1-1-1995

Trust in the Mirror of Betrayal

Carol M. Rose
Yale Law School

LECTURE

TRUST IN THE MIRROR OF BETRAYAL

CAROL M. ROSE*

I. THE IMPORTANCE AND FRAGILITY OF TRUST

Lawyers do not have much of a reputation for fostering trust. We insist that ordinary people get everything down on paper, thereby sowing seeds of discord and suspicion; we then figure out ways to weasel out of what look like clear directives, thriving on the very discord we have sown. Perhaps there is some significance in the fact that although the word "trust" figures prominently in some standard legal specialties, one of them is *anti*trust, a subject in which "trust" can take on sinister connotations.

Nevertheless, even lawyers recognize that trust is a subject of enormous importance in modern world affairs. In fact, we like to think that law has a role in creating the preconditions for trust in a more general sense. Like everyone else, we have watched for decades as the residents of Israel and Northern Ireland have torn one another apart, to some degree vindicating lawyers' fond view that trust depends on staying within the ambit of law. Of course, in the last year, it has been humbling to see these same feuding parties take astonishing steps toward cooperation—slow, difficult, tentative, and dangerous steps—with little or no help from the law. This should make people in the legal profession ask: What *has* allowed these erstwhile enemies to reach out to each other? How stable is their trusting behavior, and what might undermine the very fragile trust that makes these steps possible? What might turn their lands into battlegrounds again, where trust and cooperation are seemingly beyond the grasp of human actors?

These efforts have vast international significance, but even in the most ordinary and everyday events, trust is just as essential and just as fragile. Trust is essential because some trusting first move underlies even the simplest of commercial transactions.[1] Even a rudimentary barter trade

* Gordon Bradford Tweedy Professor of Law and Organization, Yale Law School.

[1] *See, e.g.*, Kenneth J. Arrow, *Gifts and Exchanges*, *in* ALTRUISM, MORALITY, AND ECONOMIC THEORY 13, 24 (Edmund S. Phelps ed., 1975) (affirming the importance of truthfulness and trust for commercial transactions); Carol M. Rose, *Giving, Trading, Thieving, and Trusting: How and Why Gifts Become Exchanges, and (More Importantly) Vice Versa*, 44 FLA. L. REV. 295, 311-13 (1992) (explaining why trust is essential in exchange); *see also* Partha Dasgupta, *Trust as a Commodity*, *in* TRUST: MAKING

depends to some degree on trust; that is, each party's trust that when the goods are on the table, the other party will not grab everything and run.

But why is trust fragile in these basic commercial activities? The problem is that even the simplest trade has some element of the notorious "Prisoners' Dilemma," in which "defection" is the dominant strategy of each player, even though cooperation would yield the most benefit for all of them as a collectivity.[2] This means that when two rational actors—those who seek to maximize individual benefit—engage in a trade transaction, the first actor believes he will be worse off if he trusts the second actor than if he just grabs and runs, because that is precisely what he expects the second actor to do.

To be sure, some scholars, notably Robert Axelrod, have concocted elaborate computerized playoffs to test strategies that might overcome the dreaded Prisoners' Dilemma. The tough but cooperative strategy of "tit-for-tat" dominated other strategies in Axelrod's simulated games,[3] suggesting that perhaps cooperation can prosper after all. To make tit-for-tat work, though, there is a catch: The players must begin with an unexplained and trusting "nice" move.[4] If they do not, tit-for-tat gets nowhere. Even if some players would like to make such a move, other scholars suggest that it might not be such a good idea after all. For example Jack Hirshleifer and Juan Carlos Martinez Coll worked out simulations of one-shot "elimination" games[5]—where winners take all and

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AND BREAKING COOPERATIVE RELATIONS 49, 64 (Diego Gambetta ed., 1985) [hereinafter TRUST] (describing trust as a "public good").

[2] *See* Jack Hirshleifer, *Evolutionary Models in Economics and Law: Cooperation Versus Conflict Strategies*, 4 RES. LAW & ECON. 1, 17 (1982) (presenting the model of the "Prisoners' Dilemma").

[3] ROBERT M. AXELROD, THE EVOLUTION OF COOPERATION 27-54 (1984). A player using a tit-for-tat strategy emulates the just-played move of the other, rewarding cooperation with a reciprocal cooperative move but punishing defection with reciprocal defection. *Id.* at 31.

[4] *Id.* at 31. For an earlier exploration of the importance of the first "nice" move, see Robert L. Swinth, *The Establishment of the Trust Relationship*, 11 J. CONFLICT RES. 335, 343 (1967) (asserting that the establishment of trust between two interdependent people can be accomplished in two steps: the first player exposes herself to risk, and the second player declines to take advantage of that exposure, foregoing personal gain).

[5] Jack Hirshleifer & Juan Carlos Martinez Coll, *What Strategies Can Support the Evolutionary Emergence of Cooperation?*, 32 J. CONFLICT RES. 367 (1988) (outlining and reporting results of computer-simulated elimination tournaments pitting three strategies against each other: (1) COOPERATE; (2) DEFECT; and (3) either TIT-FOR-TAT, BULLY, or PUNISHER). Hirschleifer and Martinez Coll's article also describes a number of complexities that make tit-for-tat a considerably less robust strategy than Axelrod advocates. *See id.* at 395 (disputing the effectiveness of a tit-for-tat strategy in contexts other those meeting Axelrod's precise specifications).

losers drop out—in which defectors quickly extirpated cooperators.[6] Even the nice-but-tough tit-for-tat players, who open with a cooperative first move, fared poorly in elimination tournaments as opposed to repeat-play tournaments; unless they could somehow "recognize" defectors in advance and avoid them, tit-for-tat players were quickly wiped out.[7] Of course, unless the entire game is set up in advance for repetition,[8] we don't know whether any particular game will emerge as the happy repeat play that rewards "niceness," or as the disastrous one-shot deal that punishes it. The prudent move is to assume the worst, not play at all, and not trust anyone who does.

So why does anyone trust anyone? How do trust and cooperation get started? Some legal scholars like to think that law makes trust possible,[9] but that is not really a complete answer, because it begs the question of how people cooperate to establish law.[10]

As a practical matter, of course, these are all just musings, because a great deal of trust and cooperation occurs in the world, with or without or the background of legal compulsion. In real life, people seek explanations or justifications not for trustworthiness, but for defections from it.[11] Edna Ullmann-Margalit's important book about cooperation makes the point that even if we don't know *why*, we can predict *that* we will find norms of cooperation when people need them.[12] If we can find coopera-

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[6] *Id.* at 394 (concluding that in elimination tournaments, "cooperators will always be driven to extinction").

[7] *Id.* at 393-94 (showing that tit-for-tat dominates defectors only when tit-for-tat recognizes defectors; if recognition requires tit-for-tat to lose a round to a defector, and loss means elimination, defectors eliminate tit-for-tat).

[8] For an exploration of the limited possibilities for cooperation even under conditions of repeat play, see generally Frederick Schick, *Cooperation and Contracts*, 8 ECON. & PHIL. 209 (1992) (describing the limited circumstances in which rational people cooperate in a repeat-play "supergame").

[9] *See, e.g.*, Douglas G. Baird, *Self-Interest and Cooperation in Long-Term Contracts*, 19 J. LEGAL STUD. 583, 584 (1989) (asserting that contract law induces cooperation and beneficial transactions by helping parties overcome mutual suspicion).

[10] *See* Rose, *supra* note 1, at 314-15 (pointing out that contract law, like exchange itself, is dependent on an initial gift of organizational effort); *see also* James E. Krier, *The Tragedy of the Commons, Part Two*, 15 HARV. J. L. & PUB. POL'Y 325, 334-38 (1992) (discussing, in the context of "free market environmentalism," the question-begging character of legal and cooperative solutions to the "tragedy of the commons").

[11] *See* Theodore R. Sarbin, *A Criminological Approach to Security Violations*, *in* CITIZEN ESPIONAGE: STUDIES IN TRUST AND BETRAYAL 107, 118-22 (Theodore Sarbin et al. eds., 1994) [hereinafter CITIZEN ESPIONAGE] (arguing that citizen spies create elaborate and continually evolving "self-narratives" to justify and explain their betrayals of trust); *cf.* JAMES Q. WILSON, THE MORAL SENSE 52-53 (1993) (observing that because people believe that "justice and sympathy are important," they must rationalize indifference to suffering to make their actions morally acceptable).

[12] EDNA ULLMANN-MARGALIT, THE EMERGENCE OF NORMS 9-11 (1977) (positing

tion, then we can also find trust. Unfortunately, as a second practical matter, need is often not enough either: Potential deals fall apart, courtships flounder, joint ventures collapse, and feuds and wars drag on. Trust is needed to start cooperation over again, but here trust dies on the vine.

Some theorists suggest that there really is no rational explanation for trust. Jon Elster points out that a thoroughgoing rationalist could not even *understand* cooperation, and could not comprehend how anyone would make a first trusting step out onto the cooperative limb of a decision tree.[13] Robert Frank argues that first moves toward cooperation really are not rational at all but are grounded in the emotions instead.[14] If that is so, then trust must also depend on emotion, or rather, on one person's assessment of the emotions of another.

All of this leads to three conclusions. First, pure rationality argues against trust. Second, people trust each other anyway. Third, it is very important that they do so, because without trust, we could not undertake any cooperative ventures, from the most trivial to the most cosmic.[15]

If trust is not perfectly rational, then, might it be semi-rational? That is, are there more or less *good grounds* for trust, even accepting that pure rationality generally should make us suspicious?

At this point I need to insert an explanation. What people often consider "real" or "true" trust is a kind of confidence that does not even ask for good grounds. People usually think of children and pets as trusting in this intuitively appealing way. If we define trust to mean only this innocent and unquestioning kind of trust, then there is no such thing as rational trust, or even semi-rational trust, because "real" trust does not ask for reasons.

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that human interactions can generally be classified as Prisoners' Dilemma, Coordination, or Inequality situations, and asserting that the existence of norms in these situations may exemplify the presence of an "invisible hand"); *see also* Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23, 45 (1989) ("Cooperative behavior is often observed in settings where the unalloyed rational-actor model would be unlikely to predict it.").

[13] JON ELSTER, THE CEMENT OF SOCIETY 5 (1989) (making this point in the context of a simulated game involving two rational actors); *see also* Bernard Williams, *Formal Structures and Social Reality*, *in* TRUST, *supra* note 1, at 3, 6-13 (describing the fragile formal structure of trusting first moves).

[14] ROBERT H. FRANK, PASSIONS WITHIN REASON: THE STRATEGIC ROLE OF THE EMOTIONS 47-53 (1988) (giving examples of "the commitment problem" and arguing that people's actions in situations requiring commitment or trust result directly from feelings and emotions, and only indirectly from rational thought).

[15] *See* Annette Baier, *Trust and Antitrust*, 96 ETHICS 231, 235-36, 241 (1986) (relating trust to the need to rely on others because of the basic human inability to be completely self-sufficient); Russell Hardin, *The Street-Level Epistemology of Trust*, 21 POL. & SOC'Y 505, 507 (1993) (concluding that distrust can lead to greater aggregate losses than misplaced trust because of lost opportunities for long-term relationships).

Semi-rational trust, by contrast, is something less than this "real" trust: It is a trust that asks for assurances and monitoring. This kind of trust is a *doubting* or *suspicious* trust—the trust of Thomas, say, rather than Matthew, Mark, Luke, or John. I suggest that a lot of us are rather more like Thomas than perhaps we would like to be, but if we waited for complete faith, we would exclude a lot of behavior that most people actually call "trusting."[16]

To explore the possibility of semi-rational trust, we must search for the basis of trust*worthiness*. When can A reasonably expect that B will cooperate and not defect?[17] To ask the question another way, when can A be more or less justifiably confident that some factor constrains B's self-serving behavior?

II. Semi-Rational Trust and the Constraints on Defection

Robert Ellickson has outlined a useful typology of constraints on self-interested behavior, labeling those constraints as first-party, second-party and third-party.[18]

First-party constraints are those that one puts on one's self.[19] They are motivated by such attributes as personal rectitude, honor, loyalty, love, and the like. Their primary enforcers are sleepless nights, regrets at love lost, the inability to live with one's self if one abandons a commitment, and all the visitations of the voice of conscience.

Second-party constraints are, roughly speaking, the "tit-for-tat" considerations elaborated by Robert Axelrod in *The Evolution of Coopera-*

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[16] *See* Charles F. Sabel, *Studied Trust: Building New Forms of Co-operation in a Volatile Economy*, *in* Industrial Districts and Local Economic Regeneration 215, 217, 224 (Frank Pyke & Werner Sengenberger eds., 1992) (describing one version of trust as an involuntary state akin to drowsiness or spontaneity, but observing that people in fact "negotiate" trust and think that trust is compatible with concern about breach).

[17] *See* Hardin, *supra* note 15, at 505 (asserting that the potential truster's knowledge is a central element in a rational theory of trust). Hardin also notes that trust depends not on one's assessment of self-interest, but on one's assessment of the interests of the person being trusted. *Id.* In this way, my "semi-rational trust" is similar to Hardin's "street-level epistemology of trust." Further, Hardin observes that much of the literature on trust neglects to address the question of trust*worthiness*, despite the interconnectedness of the two issues. *Id.* at 512.

[18] Robert C. Ellickson, *A Critique of Economic and Sociological Theories of Social Control*, 16 J. Legal Stud. 67, 71-72 (1987); *see also* Jonathan Bendor & Dilip Mookherjee, *Norms, Third-Party Sanctions, and Cooperation*, 6 J.L., Econ. & Organization 33, 34 (1990) (suggesting that societal norms may enhance cooperation because they are backed up by first-party, second-party, and third-party constraints on behavior); Ellickson, *supra* note 12, at 46 (opining that "in many contexts at least, first-party systems of social control are cheaper to administer than third-party systems are").

[19] Ellickson, *supra* note 18, at 71.

tion.[20] These constraints are especially important in what we might broadly call contractual relations: A is dealing with a partner B who can retaliate, and A is kept in line by her awareness of B's retaliatory capacity. By parity of reasoning, if B knows that A can retaliate, B too stays in line.[21]

Third-party constraints are those imposed by outsiders who take enforcement upon themselves,[22] even though they are not party to any relevant transactions and have no direct gains or losses from them. This kind of restraint punishes bad behavior by shaming, gossip, ostracism, refusal to deal, and sometimes even physical violence. Third-party constraints induce A to behave cooperatively with B because A is concerned about her reputation with those third parties, or she is nervous that they may volunteer to punish any defection that she perpetrates on B.

Law also functions as a third-party constraint, albeit a formal one. Though past jurisprudes have made much of legal constraints as the sinews and bones of social order, Ellickson and others, especially scholars in what is called the "Law and Society" movement, have argued that formal law is vastly overrated as a restraint on behavior.[23] These scholars stress that law has to be understood in the real world—the world studied by psychologists, sociologists, and anthropologists.[24] They think that informal first-, second-, and third-party constraints may often be far more important than formal law in constraining would-be defectors.[25] I will come back to this argument later.

Whether formal or informal, though, any of these constraints on defec-

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[20] AXELROD, *supra* note 3.

[21] *See* Ellickson, *supra* note 18, at 71-72 (describing these controls as "rewards and punishments" administered by the promisee, "depending on whether the promisor adheres to the promised course of behavior").

[22] *See id.* (listing social forces, organizations, and governments as types of third-party "controllers").

[23] *See id.* at 67-68 (criticizing the Hobbesian paradigm, in which the legal system is "the wellspring of social order"); *id.* at 81-83 (criticizing the "legal centralism" of modern law-and-economics scholars).

[24] *See id.* at 67 (labeling "empirical sociologists and anthropologists who study stateless societies" as the "core theorists" of the Law and Society movement); D.J. Galligan, *Introduction*, 22 J. LAW & SOC'Y 1, 6-7 (Special Issue: Socio-Legal Studies in Context: The Oxford Centre Past and Present, 1995) (arguing that law must be studied "in its social context," and that social sciences, including sociology, anthropology, psychology, and others, are essential for that study).

[25] *See, e.g.*, Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 60-67 (1963) (discussing the widespread sense among businessmen that formal contract is unnecessary, and offering reasons for and against the use of contract law in business relations). Macaulay identifies two norms fueling this disdain for formal contract: the principle that "one does not welsh on a deal," and the belief that "one ought to produce a good product and stand behind it." *Id.* at 63.

tion should make person A at least somewhat trustworthy. If person B knows that A is constrained in one way or another, then B's trust in A is at least semi-rational. The next question, then, is whether people actually *use* these constraints as a basis for trust.

The answer is, of course they do. From the perspective of rationality, or even semi-rationality, the trickiest trust grounds must be the first-party constraints; that is, the trust that A has in B because B is loyal, upstanding, or loving. A really cannot get inside B's head to experience B's adoration, guilt, or pride. But B clearly thinks that A can be made to trust him on those grounds, which prompts B to go on at length to assure A of his personal rectitude or undying loyalty. For her part, A observes these and other signs of B's character; she tests them, fosters them, and fiddles with them. Readers may recall, for example, how Mrs. Portnoy tweaked her son Alex's guilt, just to make the kid reliable.[26] People aside from Mrs. Portnoy are quite obviously aware of first-party constraints, and they try to assess and manipulate them. I will call this basis of trust *character*.

Second-party constraints also give rise to a good deal of trusting behavior, though subject to the objection that perhaps it is not trust, but rather A's ability to retaliate, that allows A to rely on B. As I mentioned, though, semi-rational trust is a kind of doubting trust. Insofar as trust is coextensive with confidence, the possibility of self-help—that is, striking back when one loses confidence—seems to be a fairly solid ground for semi-rational trust.

People do search for ways to give and receive second-party reassurances, often by exchanging what Oliver Williamson has called "hostages."[27] For example, courts often require criminal defendants to post bail to assure their reappearance on the date of trial. A home seller will insist that a potential buyer leave a deposit, to assure the seller that the buyer is serious during the time allotted to assembling the finances and making necessary inspections. More generally, A knows that B is much more likely to trust her with an asset of his, if he can keep one of hers as a safeguard. In all of these situations, both parties are reassured about the other's trustworthiness. I will call this trust-ground *retaliation*.

Third-party constraints also seem to be a reliable ground for confidence, though perhaps less so than retaliatory self-help. Here, A trusts B not because A can directly retaliate, but because A knows that B cares about his image or reputation with some group C through Z, whose members do not like defectors. If A knows that C through Z will snub a defecting B, gossip about B, or harass B in some other way that makes

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[26] PHILIP ROTH, PORTNOY'S COMPLAINT (1969).

[27] *See* Oliver E. Williamson, *Credible Commitments: Using Hostages to Support Exchange*, 73 AM. ECON. REV. 519, 519 (1983) (arguing that "the economic equivalents of hostages [are] widely used to effect credible commitments" in bilateral exchanges).

him suffer, then A can trust B to at least some degree. Indeed, A and B frequently try to bolster mutual trust by giving and receiving these third-party assurances. Asian and West African immigrants have used this type of reassurance to undergird the rotating credit associations through which they often finance their small business ventures. They generally restrict membership in such borrowing circles to friends, family, and compatriots, because these connected persons can be made to feel the intense sting of ostracism should they defect.[28] To the extent that the law itself is also a third-party enforcer, people use legal arrangements to shore up trust and smooth out business relations. For example, auto manufacturers, in order to entice consumers to buy more cars, might offer warranties that reassure buyers against shoddy products; here, contract law, rather than repeat play, is the implicit enforcer of the warranty. I will call this trust-ground *punishment*, though perhaps the name is unduly sharp.

Naturally, all these trust grounds may be mutually reinforcing, though they need not be. Take the situation of a Mafioso. As a first-party matter, he can be trusted for his *omertá*—his sworn honor—but reinforcing his *omertá* is his fear that a betrayed second party may arrange for his car to blow up, or that members of the more extended criminal group—third parties—may take it upon themselves to provide him with a pair of concrete shoes. All those constraints make the Mafioso an object of trust, or at least of semi-rational trust, to the members of his organization. The example also suggests, of course, as does the legal category of antitrust, that not all forms of trust and cooperation are benevolent.[29] In the case of the Mafioso, as well as with members of cartels in general, the third-party constraint of law operates not to reinforce trust, but rather to disrupt it. Other examples of cross-purpose trust grounds abound, particularly in literature: Romeo and Juliet might trust each other on the basis of their mutual assurances of love as well as their shared plight, but the third-party constraints of community norms work against that trust, even if unsuccessfully.

In sum, the major factors behind semi-rational trust are *character*, *retal-*

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[28] *See* IVAN LIGHT, ETHNIC ENTERPRISE IN AMERICA: BUSINESS AND WELFARE AMONG CHINESE, JAPANESE, AND BLACKS 22-35 (1972) (describing rotating credit associations among Asian and West African immigrants to the United States); *id.* at 58-60 (observing that Asian credit associations rely on the "informal and moralistic social relations" of their members as security against the risks inherent in lending); JANET TAI LANDA, TRUST, ETHNICITY, AND IDENTITY 102-07 (1994) (discussing trading within an "ethnically homogenous middleman group" as a response to contract uncertainty). Berry Gordy, the founder of Motown Records, started his business with a loan from his family's revolving credit fund. *See* BERRY GORDY, TO BE LOVED 104-08 (1994) (describing Berry's difficulties first in finding a source of funds and then in persuading family members to loan him $800 from their credit fund).

[29] *See* Diego Gambetta, *Can We Trust Trust?*, *in* TRUST, *supra* note 1, at 213, 214 (noting the malevolence of some trusting relations).

iation, and *punishment*—that is, trust based on first-party, second-party, and third-party constraints, respectively. These may work with each other, separately from each other, or against each other.

It is important to stress that all of these trust grounds engage the trusting party in a considerable amount of checking, monitoring, and reassurance. Consider first-party *character*. All of us have assessed the emotional state of others: parents, kin, friends, acquaintances, strangers. We want to know about those first-party constraints of love, loyalty, conscience, and guilt, and we have some confidence in our ability to discern them. The very appearance of the other person may help us to monitor his or her trustworthiness, a point immortalized in The Eagles' line, "You can't hide your lyin' eyes."[30] Moreover, even if one can hide one's lying eyes, one's lying body posture may be more difficult to conceal.[31] Other rules of thumb may also act as guides, though some might be of rather dubious validity. For example, one study indicates that people seem to think women as a gender are more trustworthy than men, though they do not necessarily apply this expectation to particular women or particular situations.[32]

Next consider *retaliation*. For a tit-for-tat strategy to work as a ground for confidence, A has to know what B is doing, and she needs to be sure that B is not sneaking something unscrupulous past her. Moreover, A needs to know that B still cares about whatever it is that A would use for retaliation. Thus second-party constraints also require A to engage in at least some monitoring of B.

The situation is similar with *punishment*. For third-party constraints to be effective, A has to know that B really cares about his status with, say, his church group, or that B wants to keep out of jail. In addition, A must be sure that the enforcing third parties will find out about any cheating by B, and will be sufficiently indignant to punish B.[33]

Clearly, monitoring and assurance are features of all these semi-rational trust-grounds. However, the extent to which one party monitors or demands reassurance from the other will be limited by the cost of

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[30] THE EAGLES, *Lyin' Eyes*, *on* THE EAGLES: THEIR GREATEST HITS (1971-75) (Elektra/Asylum/Nonesuch Records 1976) ("You can't hide your lyin' eyes, and your smile is a thin disguise.").

[31] *See* FRANK, *supra* note 14, at 114-33 (discussing a variety of physical cues, including facial expression, voice, and body language, in a chapter entitled "Telltale Clues").

[32] *See* John Orbell et al., Trust, Social Categories, and Individuals: The Case of Gender 16 (Nov. 1994) (drawing such a conclusion from experiments involving Prisoners' Dilemma games) (unpublished manuscript, on file with *Boston University Law Review*).

[33] James S. Coleman notes that trust based on third-party punishment may be weakened by a public-goods problem, because each potential punisher may prefer to leave the task to others. JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY 115-16 (1990).

those endeavors. One could hypothesize that the heaviest monitoring and reassurance occurs at the beginning of a trusting relationship, when A's confidence in B is shaky. Further along in the relationship, semi-rational people are likely to ease off and neglect some of the continued double-checking that truly rational actors might prefer. Indeed, perhaps they *should* ease off; policing and monitoring consume time and effort, which could eliminate all the gains from cooperative ventures.

Perhaps as a kind of adaptive response, people do not *like* to be monitored. They may well mistake monitoring and questioning for distrust or hatred, and in so doing, communicate to the other party that she should take things more lightly. Harold Garfinkel performed some interesting experiments in this regard, in which students were made to question or express distrust of the assertions of their friends and families. The friends and families took this extremely badly. "Are you sick?" they said, at first quizzically, and then angrily. They took it so badly, in fact, that the students had a great deal of trouble keeping up their assigned ruses.[34]

The lesson to be learned here is that constant monitoring and checking can poison the atmosphere. These activities have the appearance of a slur on the character of the monitored party. Indeed, the monitored party, feeling distrusted, may actually behave worse. By contrast, unquestioning trust has a very appealing quality to which people seem to respond well. This is demonstrated by pet therapy programs in a great variety of institutional settings: The animals give affection and trust unreservedly, and can stimulate emotional expression, brighten moods, and encourage more sociable behavior in the recipients.[35] Jon Elster attributes the first trusting step in a cooperative relation to something that he labels "magical thinking": A believes that B will behave in the same way that A does, and will therefore emulate A's trusting and cooperative moves.[36] Oddly enough, this magic very often seems to work.[37] Suspicious behavior, on

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[34] *See* BERNARD BARBER, THE LOGIC AND LIMITS OF TRUST 11-14 (1983) (summarizing Garfinkel's experiments and concluding therefrom that "[t]he absence of trust in the moral social order is very difficult to accept or to perpetrate").

[35] *See, e.g.*, Helen de Bertodano, *Prison Pets Help to Tame the Wildness of Convicts*, SUNDAY TELEGRAPH (London), Jan. 10, 1993, at 10 (reporting defused tensions and increased expressions of emotion among British convicts allowed to care for pets while in prison); Jacqueline Heard, *Pet Therapy Gains Popularity*, CHI. TRIB., Oct. 25, 1987, § 18, at 14 (describing the benefits of animal-assisted therapy programs for such diverse groups as hospital patients, abused or autistic children, the elderly, psychiatric patients, and prisoners).

[36] *See* ELSTER, *supra* note 13, at 195-201 (elaborating such thinking as the belief that "my cooperation can cause others to cooperate" and expressing surprise that some researchers think this belief is rational).

[37] *See* Swinth, *supra* note 4, at 337 (concluding from experiments that many more people are willing to respond to a cooperative move initiated by the other party than are willing to make the initial move themselves); *see also* Peter Kollock, *The Emergence of Exchange Structures: An Experimental Study of Uncertainty, Commitment,*

the other hand, may itself foster uncooperativeness.[38]

Monitoring is costly, then, both because it imposes direct burdens on the monitor and because it may engender a countersuspicion in the monitored party. For those reasons, there may be a kind of entropy of semi-rational trust over time. First, all the other trust grounds may dissolve into a trust in the other party's character—that is, trust based on first-party constraints, which are of course particularly difficult to monitor. Then, if things go well, monitoring may cease altogether. The entropy pattern is this: A gradually stops watching B and threatening B with some nasty consequence of defecting; then A starts to rely on B's upright character; and finally A just stops thinking about B's trustworthiness. This may be one reason why unguarded trust appears to be fairly common. In a way, this slide from semi-rational trust to unguarded trust is a kind of moral equivalent of the human belief in causality; as Hume observed, we have a propensity to believe that the future will be like the past.[39]

Of course, the future sometimes is not like the past, and trusted parties do betray the trusting ones. Naturally, lawyers are interested in that pattern. In fact, the law offers an unparalleled window on betrayals, an endlessly fascinating aspect of trust.

III. BETRAYALS: HOLDING THE MIRROR TO TRUST

The law's portraits of betrayals are sometimes oddly skewed, as parties try to fit their situations into various legal categories, or alternatively, escape from them. Still, it is hard to find a more fulsome repository of betrayal than law. It is an important repository, too, because betrayals cast a special light on trusting behavior. Betrayers have to induce trust by simulating reassuring appearances in a convincing way, or by inducing the victims to dispense with reassurances altogether. Either way, betrayers tell us a good deal about how and why people trust other people, even if mistakenly. It is in this sense that betrayals hold up a mirror to trust.

This Part takes up some quite egregious examples of betrayals of trust. Each example involves betrayal of a different type of trust—trust based on first-party constraints, second-party constraints, and third-party con-

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and Trust, 100 AM. J. SOC. 313, 337-38 (1994) (observing that in simulated trade relations, subjects who had been able to establish trust in trade developed very positive feelings toward one another).

[38] For a demonstration of a slightly different connection between suspiciousness and untrustworthiness, see FRANK, *supra* note 14, at 142-43 (describing a cooperation experiment in which subjects who predicted that a partner would cooperate tended to cooperate themselves, but subjects who predicted defection were themselves likely to defect).

[39] DAVID HUME, AN INQUIRY CONCERNING HUMAN UNDERSTANDING 51-53, 56 (Charles W. Hendel ed., The Liberal Arts Press, Inc. 1955) (1748) (arguing that the human belief in causality rests on the notion that the future will be like the past, and that this belief rests on custom rather than reason).

straints, in that order. For each type of betrayal, I have chosen what I hope is an exemplary crime.

A. *Bigamy: The Betrayal of Intimate Trust*

Infidelity, especially in its criminal form as bigamy, involves a betrayal of trust among intimates. I put to one side here consensual polygamy as it exists in some religious sects and traditional societies. What I mean is the bigamy in which one party consciously marries two or more spouses, and none of these spouses knows a thing about the other or others.

I think it is fair to say that, in general, the primary guarantor of marital fidelity is the first-party constraint of character, especially in the forms of love and loyalty. Partners look to each others' character for reassurances. B is crazy about A and wouldn't cheat on A for the world. What's more, if he does, A will make him feel like the guilty dog he is, thus reinforcing his first-party constraints. Second-party constraints add to the first-party ones: B knows that if he cheats, A can cheat back or get back at him some other way, such as by using his new car for target practice, or picking fights about a lot of unrelated matters when B knows full well what the real issue is. There are likely to be third-party constraints as well: B will face the disapprobation of the family, the kids, the neighbors, and the church parish. On the whole, though, the primary ground of trust in marriage is likely to be character, and when one spouse gets betrayed, he or she has made a mistake about the other's character.

The law does make these betrayals less attractive, but the legal response is calibrated to the seriousness of the offense. Modern sociobiologists suggest that infidelity has rather different impacts on male and female reproductive strategies,[40] and indeed, older law seemed to reflect some of that attitude, though no doubt for reasons other than sociobiology.[41] However, I want to focus on a different legal distinction, and a

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[40] MARTIN DALY & MARGO WILSON, SEX, EVOLUTION, AND BEHAVIOR 294 (2d ed. 1983) (observing that sociobiologists would predict men and women to have different types of sexual jealousy because infidelity's threat to men is impregnation of the wife by another, whereas the threat to women is the diversion of resources from the family); *see also id.* at 293 (stating that although American law gives both men and women the right to a divorce if the spouse commits adultery, data suggest that men appear more inclined to actually exercise that right).

[41] *See, e.g.*, State v. Holland, 145 S.W. 522 (Mo. Ct. App. 1912). In this case, the defendant—a married man—argued that he could not be charged with adultery unless he cohabited with a married woman. *Id.* at 522-23. This argument was based on the common-law notion that the crime was the adulteration of the "pure blood" of a family, which was possible only through the woman; thus, the defendant argued, the female participant had to be a married woman for him to be guilty of adultery. *Id.* at 523. The court rejected this theory after an interesting discussion of its history in Roman and ecclesiastical law, and made clear that both parties would be guilty of adultery if either were married. *Id.*

quite interesting one, between adultery and bigamy.

Adultery was not a crime at English common law, but it was later criminalized in much of this country.[42] Indeed, some colonial New England jurisdictions took adultery quite seriously.[43] On the whole, though, where adultery is still a criminal offense, it is generally a fairly trivial one.[44] The legal issues around adultery are more likely to be civil matters; for example, adultery has long been a ground for divorce,[45] but then, plenty of other things can also be grounds for divorce. However painful the subject may be for the parties, the law's current view of adultery is close to "You like tomato and I like tomahto, . . . let's call the whole thing off."[46]

Bigamy, on the other hand, is considerably more than a civil matter between the partners. Bigamy may be defined as a serious crime, indeed as a felony, even in places that have not criminalized simple adultery.[47] Why should the law take bigamy so much more seriously? One answer is that the consequences to the betrayed may be more severe. The stigma of illegitimacy is visited upon the new children, though that is true of

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[42] *See id.* at 523 (asserting that adultery was criminalized in America as a moral offense rather than as a common-law crime).

[43] *See* EDMUND MORGAN, THE PURITAN FAMILY 41 (1944) (noting that adultery was a capital crime in 17th-century Massachusetts and Connecticut, but was generally punished more lightly with fines, whippings, the forced wearing of the letter "A", and mock versions of hanging).

[44] Some states have repealed criminal penalties for adultery. *E.g.*, CAL. PENAL CODE § 269a (West 1988) (repealed 1975); CONN. GEN. STAT. ANN. § 53a-81 (West 1994) (repealed 1981); VT. STAT. ANN. tit. 13, § 201 (1994) (repealed 1981). Other states treat adultery as merely a misdemeanor. *E.g.*, GA. CODE ANN. § 16-6-19 (1992); KAN. STAT. ANN. § 21-3507 (1988); N.Y. PENAL LAW § 255-17 (McKinney 1989); UTAH CODE ANN. § 76-7-103 (1995); W. VA. CODE ANN. § 61-8-3 (1992); *see also* MD. ANN. CODE art. 27 § 4 (1992) (requiring that any person convicted of adultery be fined $10); N.D. CENT. CODE § 12.1-20-09 (1985) (making adultery a misdemeanor but providing for prosecution only upon complaint of the offended spouse). However, adultery still officially carries the potential for incarceration in some states. *See* MASS. GEN. L. ch. 272 § 14 (1993) (providing for a penalty of up to three years in state prison); S.C. CODE ANN. § 16-15-60 (Law. Co-op 1985) (providing for potential imprisonment for up to one year).

[45] Under Connecticut law, for example, adultery is no longer a crime, *see supra* note 44, though it may be a ground for divorce. *See* CONN. GEN. STAT. ANN. § 46b-40(c)(3) (West 1986) (allowing for dissolution of marriage, or legal separation, upon a finding that adultery has occurred).

[46] IRA GERSHWIN & GEORGE GERSHWIN, *Let's Call the Whole Thing Off*, *on* SHALL WE DANCE? (RKO 1937).

[47] *See, e.g.*, CAL. PENAL CODE § 283 (West 1988) (making bigamy punishable by a fine of up to $10,000 or imprisonment not exceeding one year); CONN. GEN. STAT. ANN. § 53a-190 (West 1994) (making bigamy a felony); VT. STAT. ANN. tit. 13, § 206 (1974) (providing that bigamy is punishable by imprisonment for up to five years). Note that adultery is not a crime in any of these states. *See supra* note 44.

children of adulterous relationships as well, and in any event is probably less important now than it once was. More importantly, the new spouse's and children's claims on the bigamist's assets may be limited if the bigamist has prior marital and family obligations of which the new spouse was never made aware.

There is an odd analogy to this situation in mortgage law. Like the adulterer whose behavior may precipitate a civil action for divorce and attendant property settlement, the defaulting mortgagor is treated merely as one who breaches a contract, and is subject only to the civil remedies of foreclosure and damages. On the other hand, the person who conceals a *prior* mortgage from a later lender or buyer is treated as the perpetrator of a criminal fraud,[48] as is the bigamist who conceals prior marital commitments. Aside from the consequences to the betrayed, the nub of the difference may be the fraudulent party's lying at the outset,[49] both with respect to prior marriages and prior mortgages. Adultery, like failing to

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[48] *See, e.g.*, State v. Haas, 675 P.2d 673 (Ariz. 1984) (upholding the conviction of a purchaser whose offer suggested a first mortgage retained by the seller, but who actually granted either sham security interests or mortgages on already heavily encumbered property); State v. Mills, 396 P.2d 5 (Ariz. 1964) (upholding the conviction of a borrower who ostensibly granted the lender security through first mortgages on certain properties, but who actually granted second mortgages on different and previously encumbered properties); *In re* People v. Jory, 505 N.W.2d 228, 233-34 (Mich. 1993) (affirming that one may commit the crime of obtaining money by false pretenses by either making affirmative misrepresentations or maintaining silence regarding prior encumbrances on property).

Major security interests in real estate are generally recorded, which means that property purchasers can discover prior encumbrances by examining public records. Nevertheless, courts have long held that the availability of this information does not preclude the criminal conviction of those who affirmatively misrepresent that the property for sale is free of prior encumbrances. *Jory*, 505 N.W.2d at 235 n.10 (agreeing with this principle and listing supporting cases, some nearly 100 years old, from diverse jurisdictions); *see also* Smith v. State, 98 So. 586, 587-88 (Fla. 1923) (discussing mixed case law on the issue, but siding with the majority of jurisdictions in upholding conviction); *cf.* MODEL PENAL CODE § 223.3(4) (1962) (defining "theft by deception" to include "purposely obtain[ing] the property of another by . . . failing to disclose a known lien, adverse claim or other legal impediment to the enjoyment of property which he transfers or encumbers in consideration for the property obtained, *whether such impediment . . . is or is not a matter of official record.*" (emphasis added)). *But see* Criner v. State, 109 So. 417 (Fla. 1926) (asserting, in reversing the conviction of defendants for defrauding by false pretenses, that "[t]itles are matters of public record and possession, . . . and the prospective purchaser may usually protect himself by . . . an investigation [of the records]"). It is interesting that *Criner* nowhere mentions *Smith*, a case decided by the same court just three years earlier.

[49] *See generally* Arthur R. Pearce, *Theft by False Promises*, 101 U. PA. L. REV. 967 (1953) (describing at length and condemning the longstanding legal "dogma" requiring that the crime of false promises concern misrepresentations of presently existing facts rather than future matters, including intentions about the future).

make mortgage payments, is a lapse occurring somewhere later in the relationship, and is less blameworthy in the eyes of the law.

What makes people believe that bigamists are eligible marriage candidates? The bigamist seems primarily to manipulate the victim's trust in those reassurances that are most difficult to monitor, namely the purported first-party constraints of the bigamist's love, loyalty, and fidelity. Because these constraints are difficult to monitor, however, the object of the bigamist's self-reported love and loyalty might be expected to greet the bigamist's assertions with skepticism.

On the other hand, there are several reasons why the bigamist's professions may be particularly unlikely to receive close scrutiny. First, in the intimate circumstances of courtship, it could be extremely disruptive to inquire closely into the suitor's past love life, or to insist on ironclad reassurances that the suitor is eligible. This type of detailed inquiry invites hurt and huff, and perhaps departure. Further, the bigamist's stories are typically flattering to the victim, making them easy to believe. As Arthur Leff points out, con artists are very much aided by victims' unwillingness to believe themselves gullible.[50] Finally, the bigamist's major story—that he or she is unmarried—fits well into a victim's ordinary expectations.

This last point is due in no small measure to the fact that it is quite difficult to bring off a deceit of this sort, especially when the bigamist maintains two (or more) marriages simultaneously. Mere affairs are tricky enough to conduct, but in those cases, the "outside" man or woman is likely to know about the ruse, and may cut the adulterer a bit of slack, even if grudgingly.[51] Bigamy, however, must be concealed from *both* betrayed spouses, which undoubtedly increases the complications. One has to wonder how a recent bigamist—a college student who had one wife in his hometown of Manhattan, Kansas, and a second on campus in Wichita—managed his life.[52] Although this bigamist had an excuse for travel, his finesse still seems quite remarkable.

Most bigamies appear to be considerably less spectacular, however; they are simply sequential relationships where the bigamist has parted

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[50] ARTHUR A. LEFF, SWINDLING AND SELLING 84-87 (1976) (describing the difficulty "marks" have in believing they could be fooled, and likening the phenomenon to "cognitive dissonance" in psychology and "sunk costs" in economics). In a related vein, some psychologists report a "confirmation bias" in their experiments: Subjects who form an opinion appear to search data for confirmation rather than challenge. *See* David Good, *Individuals, Interpersonal Relations, and Trust*, *in* TRUST, *supra* note 1, at 31, 42-43.

[51] *But see* IRMA THOMAS, *You Can Have My Husband (But Please Don't Mess With My Man)*, *on* SIMPLY THE BEST: LIVE! (Rounder Records 1991).

[52] *See* State v. Fitzgerald, 726 P.2d 1344, 1345 (Kan. 1986) (upholding the conviction of the bigamist, who lived with his first wife and two children on weekends and holidays and his second wife during the week). It took 10 months for the second wife to discover the first one. *Id.*

from an earlier spouse, and remarries without bothering to divorce. The second spouse, and possibly even the bigamist, may *believe* the bigamist to be widowed or divorced.[53] Here the victim's trust may be no more than a variant on Elster's magic—if I behave properly, so will he or she—and on the Humean fallacy that this marriage candidate is like most candidates because the future is like the past.[54] In such cases, of course, this past turns out not to be like those other pasts.

In general, the law against bigamy appears to be a legal rescue operation that is aimed particularly at betrayals of the first-party reassurances of character. Because bigamy can have quite serious consequences for the betrayed, it especially undermines ordinary trust in first-party reassurances. Thus, the law bites harder on bigamy, by imposing criminal penalties, than it does on adultery, where the victim generally has only civil remedies.

It is especially interesting that the law's role here is not so much one of a formal third-party *substitute* for first-party trust as it is one of a *reinforcer* of first-party trust through punishment of extraordinary betrayals. To some degree, the legal constraints should cabin the worry and alarm of potential victims, who are enmeshed in circumstances that severely weaken their motivations to pry into the bigamist's own professions of character. The law lets people go ahead and get married without engaging in some of the monitoring and double-checking that rationality might demand.

Does the law for that reason encourage sloth? Is this why we see rather a lot of careless bigamies of the sequential sort? Perhaps so: At least in part because of the legal restraints on bigamy, this behavior lies far outside people's usual expectations, and hence outside ordinary suspicions. This suggests the danger that legal reinforcements may reduce monitoring, a subject to which I will return later.

B. *Confidence Games: The Betrayal of Trust in Deals*

For the next example, I turn to betrayals of second-party trust, the semi-rational trust that is based on a the possibility of retaliation. One might think that here the law has a lesser role to play as a reinforcer. If a victim of betrayal can retaliate, outside reassurances are not necessary. Trust here seems rational and warranted, so who needs the law?

Alas, as it turns out, quite a lot of people do. Consider one of my favorite frauds, the pigeon drop, a very interesting and very durable little crime. A venerable treatise on crimes gives several classic cases that date back to at least the 1780s,[55] but a new version, called "Spanish Lotto,"

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[53] *See, e.g.* People v. Vogel, 299 P.2d 850, 855-56 (Cal. 1956) (reversing a bigamy conviction to allow the alleged bigamist to present evidence of his good-faith belief that his wife had divorced him while he was serving in the miliary overseas).

[54] *See supra* notes 36, 39, and accompanying text (discussing Elster and Hume).

[55] J. W. CECIL TURNER, 2 RUSSELL ON CRIME 931-33 (12th ed. 1964) (citing Eng-

has hit the streets of New York in recent years.[56] In one year, Spanish Lotto bilked unsuspecting victims of over two million dollars.[57]

What happens in the pigeon drop? In one possible version, the victim, known as the "mark," finds a ring, a briefcase full of bearer bonds, or some other "valuable" on the street. Just as this happens, Con A appears and seems to make the same discovery. The mark and Con A discuss the matter, and decide they should cash in. But can they really do so? And how? As they talk, a well-dressed Con B appears and behaves as if she is appropriately impressed by the "valuable." She claims to be a lawyer, and assures them that they can indeed cash in on the found object. Moreover, Con B knows a dealer who can take it, and after some discussion, she telephones this person, who is likely to be Con C. The "dealer," however, will only take the "valuable" from reputable persons, and insists that each be able to show their worth by displaying a rather large amount of cash.

Cons A and B are more than willing to go to their banks, and they return with the required sum. They then propose that the mark get cash from the mark's savings account.[58] After some hesitation, the mark does so and returns with the money. Con B must now go to see the "dealer," taking everyone's cash with her. To reassure the mark, the "valuable" is left with him and Con A. They retire to a pub for a beer, to await Con B's call. Con A excuses himself and goes to the bathroom; after a lengthy wait for Con A's return, the mark finally checks the bathroom and finds that Con A is long gone. The mark then has the alleged valuable appraised: worthless, of course. The mark is now left to contemplate his severely depleted bank account.

What has happened here? Con A and B have used a number of

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lish cases illustrative of fraud through "ring dropping" and "purse dropping," schemes in which one person obtains money from a second on the pretext that the money secures the second person's interest in an allegedly valuable object "found" on the street); *see, e.g.*, R. v. Watson, 168 Eng. Rep. 422 (P.C. 1794) (convicting the defendant of felony larceny for engaging in ring dropping); R. v. Moore, 168 Eng. Rep. 260 (P.C. 1784) (holding that obtaining money by ring dropping is a felony); R. v. Patch, 168 Eng. Rep. 221 (P.C. 1782) (holding that obtaining property from another by ring dropping is a felony if accomplished pursuant to a preconceived scheme to steal).

[56] John Tierney, *In This Lotto, All They Need Is a Dollar and a Dupe*, N.Y. TIMES, May 17, 1991, at A1 (reporting that the operators and victims of this scam, involving altered Lotto tickets, are nearly always Hispanic). Tierney describes Spanish Lotto as a derivation of two other con games, the handkerchief switch and the pigeon drop. *Id.* at B4; *see also* Fred R. Bleakley, *Posing as Bankers and Police, Con Artists Prey on the Elderly*, WALL ST. J., Dec. 13, 1994, at B1 (describing the "bank examiner" con game as another version of the pigeon drop, an "age-old scam").

[57] Tierney, *supra* note 56, at B4 (reporting total losses for 1990).

[58] This is known in the con game trade as putting the mark "on the send." *See generally* LEFF, *supra* note 50, at 52 (explaining that a major difference between big cons and little cons is that big cons typically involve putting the mark on the send).

devices to get the mark's trust, amply illustrating Arthur Leff's argument that the swindle is a kind of drama, replete with props and supporting characters, in which the victim is unknowingly cast.[59] First, they have effectively simulated coincidence—the chance find of the jewel, the chance simultaneous appearance of Con A, the chance later appearance of Con B, a possible confirming telephone voice from Con C. The mark believes that such a string of circumstances must be add up to the truth, because each independently corroborates the others. Moreover, Con A and Con B have appeared to trust each other and to trust the mark as well, by putting cash into the hands of the others. "If A is doing this," the mark thinks, "why shouldn't I?" This ruse exploits two common features of the con game: the mark's readiness to trust a partner who exposes himself to risk,[60] and the mark's willingness to believe in what others seem to believe.[61]

Most pertinent of all, the con artists have exploited a false assurance of tit-for-tat: I'll take the money, but you keep the valuable. As Leff remarked, the successful swindle never offers something for nothing; it is always something for something.[62] In short, this game not only takes the victim's money, but does so in a way that undermines the victim's ordinary strategies for self-reassurance and semi-rational trust. The con game

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[59] *Id.* at 28-29 (analogizing a con game to a play); *id.* at 51 (pointing out the relevance of theatrical terms in describing both swindling and selling). In describing the con game as a drama, Leff anticipated Charles Sabel's observation that trust has a narrative dimension: Trusting relationships occur where the participants reinterpret their histories so as to resolve prior conflicts and make trust "the natural outcome of common experiences." Sabel, *supra* note 16, at 226-28.

[60] Robert Swinth suggests that one player's willingness to expose himself to risk may signal or educate the other player that response in kind is safe. *See* Swinth, *supra* note 4, at 337. Con artists often pretend to expose themselves to risk—for example, by telling marks that they are involved in crimes or shady activities—in order to promote the marks' trust and draw them into complicity in these dealings. *See* LEFF, *supra* note 50, at 30-33 (describing "Psst Buddy," a scam in which the con artist sells purportedly stolen goods to the mark). Some pigeon drops may have such a shady feature; for example, where the "found" objects in the pigeon drop appear to be stolen or contraband, or the law allegedly requires the "finders" to try to locate the true owner. In these pigeon drops, the mark and the con become "partners" in what seems to be sub-par behavior.

[61] LEFF, *supra* note 50, at 81 (noting that the "mass mutual presence" of marks validates each mark's participation in a scam, because each thinks that "[i]f *all* those other people believe in something, it can't be a total twaddle").

[62] *Id.* at 10-11 (stating that this practice is necessary to resolve the mark's questions as to why the con doesn't just keep the bounty for himself); *id.* at 115 (explaining that the "chief dramaturgical problem of every [con] is writing and acting out a convincing script in which the mark's gain is not the conman's loss, but rather is *his* gain too").

especially undermines the credibility of that central form of second-party constraint, tit-for-tat.

Such swindles are deadly for the kind of trust that underlies business relationships. Trust based on first-party assurance is a rather specialized matter, and works primarily in friendships and family affairs, where the parties often have long and intimate knowledge of one another's character. But the second-party assurances of tit-for-tat open up the possibility of trusting persons whom one does not know anywhere near so intimately. For this reason, exchange and commerce are directly threatened by dramas that make tit-for-tat seem unreliable.

This may explain why, in a modern commercial culture, scam-dramas like the pigeon drop are crimes enforced by public authority, rather than simply occasions for civil restitution. The reason the law treats these acts as crimes is that they have wider ramifications than mere private matters between con and mark. Criminalization of these con games aims not only, or even primarily, at restoring the mark's money, but much more at stopping such underminings of trust. These con games are akin to stock market fraud and other more modern-day economic crimes, which arguably undermine confidence in a wide range of commercial activities.

On the other hand, it is worth noting that the pigeon drop and similar scams have not always been crimes, and indeed were not crimes at common law. In a sense, the mark's acts could be characterized as voluntary because no force is involved. Even if the mark is tricked, he willingly hands over his cash. A judge of the King's Bench made just this point in a 1704 case in which the defendant had gotten money by pretending to be a legitimate messenger.[63] The judge could not see why this kind of trickery should be a crime, remarking rhetorically, "Shall we indict one man for making a fool of another?"[64] Presumably the victim's remedy was a civil action for restitution.[65]

Only later in the eighteenth century, as the English legal community began to develop modern contract and commercial law, did new criminal categories begin to address scams of this sort. The new measures included a parliamentary statute punishing acquisitions by "false pretenses,"[66] and a judicial doctrine vilifying larceny by trick.[67] These criminalizations of con games suggest the tremendous importance of

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[63] R. v. Jones, 92 Eng. Rep. 174 (K.B. 1704).

[64] *Id.*

[65] *See id.* (stating that "[t]his is no crime, and [the victim] has remedy by action").

[66] 30 Geo. 2, ch. 24, sec. 1 (1757) (Eng.) (making it a crime knowingly to obtain money or goods from another under false pretenses).

[67] *See* R. v. Watson, 168 Eng. Rep. 422, 424 (P.C. 1794) (putting to the jury the issue of whether the defendant's actions in ring-dropping constituted "an original preconcerted design to obtain this property by means of a fraudulent trick"); *supra* note 55 (listing English cases classifying ring dropping as a felony); *cf.* R. v. Pear, 168 Eng. Rep. 208, 208 (P.C. 1779) (ruling that a defendant who obtained a horse under false

commerce in modern legal culture. Much commerce depends on the trustworthiness of second-party constraints, and modern law reinforces that trust by punishing the conscious undermining of those constraints.

C. *Treason: The Betrayal of Institutional Trust*

One can look upon treason as a betrayal of the kind of trust that is based primarily on third-party constraints.[68] Victim A mistakenly thinks that the threats of a blackened reputation, ostracism from the group, and criminal prosecution are sufficient to constrain B's behavior. Unfortunately, they turn out not to be.

This section actually examines not the formal crime of treason, but rather the somewhat more specialized betrayal known as citizen espionage. Treason is extremely narrowly defined in the United States Constitution, consisting only of insurrection and aiding the enemy in wartime.[69] This is largely because the founders of our nation thought that their former British rulers had abused treason prosecution.[70] However, there are many other ways to betray one's country, and citizen espionage will suffice for my purposes.

Recently there has been an extremely interesting and very damaging case of espionage against the United States, by a so-called mole and self-confessed spy in the Central Intelligence Agency ("CIA"). Over a number of years, this spy, a man named Aldrich Ames, betrayed the identity of a number of informants in the service of the United States, which betrayals appear to have led to the capture and death of these persons.[71]

Patriotism is supposed to deter people from spying on their country, but in our own espionage agencies, professions of loyalty to one's country are not enough; agents are supposedly under constant surveillance.[72]

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pretenses and immediately sold it was guilty of a felony because the hiring was with the intention to steal).

[68] *See* Sarbin, *supra* note 11, at 121 (referring to spies as betrayers of trust).

[69] U.S. CONST. art. III, § 3, cl. 1 (defining treason to "consist only in levying War against [the United States], or in adhering to [its] Enemies, giving them Aid and Comfort").

[70] NATHANIEL WEYL, TREASON: THE STORY OF DISLOYALTY AND BETRAYAL IN AMERICAN HISTORY 4-9 (1950) (describing the history and definition of treason in the Constitution, and comparing treason punishments in England and America). For a more extensive history of treason in English and American colonial legal history, see Ralph M. Carney, *The Enemy Within: A Social History of Treason*, *in* CITIZEN ESPIONAGE, *supra* note 11, at 19, 24-36.

[71] Tim Weiner, *A Decade as a Turncoat: Aldrich Ames' Own Story*, N.Y. TIMES, July 28, 1994, at A1 (stating that these betrayals led to the loss of hundreds of classified reports and the execution by the Soviet Union of up to a dozen double agents).

[72] In fact, however, surveillance may be limited once an agent is in place. *See* Katharine Herbig, *A History of Recent American Espionage*, *in* CITIZEN ESPIONAGE, *supra* note 11, at 39, 59-63. Herbig outlines several factors that since the 1950s have impeded internal surveillance: over-reliance on entry-level screening, to the exclusion

Somehow Ames slipped through. One possible explanation for this disaster is that the CIA did not really pay attention to its own surveillance, but instead mistakenly trusted Ames because of its implicit reliance on *informal* third-party constraints. Though something of a loner, Ames was an insider. His father had been a CIA man,[73] and Ames himself had worked his whole life as a CIA spy. He reportedly drank too much and was thought to be rather sloppy,[74] but given the longevity of Ames's espionage activities, there appear to have been other sloppy people in the agency as well. In some larger sense, Ames was one of the guys.[75] It seems that at least in part because he was one of the guys, no one paid much attention to Ames's drinking, his association with suspicious characters, or the large amounts of money he seemed to have at his disposal, all facts that were readily available to monitors.[76]

Ames's case is especially interesting in contrast to that of another CIA agent who was not one of the guys, and who recently brought a sex discrimination case against the agency. Janine Brookner was a rising star in the CIA until she filed internal complaints concerning her colleagues' misconduct.[77] In response to her allegations, one of these co-workers claimed, with what appears to be little or no evidence, that Brookner was a "hard-drinking hussy."[78] To the surprise of many of Brookner's colleagues, the Agency believed the male co-workers and not her.[79] Her suit alleged that CIA higher-ups had also disbelieved her on another matter. She allegedly ran across Aldrich Ames in New York in 1984, and

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of further investigation; increasing concern in the executive and judicial branches over individual privacy rights; cutbacks in congressional funding; diffusion of information through outside contracting; and the multiplication of secret projects, with an accompanying increase in the number of persons with security clearances.

[73] Weiner, *supra* note 71, at B10 (reporting that Ames's father had worked as a CIA analyst).

[74] *See id.* (noting that Ames continued to receive promotions to sensitive positions "despite his supervisors' knowledge of his heavy drinking, financial troubles, erratic work and odd views").

[75] *See* Tim Weiner, *Report on C.I.A. Spy Is Said to Show Agency's Blunders*, N.Y. TIMES, Sept. 25, 1994, at A28 (quoting an intelligence official as saying that the CIA "is an agency where you just take care of each other").

[76] *See* Weiner, *supra* note 71, at B10 (observing that Ames's reputation at the CIA was that of "deadwood, drunkard, [and] dissident," and reporting Ames's admission that he made no effort to conceal the large amounts of cash that he was receiving from the Soviets).

[77] Tim Weiner, *C.I.A. Colleagues Call Fallen Star a Bias Victim*, N.Y. TIMES, Sept. 14, 1994, at A1 (reporting that Brookner was a "terrific spy" who likely committed "career suicide" by filing an internal complaint after being denied a post because her future deputy refused to work for a woman).

[78] *Id.* (stating that Brookner's deputy station chief made these allegations in retaliation for Brookner's filing of a report that the deputy was beating his wife).

[79] *Id.* at A15.

reported that he was compromising secret operations by his loose talk and his goings-on with a foreign girlfriend. This report got more or less nowhere.[80]

The CIA's mistaken trust in Ames thus appears to have had a good deal to do with his insider status, and with the mistaken belief that he would never run the risk of ostracism, either from his country or, more particularly, from the agency for which he had worked for so long.[81] The same mistaken belief was applied to Kim Philby, a notorious British spy of a slightly earlier vintage. As one commentator observed, Philby's aristocratic colleagues in the British Secret Service "couldn't imagine that a man from all the right schools and all the right clubs could betray his blue-blood legacy."[82]

There could be another reason as well for the slackening of attention to Ames. In some ways, Ames's betrayal was rather like the betrayals that occur in the con games that Leff dubbed "public spectacles," enterprises such as Ponzi schemes or real estate bubbles in swamplands in which the con artist swindles large numbers of people.[83] Among other things, as Leff observed, these scams are advanced by the fact that the marks depend on the supposed evaluations made by all the other marks: Each victim thinks that the others must know what they are doing. "Surely," each thinks, "they can't all be as ignorant as I am."[84]

This pattern appears to be a flaw characteristic of trust based on informal third-party constraints, and perhaps of trust on formal third-party constraints as well. The problem is an information variant on the collective action problem. One's reputation spreads among many diffuse persons, all those C's through Z's. But who among the C's through Z's will be responsible for monitoring the betrayer? Who should inquire whether the betrayer truly cares about what C through Z think of him? It seems reasonable to suppose that this collective action problem only worsens with time, reflecting the more general entropy of semi-rational trust: the tendency of those monitoring trust to slide into first-party assurances of character, and then to give up on assurances altogether.

Perhaps the most important factor in the slackening of surveillance is a point discussed earlier: Distrust can be disruptive to social groups. This is

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[80] *Id.* (quoting one CIA agent who characterized the action taken against Ames as a "light, light reprimand").

[81] *See* Weiner, *supra* note 71, at B10 (quoting CIA Director R. James Woolsey's admission that the Ames case made the agency confront a culture of secrecy combined with "a sense of trust and camaraderie within the fraternity that can smack of elitism and arrogance" (internal quotation marks omitted)).

[82] Ron Rosenbaum, *Kim Philby and the Age of Paranoia*, N.Y. TIMES, July 10, 1994, § 6 (Magazine), at 29, 31.

[83] *See generally* LEFF, *supra* note 50, at 65-69 (describing the workings of such scams in a chapter entitled "Public Spectacles").

[84] *Id.* at 80-81.

well known in the sensitive world of intelligence-gathering, and is one reason why enemies try to sow rumors of moles in each others' midst. Ames's betrayals began sometime after the CIA had been overwhelmed with rumors of moles, and after purges had so thoroughly sapped morale that no one really wanted to launch another investigation.[85] Distrust had seemed to weaken the agency, and as a consequence, no one wanted to be too distrustful of Ames.

In a way, Ames's case was only a heightened instance of a certain kind of institutional vulnerability; indeed, the disruptive nature of distrust is the central feature of that vulnerability. Intelligence-gathering exemplifies a task in which the participants cannot easily assess one another's work, and therefore must trust one another in carrying out delicate operations. Precisely because intensive double-checking disturbs this trust, however, internal security generally does not rely on the impersonal "external controls" of continuous formal surveillance.[86] Instead, internal security in such organizations tends to depend on the personalized "internal controls" of social norms, camaraderie, and mutual respect and identification among co-workers.[87] What follows from this dependency are the standard features of organizations of this type: the emphasis on up-front candidate-screening instead of downstream monitoring, the clubby atmosphere, the willingness to overlook flaws in other members of the "club,"[88] and the wide-open opportunities for the defector like Ames, who was quite capable of concocting stories to convince himself that his betrayals were justifiable.[89]

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[85] Weiner, *supra* note 71, at B10 (noting that the CIA's inability to monitor itself was at least in part a reaction to the period between 1954 and 1974, during which the agency ruined the carers and lives of many agents in a dead-end search for a high-level Soviet mole); Weiner, *supra* note 75, at A28 (reporting that although the agency knew as early at 1986 that there was a traitor within its ranks, incompetence and indifference marred its investigation for the next seven years); *see* Carney, *supra* note 70, at 21 (remarking that vigilance "threatens the ecology of trust" and increases "motivation to resist excessive oversight").

[86] *See* James H. Morris & Dennis J. Moberg, *Work Organizations as Contexts for Trust and Betrayal*, *in* CITIZEN ESPIONAGE, *supra* note 11, at 163, 166-70 (explaining that jobs involving tasks that are ambiguous or dynamic, behavior that is difficult to observe, and outcomes that are difficult to assess require reliance on personal trust and do not lend themselves to formal external controls).

[87] *Id.* at 172-73.

[88] *Id.* at 172 (detailing the enhanced role of peer management and influence in internal control systems).

[89] *See* Weiner, *supra* note 71, at A1 (relating Ames's belief that he was helping world stability by "leveling the playing field" between a rising United States and a declining Soviet Union); *see also* Sarbin, *supra* note 11, at 118-23 (discussing narratives used by spies to justify or rationalize betrayals).

IV. LAW AND TRUST

In the area of business ethics, some scholars have suggested that there may be a cyclical pattern in which elevated ethical norms oil the wheels of economic activity, but simultaneously create opportunities for cheaters who free-ride on the trust created by higher standards. Conversely, periods of low ethical norms drive out all but the enterprises in which high standards can be assured, thus making high standards appear to be more attractive.[90] If those scholars are correct, then we should expect cycles of trust and distrust in many more domains. The result of the entropy of semi-rational trust is that monitoring dwindles, making swindling more feasible and attractive. As swindling increases, though, monitoring and double-checking may rebound. As Bernard Barber has observed, trust and distrust are substitutes for each other, and just as unguarded trust may replace monitoring, so monitoring may replace unguarded trust.[91]

This brings me to reconsider the role of law. Law reaches many more subjects than purposeful betrayal, of course, but in the cases I have described of conscious and purposeful betrayal, I have been stressing the role of law as a reinforcer of the trust assurances of character, retaliation, and informal sanctions. Others have described legal remedies in a similar way, as a kind of backstop for more informal grounds of trust, particularly where informal assurances are difficult to establish. One well-known example of this is the one-shot "market for lemons," where legally enforceable warranties may help organize deals that otherwise would fail for lack of consumer trust.[92]

I would like to stress an additional, more subtle aspect of the law's role as a reinforcer of trust. The betrayal examples suggest that insofar as legal remedies reinforce trust, they seem to work best when they work countercyclically. That is, legal remedies can play a certain balancing act with informal trust grounds by moderating cycles of trust and distrust that would otherwise occur.[93]

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[90] Thomas H. Noe & Michael J. Rebello, *The Dynamics of Business Ethics and Economic Activity*, 84 AM. ECON. REV. 531, 531 (1994) (remarking on the cross-disciplinary recognition of the countercyclical nature of business ethics).

[91] BARBER, *supra* note 34, at 23 (asserting that trust and distrust "serve as functional complements to maintain social order, promote effective social control, and preserve solidarity and moral community").

[92] *See* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 499-500 (1970) (employing the used-car market to give examples of institutions, such as warranties, that "arise to counteract the effects of quality uncertainty").

[93] *See* Noe & Rebello, *supra* note 90, at 544 (suggesting that the frequency of economic crime or of legal actions for breach of fiduciary duty could serve as an indicator of the level of business ethics). Presumably, such indices would be countercyclical. One might also observe in this regard that the law is only countercyclical insofar as the courts are relatively uncorrupted in periods of low business ethics.

Legal remedies lend support to an upswing toward confidence and trust, but they counterbalance overconfidence—with its concomitant increase in sloth—in a persistent pattern: They rarely completely remove the requirements of diligence. Even though Parliament criminalized theft by "false pretenses" in its 1757 statute,[94] courts found ways to disdain complainants who might have avoided victimization through the exercise of ordinary prudence.[95] In modern real estate law, there has been a very sharp move away from the doctrine of caveat emptor in sales of residential property, especially new homes, and a complementary move to require sellers to disclose flaws in their property.[96] Notwithstanding this legal evolution, if you buy a house with a hole in the kitchen floor, you are still unlikely to get a legal remedy for breach of a builder's implied warranty of workmanship or a seller's duty to disclose, because you should have seen the hole yourself.[97] Even indulgent legal developments will not allow one to neglect monitoring altogether.[98]

Perhaps an even more significant incentive to monitor is the very cost, difficulty, and anxiety of pursuing legal remedies. Going to court is time-consuming, exhausting, and risky, and even a winning complainant may find that her remedies are imperfect or difficult to execute. The long and slow-moving docket of our civil courts may be a source of much criticism,

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[94] *See supra* note 66 and accompanying text.

[95] *E.g.*, R. v. Wheatly, 97 Eng. Rep. 746, 748 (P.C. 1761) (holding that a brewer who sold only 16 gallons of ale instead of the promised 18 was subject only to a civil action because the victim's injury arose from his "own negligence and carelessness" in not measuring the amount of liquor). This comment is especially interesting coming from Lord Mansfield, who pioneered much early commercial law. *See also* Pearce, *supra* note 49, at 969-74 (documenting further instances of this judicial pattern in England in the half-century after the statute's enactment). Pearce himself saw this judicial pattern as an unduly narrow reading of the crime of false pretenses. *Id.* at 974-75 (decrying the Massachusetts Supreme Judicial Court's interpretation of the meaning of "false pretence" in an 1837 case).

[96] *See, e.g.*, Lingsch v. Savage, 29 Cal. Rptr. 201 (Ct. App. 1963) (recognizing the settled principle that a seller has a duty to disclose defects materially affecting the property's value that are known to the seller but not reasonably ascertainable by the buyer); Caceci v. Di Canio Constr. Corp., 526 N.E.2d 266, 267-68 (N.Y. 1988) (holding that a builder-vendor makes an implied warranty of skillful construction, or habitability, to a purchaser, and listing 25 other states so holding).

[97] *See, e.g.*, Lempke v. Dagenais, 547 A.2d 290, 297 (N.H. 1988) (extending the builder-vendor's implied warranty of workmanship to subsequent purchasers, but limiting it to latent defects that surface within a reasonable period of time); Kuczmanski v. Gill, 302 S.E.2d 48 (Va. 1983) (applying the doctrine of caveat emptor to defects easily discoverable by buyer).

[98] For a related effort to require diligence, see Criner v. State, 109 So. 417 (Fla. 1926) (reversing a conviction for defrauding by false pretenses and declaring that prospective purchasers of real estate can protect themselves by checking the public title records).

but there is a certain efficiency to the pattern: It induces people to look out for themselves.

I mentioned earlier that the legal scholars of the Law and Society movement generally argue that formal law is really rather marginal in people's daily lives, including their business affairs, even though there is in fact rather a lot of law on the books. These scholars argue that however extensive formal legal regulations may be, personal relations, informal sanctions, and group dynamics may do far more to govern people's behavior.[99] Yet, considering the role of trust in the light of betrayal, perhaps it is important that the law *not* be too significant. It may in fact be better that the law serve as a reinforcer of, rather than a substitute for, the ways that people normally reassure themselves about the trustworthiness of their partners. By its very slowness, clumsiness, and ineffectiveness, the law remands the policing of trust to what are often much more efficient fora: conscience, retaliation, and informal community norms.

At the same time, however, it is important that the law have *some* efficacy. In situations in which reassurances of conscience, retaliation, or community norms cannot easily take root, formal legal constraints can allow some fruitful cooperation to occur.[100] Legal remedies no doubt encourage some sloth, some entropy of semi-rational trust, and some neglect of double-checking, even when prudence might dictate greater watchfulness. Who really asks whether a marriage partner might be a bigamist, given that bigamists go to jail? Why bother to check for embezzlers and industrial spies, when they too wind up in the slammer? It seems only logical to suppose that the availability of legal sanctions leads people to relax their guard, at least at the margin.

It is important to remember, though, that *some sloth is a good thing*, because too many questions and too much suspicion may mean that the wedding bells never ring, the deal never gets cut, the office morale suffers, and the file cabinets overflow with monitoring evaluations. Just as the law's clumsiness puts the brakes on the up-stroke of excessive trusting, so the law's efficacy halts the down-stroke of excessive suspicion—the suspicion that itself undermines trust.

I am of course describing what, it seems to me, legal remedies *ought* to do. In fact, this legal balancing act is not really foreordained in any specific way. Perhaps human beings evolve toward some balance between formal and informal trust grounds, but they must make many contingent choices in the process, and different political communities make them differently over time in a process notable for fits and starts. I have mentioned a few specific examples already: Adultery comes and goes as a

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[99] *See supra* notes 23-25 and accompanying text.

[100] *See* Simon Deakin et al., *'Trust' or Law? Towards an Integrated Theory of Contractual Relations Between Firms*, 21 J.L. & SOC'Y 329, 337 (1994) (describing contract law as a "residual form of security" where other assurances fail or cannot be made easily).

matter of criminal law; different scams have received different levels of public attention over time.[101] We face contingent choices in the larger arena of economic ordering as well, but here, too, balance is elusive. Socialist systems have been faulted for an intrusive reliance on formal constraints, and for supplanting the more efficient private and informal means of assuring trust,[102] but capitalist systems have been faulted for overconfidence in private ordering, to the neglect of the large and diffuse resources that can be called the "public trust."[103]

In speaking of balance, I do not mean to suggest that trust in public institutions and trust in private assurances are in some way alternatives. If anything, the opposite is true: Private trustworthiness adds to public trustworthiness, and vice versa.[104] What is most disruptive to an appropriate balance is corruption and weakness in government, where cheaters can use payoffs or intimidation to avoid legal enforcement, where citizens cannot trust the law anyway, and where citizens may come to distrust one another as well, thus losing informal as well as formal grounds for trust.[105]

Corruption, of course, is a species of betrayal, sometimes undermining all three grounds for trust. We may have trusted that President X was a good ruler and a good person (*character*); that we could vote X out of office if he failed us (*retaliation*); and that X would be constrained by concern for reputation, or by law, or by the enforcement of other third parties in surrounding institutions (*punishment*).[106] Yet X may still

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[101] *See supra* notes 42-46 and accompanying text (discussing adultery); notes 55-67 and accompanying text (addressing the "pigeon drop" and other scams).

[102] *See* Ernest Gellner, *Trust, Cohesion, and the Social Order*, *in* TRUST, *supra* note 1, at 142, 155 (recognizing in socialist societies the "systematic destruction of subordinate units, of subunits within the society, other than those that are actually part of the central machine").

[103] For one variant of this theme, see Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 484-85, 556-60 (1970) (arguing that some resources have a public nature and that courts should restrain governmental actions giving undue weight to narrower private interests).

[104] *See* Hardin, *supra* note 15, at 523 (citing Thomas Hobbes in contending that state sanctions work together with informal norms to enhance exchange and interaction).

[105] *See* Anthony Pagden, *The Destruction of Trust and Its Economic Consequences in the Case of Eighteenth-Century Naples*, *in* TRUST, *supra* note 1, at 127, 137-39 (giving a fascinating account of two Neapolitan political writers who indicted Naples's Spanish rulers for simultaneously undermining the political and commercial trust among the citizens). For a modern example of this problem, see Celestine Bohlen, *After the Mafia, a Sort of Children's Crusade*, N.Y. TIMES, Mar. 10, 1995, at A4 (describing the undermining of civic pride and involvement during post-World War II Mafia dominance in Palermo, Sicily).

[106] Alexander Hamilton reviews all three of these trust grounds in THE FEDERAL-

betray us, exploiting and undermining all three grounds for our trust.

Even at the level of governance, then, we once again find an image of trust in the mirror of betrayal. This brings me back to the beginning point of this lecture: In modern discussions of trust, it is vitally important to address the construction or reconstruction of trust in political institutions,[107] both locally and across boundaries. It may be that the only way to approach this task is to start with small steps, which is why it is important to consider how individuals take and receive assurances of trustworthiness. When we start to think about small-scale trust, however, we find deceivers and con artists who simulate trustworthiness. This does not mean giving up on trust. Rather, we need to learn about trust from betrayals and deceptions. By looking at trust in the mirror of betrayal, we can see a reflection of the patterns, risks, and costs of establishing and maintaining trust, upon which so many of our enterprises depend, from the most personal to the most universal.

IST No. 72, in which he discusses the utility of the President's re-electability. He argues that a President who seeks fame (third-party approval) will be encouraged to undertake projects in the public interest by the prospect of re-election and time to carry out the plans; a President who is merely venal, or one who is overly ambitious, will be curbed by the prospect of not being re-elected (second-party retaliation); and a President who has learned from experience or is simply an able person (first-party character) can best serve the country if continued in office. THE FEDERALIST No. 72, at 464-65 (Alexander Hamilton) (Benjamin F. Wright, ed., 1966). Hamilton also observes the need for monitoring: He rejects the division of presidential authority into an executive council in part because such diffusions of responsibility tend to "conceal faults." THE FEDERALIST No. 70, at 455 (Alexander Hamilton) (Benjamin F. Wright, ed., 1966).

[107] *See, e.g.*, Margaret Levi, Trust, Credibility and Consent 1-2 (Sept. 1994) (arguing that democratic institutions can survive only with the "contingent consent" of citizens, which in turn depends on citizen trust in government) (unpublished manuscript, on file with *Boston University Law Review*).