt to discredit Newton); Deposition of Thomas Bolton, *Att’y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 91r (Sept. 14, 1621) (answer to interrogatory 48) (describing Hales’s attempt to discredit Newton).

289. Deposition of Joshua Nayler, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fols. 13v–14r (Mar. 24, 1621) (answer to interrogatories 25, 26) (stating that he believed that Smith’s motivation in accusing Newton of misconduct was to poach his customers away from him); Deposition of Michael Hanshett, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fols. 8r–8v (Feb. 9, 1621) (answer to interrogatory 13) (testifying that Hanshett believed that Smith spread word of Newton’s alleged wrongdoing either to disgrace Newton or to convince Hanshett to do business with him, rather than with Newton); Deposition of William Dixon, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fols.

The identity of the messenger also seemed to matter a great deal for others who either believed the accusations or were open to the possibility that they were true. Despite not being able to identify any way in which Newton had cheated him, Owen Arthur, a London grocer, nonetheless accepted the accusations because he had heard them from Newton's erstwhile temporary apprentice, Edward Thomas, "who was [Arthur's] Countryman," meaning they originated from the same provincial town or region.<sup>290</sup> John Geering pulled his fellow and much younger grocer, John Towse, into a scrivener's shop at the Royal Exchange and convinced him of Newton's guilt.<sup>291</sup> Thomas Shipton believed the accusations because he had seen witnesses testify in front of three London aldermen who had been asked to look into Newton's cheating.<sup>292</sup> By contrast, merely the "reports spread abroad that the said Newton and also the said Herbert had used divers deceits and ill dealing in their trade" were supposedly enough to convince the grocer Edward Samms to believe the gossip,<sup>293</sup> though another piece of evidence indicates that Samms was friends with Wall.<sup>294</sup> For many grocers, the fact that the Master and Wardens, who governed the Grocers' Company, had signed the petition to the Attorney General sufficed to create at least a suspicion of the truth of the rumors.<sup>295</sup> For others, all they needed to know to want Newton tried was

---

5r-5v (Feb. 3, 1621) (answer to interrogatories 18, 20) (indicating that he believed that Newton's accusers were motivated by a desire to usurp his clientele); Deposition of Thomas Tendring, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fols. 4r-4v (Jan. 31, 1621) (answer to interrogatory 14) (testifying that Smith's allegations against Newton arose from a desire to steal his customers, since Smith had unsuccessfully attempted to steal Newton's customers on at least one other occasion).

290. Deposition of Owen Arthur, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 92r (Sept. 17, 1621) (answer to interrogatory 77).

291. Deposition of John Towse, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 2, fol. 133v (Aug. 14, 1621) (answer to interrogatory 77).

292. Deposition of Thomas Shipton, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 93v (Sept. 17, 1621) (answer to interrogatory 78); see also Deposition of Edward Coker, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 82v (Sept. 3, 1621) (answer to interrogatory 78) (indicating that Coker, another London grocer, believed the accusations for the same reason).

293. Deposition of Edward Samms, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 98v (Sept. 19, 1621) (answer to interrogatory 88).

294. Interrogatories for Wall's Witnesses, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 61r (June 27, 1621) (interrogatory 11).

295. Deposition of John Shipton, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 96v (Sept. 15, 1621) (answer to interrogatory 88); Deposition of Augustine Lyn, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 83r (Sept. 6, 1621) (answer to interrogatory 78); Deposition of Edward Coker, *Att'y Gen. v. Newton & Herbert* (Star

that the gossip about Newton's misdealing was bringing public opprobrium down upon the whole company of grocers in London.<sup>296</sup>

Despite all the gossip, however, some grocers might have both been willing to believe the accusations against Newton and yet ultimately not consider him a pariah because what he was doing may not have been extraordinary. Jacob Malden, a haberdasher from Essex, deposed that once, when he was at Newton's shop, a merchant came to sell Newton currants.<sup>297</sup> Newton cheated the seller out of four pounds by using his foot to prop up the scale holding the bag of currants so "that [the scale] should not come downe as it oughte."<sup>298</sup> Malden, "fynding faulte with the *said* Newton that hee would use such fraude or deceit as aforesaid, [Newton] answered it was not deceyte to gayne from them (meaninge the Marchantes)."<sup>299</sup> What is intriguing about this incident is not that it provides yet another example of Newton's cheating but rather that Newton seemed unembarrassed about it. This suggests that he understood it to be an acceptable practice among London grocers to stiff the merchants at the margins when possible.

In a similar vein, a sugar merchant testified that he knew that grocers routinely cheated him on tare "by leaving sugar in the Chests that they might weigh heavier and so caused this deponent to allow them more for tare then otherwise hee should have done."<sup>300</sup> Such a wrong, however, did not in the merchant's opinion rise to the level of "wrong or deceit of anie value."<sup>301</sup> It was "a generall use and practise with manie

---

Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 82v (Sept. 3, 1621) (answer to interrogatory 77).

296. E.g., Deposition of Thomas Foxall, Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 102v (Sept. 21, 1621) (answer to interrogatory 88) (asserting that he signed the Certificate with the intention of clearing the reputation of the company and the grocers' trade); Deposition of George Stroude, Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 2, fol. 132v (Aug. 14, 1621) (answer to interrogatory 77) (stating that Stroude signed the Certificate with the intention of redeeming the reputation of the company of grocers); Deposition of Thomas Nutt, Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 34r (July 11, 1621) (answer to interrogatory 14).

297. Deposition of Jacob Malden, Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 37r (Aug. 27, 1621) (answer to interrogatory 2).

298. Id.

299. Id.

300. Deposition of Richard Leigh, Newton v. Wall, Hales, Smith, Thomas & Hatcliffe (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 21r (Aug. 8, 1621) (answer to interrogatory 36).

301. Deposition of Richard Leigh, Att'y Gen. v. Newton & Herbert (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 2, fol. 123v (July 12, 1621) (answer to interrogatory 38).

grocers,” in other words, a cost of doing business and not something for which he was going to seek compensation or end a relationship.<sup>302</sup>

One thing merchants did complain about, however, was a little scam that the London grocers had going at the King’s Beam, the royal scale controlled by the Grocers’ Company and mandated for use in the weighing of goods sold by non-Londoners to London grocers.<sup>303</sup> The sworn weighers, themselves grocers who received their positions as a boon from the Company,<sup>304</sup> shaded the weight in favor of their fellow grocers.

Furthermore, if one were to believe Newton, he was not alone in fiddling with his private beam. When Francis Hales reproved him for cheating Joyce Dancy by concealing extra weight under the scale, Newton justified himself with the response, “[A]nother grocer called *William dalton* dyd the like & . . . therfor why shuld not he doe it[]”<sup>305</sup> He also allegedly claimed that his master Huighson had done the same.<sup>306</sup>

Similarly, when Griffin Smith confronted Newton about his cheating, Newton replied, “[W]hat, doest thou think that other men do not the like?”<sup>307</sup> And in fact in the course of the trials, John Wall, Griffin Smith, and John Geering, another leader of the anti-Newton group, all had their own cheats revealed. Wall had complained to a merchant that he had

302. *Id.* (“[D]efendants have in small manner wronged him . . . in the taring of Chests of suger which this deponent hath sould unto them . . . , that thereby they might demand the more for allowance for the tare, as it is a generall use and practise with manie grocers.” (interlinear word normalized in quoted text)).

303. Deposition of William Hill, *Att’y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 85v (Sept. 11, 1621) (answer to interrogatory 8) (testifying that only foreign merchants and merchants from other parts of England must weigh their goods at the King’s Beam); accord Deposition of Richard Goodwin, *Att’y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 87r (Sept. 11, 1621) (answer to interrogatory 8) (same); Deposition of Stephen Mercer, *Att’y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 89r (Sept. 11, 1621) (answer to interrogatory 8) (same).

304. E.g., Grocers’ Company Court of Assistants Minutes, Guildhall Library (U.K.), MS 11,588, vol. 4, fol. 261 (Dec. 18, 1650) (describing the nomination of members for election as master weigher); Grocers’ Company Court of Assistants Minutes, Guildhall Library (U.K.), MS 11,588, vol. 3, fol. 338 (Dec. 8, 1626) (describing petitions of John Wall and others for positions as master weighers in the Company).

305. Deposition of Francis Hales, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 54(a)r (Nov. 22, 1619) (answer to interrogatory 14).

306. Deposition of William Dalton, *Att’y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 38v (Oct. 7, 1621) (answer to interrogatory 29); see also Nina Mazar, On Amir & Dan Ariely, The Dishonesty of Honest People: A Theory of Self-Concept Maintenance, 45 *J. Marketing Res.* 633, 634 (2008) (discussing “categorization malleability” that allows people to excuse their cheating and still consider themselves honest).

307. Deposition of Griffin Smith, *Att’y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 17r (Oct. 2, 1621) (answer to interrogatory 69) (internal quotation marks omitted) (quoting Newton).

sold him chests of sugar that each lacked three or four pounds.<sup>308</sup> The merchant demanded to see the chests weighed, and Wall's beam did show the underweight.<sup>309</sup> That is, it did until the merchant required Wall to switch the chest being weighed to the other pan, and there it weighed "as much over as it had weighed les being weighed in the other scale."<sup>310</sup> Chagrined—or caught—Wall excused his "mistake" as a problem with his beam.<sup>311</sup> Geering, who had already been punished once by the Master and Wardens of the Grocers' Company for some undisclosed unacceptable behavior,<sup>312</sup> was discovered cheating a merchant on the tare of a sugar chest when the merchant fortuitously bought back the same chest in the marketplace and weighed it.<sup>313</sup> Griffin Smith's close friend testified that Smith had bragged to him about cheating the starchmakers on their weight, not on the orders of Newton but rather unbeknownst to him.<sup>314</sup> And some chapmen who left Newton because of the gossip about his cheats and switched to Smith ended up leaving Smith because he "abused them and also . . . use[d] them ill in his trading."<sup>315</sup>

Ultimately, despite the ambiguity of the witness testimony and evidence that Newton was not the only cheater in the community, the Star Chamber found Newton guilty and sentenced him to the surprisingly large fine of £1000,<sup>316</sup> which, through further machinations, he may never have paid in full.<sup>317</sup> Yet why, if Newton had done nothing particularly out of the ordinary, was he punished so severely? Two answers are likely: one political and the other cultural. Politically, Wall's dispute with Newton arose at a moment when the Grocers' Company was fighting a losing battle to prevent the apothecaries from separating and forming

308. Deposition of Richard Leigh, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 21r (Aug. 8, 1621) (answer to interrogatory 36).

309. *Id.* at fol. 21v.

310. *Id.* at fols. 21r–21v.

311. *Id.* at fol. 21v.

312. Rees, *supra* note 93, at 104–05.

313. Deposition of John Juxon, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 2, fol. 134v (Aug. 15, 1621) (answer to interrogatory 37).

314. See Deposition of Richard Garford, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 72v (Aug. 26, 1621) (answer to interrogatories 47, 48) (indicating a close friendship with Smith); Deposition of Richard Garford, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 7v (Feb. 6, 1621) (answer to interrogatory 10).

315. Deposition of Thomas Tendring, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 4v (Jan. 31, 1621) (answer to interrogatory 14).

316. Opinion of the Star Chamber, *Att'y Gen. v. Newton & Herbert* (Star Chamber), British Library (U.K.), Stowe MS 397, fol. 59r (May 29, 1622).

317. See Petition of John Wall to the House of Lords, Parliamentary Archives (U.K.), HL/PO/JO/10/1/30, para. 2 (Mar. 9, 1626) (accusing Newton of not paying the fine).

their own livery company. Part of the apothecaries' complaints stemmed from the Grocers' Company's perceived leniency in dealing with abuses of trade.<sup>318</sup> The reaction—perhaps overreaction—to the allegations against Newton should probably be viewed against this backdrop.

Culturally, Newton may simply have gone too far. If everyone cheats a little bit, then prices and attitudes reflect that. But if such common low-level cheating happens because of the difficulty of verification, then an abuser can profit by exceeding the permissive margin of cheating by just a little more. That extra level of cheating is not accounted for in the price, yet the victim, unable to verify performance, cannot tell the difference between common low-level cheating and unacceptable cheating. When Wall's initial lawsuit and continued antagonism cracked open the door not just on Newton's actions but also on those of others, the community and the court may have seen this as an opportunity to express their standards and hold the line against unacceptable behavior by making an example of Newton.

And then, after four years of gossip, after a public trial and sentencing, after the humiliation of having to admit to the accusations before the Grocers' Company, Newton remained in business.<sup>319</sup> We do not know whether buyers and sellers dealt with him in the same way as they had in the past. They may have insisted on greater verification and placed less reliance on trust. The gossip did apparently hurt his trade somewhat.<sup>320</sup> One grocer testified that he did less business with Newton than he had before the accusations, even though he believed that Newton was now dealing honestly, while he could not be certain how Newton had acted earlier.<sup>321</sup> But some other customers who had dropped him soon returned.<sup>322</sup> Perhaps, in this credit-based economy, they preferred to stick

---

318. Ward, *supra* note 94, at 118.

319. See, e.g., Answer of Henry Savage, *King's Almoner v. Savage & Newton* (Star Chamber), National Archives (U.K.), STAC 8/3/11 (July 26, 1622) (reporting that Newton bought sugar a month after his sentence).

320. See Deposition of Robert Gallant, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 1, fol. 33v (July 10, 1621) (answer to interrogatory 6) (testifying that he stopped doing business with Newton); Deposition of John Walby, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 18r (Apr. 13, 1621) (answer to interrogatory 7) (asserting that he believed the accusations hurt Newton's business); Deposition of Giles Walford, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 12v (Mar. 24, 1621) (answer to interrogatory 27) (same).

321. Deposition of William Dalton, *Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21 pt. 2, fol. 146v (Sept. 6, 1621) (answer to interrogatory 63).

322. See Deposition of John Bright, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 6r (Feb. 5, 1621) (answer to interrogatory 21); Deposition of Thomas Tendring, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 4v (Jan. 31, 1621) (answer to interrogatory 14).

with Newton and his questionable ethics rather than build up credit with a new dealer.<sup>323</sup> Perhaps, like Joyce Dancy, they felt his price was still the best even if it was too good to be quite true.<sup>324</sup> Nonetheless, despite the blow to his business and presumably his reputation, Newton continued, until the year before his death in 1630, to pay the maximum annual membership dues to the Company,<sup>325</sup> and he took on new apprentices in 1625, 1627, and 1629.<sup>326</sup>

John Wall, by contrast, bankrupted himself fighting Newton and ended up having to beg for a subsidy from the Grocers' Company<sup>327</sup>— “[g]etting even,” he found, “can be expensive.”<sup>328</sup> He spent the last decade of his long life as the weighmaster at the royal weigh house, a sinecure granted by the Company to a poor member.<sup>329</sup> Francis Hales died in 1624.<sup>330</sup> Griffin Smith may have died of the plague in 1625.<sup>331</sup> If so, he had found it necessary to move outside London to the suburb of Clerkenwell just north of the city walls.<sup>332</sup> It is possible that his perceived shady role in the disgracing of Newton had limited his opportunities among the grocers of the city.

323. See *supra* notes 110–114 and accompanying text (discussing credit and its impact on trading relationships).

324. Deposition of Robert Phipps, *Newton v. Wall, Hales, Smith, Thomas & Hatcliffe* (Star Chamber), National Archives (U.K.), STAC 8/222/6, fol. 37r (Apr. 21, 1621) (answer to interrogatory 2); see also Bhide & Stevenson, *supra* note 35, at 123 (observing that people “will do business with someone they know they can’t trust if it suits their convenience” (quoting an interview with a real estate developer)). According to Professors Benjamin Klein and Keith Leffler, cheating will not occur on “promises to sell high quality output only if price is sufficiently above salvageable production costs.” Klein & Leffler, *supra* note 34, at 617–18. Thus, if Newton were underselling, we could understand his cheating. However, the authors also assume that “if a firm cheats and supplies to any individual a quality of product less than contracted for, all consumers in the market learn this and all future sales are lost.” *Id.* at 617. That clearly did not happen here.

325. Accounts of the Wardens of the Grocers' Company, Guildhall Library (U.K.), MS 11,571, vol. 11, fols. 6r, 49r, 92r, 133v, 176r, 223r, 268r, 315r (July 1622–July 1630) (tracking Newton's membership payments).

326. *Id.* at fols. 101v, 191r, 277r (recording that Newton took apprentices on March 8, 1625, June 19, 1627, and January 28, 1629).

327. See Bill of Complaint, *Wall v. Coker* (Court of Exchequer), National Archives (U.K.), E 112/207 (1629) (unpaginated); Grocers' Company Court of Assistants Minutes, Guildhall Library (U.K.), MS 11,588, vol. 3, fol. 539 (Dec. 15, 1634) (noting that the Grocers' Company granted Newton a subsidy as a “loving and free benevolence”).

328. Bhide & Stevenson, *supra* note 35, at 125–26.

329. Grocers' Company Court of Assistants Minutes, Guildhall Library (U.K.), MS 11,588, vol. 4, fol. 283 (Nov. 5, 1651) (detailing Wall's appointment); Grocers' Company Court of Assistants Minutes, Guildhall Library (U.K.), MS 11,588, vol. 3, fol. 366 (Feb. 27, 1628) (mentioning Wall's petition for place as weigh house porter).

330. Death Record for Francis Hales, Church of England Baptisms, Marriages and Burials, 1538–1812, Parish Register of St. Benet Gracechurch (U.K.) (1624).

331. See Death Record for Griffin Smith, Church of England Baptisms, Marriages and Burials, 1538–1812, Parish Register of St. James Clerkenwell (U.K.) (1625).

332. *Id.*

Of course, Newton was caught and at least in principle made to pay a fine, and yet his story illustrates how the Cheating Pays scenario works. Newton cheated from the beginning of his career and continued to cheat for at least eight years, if not more. On the whole, he seems to have kept his cheating small enough that he could excuse the variances in weight as mistakes when he was caught. And because people in the trade knew that mistakes could happen, they believed his explanations and did not downgrade his reputation. Even when the starchmakers verified his cheating and gossiped about it, the news did not spread widely or seem to cause Newton harm. It was apparently not worth the effort to punish him unless his competitors derived a direct benefit from doing so. Had Newton not made enemies, he might have continued his cheating indefinitely.

In part, Newton's business survived the ordeal because he seems to have dealt honestly with those trading partners whom he knew could and did verify his performance. This meant that when Wall, Smith, and Hales revealed the cheating, they sometimes found an unreceptive audience. Not everyone was willing to believe the gossip and let it affect their view of Newton's reputation. The fact that customers loyal to Newton were also talking about what they considered to be false accusations meant that those who had not dealt with him could have heard completely different stories about him. Consequently, even after the court found him guilty, his customers did not all abandon him, and he was able to continue his trade, remain in good standing as a member of his livery company, and ultimately die a man of property.

### III. LIMITING LOW-LEVEL CHEATING

The potential profitability of low-level cheating raises the question why anyone—whether Newton, the other grocers in his network, or firms and individuals today—had or has an incentive to act honestly. Unfortunately for private-ordering theories, the reality may be, then and now, that they do not. This Part first discusses evidence that engaging in a certain amount of low-level cheating may be a common human tendency and then considers what tools private and public ordering might deploy to combat small cheats.

#### A. *The Commonality of Low-Level Cheating*

The behavioral economist Dan Ariely has demonstrated the prevalence of ordinary low-level cheating with an experiment in which subjects received small payments for solving simple math problems under timed conditions.<sup>333</sup> In a control setting, in which a proctor graded the tests, subjects answered an average of four questions out of twenty in the time

---

333. Dan Ariely, *The (Honest) Truth About Dishonesty* 15, 17 (2012) (describing the experiment).

allowed.<sup>334</sup> In the experimental setting, however, subjects graded their own tests and shredded their answer sheets without oversight by the proctors.<sup>335</sup> The subjects then reported their now-unverifiable scores and received their payouts.<sup>336</sup> In this version, subjects self-reported an average of six correct answers out of twenty, and “this overall increase did not result from a few individuals who claimed to solve a lot more [of the problems], but from lots of people who cheated by just a little bit.”<sup>337</sup>

The test takers could all have reported they got perfect scores and collected the full payout, but they did not. In fact, of the 791 test takers across several variants of this experiment, only five claimed to have solved all twenty problems, while “most cheated only slightly.”<sup>338</sup> Ariely calls this consistent, low level of cheating the “fudge factor.”<sup>339</sup> His intuition is that people cheat enough to get some benefit from cheating but not so much that they are forced to think badly of themselves and consider themselves immoral.<sup>340</sup>

This observation led Ariely to the further discovery that even simple moral reminders can reduce cheating. When people sign a tax return or an insurance form before filling it out, they seem to cheat less.<sup>341</sup> When students sign an honor code before taking an exam, or subjects in an experiment are asked to think about the Ten Commandments before taking a test, they do not cheat at all.<sup>342</sup> Unfortunately, the salutary effects of ethical reminders are short lived.<sup>343</sup>

Ariely’s findings do, however, correspond to results reported in a *Harvard Business Review* survey of businesspeople. The authors discovered that the businesspeople “valued their reputations, not for some nebulous financial gain but because they took pride in their good names. Even more important, since outsiders cannot easily judge trustworthiness, businesspeople seem guided by their inner voices, by their consciences.”<sup>344</sup> In other words, “[w]e keep promises because we believe it is right to do so, not because it is good business.”<sup>345</sup> This internal drive to be honest is not

---

334. *Id.* at 15, 18.

335. *Id.* at 17.

336. *Id.*

337. *Id.* at 18.

338. Mazar et al., *supra* note 306, at 643.

339. Ariely, *supra* note 333, at 27.

340. *Id.* at 27; Mazar et al., *supra* note 306, at 633, 638, 642 (“[B]y engaging only in a relatively low level of cheating, participants stayed within the threshold of acceptable magnitudes of dishonesty and thus benefited from being dishonest without receiving a negative self-signal . . .”).

341. See Lisa L. Shu et al., *Signing at the Beginning Makes Ethics Salient and Decreases Dishonest Self-Reports in Comparison to Signing at the End*, 109 *Proc. Nat’l Acad. Sci.* 15,197, 15,197–99 (2012).

342. Ariely, *supra* note 333, at 39–43; Mazar et al., *supra* note 306, at 635–37.

343. Ariely, *supra* note 333, at 43.

344. Bhide & Stevenson, *supra* note 35, at 127.

345. *Id.* at 128.

new. In the rhetoric of seventeenth-century court documents, cheaters are people “without all feare of god or regard of Conscyence.”<sup>346</sup> They make “no conscience of an oath,”<sup>347</sup> “nor regard[] the punishment of [his] *Majesties* Lawes.”<sup>348</sup> If concern with reputation is to focus on the external (what do others think of me?), fearing God and the law and minding one’s conscience is to focus on the internal (is what I do right?).

Of course, in today’s secular age the fear of God may not be a strong deterrent. Perhaps low-level cheating must then be addressed by the more ordinary means of laws and private ordering. But one lesson from the history of regulation is that while underenforcement decreases regulations’ efficacy, effective enforcement may simply drive individuals and businesses to find other ways to cheat.<sup>349</sup> Furthermore, if low-level cheating is a cost of doing business, that cost may not outweigh the cost of overbroad regulation that could possibly stem the tide of cheating but will not eliminate it.

Reputation might be an important potential deterrent if the cheater gets caught and the victim can identify the behavior as cheating (rather than as a mistake), but cheaters try not to get caught. If they do not get caught, no data points exist about why they should not be trusted, and people seem to default to trusting.<sup>350</sup> Furthermore, as Newton discovered to his benefit, even if cheaters do get caught, reputation is ambiguous, susceptible to manipulation, and dependent on the evaluation of the recipient of the information. Newton cheated, got caught by the starch-makers, and nothing happened. He got caught again, and for years gossip about his misdeeds circulated. Yet, after all that, many of his customers not only remained with him but also believed he was honest. Even those who thought he might have been dishonest in the past were willing to do business with him later because, well, maybe he was honest now, and he did have awfully good prices—“[i]n the eyes of people blinded by greed, the most tarnished reputations shine brightly.”<sup>351</sup> If reputation were all that kept grocers like Newton honest, why would they not cheat as soon as they realized they could do so without paying a price?<sup>352</sup>

---

346. Bill of Complaint, *Dawbney v. Gore et al.* (Star Chamber), National Archives (U.K.), STAC 5/D13/22 (1584) (unpaginated).

347. Bill of Complaint, *Barrowe v. Llewellyn* (Star Chamber), National Archives (U.K.), STAC 8/56/2, fol. 37r (Nov. 18, 1610).

348. Bill of Complaint, *Campe v. Llewlyn* (Star Chamber), National Archives (U.K.), STAC 8/105/5, fol. 12r (Feb. 8, 1610).

349. See Luzi Hail et al., *Corporate Scandals and Regulation*, 56 *J. Acct. Res.* 617, 655 & n.28 (2018) (describing how Lehman Brothers and Wells Fargo “direct[ed] their misbehavior to areas outside the narrow scope of [a] new regulation”).

350. Bhide & Stevenson, *supra* note 35, at 125.

351. *Id.* at 124.

352. Cf. Steven Lubet, *The Importance of Being Honest* 196 (2008) (“Liars, they say, will eventually be caught and disgraced, if not disciplined. At the very least, their reputations will suffer as word gets around, and no one will trust them. . . . This approach

B. *Mechanisms to Control Low-Level Cheating*

Low-level cheating is not sexy and may not make the front page of the newspaper, but it is rampant and expensive.<sup>353</sup> Four hundred years after Newton's trial, grocers are still overcharging customers on weight.<sup>354</sup> Whole Foods stores in California in 2014 and New York in 2015 were caught doing just that,<sup>355</sup> with "overcharges [that] ranged from [80 cents] for a package of pecan panko to \$14.84 for a package of coconut shrimp."<sup>356</sup> The retailer L.L. Bean recently had to end its no-questions-asked return policy because of people taking fraudulent advantage of it by doing things such as returning goods they had picked up at thrift stores.<sup>357</sup> Airlines are struggling to distinguish between flyers needing genuine service-animal support and those trying to bring their pets on airplanes by showing counterfeit service-animal papers.<sup>358</sup> In a cheat reminiscent of the 2015 Volkswagen emissions scandal but attracting much less attention,<sup>359</sup> Lumber Liquidators sold goods falsely labeled as meeting government emissions standards.<sup>360</sup> Individuals cheat on their

---

has always seemed questionable . . . . I think . . . that liars (and other assorted cheaters) often succeed and prosper . . . .").

353. Ariely, *supra* note 333, at 239–40; Mazar et al., *supra* note 306, at 643.

354. See, e.g., Shefalee Loth, *Is Your Food Lighter than It Claims?, Which?* (Feb. 6, 2015), <https://conversation.which.co.uk/food-drink/underweight-supermarket-food-cans-tins-weight-grams/> [<https://perma.cc/9AZK-W62K>] (discussing underweight food routinely found in English grocery stores); see also Diane Quagliani, *The Shady Business of Food Fraud*, *Food & Nutrition Mag.* (July 1, 2016), <https://foodandnutrition.org/july-august-2016/shady-business-food-fraud/> [<https://perma.cc/3K9W-B6M8>] (reviewing grocery stores passing off mislabeled goods).

355. See Marks, *supra* note 21 (describing California violations and New York allegations); see also Stephen Mihm, *Editorial, Whole Foods Resurrects the Thumb-on-the-Scale Trick*, *Chi. Trib.* (July 2, 2015), <http://www.chicagotribune.com/news/opinion/commentary/ct-whole-foods-overcharges-prices-20150702-story.html> (on file with the *Columbia Law Review*) (reviewing the history of American grocery stores cheating on weight).

356. Fred Imbert, *Agency Says Whole Foods Overcharges: 'Worst Case of Mislabeled,'* *CNBC* (June 24, 2015), <https://www.nbcnews.com/business/consumer/agency-says-whole-foods-overcharges-worst-case-mislabeled-n381026> [<https://perma.cc/4N6N-9SEP>] (internal quotation marks omitted) (quoting a New York City Department of Consumer Affairs statement).

357. Ian Crouch, *A Fond Farewell to L.L. Bean's No-Questions-Asked Return Policy*, *New Yorker* (Feb. 9, 2018), <https://www.newyorker.com/culture/culture-desk/fond-farewell-l-l-bean-no-questions-asked-return-policy> (on file with the *Columbia Law Review*); Tiffany Hsu, *L.L. Bean, Citing Abuse, Tightens Its Generous Policy on Returns*, *N.Y. Times* (Feb. 9, 2018), <https://www.nytimes.com/2018/02/09/business/ll-bean-returns-policy.html> (on file with the *Columbia Law Review*).

358. See Christopher Mele, *Is That Dog (or Pig) on Your Flight Really a Service Animal?*, *N.Y. Times* (May 1, 2018), <https://www.nytimes.com/2018/05/01/travel/service-animals-planes.html> (on file with the *Columbia Law Review*).

359. See, e.g., Geoffrey Smith & Roger Parloff, *Hoaxwage*, *Fortune* (Mar. 7, 2016), <http://fortune.com/inside-volkswagen-emissions-scandal/> [<https://perma.cc/VA8H-EAX2>].

360. See, e.g., Hagens Berman Expands National Lumber Liquidators Lawsuit to Include Engineered Hardwood Flooring Containing Formaldehyde, *Bus. Wire* (May 21, 2015), <https://www.businesswire.com/news/home/20150521005998/en/Hagens-Berman>

taxes,<sup>361</sup> and they take items from the company supply closet for personal use. Each act of cheating may cause minimal harm, but collectively, low-level cheating is a drain on the economy.<sup>362</sup> For instance, the fraudulent return of preworn clothing costs retailers billions each year,<sup>363</sup> and tax cheating is estimated to cost the U.S. government over \$450 billion per year.<sup>364</sup> Laws of contract and remedial procedure should be searching for ways to address this problem.

Perhaps the most effective check on low-level cheating comes from the verification of performance, whether done by public institutions or by contract. Americans discovered this fact in the nineteenth century when states began mandating inspection and testing of bulk commodities like grain, fertilizer, milk, and margarine in response to rampant cheating on quality.<sup>365</sup> The resulting improvement in quality assurance expanded markets and boosted confidence.<sup>366</sup> Public inspection regimes are expensive, however, and create their own potential for cheating the system.<sup>367</sup>

Private contracts may provide a more efficient avenue for using verification to reduce shirking, at least in certain business scenarios. Firms with bargaining power can impose direct monitoring on their partners, including the ability to observe manufacturing and precertify quality.<sup>368</sup> In addition, contracts can include what Professor Lisa Bernstein

---

Expands-National-Lumber-Liquidators-Lawsuit [<https://perma.cc/MJ2L-P6WV>] (discussing the Lumber Liquidators class action settlement over engineered wood flooring manufactured with hazardous levels of formaldehyde while falsely labeling their products as meeting or exceeding CARB emission standards).

361. See Stuart P. Green, *What Is Wrong with Tax Evasion?*, 9 *Hous. Bus. & Tax L.J.* 221, 222–23 (2009).

362. See Ariely, *supra* note 333, at 240 (“[A]lthough it is obviously important to pay attention to flagrant misbehaviors, it is probably even more important to discourage the small and more ubiquitous forms of dishonesty—the misbehaviors that affect all of us most of the time . . .”).

363. David Speights & Mark Hilinski, *Return Fraud and Abuse: How to Protect Profits 1* (2018), [https://apprissretail.com/wp-content/uploads/sites/4/2017/02/wp\\_TRE4013-WhitePaper-ReturnFraud101\\_Feb2013.pdf](https://apprissretail.com/wp-content/uploads/sites/4/2017/02/wp_TRE4013-WhitePaper-ReturnFraud101_Feb2013.pdf) [<https://perma.cc/WMR4-Z55V>].

364. See, e.g., IRS, *Tax Gap Estimates for Tax Years 2008–2010*, at 2 (2016), <https://www.irs.gov/pub/newsroom/tax%20gap%20estimates%20for%202008%20through%202010.pdf> [<https://perma.cc/8SVW-CUWC>] (last updated Mar. 15, 2018).

365. Edward J. Balleisen, *Fraud: An American History from Barnum to Madoff* 110–22 (2017).

366. *Id.* at 113, 118.

367. *Id.* at 116–17, 121–22 (discussing criticisms of and problems with the inspection regimes).

368. See Bernstein, *Beyond Relational Contracts*, *supra* note 116, at 572–76 (discussing original equipment manufacturers as types of direct monitoring methods); Ann Terlaak & Andrew A. King, *The Effect of Certification with the ISO 9000 Quality Management Standard: A Signaling Approach*, 60 *J. Econ. Behav. & Org.* 579, 598 (2006) (“[I]n long-term relationships, certification with ISO 9000 may play a dual role of being a signal that differentiates potential suppliers (prior to contract formation) and a device that helps monitor supplier behavior (post contract formation).”).

calls “interior remedies”—fines and liquidated damages—to punish small breaches.<sup>369</sup> Scorecards keep track of such imperfect performance, giving parties a record that helps identify patterns that could indicate shirking and partners with whom it is no longer worth doing business.<sup>370</sup>

Of course, contractual verification regimes add “trouble and expense” to the creation of the contracting partnership.<sup>371</sup> In addition, as verification decreases cheating, firms may be inclined to shed this expense, which then leaves an opening for opportunism to increase again.<sup>372</sup> An insistence on verification may also sometimes transgress the social and cultural expectations of trust within personal and business relationships.

Furthermore, such complex verification regimes are difficult to establish outside of negotiated contracts, and perhaps even outside of relational contracts. Consumers can hardly expect to be able to monitor the production of manufacturers, and contracts of adhesion limit buyers’ remedies in the event of breach. On the back end of the transaction, consumer class actions, as stated by the Third Circuit in *Reyes v. Netdeposit LLC*, used to “have the practical effect of allowing plaintiffs who have suffered relatively *de minimis* loss to nevertheless function as private attorneys general and thereby deter fraud in the marketplace.”<sup>373</sup> Unfortunately, in the light of recent Supreme Court rulings privileging arbitration and permitting class waiver clauses in consumer and employment contracts,<sup>374</sup> and the apparent growing lack of concern among businesses for the potential reputational harm caused by lawsuits,<sup>375</sup> class actions might prove to be a less valuable tool for combating cheating in the future.<sup>376</sup>

369. Bernstein, *Beyond Relational Contracts*, supra note 116, at 571.

370. *Id.* at 580.

371. Terlaak & King, supra note 368, at 580.

372. Jiong Gong, R. Preston McAfee & Michael A. Williams, *Fraud Cycles*, 172 *J. Institutional & Theoretical Econ.* 544, 547 (2016).

373. 802 F.3d 469, 492 (3d Cir. 2015).

374. See, e.g., *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011).

375. As Professor Jonathan Macey puts it:

[P]eople are no longer embarrassed to be sued the way they used to be. It is just a cost of doing business. Moreover, there are so many nonmeritorious lawsuits mixed in with the meritorious lawsuits that getting sued does not send a strong negative signal in the financial industry about the cost of being sued. Everybody is sued all the time. In addition, virtually all lawsuits settle; and they settle without the bank or investment bank admitting or denying any guilt or responsibility, so the public never even finds out whether a judge or jury would have decided that they are guilty.

Macey, supra note 18, at 23.

376. See Janet Cooper Alexander, *To Skin a Cat: Qui Tam Actions as a State Legislative Response to Concepcion*, 46 *U. Mich. J.L. Reform* 1203, 1204 (2013) (stating *Concepcion* “may lead to the virtual death of the class action in employment cases and consumer contracts involving the sale of goods and services—any small-dollar transaction that can be

As a consequence, some scholars are advocating for a solution very much like the one the Grocers' Company used against Newton: state qui tam actions that permit private attorney general suits to directly enforce antifraud laws.<sup>377</sup> In such cases, a private party—the relator—brings an action on behalf of the state. The relator receives a “portion of the recovery as an incentive to bring the suit.”<sup>378</sup> This is essentially the same procedure used in the action against Newton. The relator (ostensibly the Grocers' Company but probably really John Wall) asked the Attorney General to bring the suit, but the relator was the one who hired the lawyers and footed the bill in the expectation of receiving part of any damages in compensation.<sup>379</sup> The Attorney General could, however, exercise some discretion in deciding whether or not to permit the case to go forward. This veto power of the attorney general is similarly an element of the proposed state qui tam model and would help address concerns about nonmeritorious suits muddying the waters.<sup>380</sup>

The relator suit worked particularly well in the Newton situation because individual victims either never identified that Newton had cheated them or were willing to simply walk away and not bring his cheating to the notice of a body, such as the Grocers' Company or the courts, capable of punishing him. Many victims of small cheats today may find themselves in a like situation. Incentivizing whistleblowers like Griffin Smith and John Wall meant that Newton's cheating would at least be brought to light and punished. State qui tam actions could accomplish the same result.

Notably in qui tam suits of this nature, the victims of the cheating receive nothing.<sup>381</sup> Yet in the case of low-level cheating this may be defensible. Class actions, for instance, have often been brought in situations in which the harms were so small that the victims would, without the class action, “accept any loss and move on.”<sup>382</sup> Such a response only encourages the cheater to keep cheating. At least the threat of a qui tam action

---

governed by shrinkwrap, clickwrap, claim check, or other form contract”); Myriam Gilles, *The Politics of Access: Examining Concerted State/Private Enforcement Solutions to Class Action Bans*, 86 *Fordham L. Rev.* 2223, 2228 (2018) (“Forced arbitration and class action bans serve only to immunize bad actors . . .”).

377. Alexander, *supra* note 376, at 1224; Gilles, *supra* note 376, at 2236.

378. Alexander, *supra* note 376, at 1223.

379. List and Index, *supra* note 135, at 31 (discussing relator cases in the Star Chamber); see also *Interrogatories for Defendants' Witnesses, Att'y Gen. v. Newton & Herbert* (Star Chamber), National Archives (U.K.), STAC 8/32/21, pt. 2, fol. 167r (undated) (interrogatory 35) (asking whether Newton's former apprentices did not hope to receive “the one third or part of the *defendantes fynes* which they affirmed usuallie cometh to such as are the *relatoꝛs* or *prosecutoꝛs* of the suite”).

380. See Macey, *supra* note 18, at 23; Gilles, *supra* note 376, at 2236 (“[T]he AG may, if she wishes, intervene in order to dismiss the case—exercising, in essence, a veto power over the litigation.”).

381. Gilles, *supra* note 376, at 2238–39.

382. *Reyes v. Netdeposit, LLC*, 802 F.3d 469, 491 (3d Cir. 2015).

forces the potential cheating company to contemplate the expense of defending itself in court, defending its reputation in the media, and possibly paying a punitive fine. So far, however, no states have succeeded in passing proposed qui tam legislation, so the search for consumer-friendly solutions continues.<sup>383</sup>

#### CONCLUSION

If one believes in the self-regulating nature of markets driven by concern for reputation, then honesty is presumably a common equilibrium condition. But the lesson of the case study about Francis Newton is that private-ordering theories, with their assumptions of the discoverability of cheating and the effectiveness of reputational discipline, may be irrelevant to the sort of low-level cheating that is common in everyday commerce. Small cheats can go undetected or unpunished; reputational information can be ambiguous or ignored. The Cheating Pays scenario acknowledges this and demonstrates how cheaters can get away with their opportunistic behavior in situations in which verification is difficult or absent; in which cheaters have plausible deniability if they get caught; and in which cheating some while dealing honestly with others muddies the available reputational information.

The intention of this Essay is to motivate a shift in focus from a presumption of honesty to a presumption of common low-level dishonesty. With a different focus, the possible solutions may be seen in a different light. If *ex ante* regulation proves to be too blunt and costly to contain the inevitable cheating, and if only negotiated contracts have the potential to include verification provisions, perhaps *ex post* punishment through the courts is required to help constrain low-level cheating through exposure and punishment. But until then, cheating pays.

---

383. Gilles, *supra* note 376, at 2238–39.

