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David J. Gerber

IIT Chicago-Kent College of Law, dgerber@kentlaw.iit.edu

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PROMETHEUS BORN: THE HIGH MIDDLE AGES AND THE RELATIONSHIP BETWEEN LAW AND ECONOMIC CONDUCT

DAVID J. GERBER*

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INTRODUCTION

POLITICAL powerholders typically prefer to regulate economic conduct for their own political and economic ends. In the Western political tradition, however, a different conception of the relationship between law and economic conduct has long constrained that preference. Here, the regulation of economic conduct has been heavily influenced, at times even dominated, by the

languages of religion, philosophy and ethics rather than being exclusively an issue of wealth and power.

This conception of the relationship between law and economic conduct has shaped the market in the West—its development as well as its current operation. It has borne values, perceptions and expectations that have molded the conduct of economic and political actors by defining the costs and benefits of entrepreneurial as well as of regulatory action. In particular, it has helped to create and maintain the relative autonomy of economic activity from state control that has fueled the West's economic dynamism during the last century and a half. The "Prometheus" of economic dynamism may have been "unbound" during this period, but I suggest that it was "born" much earlier when this unique relationship between law and economic conduct was sculpted.¹

The influence of this relationship has varied over the centuries,² but it remains central to thought and practice in most Western societies. In both Europe and the United States, for example, the very language of current debates in areas as varied as antitrust law and environmental protection often is intelligible only by reference to the relationship between law and economic conduct. Such debates routinely assume that the regulation of economic conduct is a matter not only of the objectives of the regulating state, but also of the moral and ethical claims of those affected by the regulations. Outside the West, such claims are rare.

But why is this so? How did non-economic values become so important in the West? This study offers answers to these questions by exploring the origins of this conception of the relationship between law and economic conduct. My central thesis is that this relationship was generated in response to the first great wave of market forces that transformed European society during the twelfth and thirteenth centuries.³ The market's menacing new power rolled through Europe during an extraordinary period in which the

1. The reference here is to DAVID S. LANDES, *THE UNBOUND PROMETHEUS: TECHNOLOGICAL CHANGE AND INDUSTRIAL DEVELOPMENT IN WESTERN EUROPE FROM 1750 TO THE PRESENT* (1976), a leading work of economic history that describes the immense economic power unleashed in Europe during the last two centuries through the freeing of private enterprise from governmental interference.

2. The force of this tradition has diminished, for example, during the last century. *Laissez-faire* and marxist conceptions of political economy have undermined the notion of subjecting economic conduct to principles of justice, the former opposing all notions of state intervention in economic processes and the latter rejecting morally-based limits on state policy. In addition, legal positivism has eroded the very conception of law that has provided a vehicle for this relationship, that is, the concept of law as a process for developing and transmitting principles of justice.

3. This revolution is generally considered to have begun around the eleventh century, and it continued for some three centuries. See ROBERT S. LOPEZ, *THE COMMERCIAL REVOLUTION OF THE MIDDLE AGES: 950-1350* (1971).

church and the universities not only dominated thought about economic conduct, but possessed enormous political power as well, and in which a new conception of law was emerging.⁴ The result was a uniquely Western conception of economic regulation, and I seek here to understand that story.⁵

A phenomenon as fundamental to the dynamics and the self-understanding of Western societies as the relationship between law and economic conduct always "presses" to be better understood. Yet the need to understand that phenomenon is especially urgent today, because in many parts of the world the market is making another powerful surge forward, moving from marginal roles to the dominant society-shaping role that it has so often played in the West. As it does, societies face fundamental issues about how to respond to the market, and they often look to the West's experience with the market for guidance and orientation in making these decisions. The more insight they can acquire into this experience, the more effectively they may be able to craft their own relationships between law and economic conduct.

The first part of the essay briefly describes the first commercial revolution and some of its consequences (I.). I next evoke the institutional and intellectual dynamics that shaped responses to the market (II.). The focus then turns to the responses of the church and the universities to market forces, and I here analyze in detail the development and impact of the norms which were developed to control the market (III.-VI.).⁶ This is followed by discussion of the ways in which secular institutions responded to these forces (VII.). And, finally, I venture some suggestions about the factors that gave this unique framework its strength and durability (VIII.).

I. THE MARKET AND ITS IMPACTS

The rapid commercialization of society was a wrenching force then, as it is now. The market transformed medieval society in the twelfth and thirteenth centuries, and the Western tradition of economic regulation was forged in response to the revolution it brought about.

4. Although this essay focuses on the twelfth and thirteenth centuries, it is important to remember that the processes that generated this relationship often began before 1100, and they took hold in some areas after 1300.

5. Much is known about the components of the story, with legal, economic, intellectual and church historians all illuminating segments of the historical mosaic, but there have been few attempts to integrate these components and to understand the story itself. Specialists in Roman law, for example, often pay little attention to economic development; economic historians frequently pay little heed to the role of church; and historians of religion tend to be unconcerned with secular legal developments.

6. My concern here is with the processes by which institutions influence behavior through the use of articulated conduct standards, regardless of whether those standards were then or would today be called "law." Consequently, in order to avoid potential confusion resulting from the use of the terms "law" and "legal" in these contexts, I often use the more inclusive terms "norm" and "normative" to refer to such standards of conduct.

A. *The Setting*

For centuries prior to the onset of this revolution most Europeans had lived in manorial communities, with Northern Italy the sole significant exception to this model.⁷ Characterized by a high degree of self-sufficiency, such communities frequently had little contact with the outside world.⁸ Agriculture and the social cooperation into which it was woven dictated their structures, rhythms and expectations.⁹ Production frequently did not reach organized markets, and the markets that did exist were generally local, with buyers from the same village or manor purchasing for immediate consumption.

Manorial society was highly communitarian. The individual was conceived as part of a community, an organic whole consisting of interrelated and interdependent pieces.¹⁰ Relations among members of the community were defined by the group's objectives; the individual was defined by his place in the whole; and individual roles were dictated by custom and necessity.

A primary concern of such communities was that the components of the social fabric fit together harmoniously. According to one historian, "[A]lready in the early Middle Ages public opinion praised one principle—which applied to all economic and social measures—that it was better to prevent than to heal, in other words, that as a matter of principle one should combat everything that might possibly lead to conflicts."¹¹ This, in turn, meant that the basic images and conceptions of society were antithetical to notions of competition—particularly economic competition—among members of the community.

7. In northern Italy the feudal system did not achieve the same degree of pervasiveness that it achieved in most of the rest of Europe. There "commerce was more important, society more urban and culture more lay than in the other lands of the West." JOHN K. HYDE, *SOCIETY AND POLITICS IN MEDIEVAL ITALY: THE EVOLUTION OF THE CIVIL LIFE 1000-1350* 2 (1973). See also GINO LUZZATTO, *AN ECONOMIC HISTORY OF ITALY FROM THE FALL OF THE ROMAN EMPIRE TO THE SIXTEENTH CENTURY* 40-65 (Philip Jones trans., 1961).

8. This does not mean that there was no population movement. From the eleventh century forward people frequently moved from rural areas to towns and cities, and in northern and central Europe, in particular, there was significant population movement from one rural area to another. See, e.g., Richard Koebner, *The Settlement and Colonization of Europe*, in 1 *CAMB. ECON. HIST. EUR.* 1, 26-91 (Michael M. Postan & H.J. Habakkuk eds., 2d ed. 1966).

9. See generally GEORGES DUBY, *L'ÉCONOMIE RURALE ET LA VIE DES CAMPAGNES DANS L'OCCIDENT MÉDIÉVAL* (1962); JEAN-PIERRE POLY & ERIC BOURNAZEL, *THE FEUDAL TRANSFORMATION: 900-1200* 246-71 (Caroline Higgitt trans., 1990). For Germany, see 1 HERMAN KELLENBENZ, *DEUTSCHE WIRTSCHAFTSGESCHICHTE* 49-75 (1977).

10. For a discussion of communities during this period, see SUSAN REYNOLDS, *KINGDOMS AND COMMUNITIES IN WESTERN EUROPE: 900-1300* (1984).

11. HEINRICH BECHTEL, *WIRTSCHAFTS- UND SOZIALGESCHICHTE DEUTSCHLANDS* 91 (1967).

B. Commercialization: Trade and its Roles

The market confronted and threatened this communitarian ethos. As the amount and scope of trade increased,¹² more goods were bought and sold in more transactions; more goods were transported longer distances for purposes of sale; and more people participated in those transactions.¹³ The commercial component of social life grew—and rapidly.¹⁴

Growth in the volume and scope of commerce also brought increased complexity to commercial transactions and to the organizations engaged in them. By the thirteenth century, partnerships, limited partnerships, joint ventures and other forms of enterprise became increasingly common.¹⁵ Larger and more complex organizations heightened the demand for financing, and, as a consequence, banking and other financial services developed rapidly in both scope and sophistication.¹⁶

New forms of relationship among enterprises also developed. Merchants, for example, formed guilds and other associations to protect and further their own interests.¹⁷ In addition, new organizations such as trade fairs arose to facilitate commerce in areas where facilities for commerce were needed but the existing towns were inadequate or inappropriate for such commerce.¹⁸

12. See MICHEL LE MENÉ, *L'ÉCONOMIE MÉDIÉVALE* 51-60 (1977) and Francois L. Ganshof and Adriaan Verhulst, *Medieval Agrarian Society in its Prime*, in 1 *CAMB. ECON. HIST. EUR.* 291-339 (Michael M. Postan ed., 2d ed. 1966).

13. See FRITZ RÖRIG, *MITTELALTERLICHE WELTWIRTSCHAFT* (1933); LOPEZ, *supra* note 3, at 56-84.

14. Despite the rapid progress of commercialization and urbanization, it is important to remember that agriculture remained the dominant form of economic activity throughout the period. It has been estimated that during this period the urban population in most areas did not represent more than ten to fifteen percent of the total. BECHTEL, *supra* note 11, at 86.

15. See generally Raymond De Roover, *The Organization of Trade*, in 3 *CAMB. ECON. HIST. EUR.* 42-66 (Michael M. Postan et al. eds., 1965). For the leading role of Italian merchants in developing such entrepreneurial forms, see ARMANDO SAPORI, *LE MARCHAND ITALIEN AU MOYEN AGE* xxix - xliii and 15-21 (1952) and the abridged English version entitled *THE ITALIAN MERCHANT IN THE MIDDLE AGES* 39-64 (Patricia A. Kennen trans., 1970).

16. See generally RAYMOND A. DE ROOVER, *MONEY, BANKING AND CREDIT IN MEDIAEVAL BRUGES* (1948); CARLO M. CIPOLLA, *MONEY, PRICES AND CIVILIZATION IN THE MEDITERRANEAN WORLD* (1956); and GEORGES BIGWOOD, *LE RÉGIME JURIDIQUE ET ÉCONOMIQUE DU COMMERCE DE L'ARGENT DANS LA BELGIQUE DU MOYEN AGE* (pt.1, 1921; pt. 2, 1922).

17. Among the most notable of these was the German Hansa, an association of merchants that dominated much of the commerce of the Baltic and northern Germany and eventually acquired important political roles. See PHILIPPE DOLLINGER, *THE GERMAN HANSA* (D.S. Ault & S.H. Steinberg eds. & trans., 1970).

18. The Champagne fairs—which became, in effect, permanent trading organizations—were by far the most important, because they served as the primary forum for transactions between the Italians, who dominated commerce in southern Europe, and the merchants of Flanders, England and other areas in northern Europe. Such fairs flourished during the twelfth and early thirteenth

"The market" thus became a dominant organizing force in society,¹⁹ often dictating where and how people lived and what they did. It induced extensive migration from the country to cities, reorganized agricultural production to meet the needs of the cities, and generated what Lester Little has called "pre-industrial revolution industry" in the manufacture of products such as wool.²⁰

The economic process of commercialization was also closely associated with the social process of urbanization.²¹ Trade fed on the growth of cities, and cities fed on the growth of trade. New cities were formed in significant numbers in the eleventh and twelfth centuries, and existing cities typically experienced rapid growth.²² As the market became society's dominant organizing process, the cities, as headquarters for this process, became the centers of civilization.²³

Yet urbanization did not necessarily destroy communitarian patterns. The concept of community was adapted to an urban context. Within the new and renascent cities were communities that buffered their inhabitants against urban impersonality and anonymity. The main difference between the manorial and urban conceptions of community was the voluntary character of the urban community. In the village one was born into the community, whereas membership in the urban community involved at least some degree of personal choice, often represented by an oath of membership.²⁴

At the center of the commercialization and urbanization processes stood the merchant.²⁵ Typically a marginal figure in society at the beginning of the period, the merchant rose in wealth, political power and social status with the growth of cities and the development of commerce. In most cities, by the end of the thirteenth century the merchant class came to have a predominant influence on communal life.

centuries, but gradually diminished in importance thereafter as cities increasingly took over their functions. See, e.g., ELIZABETH CHAPIN, *LES VILLES DE FOIRES DE CHAMPAGNE, DES ORIGINES AU DÉBUT DU XIV^e SIÈCLE* (1937); C. Verlinden, *Markets and Fairs*, in 3 *CAMB. ECON. HIST. EUR.* 119-56 (Michael M. Postan et al. eds., 1965).

19. For a classic description of the process, see HENRI PIRENNE, *MEDIEVAL CITIES* 55-74 (1925).

20. LESTER K. LITTLE, *RELIGIOUS POVERTY AND THE PROFIT ECONOMY IN MEDIEVAL EUROPE* 13 (1978) [hereinafter LITTLE, *RELIGIOUS POVERTY*].

21. See HENRI PIRENNE, *HISTOIRE ÉCONOMIQUE ET SOCIALE DU MOYEN AGE* 35-50 (H. Van Werveke ed., 2d ed. 1969).

22. See generally PAUL BAIROCH, *CITIES AND ECONOMIC DEVELOPMENT: FROM THE DAWN OF HISTORY TO THE PRESENT* 124-74 (Christopher Braider trans., 1988).

23. See Jacques Le Goff, *The Town as an Agent of Civilization: 1200-1500*, in *THE MIDDLE AGES* 71-107 (1 Fontana Econ. Hist. of Eur., Carlo Cipolla ed. 1976).

24. BECHTEL, *supra* note 11, at 89.

25. For a discussion of the social and political roles of the merchant, see JACQUES LE GOFF, *MARCHANDS ET BANQUIERS DU MOYEN AGE* 42-69 (1956) [hereinafter LE GOFF, *MARCHANDS ET BANQUIERS*]. For the Italian merchants, see SAPORI, *supra* note 15, at xi-xxix (9-38 in abridged ed.).

C. *The Impact of Commercialization*

Commercialization improved the material standard of living for many, not only in the cities but also in the rural areas that supplied cities. Its impact was not, however, always positive. Particularly in the cities, "the commercial revolution did not strengthen the economic security of the masses, but weakened it"²⁶

Inevitably, commercialization and urbanization created new pressures, new values and new patterns of thought, and thus made life more precarious for many. This new environment required individuals to function in a world of markets and prices, to respond to changing conditions of supply and demand, and to calculate their own futures in those terms. The community continued to provide support, but the individual increasingly was exposed to "invisible forces" that could make his daily bread unaffordable, and to the very visible forces of those who would take advantage of him. As a result, the denizens of the cities were faced with fundamental conflicts between traditional moral, ethical and religious norms and a new environment in which such norms were continually challenged.

II. RESPONDING TO THE MARKET: DYNAMICS

Institutional power and intellectual authority combined to shape responses to the market. Institutions that had the authority to apply norms to economic conduct, and the power to secure respect for those norms, played a key role in this process, as did those capable of influencing how economic conduct was perceived and which values were considered relevant to it. In the twelfth and thirteenth centuries these forces were tightly interwoven.

A. *Law and Political Authority*

The structures of political power, and the emerging role of law in relation to those structures, made possible a special relationship between law and economic conduct. The dispersal and particularism of secular political power inhibited individual institutions from harnessing economic conduct in the service of their own ends, and the general lack of interest in economic conduct by many political powerholders left regulatory space that other institutions would fill.

26. JOHN T. GILCHRIST, *THE CHURCH AND ECONOMIC ACTIVITY IN THE MIDDLE AGES* 64 (1969). For a discussion of the poor during this period, see MICHEL MOLLAT, *THE POOR IN THE MIDDLE AGES* (Arthur Goldhammer trans., 1986).

1. Custom and Community

For centuries, communities had ordered social life primarily through custom—"the idea that what has been has *ipso facto* the right to be."²⁷ Actions were a community's legislative process, and its norms were embodied in its understanding of its own past.²⁸ The communal memory was the means by which customs were transmitted, and participation in the communal memory represented, in turn, a powerful force for social cohesion.

Despite the development of newer forms of law from the twelfth century on, this customary law only gradually lost its authority in many areas.²⁹ Newer conceptions of law often had to compete against such customary norms. Moreover, in most of Northern Europe customs were written down, adapted, infused with new ideas and, in varying degrees, systematized from the twelfth through the fifteenth centuries.³⁰

As a product of agricultural and manorial communities, this body of law had little to say about the market, because the market had played only a peripheral role in such communities, and thus there had been few occasions to regulate it. Moreover, relations among members of such communities were defined largely by status within the community, and market concepts did not fit easily into those relationships.

2. The Feudal Dispersion of Political Authority

Feudal structures provided the framework of secular political authority in most areas, and here again the market played a minimal role.³¹ The basic concept of feudalism was that political power was a function of personal relationships that were tied to rights in land. Individual landholders owed military and other service obligations to those above them in the hierarchy of property relationships, and they, in turn, were owed similar duties by those below them.

This framework also meant that political power was highly dispersed and particularistic. There were no central governments with direct control over

27. 1 MARC L. BLOCH, *FEUDAL SOCIETY* 113 (L.A. Manyon trans. 1961).

28. For a discussion of the customary law background to the development of the Western legal tradition, see HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 49-84 (1983); BLOCH, *supra* note 27, at 88-102.

29. For a discussion, see REYNOLDS, *supra* note 10, at 39-66.

30. See, e.g., John P. Dawson, *The Codification of the French Customs*, 38 MICH. L. REV. 765 (1939).

31. See generally BLOCH, *supra* note 27; FRANCOIS L. GANSHOF, *FEUDALISM* (Philip Grierson, trans., 3d Eng. ed. 1964). For England, see Robert C. Palmer, *The Feudal Framework of English Law*, 79 MICH. L. REV. 1130 (1981). The term "feudalism" is fraught with difficulties. See, e.g., Elizabeth A.R. Brown, *The Tyranny of a Construct: Feudalism and Historians of Medieval Europe*, 79 AM. HIST. REV. 1063 (1974). It is, however, sufficiently descriptive for present purposes.

large populations and large territories. Each lord in the feudal structure had authority to create and enforce certain kinds of norms regarding certain actions of certain persons. The precise contours of such feudal patterns varied, especially in regard to the role of the king, but everywhere—outside of Italy—feudal relationships provided the basic framework within which norms evolved.

This dispersion of political authority allowed cities to acquire significant autonomy and thus to develop a unique political role.³² Because commercialization was, above all, an urban phenomenon, the freedom of cities to regulate it according to their own lights was of crucial importance in the development of a normative framework for economic conduct.³³

With political autonomy came independent legal systems, and cities often had their own laws and court systems. The substantive laws typically were mixtures of custom, Roman law principles and the legislative policy decisions of the governing city councils.³⁴ In some areas, notably in Germany, the laws of cities were often related to each other, with newer cities often adopting the laws of established cities and continuing to look to the “mother city” for guidance in the interpretation of those laws.³⁵

Kings were, in theory at least, at the apex of the feudal structure,³⁶ and thus everyone within the royal territory owed the king allegiance. In practice,

32. The political independence of local powers was characteristic of the medieval political system. Cities achieved autonomy in a variety of ways. Sometimes (notably in Northern Italy) they won it, even through the use of military force. In other cases, kings or territorial rulers granted charters of freedom from territorial or royal authority in order either to secure the cooperation of a lord who stood to increase his tax revenues through increased trade or to achieve cooperation from the residents of the city themselves.

The degree of autonomy enjoyed by cities varied according to the area and period under consideration. The cities of northern Italy often had acquired virtual independence by the eleventh century, and they generally maintained such independence throughout the period. The Free Imperial Cities (*Freie Reichstädte*) of the Holy Roman Empire were generally autonomous by the latter part of the thirteenth century. In France cities acquired significant autonomy in the twelfth and thirteenth centuries, only to begin to relinquish it by the end of the period with the consolidation of royal power. In England alone was the autonomy of cities significantly restricted—by the strength of royal power. See generally JOHN H. MUNDY, *EUROPE IN THE HIGH MIDDLE AGES: 1150-1309* 422-31 (1973).

33. See *infra* text accompanying notes 254-80.

34. See, e.g., HANS REICHARD, *DIE DEUTSCHEN STADTRECHTE DES MITTELALTERS IN IHRER GEOGRAPHISCHEN, POLITISCHEN UND WIRTSCHAFTLICHEN BEGRÜNDUNG: UMRISSE EINER GEOJURISTISCHEN STADTRECHTSGESCHICHTE* (1930).

35. See FRANZ WIEACKER, *PRIVATRECHTSGESCHICHTE DER NEUZEIT: UNTER BESONDERER BERÜCKSICHTIGUNG DER DEUTSCHEN ENTWICKLUNG* 108-110 (1967).

36. The Holy Roman Emperor claimed to be above the entire structure of feudal relationships, but by the twelfth century this claim found little support outside of the German empire, and even within the German empire it often had relatively little practical significance. See, e.g., BLOCH, *supra* note 27, at 390-93.

however, kings frequently had less actual power than great feudal lords who were technically their vassals. These vassals, including, for example, dukes such as those of Flanders and Burgundy, often ruled large areas and exceeded their kings not only in authority and in ability to secure service from their vassals, but also in wealth. Thus kings often had far less effective power to regulate conduct than they appeared to have.³⁷ Neither kings nor nobles were inclined, however, to engage in extensive regulation of the lives of their subjects.³⁸

This configuration of political authority opened the way for other institutions to articulate and enforce economic conduct. If no such institutions had been in a position to play those roles, secular authorities would probably have moved quickly to regulate economic conduct for their own purposes. But before that move occurred, the church and the universities claimed that regulatory space and set indelible marks on it.

B. *The Church and Its Roles*

In stark contrast to the dispersion of secular political authority, the church stood at the apex of society as a centralized, hierarchic institution. It was in many respects the most powerful institution in Europe, wielding extraordinary political and intellectual authority throughout all levels of society, and it was becoming very interested in regulating the market.

1. *The Church as an Institution*

Europe during this period was a Christian civilization, organized and dominated by Christian symbols, ideas and institutions. With few exceptions, the entire population of Europe "belonged" to the church. As Richard Southern has put it, "[T]he church was a compulsory society in precisely the

37. As Helmut Coing points out, "The power of the nobility was based as before on land ownership. The nobility, particularly the aristocracy, was the true bearer of policy [*Träger der Politik*]." Helmut Coing, *Einleitung*, in 1 HANDBUCH DER QUELLEN UND LITERATUR DER NEUEREN EUROPISCHEN PRIVATRECHTSGESCHICHTE 3, 19 (Helmut Coing ed., 1973).

38. In some areas royal power was gradually consolidated and centralized, in England from the twelfth century and from the following century in France, with kings expanding their administrative and legislative activity as well as their actual control. For a discussion, see generally JOSEPH R. STRAYER, ON THE MEDIEVAL ORIGINS OF THE MODERN STATE 36-56 (1970). For England, see e.g., Joseph Biancalana, *For Want of Justice: Legal Reforms of Henry II*, 88 COLUM. L. REV. 433 (1988).

In the Holy Roman Empire, in contrast, the emperor gradually lost influence and control over large portions of his territory from the twelfth century, and by the fourteenth century the empire played only a marginal role in normative processes. See HEINRICH MITTEIS, DER STAAT DES HOHEN MITTELALTERS: GRUNDLINIEN EINER VERGLEICHENDEN VERFASSUNGSGESCHICHTE DES LEHNZEITALTERS 342-361 (9th ed. 1974).

same way as the modern state is a compulsory society."³⁹ Moreover, the church's influence reached into all areas of life, far exceeding the bounds of what today would be considered areas of religious concern.

The church had played religious and even political roles in European society for centuries, but, beginning in the eleventh century, it also became a regulatory institution. A group of reforming popes, led by Gregory VII (1073-1085), remolded the church into an hierarchical and highly bureaucratized organization and significantly broadened its functions.⁴⁰ In particular, the church took upon itself the role of creating, applying and enforcing basic conduct norms for society. The church's religious, political and social functions shaped its regulatory role. Its political power enabled it successfully to assert its jurisdictional claims, and its social and religious roles assured widespread penetration and acceptance of its norms.

The size, organization and omnipresence of the church gave it enormous political power.⁴¹ The pope, for example, could wield the full weight of the institution against his enemies, and thus he often played an important role in determining not only who would have secular power, but also how that power would be exercised. At the local level, bishops and monasteries were part of the feudal structure. The church owned vast amounts of land, and thus the local bishop or abbot exercised many of the same feudal rights as any other feudal lord. Moreover, the church hierarchy was often closely interwoven with the local nobility, and thus its political power was augmented by close ties to ruling families.⁴²

The church's social roles reinforced this power. The church was not only the sole source of spiritual care,⁴³ but it also frequently provided the only significant social and economic support available to most people.⁴⁴ In many areas, for example, its monasteries were a primary source of food, shelter and employment. Thus people were often dependent on the church for their material as well as for their spiritual well-being.

2. The Regulatory Impulse

The transformation of the church into a regulatory institution led to the creation of two distinct systems for developing, applying and enforcing these

39. RICHARD W. SOUTHERN, *WESTERN SOCIETY AND THE CHURCH IN THE MIDDLE AGES* 17 (1970) [hereinafter, SOUTHERN, *WESTERN SOCIETY*].

40. For a discussion, see *Id.* at 100-33; BERMAN, *supra* note 28, at 95-119.

41. 1 GABRIEL LE BRAS, *INSTITUTIONS ÉCCLESIASTIQUES DE LA CHRÉTIENTÉ MÉDIÉVALE* 235-270 (1964) [hereinafter LE BRAS, *INSTITUTIONS*].

42. SOUTHERN, *WESTERN SOCIETY*, *supra* note 39, at 170-73.

43. For a discussion of the church's programs of "pastoral care" and differing styles in providing such care, see ROBERT BRENTANO, *TWO CHURCHES: ENGLAND AND ITALY IN THE THIRTEENTH CENTURY* 100-32 & 346-52 (1988).

44. See generally BRIAN TIERNEY, *MEDIEVAL POOR LAW* (1959).

norms.⁴⁵ By the end of the twelfth century it had developed the concept of two fora, which distinguished between the internal forum of the confessional and the external forum of the ecclesiastical court.⁴⁶

In the internal forum, norms were part of the relationship between the individual and his god. The priest's primary role was to apply the church's norms to the conduct of the individual and to explain divine sanctions—i.e., how God was likely to view violations of those norms. This direct confrontation with God's representative in the sacrament of confession was a new and extremely important focus of religious activity during this period.⁴⁷ Confessors' manuals were produced in great numbers to provide guidance to local priests, and they quickly came to be viewed as a form of "law."⁴⁸ Moreover, confession and confessors' manuals provided vehicles by which theological doctrines found direct application to large segments of the populace.⁴⁹

The external forum was represented by the ecclesiastical courts. Here the norms were understood primarily as a means of structuring the relationship between the individual and the Christian community.⁵⁰ The court determined whether church norms were violated, and it enforced those norms by withdrawing the church's support from the violator. Church courts had limited means of coercing compliance with their decisions; with excommunication

45. For a discussion of the context in which the normative role of the church developed, see GABRIEL LE BRAS, *L'AGE CLASSIQUE: 1140-1378: SOURCES ET THORIE DU DROIT* 2-16 (1965) (Vol.7 of *L'Histoire de l'Église et ses Institutions*, Gabriel Le Bras ed.) [hereinafter LE BRAS, *L'AGE CLASSIQUE*].

46. See generally LE BRAS, *id.* at 25-26; 1 HASTINGS RASHDALL, *THE UNIVERSITIES OF EUROPE IN THE MIDDLE AGES* 134-35 (1895).

47. The Fourth Lateran Council (1215) established the requirement that all Christians participate at least once a year in the sacrament of confession, and this led to an immense increase in the importance of the confessional. For a discussion, see 1 JOHN W. BALDWIN, *MASTERS, PRINCES AND MERCHANTS: THE SOCIAL VIEWS OF PETER THE CHANTER AND HIS CIRCLE* 47-59 (1970) [hereinafter BALDWIN, *MASTERS, PRINCES AND MERCHANTS*]; WINFRIED TRUSEN, *ANFÄNGE DES GELEHRTEN RECHTS IN DEUTSCHLAND: EIN BEITRAG ZUR GESCHICHTE DER FRÜHREZEPTION* 135 (1962).

48. Scholars have referred to the development of law in the context of confessors' manuals as a form of "confessional jurisprudence." See, e.g., WINFRIED TRUSEN, *SPÄTMITTELALTERLICHE JURISPRUDENZ UND WIRTSCHAFTSETHIK, DARGESTELLT AN WIENER GUTACHTEN DES 14 26* (1961).

49. Confessors' manuals were also often owned by private persons, primarily merchants. See Jacques Le Goff, *Trades and Professions as Represented in Medieval Confessors' Manuals*, in *TIME, WORK AND CULTURE IN THE MIDDLE AGES* 107-12 (Arthur Goldhammer trans., 1980) [hereinafter LE GOFF, *Trades and Professions*].

50. See generally ROBERT C. MORTIMER, *WESTERN CANON LAW* 74-90 (1953).

being the ultimate sanction,⁵¹ but the power of the church as a universal religious institution created extraordinary compliance pressure.

The norms applied in the two fora were often similar, but variations resulted from differences between the characteristics of the two fora and the methods used by those who worked within the two systems.⁵² The theologians developed doctrine with little, if any, regard for legal considerations such as proof of guilt, while the canon (i.e., ecclesiastical) lawyers were charged with the practical task of applying church norms in legal proceedings.

The jurisdiction of church courts was extensive, although it frequently was not fully exercised.⁵³ Not only did it include all suits involving clergy, but also those involving crusaders, university students, the needy, Jews and travellers such as seamen and merchants. Any suit related to issues of faith could also be brought in this forum, including marital conflicts, many contractual issues and sins against justice such as, for example, usury. As Professor Le Bras puts it, "[a]ll of the countries of Christianity conformed their laws and their customs to the principles of canon law; all of the doctors and judges had to take it into account."⁵⁴

These two mechanisms for applying church norms to individuals combined to create powerful compliance pressures. According to Jacob Viner, "The moral doctrines of the Church were thus not merely a matter of preaching and moral influence but were of direct and practical consequence as effective social discipline in a period of almost universal faith."⁵⁵

3. Interpreting the Universe

The church's effectiveness as a regulatory institution was also tied to its power over thought. Church doctrine provided the central intellectual framework of the Middle Ages, supplying the dominant cosmology and a

51. For a discussion of excommunication as a sanction, see Richard H. Helmholz, *Excommunication as a Legal Sanction: The Attitudes of the Medieval Canonists*, 99 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE, KANONISTISCHE ABTEILUNG 202-18 (1982), reprinted in RICHARD H. HELMHOLZ, *CANON LAW AND THE LAW OF ENGLAND* 101-17 (1987); ELISABETH VODOLA, *EXCOMMUNICATION IN THE MIDDLE AGES* (1986).

52. For a discussion of the relationship between theology and canon law during this period, see LE BRAS, *L'AGE CLASSIQUE*, *supra* note 45, at 26-39.

53. See Trusen, *Die gelehrte Gerichtsbarkeit der Kirche*, in 1 HANDBUCH DER QUELLEN UND LITERATUR DER NEUEREN EUROPÄISCHEN PRIVATRECHTSGESCHICHTE 467, 483-87 (Helmut Coing ed., 1973).

54. LE BRAS, *L'AGE CLASSIQUE*, *supra* note 45, at 13. For the role of canon law in England, see FREDERICK M. MAITLAND, *ROMAN CANON LAW IN THE CHURCH OF ENGLAND* (1898); Charles Donahue, Jr., *Roman Canon Law in the Medieval English Church: Stubbs vs. Maitland Re-examined After 75 Years in the Light of Some Records from the Church Courts*, 72 MICH. L. REV. 647 (1974).

55. JACOB VINER, *RELIGIOUS THOUGHT AND ECONOMIC SOCIETY* 48 (Jacques Melitz & Donald Winch eds., 1978).

concomitant set of moral values. The church's framework represented the enormous power of virtually unchallenged orthodoxy, for, with few exceptions,⁵⁶ there was no viable alternative to acceptance of its doctrines.

Outside northern Italy the church dominated education and thus much of intellectual life.⁵⁷ In the early Middle Ages formal education had been almost exclusively the domain of the church, carried out for the most part in cathedral or monastery schools. These schools were part of the church, and education was subsumed within the church's religious functions. The universities broke this near-monopoly in the twelfth century, but the influence of the church remained strong in most universities.⁵⁸ Theology and canon law were often core subjects; faculties were often dominated by clergy; and the papacy often had ultimate control over major issues of educational policy.⁵⁹ Moreover, pre-university education generally remained in the hands of the church.

The church explained the world, and its normative roles were closely tied to its monopolization of this function. According to Richard Southern,

One of the greatest achievements of the Middle Ages was the detailed development of this idea of a universal human society as an integral part of a divinely ordered universe in time and in eternity, in nature and supernature, in practical politics and in the world of spiritual essences. Nearly everything of importance that was written in the Middle Ages, until the system began to break up in the fourteenth century, was written with some consciousness of this cosmic background.⁶⁰

In the church's cosmology the physical world was only one sphere of reality. The other—the spiritual sphere—was transcendent, and both were subject to divine intervention.⁶¹ This view of the world supported the church's norms, for if the norms were the will of a god who controlled both the physical and spiritual realms, there were no limits on the sanctions for violation of his norms.

The divine will could, however, be known only through the church, whose avowed role was to interpret this divine will on earth and thus to enable man

56. Outside of Spain, where there were significant numbers of Arabs, Jews alone represented a significant exception to this pattern. They were, however, too few in number to challenge the Church's framework. They merely sought to avoid its application to them. For a discussion, see, e.g., LITTLE, RELIGIOUS POVERTY, *supra* note 20, at 42-58.

57. For a discussion, see 1 RASHDALL, *supra* note 46, at 26-35, 90-104.

58. See, e.g., Coing, *supra* note 37, at 57-60.

59. In 1219, for example, Pope Honorius III forbade the teaching of Roman law in Paris. Excerpts from the Papal prohibition are contained in H. WIERUSZOWSKI, THE MEDIEVAL UNIVERSITY 144-5 (1966). For the circumstances, see 1 RASHDALL, *supra* note 46, at 323-24.

60. SOUTHERN, WESTERN SOCIETY, *supra* note 39, at 22.

61. For a discussion, see generally JAROSLAV J. PELIKAN, THE GROWTH OF MEDIEVAL THEOLOGY (600-1300) 268-307 (1978); BLOCH, *supra* note 27, at 81-87.

to achieve the salvation that divinity preferred. The church was responsible for establishing norms of conduct that would guide the individual toward his own salvation and discourage conduct that might harm the Christian community and thus impede the salvation of others.⁶²

In the thirteenth century these values penetrated society with a new intensity. Led by Popes such as Innocent III (1198-1216) the church developed a new spirit of reform and started a campaign "to bring the church to the people." Two central components of this campaign were the generalization of confession and the new emphasis on preaching.⁶³ The enormous expansion of the importance of confession meant that the individual had to confront his conscience directly (at least once a year) and the new preachers, especially the enthusiastic and reform-minded Franciscan and Dominican friars that swept through the cities, gave new immediacy and vigor to church doctrine.⁶⁴

C. *The Universities: Knowing, Power and the Law*

Universities also played key roles in responding to the market. As David Knowles has written, "Of all the agencies of change the most influential was the formalization of higher education and its close relationship to the two chief 'learned professions' of law and theology that grew so greatly in numerical strength and social importance in the latter half of the twelfth century."⁶⁵

1. Universities as "Super-Legislatures"

A university represented a kind of super-legislature to which all institutions—secular or religious—turned for guidance in responding to the new problems of the period. According to Richard Southern, "The schools were the parliaments of the twelfth century, defining the principles and laying down the rules of conduct of society, and in large part training the executives who would enforce them."⁶⁶ In particular, the faculties of law (canon and secular) and theology dominated the process of creating new norms of conduct.

This power derived in part from the allegiance that the early universities demanded, and received, from those who attended them. Matriculation meant entry into a "corporate" brotherhood and required an oath of permanent

62. "The subject of all law, they [canonists] would say, is not simply man, but the spiritual man, a pilgrim on his way between this world and eternal life." STEPHAN G. KUTTNER, *HARMONY FROM DISSONANCE* 46 (1960).

63. Jacques Le Goff, *The Usurer and Purgatory*, in *THE DAWN OF MODERN BANKING* 25, 29-42 (Center for Medieval and Renaissance Studies, U.C.L.A. ed., 1979) [hereinafter Le Goff, *The Usurer and Purgatory*].

64. See, e.g., MOLLAT, *supra* note 26, at 147-64.

65. DAVID KNOWLES, *THE EVOLUTION OF MEDIEVAL THOUGHT* 224 (1962).

66. RICHARD W. SOUTHERN, ROBERT GROSSETESTE: *THE GROWTH OF AN ENGLISH MIND IN MEDIEVAL EUROPE* 238 (1986) [hereinafter SOUTHERN, *ENGLISH MIND*].

allegiance to the university.⁶⁷ As a result, universities were centers of “networks” to which virtually all members of the new class of secular and ecclesiastical bureaucrats belonged.

At the local level, universities derived influence from their economic impact and the status they conferred on their host cities. Even in major cities such as Paris, universities wielded significant power, because they could always threaten to leave, and no city could view with equanimity the loss of income and prestige that such a move would entail.⁶⁸

2. Reason and its Roles

Much more important for our purposes, however, was the role of the universities in shaping thought. In a world freshly awakened to the power of systematic learning and in critical need of guidance in responding to rapid social and economic change, the universities provided much of that guidance.

The thrust of the market coincided with a general intellectual revival often known as the “renaissance” of the twelfth century.⁶⁹ The creation of economic knowledge and of norms relating to economic conduct was thus part of a process of intense intellectual development. Reason—the process of discovering “truth” through the application of human intelligence—grew rapidly in importance throughout the period.⁷⁰ Its range of application expanded, and confidence in its benefits grew.

Reason’s growing importance received a powerful impetus with the influx from the Arab world of translations of ancient Greek thinkers.⁷¹ European scholars sought to adapt these new methods and the conceptual structures embodied in the texts to their own agendas, particularly to the normative needs of the church and Roman law, and thus they quickly acquired a high degree of authority.

The most important of the thinkers reintroduced to the West in this way was Aristotle. The thirteenth century has been called the age of Aristotle, and it is difficult to overstate his influence during that period.⁷² Many texts of Aristotle that had been largely forgotten for centuries in Europe—often with unidentified interpolations from Arabic and Jewish translators—were again

67. For a discussion, see ALEXANDER MURRAY, *REASON AND SOCIETY IN THE MIDDLE AGES* 285-87 (1985).

68. See, e.g., 1 RASHDALL, *supra* note 46, at 335-44.

69. The classic work is CHARLES H. HASKINS, *THE RENAISSANCE OF THE TWELFTH CENTURY* (1927, reprinted 1965). See also *RENAISSANCE AND RENEWAL IN THE TWELFTH CENTURY* (Robert L. Benson and Giles Constable eds., 1982); *TWELFTH-CENTURY EUROPE AND THE FOUNDATIONS OF MODERN SOCIETY* (Marshall Clagett et al. eds., 1961).

70. See generally MURRAY, *supra* note 67.

71. See KNOWLES, *supra* note 65, at 185-92.

72. See generally JACQUES LE GOFF, *LES INTELLECTUELS AU MOYEN AGE* 121-29 (1957) [hereinafter LE GOFF, *LES INTELLECTUELS*].

made available, and they quickly came to represent a dominant force in all intellectual life.

This process of intense intellectual development was centered in the universities, whose primary mission was to search for truth and to disseminate the knowledge acquired in that search.⁷³ At the same time, however, the mission of the universities was to train a new class of administrators for positions in the church and in secular political institutions.⁷⁴ Regulatory issues were their major concern, and it was in this context that they sought to apply reason to both divine and human affairs. Even in the relatively speculative discipline of theology, for example, the transfer of educational leadership from the monasteries to the universities led to a rapid shift in emphasis from speculative and metaphysical issues to regulatory and normative issues.⁷⁵

3. The Roles of Roman Law

Roman law provided the principal intellectual framework for structuring this normative component of thought. Those responsible for developing societal norms quickly came to rely on it in ordering and interpreting social experience, and thus it dominated the response to the market.⁷⁶

The university environment shaped the study of Roman law and provided the vehicle for its influence. By the eleventh century the corpus of Roman law had been largely forgotten in the West,⁷⁷ but in about 1075 in the Northern Italian city of Bologna the texts of Roman law—some of which had only recently been rediscovered⁷⁸—began to be systematically and intensively studied as part of the process of responding to commercialization and

73. The ideal was, of course, not always attained. For a discussion of papal and secular influences on legal education, see David S. Clark, *The Medieval Origins of Modern Legal Education: Between Church and State*, 35 AM. J. COMP. L. 653 (1987).

74. See ALAN B. COBBAN, *THE MEDIEVAL UNIVERSITIES: THEIR DEVELOPMENT AND ORGANIZATION* 219-34 (1975).

75. "Although theology was discussed throughout all of the Middle Ages, treatment of ethical questions of a practical nature such as the just price appears not to have been developed until the influence of the universities had been felt at the turn of the twelfth and thirteenth centuries." John W. Baldwin, *The Medieval Theories of the Just Price: Romanists, Canonists and Theologians in the Twelfth and Thirteenth Centuries*, 49 TRANS. AMER. PHIL. SOC. 9 (1959) [hereinafter Baldwin, *Just Price*].

76. For a discussion of the intellectual impact of Roman law study, see, e.g., JOHN P. DAWSON, *ORACLES OF THE LAW* 100-47 (1968); PAUL KOSCHAKER, *EUROPA UND DAS RÖMISCHE RECHT* 55-86 (3d ed. 1958); Coing, *supra* note 37, at 25-35; and WIEACKER, *supra* note 35, at 124-33.

77. Remnants could be found, of course, in various pieces of statutory material and even in some scholarly works. For a discussion of legal thought prior to the recommencement of Roman law study, see CHARLES RADDING, *THE ORIGINS OF MEDIEVAL JURISPRUDENCE: PAVIA AND BOLOGNA 850-1150* (1988) and 1 RASHDALL, *supra* note 46, at 99-110.

78. See generally, *id.* at 123.

urbanization. The study of these sources and the attempt to make them useful and applicable to new circumstances was the only legal education available throughout Europe for centuries, and thus the concepts and categories of Roman law acquired the enormous power of universality.⁷⁹

The study of Roman law centered on the texts known as the *corpus juris civilis*, which were compiled and edited under the Eastern Emperor Justinian in the sixth century.⁸⁰ This collection consists primarily of opinions of classical jurists and edicts of Roman emperors.⁸¹ It does not represent the law of a particular period of Roman history, but material collected from many sources and many periods. These texts were studied neither as positive law nor in their historical context, but as a body of legal principles to guide all thought about law. Roman law was viewed as *ratio scripta* ("written reason") and it was bathed in the brilliant, half-mythical imagery generally attached to achievements of Roman civilization. It was treated in much the same way as was scripture, with rigorous parsing of individual passages for the meaning of the language used and the general principles that might inhere in it.⁸²

The objective of Roman law study was thus to generate an enlightened body of knowledge about how to order society. It was a central source of knowledge, and its study promised significant intellectual rewards. There was, however, another reason for studying Roman law—ambition. University-trained lawyers were in great demand throughout Europe.⁸³ The bureaucratization of the church, the development of city administrations and the

79. For an argument that the study of Roman law has been the central identifying characteristic of the civil law tradition, see ALAN WATSON, *THE MAKING OF THE CIVIL LAW* (1981).

80. For a description of the process, see HANS J. WOLF, *ROMAN LAW: AN HISTORICAL INTRODUCTION* 158-74 (1951).

81. The *Corpus Juris* consisted of four parts: The codex, primarily a collection of edicts of Roman emperors; the digest, a compilation of opinions of jurists from the classical period; the institutes, a basic introduction to Roman law; and the novels, selections from Justinian's own legislation. For a discussion of the roles played by the various materials in legal education during the medieval period, see WATSON, *supra* note 79, at 10-13.

82. See generally KOSCHAKER, *supra* note 76, at 69-82; Helmut Coing, *Die juristische Fakultät und ihr Programm*, in 1 *HANDBUCH DER QUELLEN UND LITERATUR DER NEUEREN EUROPÄISCHEN PRIVATRECHTSGESCHICHTE* 69-79, 140-46 (Helmut Coing ed., 1973).

83. The "market" for knowledge of Roman law knew no boundaries within Europe, as students from all areas, including England and Scandinavia, converged on the centers of Roman law and upon finishing their studies were sought for posts throughout Europe. See, *id.* at 80-84 and 94-95. See also, e.g., Andre Gouron, *The Training of Southern French Lawyers During the Thirteenth and Fourteenth Centuries*, XV *STUDIA GRATIANA* 219-27 (1972); *Le rôle social des juristes dans les villes méridionales au Moyen Âge*, *ANNALES DE LA FACULTÉ DES LETTRES ET SCIENCES DE NICE* 55-69 (1969), both reprinted in ANDRE GOURON, *LA SCIENCE DU DROIT DANS LE MIDI DE LA FRANCE AU MOYEN ÂGE* (1984).

centralization of royal power all called for law-trained personnel.⁸⁴ Roman law study thus also promised advancement, status, and wealth.⁸⁵

The comprehensiveness of Roman law further enhanced its intellectual influence. The *corpus juris* contained principles that could be applied to virtually any political or legal issue—from contracts to inheritance to public law. It provided a framework to which one could always turn for solutions—or at least conceptualizations—of societal problems. Moreover, at least from the gloss of Accursius in the middle of the thirteenth century,⁸⁶ its provisions were organized and accessible.

Roman law was studied as an ideal—a standard against which all law should be measured—rather than as the positive law of a particular polity, and thus throughout Europe both secular and ecclesiastical judges were soon incorporating Roman law principles into their daily decisions.⁸⁷ The rate of penetration of Roman law ideas depended on factors such as the rate at which judicial positions came to be occupied by judges trained in Roman law and the degree of political support or resistance to this use of Roman law.⁸⁸

Roman law was used not only in judicial decisions, but also as a model for legislation. Those charged with writing legislation generally were trained in Roman law and, consequently, they utilized Roman law concepts, structures

84. See generally Coing, *supra* note 82, at 84-90; MURRAY, *supra* note 67, at 302-16; JOHANNES FRIED, *DIE ENTSTEHUNG DES JURISTENSTANDES IM 12. JAHRHUNDERT* (1974).

85. See generally MURRAY, *supra* note 82 at 222-24. By the fourteenth century, for example, doctors of Roman law in Italy and Germany were often accorded noble status similar to that of knights. See also 1 RODERICK VON STINTZING, *GESCHICHTE DER DEUTSCHEN RECHTSWISSENSCHAFT* 61 (1880).

86. "From the middle of the thirteenth century . . . the gloss of Accursius as a generally recognized commentary on the *corpus juris* became the starting point and basis of every involvement with the sources and of every legal discussion." Peter Weimar, *Die legistische Literatur der Glossatorenzeit*, in 1 *HANDBUCH DER QUELLEN UND LITERATUR DER NEUEREN EUROPÄISCHEN PRIVATRECHTSGESCHICHTE* 139 (Helmut Coing ed. 1973).

87. See generally WIEACKER, *supra* note 35, at 175-89; KOSCHAKER, *supra* note 76, at 124-63 and 212-44; Norbert Horn, *Die legistische Literatur der Kommentatoren und die Ausbreitung des gelehrten Rechts*, in 1 *HANDBUCH DER QUELLEN UND LITERATUR DER NEUEREN EUROPÄISCHEN RECHTSGESCHICHTE* 261, 264-8 (Helmut Coing ed. 1973).

88. It was fastest in northern Italy, where the study of Roman law was centered and its use met limited resistance. See FRIED, *supra* note 84, at 140-69. In the German territories, the percentages of secular judges trained in Roman law increased only slowly during the thirteenth and fourteenth centuries, although Roman law was to gain predominance by the sixteenth century. See WIEACKER, *supra* note 35, at 97-189. In sections of France, particularly in the south, Roman law training for judges gained ground more quickly, but political opposition often prevented explicit use of Roman law as a source. See ADHEMAR ESMEIN, *COURS ÉLÉMENTAIRE D'HISTOIRE DU DROIT FRANÇAIS: À L'USAGE DES ÉTUDIANTS DE PREMIÈRE ANNÉE 679-735* (Robert Genestál ed., 15th ed. 1925); PAUL VINOGRADOFF, *ROMAN LAW IN MEDIEVAL EUROPE* 119-45 (1929); Dawson, *supra* note 76, at 263-90. Roman law's influence in England was similar, if less pronounced. See, e.g., *id.* at 97-117.

and solutions in the laws they wrote. This influence was particularly strong in city laws, where customary law typically was weak and where legislation was often needed to deal with new problems.

4. Canon Law

Canon law played a uniquely influential role in structuring the church's intellectual response to commercialization by fusing legal and religious concepts and roles.⁸⁹ Canon lawyers were neither theologians nor Romanists, but a distinct professional group closely associated with both.⁹⁰ Canonists shared with theologians the institutional and cosmological framework of the church, and there was a necessarily close relationship between religious doctrines and canonical norms. Canonists and theologians also studied and relied on many of the same sources—in particular, scripture and patristic writings.⁹¹

Canonists were, however, lawyers; their primary function was to apply legal norms in tribunals.⁹² As a consequence, they joined with Romanists in developing legal concepts and procedures. Roman and canon law developed symbiotically. Roman law scholars were, for example, influenced by exegetic methods used in the church, while the canon law was largely constructed on Roman law principles.⁹³ The two systems utilized the same methods of instruction and the same modes of analysis.⁹⁴ In many universities both systems of law were taught, often by many of the same professors and to many of the same students. Thus basic principles of canon law were often indistinguishable from their Roman law counterparts.

The strategic position of canon lawyers between the theologians and the Romanists made them conduits and processors of ideas between Roman law

89. See generally DOROTHY M. OWEN, *THE MEDIEVAL CANON LAW: TEACHING, LITERATURE AND TRANSMISSION* (1990); Harold J. Berman, *The Origins of Western Legal Science*, 90 HARV. L. REV. 894 (1977). See also James Gordley, *Law and Religion: An Imaginary Conversation with a Medieval Jurist*, 75 CAL. L. REV. 169 (1987).

90. For a discussion of the relationship between theology and canon law, see LE BRAS, *L'AGE CLASSIQUE*, *supra* note 45, at 26-30.

91. See generally CHARLES MUNIER, *LES SOURCES PATRISTIQUES DU DROIT DE L'ÉGLISE DU VIII^E AU XIII^E SIÈCLE* (1957).

92. "Every fresh step in the development of the Canon Law after Gratian [ca. 1140] brought with it a still further infiltration of legal ideas, so that that ere long a study of the Civil Law became an indispensable preliminary to the education of the Canonist, who became in consequence less and less of a Theologian, and more and more of a lawyer." 1 RASHDALL, *supra* note 46, at 135-36 (wrong pg numbers). For a discussion of the differentiation between canon law and theology after Gratian, see *id.* at 136-28.

93. For a discussion, see *id.* at 134-36 and LE BRAS, *L'AGE CLASSIQUE*, *supra* note 45, at 30-43.

94. See generally, *id.* at 25.

and theology, the two leading disciplines of the period.⁹⁵ Canon law provided an interface between the moral ideas developed by the thinkers of the church and the emerging secular concepts of law, and thus in canon law the nexus between morality and positive law was developed and cemented.⁹⁶

Canon law as a distinct discipline began to emerge with the ascendancy of Roman law in the twelfth century, focusing particularly on the so-called "Decretum" of Gratian, which appeared around 1140.⁹⁷ This systematized and annotated collection of religious texts became the focus of intense efforts during the twelfth and thirteenth centuries to develop a structured body of normative principles, and it remained part of the corpus of canon law until 1918. In the thirteenth century, canon lawyers also turned their attention to organizing the surge of papal legislation produced by the activist popes of the period,⁹⁸ organizing and elaborating them according to the same methods being used to organize Roman law and infusing them with concepts derived from Roman law.

5. Norms, Authority and Knowledge

In assessing the roles of Roman and canon law, it is important to note that law was emerging at this time as an autonomous discipline. Prior to the eleventh century, societal norms had been derived from poorly-defined admixtures of ethical, moral and political authority. As Harold Berman has pointed out, "law did not exist as a distinct system of regulation or as a distinct system of thought."⁹⁹ It tended to be understood either as an aspect of the will of the ruler or as an emanation of religious authority.¹⁰⁰ In the

95. According to Professor Le Bras, "All of the moral problems were transported into the 'legal domain' (*la domaine juridique*) by the commentaries of the canonists." *Id.* at 29.

96. The importance of canon law's intermediary role is indicated by its pervasiveness in the universities. Roman law was studied primarily in the Italian universities, particularly Bologna, while theology was primarily the domain of Paris and the English universities. Virtually every university, however, had a faculty of canon law. For a discussion, see 1 RASHDALL, *supra* note 46, at 8.

97. GRATIAN, *DECRETUM*, in 1 *CORPUS IURIS CANONICI* (E. Friedberg ed. 1879, reprinted 1959). For a discussion of the Decretum and its influence, see STANLEY CHODOROW, *CHRISTIAN POLITICAL THEORY AND CHURCH POLITICS IN THE MID-TWELFTH CENTURY* (1972) and STEPHAN KUTTNER, *GRATIAN AND THE SCHOOLS OF LAW* (1983).

98. See Kuttner, *The Revival of Jurisprudence*, in *RENAISSANCE AND RENEWAL IN THE TWELFTH CENTURY* 299, 316-18 (Robert L. Benson and Giles Constable eds., 1982).

99. BERMAN, *supra* note 28, at 85.

100. As Walter Ullmann has noted, "Whatever we are inclined to call 'political' was for the greater part of the Middle Ages expressed within the terms of the law." WALTER ULLMANN, *MEDIEVAL POLITICAL THOUGHT* 15 (1975). Similarly, political and religious authority often were so closely related as to be indistinguishable. *Id.* at 38; ERNST H. KANTOROWICZ, *THE KING'S TWO BODIES: A STUDY IN MEDIAEVAL POLITICAL THEOLOGY* (1957).

twelfth century that changed, and law began to emerge as an autonomous sphere of societal life.

In this new capacity, law acquired a powerful influence over knowledge itself, because knowledge was authority-bound and norm-directed, and the authorities and norms that bound and directed it were associated with law. Intellectual activity was largely a matter of interpreting authoritative texts, and thus interpretation was the central intellectual process.¹⁰¹ Theologians interpreted scripture and church writings; civil lawyers interpreted Roman law texts; canon lawyers interpreted both of the above plus the Decretum of Gratian and the decretals of the popes; and philosophers interpreted classical texts.¹⁰² Methods of interpretation evolved, and there was growing awareness of the role of "creativity" in interpretation, but authority continued to structure all forms of thought.¹⁰³

The dominant role of authority was reflected in, and perpetuated by, the scholastic method, which was the standard form of analysis during the period.¹⁰⁴ Developed out of the principles of classical rhetoric, this method called for rigorous marshalling of authoritative texts on both sides of a given proposition and sustained deductive reasoning to establish the cogency of the preferred interpretation.¹⁰⁵

Knowledge generally was also normative—i.e., it was linked to conduct norms. The question "What principles should govern behavior?" was at the core of most intellectual activity.

Men who were trained in the scholastic tradition studied the natural world mainly with a view to tracing the limitations within which human minds and wills had to operate. They classified temptations, and provided remedies and penalties which would help to free reason from the constraints of the passions, and from the pressures of the world. They approached the phenomenon of nature like mariners exploring a hostile coast, not with a view to landing and surveying the country, but with a view to providing navigational signs and precautions against shipwreck. They were regulators, not explorers.¹⁰⁶

101. See, e.g., 1 RASHDALL, *supra* note 46, at 131.

102. See generally Coing, *supra* note 82, at 39, 41.

103. For a discussion, see generally, DONALD R. KELLEY, *THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION* 109-27 (1990).

104. For a discussion of the development of the scholastic method during this period, see 2 MARTIN GRABMANN, *DIE GESCHICHTE DER SCHOLASTISCHEN METHODE* (1911, *reprinted* 1961).

105. See Weimar, *supra* note 86.

106. SOUTHERN, *ENGLISH MIND*, *supra* note 66, at 94.

The idea of acquiring knowledge for its own sake was little developed,¹⁰⁷ remaining veiled and obscure throughout the period.¹⁰⁸

III. ORDERING ECONOMIC LIFE: THE TRANSCENDENT NORMS

These dynamics shaped a bifurcated response to the market that was to have an immense impact on the subsequent development of Western civilization. The church and the universities carved out a regulatory space in which economic conduct norms were informed by ethical, philosophical and religious values, and understood as autonomous, timeless, absolute standards of conduct. Political institutions such as cities, in contrast, regulated economic conduct in order to achieve specific policy objectives, utilizing discourse and processes separate from those of the church and the universities, even while incorporating and adapting some of their substantive principles.

The norms of the church and the universities formed the core of this framework, combining church doctrine with Roman law to structure the market. I use the term "transcendent" to refer to these norms, because their defining characteristic is that they were based on claims of abstract, non-contingent validity. Hence, they "transcended" the world of laws made by men. A transcendent norm of conduct claims validity for all people under all circumstances; it is conceived as an expression of abstract "truth."

A. *The Church and Economic Activity*

1. The Church and Commerce: A Tradition of Antipathy

The church's dominant role in society meant that its values would be the starting-point for responding to the market, and the church's tradition was filled with antipathy to commerce.

From its inception, church tradition had painted an overwhelmingly negative picture of commercial activity.

[Its] morality had been formulated either in the early Christian period, when Christians did not benefit from the flourishing urban-commercial society in

107. According to Rashdall, "Under cover of this idea [that rules of right reasoning were the same for Christian and for pagan alike] teacher and pupil alike were enabled in the study of dialectic, and perhaps in dialectic only, to enjoy something of the pleasure of knowledge for its own sake." 1 RASHDALL, *supra* note 46, at 37.

108. Some intellectuals, notably those associated with the School of Chartres, sought to understand cause and effect relationships in nature as part of the theological and philosophical attempt to understand the world, but knowledge about society remained primarily normative. For a discussion of the exploration of nature during the twelfth century, see MARIE-DOMINIQUE CHENU, *NATURE, MAN AND SOCIETY IN THE TWELFTH CENTURY: ESSAYS ON NEW THEOLOGICAL PERSPECTIVES IN THE LATIN WEST* 1-48 (Jerome Taylor & Lester Little eds. and trs., 1968) and GAINES POST, *STUDIES IN MEDIEVAL LEGAL THOUGHT* 494-561 (1964).

which they lived; or in the patristic era, when that urban-commercial society was crumbling and theologians were investing intellectual and emotional capital in an unworldly city; or, finally, in the feudal era, when commerce and city life were moribund.¹⁰⁹

In each of these contexts commercial values appeared alien and potentially dangerous to Christian writers and to those who formulated church policy.

The patristic writings that were the primary sources of authority for the church's intellectual encounter with the market were replete with denunciations of mercantile activity.¹¹⁰ Heavily influenced by Greek, especially Platonic, philosophy, these works considered commercial activity incompatible with religious salvation.¹¹¹ A merchant could not follow the church's precepts, it was thought, because commerce required lying, deception, exploitation and other sins.¹¹² Moreover, the market was seen as a threat to the Christian community, because it undermined the ideas of fairness and cohesion on which that community was based.¹¹³ Early medieval writers who were used as authorities during the twelfth and thirteenth centuries typically either repeated the condemnations found in patristic writings or paid little heed to commercial activity.

2. The Church's Response to the Market

The church's response to commercialization thus developed against a backdrop of moral disdain for commerce, and the growing importance of the market initially led the church to intensify its doctrinal and didactic efforts to combat this threat. The church's view of the market centered on the moral vulnerability of the merchant, and church doctrine only gradually recognized that although the market could be a source of moral and religious contamina-

109. Lester Little, *Pride Goes Before Avarice: Social Change and the Vices in Latin Christendom*, 76 AMER. HIST. REV. 16, 30-31 (1971).

110. For a discussion of the moral context in which these values were shaped, see WAYNE A. MEEKS, *THE MORAL WORLD OF THE FIRST CHRISTIANS* (1986) and ROBIN L. FOX, *PAGANS AND CHRISTIANS* 265-608 (1986).

111. For a discussion of the economic program of the early church, see JUSTO L. GONZALEZ, *FAITH AND WEALTH: A HISTORY OF EARLY CHRISTIAN IDEAS ON THE ORIGIN, SIGNIFICANCE AND USE OF MONEY* (1990); THEO SOMMERLAD, *DAS WIRTSCHAFTSPROGRAMM DER KIRCHE DES MITTELALTERS* 3-32 and 95-170 (1903) and IGNAZ SEIPEL, *DIE WIRTSCHAFTSETHISCHEN LEHREN DER KIRCHENVÄTER* (1907).

112. See VINER, *supra* note 55, at 30-38.

113. The only patristic writer of importance during the medieval period who placed any significant emphasis on justifying commercial activity was Augustine. John W. Baldwin, *The Medieval Merchant before the Bar of Canon Law*, 44 PAPERS OF THE MICHIGAN ACADEMY OF SCIENCE, ARTS AND LETTERS 287, 290 (1959). See generally PETER R.L. BROWN, *AUGUSTINE OF HIPPO* (1967).

tion, individual market participants could withstand its temptations, at least sometimes.¹¹⁴

For the church, greed (*avaritia*) was a sin and thus an impediment to salvation, and the church's response to the market focused on eliminating temptations. Although avarice had been considered a sin since the early days of the church, it acquired new importance in the twelfth and thirteenth centuries. As Lester Little has shown,¹¹⁵ it was during this period that avarice replaced pride as the most important sin. According to the church, the desire for wealth beyond that which was necessary for the performance of familial and societal duties was inconsistent with spiritual salvation. As a result, it denounced wanting more than was appropriate for one's station in life. Attacks on avarice were a frequent theme in the art and literature of the period, and such condemnations typically implicated all commercial activities.

In the thirteenth century, avarice became a major theme of the urban preachers and of the popular spiritual movements associated with them.¹¹⁶ The mendicant orders of the Franciscans and Dominicans glorified religious poverty and called for the renunciation of wealth.¹¹⁷ For them, voluntary poverty was a highly valued state—one thought to be particularly conducive to spiritual well-being. In emphasizing the spiritual benefits of poverty, these popular movements further underscored the threat posed by greed and the market.¹¹⁸

Church doctrine was also concerned with the impact of the market on the Christian community. The church sought to protect communitarian values and to avoid envy and resentment among its members, and the activities of the merchant were seen as an obstacle in the path of both of these objectives. The church asked members of the Christian community not only to cooperate with each other, but also to love and support one another. Yet commercial activity confronted this ideal at every turn. Buying and selling on an open market encouraged each party to a transaction to seek gain at the expense of the other, while the availability of funds to some and the need for funds by others provided incentives to make loans at high interest rates.

As the concept of community adjusted to the urban and commercial environment of the twelfth and thirteenth centuries,¹¹⁹ communitarian values were abstracted and conceptualized. In this process the concept of "justice" acquired great symbolic significance as a repository of many of these

114. For discussion of the church's accommodation of commercial objectives, see BERMAN, *supra* note 28, at 336-39.

115. Little, *supra* note 109.

116. See CHENU, *supra* note 108, at 239-69.

117. See generally LITTLE, RELIGIOUS POVERTY, *supra* note 20, at 146-70; SOUTHERN, WESTERN SOCIETY, *supra* note 39, at 272-99; 1 RASHDALL, *supra* note 46, at 344-92.

118. See, e.g., TIERNEY, *supra* note 44.

119. For a discussion of this process, see REYNOLDS, *supra* note 10, at 155-218.

communal values and a conceptual mechanism for their realization. Concepts of justice were designed to achieve fairness and protect the sense of community in the new environment, and, because threats to the community from this environment were primarily associated with commercialization, issues of justice focused on economic conduct.¹²⁰

This communitarian perspective also led to increased emphasis on the "common good" as a symbol of the community's needs.¹²¹ This concept served to reinforce cohesion in the face of threats from commercialization and urbanization.¹²² The church supported the regulation of prices by cities, for example, largely on the grounds that it protected the common welfare.¹²³

Ironically, this emphasis on the common good also eventually supplied the theoretical justification for the market and the merchants' activities. "As the new world [of the twelfth and thirteenth centuries] was conceptualized, a role of great importance was played by the idea of the *common good*. It became the touchstone of the utility and legitimacy of every profession."¹²⁴ The community needed to be supplied, particularly with food, and by the thirteenth century churchmen increasingly recognized the importance of the merchant's services for the satisfaction of the community's material needs.¹²⁵

3. The Church's Institutional Interests

From the perspective of church doctrine the regulation of economic conduct was a moral and religious issue, but the church was also a political and economic institution, and thus institutional and personal incentives also influenced the development of economic conduct norms. These influences, however, often pulled in opposing directions.

On the one hand, the church had incentives to use its regulatory power to restrain commercial activity. It often had cause, for example, to seek to restrict the power of urban commercial classes that threatened the political

120. The perceived need to protect the Christian community from the spiritual harms associated with the market also contributed to the development of hostility against Jews, who often engaged in commercial and, particularly, money-lending activities. The church increasingly found it politically useful to associate Jews with the harmful aspects of commercialization, thereby identifying them as a source of harm outside of the Christian community. For a discussion, see LITTLE, RELIGIOUS POVERTY, *supra* note 20, at 42-57; ROBERT I. MOORE, THE FORMATION OF A PERSECUTING SOCIETY: POWER AND DEVIANCY IN WESTERN SOCIETY 950-1250 27-44 (1987).

121. See, e.g., Walther Merk, *Der Gedanke der gemeinen Besten in der deutschen Staats- und Rechtsentwicklung*, in Festschrift für A. Schultze 451 (1934).

122. For a discussion of the roles and significance of symbolism during this period, see CHENU, *supra* note 108, at 99-145.

123. GILCHRIST, *supra* note 26, at 52.

124. Le Goff, *Trades and Professions*, *supra* note 49, at 117.

125. See also Jacques Le Goff, *Licit and Illicit Trades in the Medieval West*, in JACQUES LE GOFF, TIME, WORK AND CULTURE IN THE MIDDLE AGES 58, 64-66 (Arthur Goldhammer trans., 1980).

position of church institutions. Moreover, the church—particularly through its monastic orders—was a major landowner, depending on agriculture for much of its income,¹²⁶ and in many areas bishops were predominantly from the landed nobility and operated for most purposes as seignorial lords.¹²⁷ Thus the cities—and the merchants who often controlled them—sometimes represented a direct economic threat to the church by attracting away laborers and increasing costs to agriculture.

On the other hand, commercial activity also provided material benefits to the church, its components and its personnel. Merchant gifts supplied, for example, much of the financing for the extraordinary surge of ecclesiastical construction during this period.¹²⁸ The trading activities of merchants also allowed monastic orders such as the Cistercians to develop great wealth and made possible the refined lifestyles of many prelates.

The conflicts between religious concerns and institutional interests, as well as the number and variety of such interests, make the impact of institutional interests difficult to assess, particularly because those involved often did not perceive such influences and, even where they did recognize them, the church forbade reference to them. Churchmen undoubtedly were often concerned with the church's political and economic circumstances as well as their own wealth, but late twentieth century assumptions about the influence of economic and political incentives on institutional behavior have limited application to the church of that period.¹²⁹

The difficulty of drawing inferences about actual impact from an analysis of incentives is demonstrated by the church's stance on borrowing. The church, particularly the papacy, frequently needed funds and was forced to borrow. In addition, individual bishoprics and monasteries often possessed great wealth that could be used profitably to fund commercial expansion. Yet, despite these incentives to reduce restrictions on lending, the church steadfastly resisted any relaxation of the usury prohibition and frequently pushed for even tighter controls.¹³⁰

Perhaps all that can be said is that despite the moral rigor with which the church as a normative institution often attacked mercantile activity, as a political and economic institution it also accommodated and protected merchants. This often meant that the church's economic conduct norms tended to be enforced more vigorously against less powerful economic actors such as

126. GILCHRIST, *supra* note 26, at 27-39 and 51-52.

127. See SOUTHERN, WESTERN SOCIETY, *supra* note 39, at 188-213.

128. See generally 2 LE BRAS, INSTITUTIONS, *supra* note 41, at 251-61; GEORGES DUBY, THE AGE OF THE CATHEDRALS: ART AND SOCIETY 980-1420 110-12 (Eleanor Leveux & Barbara Thompson trans., 1981).

129. See JOHN T. NOONAN, THE SCHOLASTIC ANALYSIS OF USURY 13-14 (1957).

130. See *infra* text accompanying notes 149-95.

public moneylenders and that the symbolic and hortatory functions of the norms were more important than their judicial enforcement.

4. From Religious Doctrines to Legal Norms

The church provided a basic set of values for the ordering of economic life and a basic image of market activity as a serious threat to spiritual welfare. The resulting *mentalité* thus influenced virtually everyone involved in shaping the normative response to the market—whether judges, lawyers, legislators or theologians.¹³¹ In addition, however, the church's twelfth-century transformation into a bureaucratic and juristic organization led to the embodiment of these values in norms applicable by courts, priests and administrators. In particular, it gave to canon lawyers and church courts responsibility for applying the church's value scheme to specific cases and for developing its normative implications. It was in this process of concretizing church values that specific norms such as usury and just price were developed.

B. Roman Law and Economic Conduct

As the church became a regulatory institution, it had to develop legal forms into which these values and attitudes could flow, and Roman law provided a refined set of concepts, classifications and distinctions that theologians and canonists used for these purposes. According to Raymond De Roover,

[The scholastics'] purpose was always to determine the rules of justice which should govern economic transactions and social relations. Under the impact of Roman Law, the decisive criterion depended upon the legal nature of the contract. Thus the just price was discussed in connection with *emptio venditio*, or the contract of purchase and sale. The *mutuum* or loan gave rise to the usury problem.¹³²

Roman law thus often provided the conceptual structures through which church values and objectives were expressed.

Roman law did more, however, than merely provide the vocabulary for regulating economic conduct, it served as a powerful alloy that strengthened the church's message while giving it form. Roman law was "written reason" and imbued as such with authority and power. The fusion of church values with Roman law concepts thus enhanced the power and impact of each.

131. This concept has been defined by M.D. Chenu as "a permeating influence, of which men were more or less aware, upon their ways and turns of thought; a cast or coloration given to even their commonest notions; a body of assumptions rarely expressed yet accepted everywhere and by all and very difficult to uncover." CHENU, *supra* note 108, at 102.

132. Raymond De Roover, *Joseph A. Schumpeter and Scholastic Economics*, 10 KYKLOS 115, 123 (1957).

In addition to providing form and authority for church values, Roman law provided implicit ideological messages that further strengthened the evolving normative framework for economic conduct. Roman law contained two basic ideological messages—one from the classical period and the other from the later empire, and thus when lawyers, judges and administrators looked to Roman law for guidance in regulating economic conduct, what they found depended on where they looked, and they could combine or choose among these messages in accordance with their objectives.

Classical Roman law demonstrated a clear preference for freedom of bargaining as a basic approach to economic processes. It emphasized the will of the parties and the sanctity of the contract, and it was reluctant to interfere with bargains freely entered into.¹³³ This heritage was contained primarily in the Institutes and the Digest, the two components of the *corpus juris* that were particularly influential during the twelfth and thirteenth centuries, and it has been among Roman law's most significant contributions to the development of economic patterns in Europe.

There was, however, another side of Roman law that presented a very different picture of the proper relationship between law and the market. The Roman economy tended to be far more extensively regulated during the later empire than it had been in the period of classical Roman law. Thus the Codex of Justinian, which contained many regulatory edicts of emperors, was replete with economic regulations. These Codex notions of economic regulation were known and available for use, and they were also *ratio scripta*.

C. *Economic Knowledge*

Before we turn to a more detailed look at the transcendent norms that were developed to order economic life during this period, it is essential to recognize that during this period economic knowledge was constructed within normative categories.¹³⁴ The central objective of those who wrote about economic conduct was to determine whether such conduct violated legal, ethical or religious norms; there was little concern with economic consequences. Scholastic writers, for example, were concerned primarily with issues such as

133. "Originating from Classical law and extending up through the compilation of Justinian, the fundamental Roman law principle of sale and price was that of freedom of bargaining. Its importance as a source of medieval theories of sale and price cannot be overestimated." Baldwin, *Just Price*, *supra* note 75, at 17.

134. According to Jean Ibanès, "medieval economic analyses are not . . . separable from a theological and philosophical conception of man and of the world from which they derive the framework for their research and from a system of values which confers a normative character on their conclusions." JEAN IBANÈS, *LA DOCTRINE DE L'ÉGLISE ET LES RÉALITÉS ÉCONOMIQUES AU XIIIÈ SIÈCLE* 1 (1973). See also RAYMOND A. DE ROOVER, *LA PENSÉE ÉCONOMIQUE DES SCOLASTIQUES: DOCTRINE ET MÉTHODE* 19 (1967) [hereinafter DE ROOVER, *LA PENSÉE ÉCONOMIQUE*].

the incentives to dishonesty and exploitation created by economic transactions.¹³⁵

Insights into the economic consequences of conduct began to emerge, however, in the process of studying economic conduct for these normative purposes. This was particularly true of scholastic thought. According to Jacob Viner, "The Scholastics did in fact make contributions of value to economic theory and to the understanding of economic process, but this was mainly a fortuitous by-product of their examination of various types of economic transactions to determine whether they were morally licit or not."¹³⁶

From a twentieth century perspective, the most formidable obstacle to understanding economic knowledge during this period is its lack of a separate identity. People produced and consumed and bought and sold, but these activities were not identified as a distinct category of human activity.¹³⁷ There was no body of knowledge that sought to explain economic conduct or to understand its consequences, and there was no concept of an economic system which would identify data as having economic relevance.

Against this background, we can now examine in the following three sections the transcendent norms that were the core of the Western response to the market. Each of these norms had enormous power in its own right, and together they structured thought about economic conduct for centuries. Fusions of church doctrine, Roman law and scholastic philosophy shaped the development of each.

IV. THE PROHIBITION OF USURY

The prohibition of usury was the single most important economic conduct norm during this period and for centuries afterward. It was feared, if not always followed, throughout Europe, and it shaped thought about economic conduct as well as patterns of economic development.¹³⁸

135. According to Jacob Viner, "The interest of the Church in economic matters, aside from its interest in conducting its own substantial material affairs, was confined practically exclusively to their actual or supposed religious and moral aspects. The study of economic process out of scientific interest or with a view to the discovery of means of promoting temporal prosperity did not come within the range of interest or duty of the Scholastics." VINER, *supra* note 55, at 49.

136. *Id.* As used by Viner the term "scholastic" covers "all Catholic moral theologians and canonists who wrote in the central tradition of the Church from the late Middle Ages to the end of the sixteenth century." *Id.* at 46.

137. See generally JOSEPH A. SCHUMPETER, *HISTORY OF ECONOMIC ANALYSIS* 82-94 (1954); GEORGE A.T. O'BRIEN, *AN ESSAY ON MEDIEVAL ECONOMIC TEACHING* 8 (1920).

138. For detailed discussions of usury during this period, see NOONAN, *supra* note 129; McLaughlin, *The Teaching of the Canonists on Usury*, *MEDIEVAL STUDIES* 81 (1939) [hereinafter McLaughlin, pt.1] and 2 *MEDIEVAL STUDIES* 1 (1940) [hereinafter McLaughlin, pt.2]; JACQUES LE GOFF, *YOUR MONEY OR YOUR LIFE: ECONOMY AND RELIGION IN THE MIDDLE AGES* (Patricia Ranum, trans. 1988) [hereinafter LE GOFF, *YOUR MONEY*]; PATRICK CLEARY, *THE CHURCH AND USURY* (1914); BENJAMIN NELSON, *THE IDEA OF USURY* (1969) and FRANZ

A. *The Concept of Usury*

The term "usury" and its cognates in other European languages have been used to refer to two separate, albeit related ideas. Usages have varied over time, and there continue to be differences in usage among the various European languages. The narrow meaning of usury relates to making profits on a loan, usually from the charging of interest. Originally, it apparently included any profits on a loan,¹³⁹ but its meaning was gradually restricted to refer to the taking of undue interest, and it is to this concept that the current English term refers. According to a broader usage, however, the concept of usury includes any transaction in which one member of a community takes advantage of another—i.e., profits from his neighbor's misfortune, weakness, or need. This more inclusive usage is still found in some European languages, notably in the German "*Wucher*."¹⁴⁰

B. *Early Development of the Usury Prohibition*

The idea that usury was sinful was deeply imbedded in the Christian tradition long before the commercial revolution. Both testaments of the Bible contain passages in which profits on a loan are prohibited, at least in transactions among members of the relevant religious community.¹⁴¹ Relying on this biblical interdiction, the early Christian church exhorted its members not to practice usury and forbade it under some circumstances.¹⁴² In both the biblical and early church contexts, usury doctrine served the need for solidarity and cohesiveness in generally small religious communities that often were persecuted minorities as well.

As Christianity became the (almost) universal religion of Europe in the centuries following its official acceptance by the Roman emperor Constantine in the fourth century, the church widened the scope of the usury prohibition, but until the ninth century only the clergy were subjected to significant sanctions for engaging in usury; others were merely exhorted to avoid it.¹⁴³ The Carolingian reforms of that century extended usury prohibitions to all

SCHAUB, DER KAMPF GEGEN DEN ZINSWUCHER, UNGERECHTEN PREIS UND UNLAUTEREN HANDEL IM MITTELALTER (1905).

139. For a discussion, see *infra* text accompanying notes 174-78.

140. See, e.g., German Civil Code (BGB) §138; KLAUS RÜHLE, DAS WUCHERVERBOT - EFFEKTIVER SCHUTZ DES VERBRAUCHERS VOR ÜBERHÖHTEN PREISEN? (1978).

141. The book of Deuteronomy provides, for example, that "Thou shalt not lend upon usury to thy brother"(Deut. XXIII:19), but "Unto a stranger thou mayest lend upon usury"(Deut. XXIII:20). For a discussion of the biblical passages, see LE GOFF, YOUR MONEY, *supra* note 138, at 21-23, and CLEARY, *supra* note 138, at 1-18, 32-36.

142. See generally CLEARY, *supra* note 138, at 37-60.

143. SCHAUB, *supra* note 138, at 31.

Christians and enforced them through secular sanctions.¹⁴⁴ These two developments became particularly important in the twelfth century, because both churchmen and secular leaders used this general religious-secular prohibition of usury as a guide in responding to problems of commercialization.¹⁴⁵

In the manorial society that dominated the centuries following the disintegration of the Carolingian empire the prohibition of usury continued to serve an important symbolic function. The community of the manor or village was the dominant social unit, and its success and even its survival often depended on group solidarity. Because usury represented a threat to community cohesion—individualistic striving for gain at the expense of another member of the community—its prohibition became an important symbol of group solidarity.

The agricultural context of manorial society made the taking of interest on a loan particularly odious. In the manorial community there was generally little opportunity for investment, and, as a result, people were likely to borrow only when they had suffered some misfortune such as the loss of a crop or home, in which cases they would often be in an exceptionally weak bargaining position.¹⁴⁶ In such situations the cohesiveness of the community required that others make the needed loan without asking for the payment of interest. It was not the fault of the unfortunate that he needed to borrow. Moreover, if he were required to pay interest on the loan, the interest burden might prevent him from continuing as a productive member of the community.

The church shared these communitarian concerns. Its power and authority were built on the notion of Christian community, and the taking of interest on distress loans did not comport well with the church's notions of brotherly love. In addition, the church depended on contributions, and willingness to contribute might well have been undermined if the church or individual priests had been allowed to take advantage of the need of members of the community by charging interest on loans of contributed funds.

While the usury prohibition performed a valuable symbolic role in manorial society, its agrarian context also meant that there were few transactions to which it applied. Usury was not a frequent problem, because opportunities for both investment and commercial exchange were rare. This may explain, in part at least, why there was so little effort during this period to justify the prohibition of usury. Usury was associated with the sin of avarice and, especially in the penitential literature, it was considered a sin

144. See NOONAN, *supra* note 129, at 15-17.

145. SCHAUB, *supra* note 138, at 35.

146. See NOONAN, *supra* note 129, at 13; *Id.* at 41-3.

because it was a manifestation of avarice.¹⁴⁷ There was, however, little theoretical discussion of the prohibition.¹⁴⁸

C. *Usury and the Commercial Revolution*

In an urban and commercial context, however, the prohibition of usury cannot be a marginal issue. In changing the context of the practice of usury, the commercial revolution also transformed the roles played by its prohibition. Usury became the central normative economic issue of the twelfth and thirteenth centuries, placing the forces of commercialization in direct opposition to central values of church and community.¹⁴⁹

This conflict was inevitable, because to prohibit profits on lending is inconsistent with a market economy. Merchants must borrow in order to invest and lend in order to sell, but funds will not be made available for loans unless profit can be made to justify both the opportunity costs of lending and the attendant risks. Commercialization meant that some would provide funds to others and that they would be compensated for doing so. The question was what forms such financing would take.

In a market-oriented society few could be confident that they would never have to borrow, and, consequently, exploitation became an even greater, more immanent and more visible threat to the Christian community than it had been previously.¹⁵⁰ Beginning about the middle of the twelfth century, the church made usury the target of an intense campaign that lasted for centuries.¹⁵¹ Usury became the symbolic focus of resistance to the threatened moral harms of commercialization, and the church attacked it vigorously at all levels. In church art—the central didactic medium of the period—the usurer came to embody the evils of commercialization and was depicted as a pathetic and often disgusting creature.¹⁵² This vile figure was also a frequent object of scorn in sermons and in the confessors' manuals that provided moral guidance to priests.¹⁵³

This campaign was sharpened and emotionalized, particularly in the thirteenth century, by strong utopian and communitarian movements centered

147. See LE GOFF, *YOUR MONEY*, *supra* note 138, at 27; NOONAN, *supra* note 129, at 17.

148. CLEARY, *supra* note 138, at 62.

149. See generally Bernard Schnapper, *La répression de l'usure et l'évolution économique*, 37 *TJDSCHRIFT VOOR RECHTSGESCHIEDENIS* 46-50 (1969).

150. LE GOFF, *YOUR MONEY*, *supra* note 138, at 25.

151. See generally 1 BALDWIN, *MASTERS, PRINCES AND MERCHANTS*, *supra* note 47, at 296-311. The political and economic issues associated with the crusades represented an important factor in launching and maintaining this campaign. For a discussion, see, e.g., MUNDY, *supra* note 32, at 190.

152. For examples of descriptions of the usurer in *exempla* (source-books for sermons) from this period, see Le Goff, *The Usurer and Purgatory*, *supra* note 63, at 30-35.

153. See LE GOFF, *YOUR MONEY*, *supra* note 138, at 13-16, 30-36, 52-64.

in the cities. These movements, often led by mendicant friars, emphasized the importance of community solidarity, which included the obligation of each community member to work.¹⁵⁴ Speculative gain appeared in this context to stand in the way of a more just society.

D. Justifying the Usury Prohibition¹⁵⁵

The fundamental conflict between the newly recast usury norm and the thrust of the market demanded that the usury prohibition be justified. Those who might violate the prohibition wanted to know what it meant, what it included and why, as did those who sought its protection. Moreover, the prohibition had to be applied in ecclesiastical and secular courts as well as in confessionals, and rationales were needed to justify and guide these applications. These justifications were developed almost exclusively by canonists and theologians, to be joined in the fourteenth century by the Romanists.¹⁵⁶

1. From Greed to Injustice

Although the association between avarice and usury continued during the twelfth and thirteenth centuries,¹⁵⁷ usury was increasingly understood as a sin against justice.¹⁵⁸ This shift in the rationale for the usury prohibition made it more amenable to application by the ecclesiastical courts, for it focused on the protection of others from the actions of the usurer rather than on the salvation of the usurer himself. Moreover, by analogizing usury to theft the canonists significantly increased the sanctions imposed on it, because a sin against injustice required full restitution of the illegally gotten gains, whereas the sin of avarice merely required contrition.¹⁵⁹

In order for usury to constitute theft, one had to posit that the usurer acquired property of the borrower to which he was not entitled, but how did the usurer acquire property that was not his? Foremost among the early theories answering this question was the claim that the lender was appropriat-

154. See LITTLE, RELIGIOUS POVERTY, *supra* note 20, at 146-70; LE GOFF, YOUR MONEY, *supra* note 138, at 42-43.

155. The need to justify the prohibition led to an extraordinary amount of writing on the subject of usury and, consequently, to many variations in doctrine. I concentrate here only on the basic lines of justification. See generally McLaughlin, pt.1, *supra* note 138, at 110-11.

156. See generally *id.* at 83-95.

157. According to Lester Little, "Usury, money-lending, commerce and money itself had not yet been fully sorted out; they were all guilty, as it were, by association with one another." Little, *supra* note 109, at 31.

158. Anselm of Lucca in 1066 appears to have been the first to treat usury as a sin against the seventh commandment's prohibition of theft, and it was this conception that was developed and expanded during the following centuries. For a discussion, see NOONAN, *supra* note 129, at 17-20.

159. *Id.* at 30.

ing income from property that no longer belonged to him.¹⁶⁰ A careful distinction was made between a loan and a lease arrangement. In a lease, charging a fee for the use of the property was acceptable because the property continued to be owned by the lessor. In a loan, however, the money loaned became the property of the borrower. Consequently, it appeared that the lender was gaining profits from property that was not his, and the transaction amounted to theft. Associated with this notion was the proposition that a lender was not entitled to charge for the use of money because money did not deteriorate as leased property did. The lender received back precisely what he had lent and thus had no right to charge a fee for such use.¹⁶¹

Usury was also classified as theft on the ground that the lender was charging for the use of something that was not his—time. The lender had no right to appropriate the time value of the money, because it belonged not to him, but to God, and it was intended for unrestricted use by all men.¹⁶² This argument is fathomable only in the context of medieval cosmology, but it had substantial appeal at the time, because to charge for the use of time was a fundamental challenge to that cosmology.¹⁶³

2. Aristotle and Aquinas

In the thirteenth century Thomas Aquinas provided additional justifications for the prohibition of usury, most of which were based on Aristotle, and these became standard for centuries. According to Aristotle, the only legitimate function of money was as a medium of exchange.¹⁶⁴ Usury thus violated natural law, because it involved the use of money for a purpose—profit-making—other than its natural purpose. Aquinas extended this logic. He argued that by its nature money was a measure, and a measure had to have a fixed value. A loan at interest violated natural law, because it required the measure—money—to have different values at different times.¹⁶⁵

Aquinas also added a further refinement that became part of the standard argument. He classified money as “consumptible in use” and thus inherently incapable of generating profit. To use money was to consume it. Its use could not be separated from its substance: To borrow at interest, therefore, was to

160. See IBANES, *supra* note 134, at 19.

161. LE GOFF, *YOUR MONEY*, *supra* note 138, at 29.

162. See IBANES, *supra* note 134, at 22-23. For a discussion of the rhetorical power of this argument, see LE GOFF, *YOUR MONEY*, *supra* note 138, at 30, 39-41.

163. See NOONAN, *supra* note 129, at 58; JACQUES LE GOFF, *Merchant's Time and Church's Time in the Middle Ages*, in *TIME, WORK AND CULTURE IN THE MIDDLE AGES* 29 (Arthur Goldhammer trans., 1980).

164. See generally ODD LANGOLM, *THE ARISTOTELIAN ANALYSIS OF USURY* (1984); VINER, *supra* note 55, at 89-91.

165. See IBANES, *supra* note 134, at 19.

pay for something, but to receive nothing, and this was against natural justice.¹⁶⁶

3. The Impact of Roman Law

Roman law played two key roles in the development of usury doctrine. The first was as a source of conceptual structure. Roman law did not recognize the concept of contract in the abstract; it treated only specific types of contract, each of which was subject to its own rules.¹⁶⁷ One of these contract types was the "*mutuum*," in which one party transferred property to another in exchange for a promise to return the same property or its equivalent. The canonists seized upon the *mutuum* concept, added a normative element, and used it in defining usury.¹⁶⁸ Previous tradition had defined usury as "'to demand more than one gives.'"¹⁶⁹ The canonists recast usury as profit on a *mutuum* contract, thus making the *mutuum* concept an important doctrinal anchor for the usury norm.

Roman law also provided a solution to the usury problem that was resisted at first, but later adopted. Roman law did not prohibit loans at interest, but it did proscribe interest in excess of rates fixed by the authorities (usually ten percent).¹⁷⁰ Initially, Romanists and canonists thus had to explain why Roman law's apparent acceptance of (moderate) interest should be disregarded. They avoided this obstacle by explaining that on this point Roman law was not authoritative, because Justinian's compilation explicitly incorporated changes made by the church.¹⁷¹ Nevertheless, the idea that the better solution might be merely to restrict interest rates was continually present, and it was eventually readopted.¹⁷²

E. The Scope of the Usury Prohibition

But what exactly did the usury norm include? Everyone agreed, for example, that to profit on a loan by charging interest was usury, but prior to the twelfth century there had been little opportunity to explore the potential scope of the norm. The commercial revolution required the church to determine what else fell within the concept of usury.

166. See NOONAN, *supra* note 129, at 53-57.

167. See, e.g., JOHN A. CROOK, *THE LAW AND LIFE OF ROME* 206-49 (1967).

168. See 1 McLaughlin, pt.1, *supra* note 138, at 95-104.

169. See LE GOFF, *YOUR MONEY*, *supra* note 138, at 26 (quoting the Capitulary of Nijmwegen of 806).

170. For a discussion, see CLEARY, *supra* note 138, at 22-26.

171. See McLaughlin, pt.1, *supra* note 138, at 92-94.

172. See *infra* text accompanying note 178.

The new importance of intention in defining conduct norms played a central role in this process.¹⁷³ Prior to the eleventh century, sin was generally an issue of objective behavior; only the overt act was proscribed. This gave way during the eleventh and especially the twelfth centuries to the notion that intention was what really mattered. To have the mental state of the prohibited conduct was equivalent to having committed the act itself.

This meant that usury was committed where the lender intended to make a profit on the loan, and it significantly broadened the impact of the usury norm. Usury might be lurking wherever a loan was made, regardless of the form of the arrangement. The element of intention "led directly to the doctrine that no loan might ever be made in the same spirit as other business transactions."¹⁷⁴

The primacy of intention also led to the development of a category of violations of the usury norm called *in fraudem usurarum*—fraud in usury or usurious fraud.¹⁷⁵ This category included loans that did not in terms call for profit, but whose circumstances indicated that such was the intent. It included, for example, a loan of grain when it was plentiful to be returned in a time of short supply.¹⁷⁶

Some non-loan business arrangements also became important usury issues. The partnership (*societas*), for example, was an institution of Roman law that allowed an investor to receive income in return for the use of capital and thus served many of the functions that otherwise might have been served by loan financing. Only after much controversy did the church determine that such agreements were not usurious, because the supplier of capital took risks that justified any profit from the venture. The exclusion of partnerships from the usury ban thus encouraged the growth of investment through partnerships rather than through loans and played an important role in shaping economic development.¹⁷⁷

The scope of the prohibition eventually also was narrowed by a change in its form. The conception that loans at interest were generally forbidden was gradually replaced by the concept that only excessive interest was usurious.

173. See ETIENNE GILSON, *L'ESPRIT DE LA PHILOSOPHIE MÉDIÉVALE* 324-44 (2d ed. 1969); MARIE DOMINIQUE CHENU, *L'EVEIL DE LA CONSCIENCE DANS LA CIVILIZATION MÉDIÉVALE* 47-62 (1969); LE GOFF, *LES INTELLECTUELS*, *supra* note 72, at 51-52.

174. NOONAN, *supra* note 129, at 33.

175. For a discussion of usurious fraud, see McLaughlin, pt.1, *supra* note 138, at 112-24; 1 BALDWIN, *MASTERS, PRINCES AND MERCHANTS*, *supra* note 47, at 273-79.

176. A loan requiring repayment in excess of the principal did not constitute usury, however, where it was justified by a so-called "extrinsic title." The basic idea was that where the loan involved harm to the lender or lost profits, the lender should be compensated. Thus a *mutuum* could legitimately provide that the lender required repayment by a certain date and that a penalty would be charged for late payment. See, e.g., McLaughlin, pt.1, *supra* note 138, at 125-47.

177. For a discussion, see CLEARY, *supra* note 138, at 114-21; NOONAN, *supra* note 129, at 133-53.

Although this conception of usury was gradually accepted by canonists in the fourteenth and fifteenth centuries, theologians resisted it for several more centuries.¹⁷⁸

F. Enforcing Usury Norms

1. The Church

Religious sanctions and associated communal pressure provided important mechanisms for enforcing the usury norm. The church's ever-present warnings about the personal and communal harms associated with usury provided a powerful incentive to comply with the norm. The church repeated this message in both its art and its preaching, continually reminding all Christians of the horrors that would befall their souls if they practiced usury. Moreover, this public pressure was supplemented in the confessional, where confessors' manuals indicate that usury was a major focus of concern.¹⁷⁹

The external forum was, however, also an important element of this mechanism. Suits in ecclesiastical courts based on usury were common.¹⁸⁰ Such suits could be initiated either by aggrieved parties or by the court itself, and they sometimes involved protracted and costly litigation.¹⁸¹ The courts had authority to apply a variety of sanctions in such cases, ranging from restrictions on the usurer's participation in particular religious ceremonies (e.g., refusal of communion or Christian burial) to full excommunication, in which the individual was expelled from the community of the church, and to orders for restitution of illicit gains either to the victims or to the church.¹⁸² Sanctions were increased during the twelfth and thirteenth centuries, eventually including sanctions on members of a usurer's family and on persons failing to report usurious activities to church authorities.¹⁸³

Ecclesiastical sanctions were often applicable only to "manifest" usurers.¹⁸⁴ This classification was established by the Third Lateran Council in 1179, which forbade communion and a Christian burial only to such usurers.¹⁸⁵ Manifest usurers included pawnbrokers and other professional

178. See FERNAND BRAUDEL, *THE WHEELS OF COMMERCE* 559-66 (Sian Reynolds trans., 1982).

179. LE GOFF, *YOUR MONEY*, *supra* note 138, at 13.

180. For a detailed study of usury in the ecclesiastical courts in England, see Richard H. Helmholz, *Usury and the Medieval English Church Courts*, in RICHARD H. HELMHOLZ, *CANON LAW AND THE LAW OF ENGLAND* 323 (1987).

181. *Id.* at 367-69, 376-79.

182. See generally Gabriel Le Bras, *Usure*, in *DICTIONNAIRE DE THÉOLOGIE CATHOLIQUE*, cols. 2366-72 (1950) [hereinafter *Le Bras, Usure*]; McLaughlin, pt.2, *supra* note 138, at 1-13.

183. See *id.* at 2.

184. See generally Schnapper, *supra* note 149, at 49; GILCHRIST, *supra* note 26, at 66.

185. For a discussion, see McLaughlin, pt.2, *supra* note 138, at 4.

providers of consumption loans, whose usury was manifest because openly practiced. In such cases ecclesiastical sanctions could be imposed without a court order. A priest could, for example, refuse to provide a sacrament to a notorious usurer.¹⁸⁶ This focused enforcement activity on church doctrine's core concern, which was the exploitation of the weak and the vulnerable in the context of consumer loans. One could also become a manifest usurer, however, by virtue of being found guilty of usury in a court. Here one's usury was "manifest" not because it was publicly performed, but because it was determined in a public forum.

The extent of voluntary restitution of usury gains attests to the power of the church's usury norms. Beginning around 1200 there was a remarkable increase in the frequency with which merchants voluntarily provided in their wills or on their deathbeds for restitution of usurious gains to the victims or to the church.¹⁸⁷ In doing so they sought to avoid eternal damnation as well as to avoid confiscation of part or all of their estates by secular authorities who often "assisted" ecclesiastical courts in enforcing the usury prohibition while adding to their own revenues.¹⁸⁸

2. The Usury Norm in Secular Legal Systems

Although the church was the primary force in applying and enforcing the usury prohibition, some secular legal systems also prohibited usury. City laws, for example, sometimes prohibited usury, albeit for diverse reasons.¹⁸⁹ In some cases the church urged enactment of such legislation, apparently because it considered ecclesiastical sanctions inadequate to combat usurious practices.¹⁹⁰ Secular norms reiterated and reinforced the religious norm. In other cases the initiative came from city authorities who sought to direct usury claims into secular rather than ecclesiastical courts, thus reducing the power of the church over economic activity and, correspondingly, increasing the power of local officials.¹⁹¹

In the thirteenth century, royal legal systems also began to encroach on the church's territory by enacting their own legislation on usury. As part of the French crown's intensifying efforts to achieve centralized control over the economy, for example, the king authorized consumer loans at interest, provided the lenders were licensed by the crown and provided that the interest rate did

186. See Le Bras, *Usure*, *supra* note 182, at cols. 2365-66.

187. Benjamin Nelson, *The Usurer and the Merchant Prince: Italian Businessmen and the Ecclesiastical Law of Restitution, 1100-1550*, 7 J. ECON. HIST. 104, 112-21 (1947).

188. According to the Council of Pisa in 1212, property of one who dies a usurer was to be confiscated by the king. McLaughlin, pt.2, *supra* note 138, at 5. For the situation in England, see Helmholz, *supra* note 180, at 365-67.

189. See, e.g., Schnapper, *supra* note 149, at 50-51.

190. See, e.g., McLaughlin, pt.2, *supra* note 138, at 17.

191. IBANES, *supra* note 134, at 94-95.

not exceed a specified rate, often twenty percent.¹⁹² Such legislation served the dual functions of raising revenues and increasing political power over the cities.

G. Usury and the Normative Framework

The usury prohibition was at the center of the conflict between the forces of the market economy, on the one hand, and the church-supported values of community on the other. It was a focus not only of intellectual concern, but also of popular fervor, because it became a symbol of resistance to the values of commercial society. It had an extraordinary impact because it was not merely a norm, but also the description of a form of evil.

Because of its symbolic poignancy and deep penetration of society, the usury norm served a central perceptual function. It structured the ways in which people perceived the commercialization process, reinforcing the image of the moneylender as a vile enemy of the community and underscoring the need to protect the weak from exploitation.

The usury prohibition was also a central context for the development of economic thought. According to John T. Noonan, "the scholastic theory of usury is an embryonic theory of economics . . . [and] the first attempt at a science of economics known to the West."¹⁹³ Intellectuals were faced with the task of reconciling traditional values with the needs of the newly-emerging mercantile component of society, and it was in this context that they began to examine economic processes in a systematic way.

Finally, the usury prohibition also affected the development of economic patterns. People went to great lengths to avoid being classified as usurers. One measure of the impact of usury doctrine was, for example, the extent to which public consumption lending was left to special categories of persons—particularly, Jews and "Lombards."¹⁹⁴ Despite the obvious incentives and attractions of such activity, Christians seldom engaged in them. Similarly, within a generation after the church's adoption of sanctions against usurers at the Third Lateran Council (1179), the *mutuum* (loan) and the *pignus* (mortgage)—both of which had been common in commercial practice—virtually disappeared.¹⁹⁵ Henceforth, merchants developed partnership and other risk-sharing devices in order to test the limits of the usury doctrine and achieve the financing objectives of the loan without being categorized as usurers.

192. Schnapper, *supra* note 149, at 51-52.

193. NOONAN, *supra* note 129, at 2.

194. See *Id.* at 35; Yoram Barzel, *Confiscation by the Ruler: The Rise and Fall of Jewish Lending in the Middle Ages*, 35 J.L. & ECON. 1 (1992).

195. MUNDY, *supra* note 32, at 180.

V. JUSTICE AND PRICES

The market subjected increasing numbers of people to the vagaries and potential harms of the pricing mechanism for increasing numbers of transactions of increasing subjective importance to the participants. Not surprisingly, this process generated demands that prices be subject to some form of community control, and this, in turn, led to the idea that principles of justice were applicable to prices and to the distinction between just and unjust prices. "Beginning chiefly with the twelfth and lasting until the sixteenth century the thinkers of the Middle Ages adopted the term *justum pretium*, refined its meaning, and enlarged its importance until the expression became a legal device, a moral imperative, and an economic doctrine."¹⁹⁶

A. Sources of the Just Price Norm

The just price doctrine that developed in the twelfth century had antecedents in classical philosophy.¹⁹⁷ Plato concluded, for example, that market activity demanded dishonesty and moral depravity on the part of the individual and that it all but precluded effective cooperative arrangements within the community.¹⁹⁸ By far the most important contribution, however, was that of Aristotle. He developed the idea that economic exchanges themselves could be evaluated according to moral principles,¹⁹⁹ and he provided a framework for this evaluation that was to be critical to the development of the just price norm in the thirteenth century.

Aristotle's analysis derived power from intertwining concern for the moral well-being of the individual with concern for the functional well-being of the community. From the perspective of the individual who gained from a transaction, the problem was virtue. Consistent with his view that moderation was virtuous and excess was not, Aristotle considered it immoral to achieve an unusually or unreasonably high profit in a sales transaction. Such immoral conduct also harmed the community, Aristotle argued, because the well-being of the community depended on exchanges among its members, and unfair exchanges reduced the willingness to trade and destroyed the fabric of the community.²⁰⁰

196. Baldwin, *Just Price*, *supra* note 75, at 8.

197. For a discussion, see HENRI GARNIER, *L'IDÉE DU JUSTE PRIX CHEZ LES THÉOLOGIENS ET CANONISTES DU MOYEN AGE* 5-22 (1900); Baldwin, *Just Price*, *supra* note 75 at 10-12.

198. These ideas of Plato probably had little direct effect on thought in the twelfth and thirteenth centuries, but they did have an indirect impact through Plotinus and the school of Alexandria. See GARNIER, *Id.* at 10-11.

199. See ARISTOTLE, *NICOMACHEAN ETHICS V*, in *THE BASIC WORKS OF ARISTOTLE* 927-1002 (Richard McKeon ed., 1941).

200. For a discussion, see Josef Soudek, *Aristotle's Theory of Exchange: An Inquiry into the Origin of Economic Analysis*, 96 *PROC. AM. PHILOS. SOC'Y* 45, 46-49 (1952).

The analytical core of the Aristotelian framework was the concept of commutative (or corrective) justice, which required that exchanges between members of the same polity be subject to a principle of proportionality.²⁰¹ According to this principle, each party to an exchange should derive essentially the same satisfaction of wants from that exchange; each should gain—from a subjective standpoint—the same amount from the transaction. This idea was to have immense impact on the development of the just price norm, but not until Aristotle's major writings were "rediscovered" in the twelfth and thirteenth centuries.²⁰²

Roman law also contained references to the just price concept. While classical Roman law generally held, as we have seen,²⁰³ that sales transactions should be free from state interference, the term "just price" frequently appeared in the *corpus juris*.²⁰⁴ These references were generally in provisions dating from the later empire and many were interpolations by Justinian's compilers, but they supported the notion that prices may be subject to standards of justice, at least under some circumstances.

The *corpus juris* also contained a specific provision, the so-called *laesio enormis* (excessive harm) that was to become important in the development of the just price doctrine.²⁰⁵ According to this provision, a contract for the sale of land was voidable by the seller where the price was less than 50 percent of the actual value of the promised performance.²⁰⁶ Even assuming that this provision was intended to provide a general remedy for a seller who had made a sale at a price that was unreasonably low,²⁰⁷ the concept is quite narrow, providing a remedy only to the seller and applying only to sales of land.

Early church doctrine represents a third source of ideas for the just price norm. It did not deal systematically with the justness of prices, but it did consign the profits of some transactions to the category of *turpe lucrum* (literally, soiled profits). This doctrine made it a sin to acquire profits in an illicit or immoral manner.²⁰⁸ It was applied to many types of conduct such as, for example, fraud, monopoly and speculation, but it was not carefully defined.²⁰⁹ Nevertheless, there was but a short logical step from determining

201. For a discussion, see *id.* at 49-53; Baldwin, *Just Price*, *supra* note 75, at 10-12.

202. See *supra* text accompanying note 72.

203. See *supra* text accompanying note 133.

204. Baldwin, *Just Price*, *supra* note 75, at 19-21.

205. *Corpus juris civilis* C2, C 4, 44.

206. For a discussion of this provision, see, e.g., RENÉ DEKKERS, *LA LÉSION ENORME* (1937); James Gordley, *Equality in Exchange*, 69 CAL. L. REV. 1587, 1638-45 (1981); Baldwin, *Just Price*, *supra* note 75, at 22-27.

207. For an argument that this provision was misread by medieval scholars, see Kenneth S. Kahn, *The Roman and Frankish Roots of the Just Price of Medieval Canon Law*, in 6 STUDIES IN MEDIEVAL AND RENAISSANCE HISTORY 3, 12-36 (1969).

208. For background, see CLEARY, *supra* note 138, at 21-42.

209. Baldwin, *Just Price*, *supra* note 75, at 32-33.

that profits were sinful under certain circumstances to establishing a moral standard by which the prices of transactions that generated those profits could themselves be evaluated.

Finally, when scholars in the twelfth century focused attention on the sales transaction, they encountered elements of Frankish law.²¹⁰ During the ninth century a concept of just price had already been developed as part of the Carolingian reforms.²¹¹ The government of Charlemagne actually had used such a concept to support its regulation of prices. These provisions had been largely forgotten during the intervening centuries, but some scholars were aware of them, and they became a source of guidance in the twelfth century.

B. Commercialization and Just Price

In response to the problems created by commercialization, scholars and lawyers drew on these sources and intertwined them to create a generalized just price norm. By the thirteenth century, prices were firmly imbedded in a normative context; they were subject to concepts of justice.

The church's disdain for mercantile activity spurred this development, because the application of a standard of justice to prices provided a means by which the church could classify objectionable transactions as sinful. According to John Baldwin, "The perils of wealth, the contagion of greed, the propensity toward fraud, and the oppression by monopoly became the major moral problems of the medieval theorists in their consideration of the subject of sale and price."²¹²

This moral impetus for development of a just price norm was accompanied by a jurisdictional thrust. The rapid expansion of the jurisdiction of the ecclesiastical courts in the twelfth century created a powerful incentive for canonists to develop a norm which could be applied in those courts and which would provide a practical vehicle for subjecting sales transactions to the moral standards of the church. As a result, canonists often played leading roles in developing just price doctrine.

The social impact of commercialization and urbanization provided an additional developmental impulse. The commercial revolution threatened individuals as well as social relationships, and as a result, the Christian community in general, and the urban community in particular, sought assurance that community members would not be exploited or unfairly treated in the sales transactions on which they increasingly depended for their lives

210. See Kahn, *supra* note 207, at 36-43; Baldwin, *supra* note 75 at 31-34; Schaub, *supra* note 138, at 79-103.

211. "In a large measure the Canonists of the twelfth and thirteenth centuries rationalized and theorized upon what the Carolingians had created." Baldwin, *supra* note 75 at 34.

212. *Id.* at 14.

and welfare.²¹³ They sought a normative context for these transactions that would provide some degree of community control over them.

In the thirteenth century the intellectual encounter with Aristotle provided an intellectual spur to this development. Much of the intellectual activity of that century centered on applying Aristotelian concepts of justice to current problems, and this naturally led to their application to the problems of commercialization. Moreover, in his *Nicomachean Ethics*, which was among the most important works to be introduced in the thirteenth century,²¹⁴ Aristotle specifically addressed the ethical issues associated with sales transactions, thus compelling commentators to grapple with those issues.

Development of the just price norm was not always impelled, however, by the desire to increase constraints on economic activity. One significant impetus led in the opposite direction. In the twelfth century Gratian's *Decretum* had defined usury broadly enough that it cast moral doubts on all sales transactions.²¹⁵ As practical churchmen, however, canonists recognized that merchants also provided a valuable service to society and that extending the highly charged and onerous usury doctrine to all sales might not only be unworkable, but counterproductive. They sought, therefore, to limit the scope of the usury doctrine to loans, and one means of doing this was to reconceptualize the normative treatment of sales so that a separate—and less severe—standard would be applicable to sales rather than the usury standard.

C. Just Price as a Generalized Norm

Two paths led to the establishment of a generalized just price norm. Romanists and canonists came to perceive in the relatively obscure *laesio enormis* provision the abstract principle that the law should provide redress when a sales price diverged excessively from a fair price. Consequently, they transformed it into a generalized norm by expanding its scope of application,²¹⁶ including within it buyers as well as sellers, and all sales rather than only land transactions. This principle had the practical benefit of invalidating contracts only where the price charged deviated by at least one half from the just price, thus calling for sanctions only in egregious situations while establishing a workable conceptual limit on expansion of the just price idea.

The theologians, in contrast, developed a just price norm on the basis of moral and religious principles.²¹⁷ Beginning with the broad concept of *turpe lucrum*, the theologians labeled as sin the charging of any price that deviated from what was considered just. Unrestrained by the need to temper moral vigor with practicality, they saw no reason why deviations from the just price

213. See SCHAUB, *supra* note 138, at 100.

214. See KNOWLES, *supra* note 65, at 191-92.

215. See Baldwin, *Just Price*, *supra* note 75, at 34-37.

216. See DEKKERS, *supra* note 206, at 41-99.

217. See generally Baldwin, *Just Price*, *supra* note 75, at 68-80.

should be tolerated. If one could determine a price that was just, there could be no moral justification for charging a price that was not just, regardless of how much it deviated from the just price.

These two developmental paths led to two versions of the just price norm, with the lawyers finding a violation of the just price norm only where the price charged deviated by more than fifty percent from the just price and the theologians considering any price other than the just price sinful. The Roman law solution was applied in the courts, while the theologians' stricter interpretation was to be applied in the internal forum.

D. Defining and Applying the Just Price Norm

Recent scholarship has fundamentally revised our understanding of how the just price was determined.²¹⁸ From the late nineteenth century until recently the just price concept generally was thought to have been a rigid notion based on the costs of production plus a reasonable profit.²¹⁹ As such, the concept was assumed to have represented a major obstacle to economic development because it interfered with the allocative efficiency of markets.²²⁰

In recent decades, however, scholars have demonstrated the distortions in this picture. The cost-based idea of just price was apparently not expressed until the latter part of the fourteenth century, and then only as a minority view.²²¹ The dominant conception was that a price was just if it represented the community's estimation of the value of the good. This could be established either through the unmanipulated interplay of supply and demand on the local market or through prescription by the authorities, and thus in most cases the just price was the actual market price of the good.²²² The market was seen as a communal mechanism that reflected either the needs of the community and the supplies available to it, or a decision of the authorities concerning the best interests of the community.²²³

In ordinary market transactions, therefore, the price was *ipso facto* just, and there was no need for extended analysis. There were, however, three basic situations in which the just price norm might invalidate a transaction. One was

218. Professor Raymond De Roover was the leading figure in this process of revision. See, e.g., Raymond De Roover, *The Concept of the Just Price: Theory and Economic Policy*, 18 J. ECON. HIST. 418 (1958) [hereinafter de Roover, *Just Price*].

219. See, e.g., O'BRIEN, *supra* note 137, at 111-12; Rudolf Kaulla, *Die Lehre vom Gerechten Preis in der Scholastik*, 60 ZEITSCHRIFT FÜR DIE GESAMTE STAATSWISSENSCHAFT 579-602 (1904).

220. Other scholars saw support in the just price doctrine for what they considered a fairer economic system. For a discussion, see De Roover, *Just Price*, *supra* note 218, at 420.

221. This concept apparently was first elaborated by Henry of Langenstein, a nominalist of some note who taught in Paris as well as in Central Europe. For a discussion, see *id.* at 419-20.

222. See *id.* at 419-26; Baldwin, *Just Price*, *supra* note 75, at 68-80.

223. See Bernard W. Dempsey, *Just Price in a Functional Economy*, 25 AM. ECON. REV. 471 (1935).

where there was no market price. This problem arose wherever the sales transaction involved nonfungible goods. Particularly prominent here were real estate transactions. In such cases courts generally relied on a named estimator or group of estimators whose task was to establish the price that the community would consider to be fair.²²⁴

A second category of cases involved sales outside the market. The just price norm was frequently used to combat discrimination in price, as, for example, where a seller sold goods outside a market at a price higher than that available on the market. Theologians and canonists paid particular attention to this type of transaction, because it could be used to take advantage of the weak and vulnerable—including pilgrims and other travellers as well as those unable to attend the market.²²⁵

The third situation involved market distortion. Market purchases might be invalidated if the market could be shown to have been manipulated. This notion of market distortion was poorly defined and appears to have included many of the practices—such as fraud and monopoly—that previously had been included in the concept of *turpe lucrum*. Where, for example, individuals or groups cornered a market in order to drive up prices, they distorted the market and rendered it unjust.²²⁶

E. Just Price and Its Roles

Although the just price norm did not acquire the powerful emotional and symbolic impact of the usury prohibition, it was enormously important, because it established the proposition that sales transactions—the market—had a moral and ethical dimension. As significant as the usury prohibition was, it was primarily associated with a type of transaction—the loan—in which most people seldom engaged. The concept of just price, on the other hand, was applicable to every sale and thus imposed a normative perspective on the entire economy.

The just price norm was, according to Harold Berman, “both a rule of unconscionability, directed against oppressive transactions, and a rule of unfair competition, directed against breach of market norms.”²²⁷ As such it intertwined the notion of individual justice associated with protection against oppression and the ideas of communal order and the common good associated with market regulation.

The just price norm also encouraged, justified and shaped other forms of economic regulation. By acknowledging that a price properly set by the government was necessarily just, for example, the just price concept

224. Baldwin, *Just Price*, *supra* note 75, at 70-72.

225. See DE ROOVER, *LA PENSÉE ÉCONOMIQUE*, *supra* note 134, at 55.

226. See *id.* at 54-55; *infra* text accompanying notes 229-52.

227. BERMAN, *supra* note 28, at 248.

legitimized and supported price regulations.²²⁸ It also encouraged market centralization, for if the market price was not only factual, but normative, there was an incentive to assure that all transactions took place on the market, so that they would properly reflect the community's estimate of the value of the goods. In addition, it encouraged standardization and regulation of product quality, because the just price norm could perform its functions only in a context of comparable goods.

The just price norm made the market a focus of concern not only for merchants, courts and lawyers, but also for priests and theologians. It thus provided a nexus for the interpenetration of law, morality and philosophy. The legal norm applied in secular courts was inextricably interwoven with concepts of justice developed by theologians, and the economic policies of cities were intertwined with the ethical and moral propositions of the church. Courts, classrooms and the confessional were all involved in analyzing, applying and transmitting the just price norm.

Antipathy toward the charging of (unreasonably) high prices is hardly uncommon, but the idea that there is an articulable, enforceable and philosophically-based moral standard by which to determine the "justness" of prices is specific to the Western legal tradition, and that idea was generated and received broad acceptance and application during the twelfth and thirteenth centuries.

VI. MONOPOLY

The prohibition of monopoly was the third of the core norms of economic conduct. Although often associated in the twelfth and thirteenth centuries with the concept of just price,²²⁹ the norm itself derived from independent sources and identified and addressed a distinct aspect of the commercialization process. The growing force of the market increased the potential harms from the use of economic power, and thus, for those who increasingly had to depend on markets, the monopolist—i.e., anyone with sufficient economic power to manipulate the market—was a dreaded figure, an "abominable monster."²³⁰

The fear of monopoly had roots in church doctrine and Roman law, and during the twelfth and thirteenth centuries the church and the universities combined to forge a transcendent norm to combat monopoly that was to become extremely important. These institutions paid less attention to the monopoly problem during this period than to the usury and just price norms,

228. See *infra* text accompanying notes 276-77.

229. See *supra* text accompanying note 212.

230. Raymond De Roover, *La Doctrine Scolastique en Matière de Monopole et son Application à la Politique Économique des Communes Italiennes*, in *STUDI IN ONORE DI AMINTORE FANFANI* 151, 162 (1962) [hereinafter De Roover, *La Doctrine Scolastique*].

but they laid the foundation for dramatic increases in the importance of the norm during the following centuries.²³¹

A. Monopoly and the Church

The early church identified monopolistic practices as sinful and placed them in the category of *turpe lucrum*. Patristic writers often denounced, for example, the sinfulness of merchants who either alone or in cooperation with others cornered a market in order to drive up prices and exploit purchasers.²³² Although there was no systematic analysis of such practices, three main reasons were cited for condemning them. First, manipulative practices demonstrated avarice. If a merchant's trade necessarily led to temptation, manipulation was proof that he had succumbed, for monopolistic conduct was inconsistent with any legitimate motives.²³³ Second, the monopolist sought to gain not from "honest work," but through manipulation and speculation.²³⁴ He was parasitic, for he did not produce anything; he merely acquired at the expense of others. Finally, cornering the market in essential goods such as food was a form of theft and thus an attack on the welfare of the community.²³⁵

During the twelfth and thirteenth centuries monopolistic practices continued to be classified as sins by virtually all ecclesiastical writers.²³⁶ The *Decretum* of Gratian included the above-quoted provision of Pope Julius, which, according to Josef Höffner, became the standard treatment of monopoly and "was for centuries quoted by almost all scholastics."²³⁷ Such writers did not, however, carefully develop the concept of monopoly as an independent conduct norm, nor did they clearly delineate the practices that fell into this category. Moreover, theologians and canonists developed divergent approaches to such practices, and thus the bifurcation of the church's intellectual tradition,

231. See generally JOSEF HÖFFNER, *WIRTSCHAFTSETHIK UND MONOPOLE IM FÜNFZEHNTEN UND SECHZEHNTEN JAHRHUNDERT* 64-100 (1941).

232. Baldwin, *Just Price*, *supra* note 75, at 14-15. Particularly influential in establishing the immorality of such practices was a regulation of Pope Julius I (337-352) which provided that "[i]f someone at the time of the harvest buys up the wheat or the wine not to cover his needs but for purposes of profit, for example, at 2 dinars per unit, and then stores it until it is worth 4, 6 or even more dinars, we call that shameful profit." Cited in HÖFFNER, *supra* note 231, at 75-76.

233. Baldwin, *Just Price*, *supra* note 75, at 14-15.

234. For a discussion of the importance of work in the early church, see Le Goff, *Trades and Professions*, *supra* note 49, at 110-11.

235. Ambrose of Milan, for example, attacked those who manipulated agricultural markets, asking "Why do you produce scarcities? . . . This you call industry; this you term diligence, which is the deceitfulness of craft, which is the cunningness of fraud . . . This I call robbery and usury . . . Your gain is the public's loss!" Cited in Baldwin, *Just Price*, *supra* note 75, at 15.

236. See De Roover, *La Doctrine Scolastique*, *supra* note 230, at 160-64.

237. HÖFFNER, *supra* note 231, at 76.

which separated theologians from canonists, influenced the development of monopoly concepts.

Theologians and priests were content to allow monopolistic practices to remain in the loose category of *turpe lucrum*.²³⁸ For their purposes the lack of a separate conceptual locus for such practices presented no significant problems. They may even have seen educational benefits in maintaining an association between monopoly and the emotionally-charged and highly potent usury norm. This is suggested by the tendency among theologians to focus on the didactic rather than the analytical treatment of monopolistic practices. Confessors' manuals, rather than theological treatises, contained the most extensive references to the monopoly problem.²³⁹

The power of Aristotelian thought and the just price doctrine that developed from it led the canonists in a different direction. Their solution to the monopoly problem was to include monopoly within the scope of the just price norm. As discussed above,²⁴⁰ they made monopolistic manipulation of the market one of the conditions which could render prices unjust. Accordingly, canonists increasingly viewed monopoly as exploitation and thus a sin against justice and natural law, because it raised prices above the natural (i.e., just) price.²⁴¹ This placed monopoly within the dominant legal-intellectual framework of the thirteenth century and supplied a conceptual anchor for treating problems of monopoly. Moreover, it obviated the need to develop a separate theoretical framework for such practices.

B. Monopoly and Secular Law

Roman law provided a separate base of authority for the concept of monopoly, for several provisions of the *corpus juris* established criminal penalties for acquiring a monopoly position in the market for certain goods and for utilizing that position to influence prices.²⁴² The *lex julia de annona*, which is referred to in the Digest, provides a penalty for anyone "who commits any act or forms any association by means of which the price of provisions may be increased."²⁴³ One author has claimed that "it was the main purpose of this law to prevent a *permanent and general dearness of corn* [i.e., wheat],

238. De Roover, *La Doctrine Scolastique*, *supra* note 230, at 160.

239. HÖFFNER, *supra* note 231, at 78.

240. See *supra* text accompanying note 226.

241. Raymond De Roover, *Monopoly Theory Prior to Adam Smith: A Revision*, 65 Q. J. ECON. 492, 500 (1951).

242. See generally von Brunn, *Vom Kartellrecht der Römer*, in 24 RECHT UND WIRTSCHAFT: FESTSCHRIFT FÜR JUSTUS WILHELM HEDEMANN ZU SEINEM 80 47 (1958).

243. CORPUS JURIS CIVILIS I, 2 D 48, 12 (S.P. Scott trans., 1932). For a discussion of the *corpus juris civilis*, see *supra* note 81 and text accompanying notes 80-82.

resulting from systematic operations of traders, acting not only individually but on an understanding . . . which we would call to-day a *price-fixing cartel*.”²⁴⁴

More elaborate and sophisticated versions of this basic idea emerged from the later, more economically troubled years of the Roman state. These provisions generally broadened the category of goods whose markets were to be protected, and increased the penalties. The most significant of these was the so-called Constitution of Zeno of 483, which prohibited “monopolization” of anything “having reference to the nourishment or the common use of mankind.”²⁴⁵ This constitution was the first Roman text to use the term “monopoly,”²⁴⁶ and it has been called “the most important contribution of the Roman era to the history of the monopoly movement and its legislation.”²⁴⁷

Penalties for violation of the Constitution were severe. The “practice” of monopoly was to be punished with confiscation of all property and lifelong exile, and price-fixing and related contracts were subject to a heavy fine. Moreover, a substantial fine was prescribed for any government official who failed to enforce the provision. Scholars of the twelfth and thirteenth centuries interpreted the severity of these penalties as an indication of the importance of the norm.

The primary impact of these monopoly provisions was on legal thought. “Monopoly” became a proscribed evil and thereby structured the perception of economic processes. These provisions defined a category of behavior and posited a causal relationship between such behavior and certain societal harms, and this conceptualization became part of the stock of knowledge of those who were involved in creating and applying norms of economic conduct.

Soon the monopoly concept was also embodied in secular legislation.²⁴⁸ By the thirteenth century, statutes similar to the Constitution of Zeno were common in city laws in Italy, France and Germany, and in royal statutes in France and England.²⁴⁹ The common theme of such legislation was that manipulative conduct which interfered with the free interplay of market forces was harmful and deserved criminal punishment.

244. ROMAN PIOTROWSKI, *CARTELS AND TRUSTS* 99 (1933).

245. “We order that no one shall be so bold as to monopolize the sale of clothing of any kind, or of fish, combs, copper utensils, or anything else having reference to the nourishment or the common use of mankind, no matter of what material it may be composed, whether he does so by his own authority, or under that of a Rescript already promulgated, or which may hereafter be promulgated, or of a pragmatic sanction, or of any Imperial Annotation; and let no one conspire, or agree in any unlawful assembly, that any kind of merchandise which is an object of commerce shall not be sold for less than it is agreed upon by the parties in question . . .” *CORPUS JURIS CIVILIS* c.2, C 4, 59 (S.P. Scott trans., 1932).

246. PIOTROWSKI, *supra* note 244, at 112.

247. *Id.* at 111.

248. For a review of such legislation, see *id.* at 131-52.

249. See De Roover, *La Doctrine Scolastique*, *supra* note 230, at 167-79.

Monopoly provisions eventually also were "received," along with the rest of Roman law, into judicial practice throughout Europe. This process appears to have made little progress before the end of the fourteenth century, but it became immensely important in later periods, particularly in the fifteenth and sixteenth centuries.²⁵⁰

C. *The New Problem of Production Monopolies*

Until the thirteenth century, monopoly was associated with the manipulation of existing supplies, but guilds engaged in a new form of monopolization. They did not manipulate existing supplies; they controlled production and restricted output. The issue was how to conceptualize and evaluate such conduct.

Both the church and Roman law responded by subsuming this new form of monopoly within existing categories. The monopolistic practices of guilds came to be seen as violations of the same norms that were applied to the manipulative practices of merchants and thus subject to the same moral-legal condemnation. Theologians expanded the moral arguments against market-manipulating merchants to include the cartel behavior of guilds, and by the end of the period they were castigating guilds for avariciously pursuing their own gains at the expense of the Christian community.²⁵¹ At the same time concepts developed from the Roman law of monopoly were increasingly applied to the cartel conduct of guilds.²⁵²

D. *The Emerging Monopoly Norm*

The church and the universities combined to establish the prohibition of monopoly as a fundamental norm of economic conduct. Church doctrine identified monopolistic practices as pernicious and morally wrong, and Romanists condemned them as violations of natural law and right reason. Like the usury and just price norms, the prohibition of monopoly was not developed primarily as a policy norm, but as a transcendent, universal norm of conduct. It was thus imbedded in the same moral-ethical nexus which contained the usury and just price norms.

250. See, for example, the much-publicized controversy during the early sixteenth century concerning the monopolistic activities of leading international trading companies such as the Fuggers and Welsers. A central element in the controversy was the alleged violation by such trading companies of Roman law monopoly provisions. See, e.g., HÖFFNER, *supra* note 231, at 22-25; FRITZ BLAICH, *DIE WIRTSCHAFTSPOLITIK DES REICHTAGS IM HEILIGEN RÖMISCHEN REICH* 135-45 (1970).

251. See, e.g., De Roover, *Just Price*, *supra* note 218, at 431; HÖFFNER, *supra* note 231, at 66-78.

252. See, e.g., ANTONY BLACK, *GUILDS AND CIVIL SOCIETY IN EUROPEAN POLITICAL THOUGHT FROM THE TWELFTH CENTURY TO THE PRESENT* 17 (1984).

Although important by the thirteenth century, the monopoly norm was to play its most visible and politically-charged roles during the fifteenth and sixteenth centuries. During that period it became an exceptionally powerful political symbol in the popular movements associated with the Protestant Reformation.²⁵³ It identified the cartel behavior of the guilds and the economic power of large trading companies as moral evils and social harms, and it thus encouraged and justified popular resentment and hatred against such institutions. The perception of the problem of monopoly during that period, and the authority and importance of the monopoly norm, stemmed from the moral-legal framework established in the twelfth and thirteenth centuries.

VII. POLICY AND ECONOMIC REGULATION

While these transcendent norms represented the core of the normative framework, secular politics also regulated economic conduct, and the unique relationship between these two spheres of normative activity was critical to the force of that framework. Policy-based regulation did not compete with the transcendent norms or the institutions associated with them. Instead, it operated independently, interweaving transcendent norms with policy objectives in ways that strengthened both.

A. *Urban Economic Regulation*

The secular institutions primarily responsible for economic regulation in most areas were the cities. According to Raymond De Roover, "In the Middle Ages the implementation of economic policy rested to a large extent, if not exclusively, with the municipal authorities of cities, towns and boroughs."²⁵⁴ This policy autonomy of municipalities developed more slowly in Germany and began to erode more quickly in France and England,²⁵⁵ but it was in all areas a critical factor in the development of patterns of economic regulation.

1. Contexts and Objectives

Although cities had significant freedom to devise and pursue their own economic policies, the characteristics and circumstances of those cities dictated the parameters within which that autonomy could be exercised. Cities generally were, for example, small. While the estimated population of Paris reached 110,000 by 1200,²⁵⁶ cities with significant markets and significant autonomy in regulating them often had fewer than 5,000 inhabitants.²⁵⁷ Moreover, the population frequently was compressed within walls that could

253. See HÖFFNER, *supra* note 231, at 50-55.

254. De Roover, *Just Price*, *supra* note 218, at 428.

255. See *supra* text accompanying notes 32-35.

256. BAIROCH, *supra* note 22, at 136.

257. See *id.* at 164-66.

not easily accommodate rapid growth, and this often led to high population density. The size and compression of cities thus established practical limits on the degree to which any one group could disregard the interests of other groups.

In addition, population groups within the city often were highly interdependent. Merchants often depended on artisans to supply the goods they exported and on the local consumer to purchase the products they imported, and artisans and consumers often depended on merchants for their incomes and their supplies. This interdependence was reflected in conceptions of urban society as an organic community bound together by reciprocal obligations.²⁵⁸

City governments typically were dominated either by merchants or by patricians,²⁵⁹ and by the thirteenth century representatives of guilds acquired significant power in many cities.²⁶⁰ The relative power of these groups in a given city influenced specific policy decisions, but the basic patterns of urban economic regulation were similar throughout Europe.²⁶¹

Given these circumstances, urban governments sought three main economic policy objectives—maintenance of supplies, growth of trade and reasonable equity among population groups.²⁶² Political and economic exigencies impelled them to seek to advance both the common interests of the community and the special interests of the merchants, artisans and consumers who comprised it.²⁶³

The most vital concern of city governments was maintaining adequate supplies of necessities, particularly food.²⁶⁴ Limited ability to retard spoilage meant that food shortages were a constant threat. Cities thus coerced supplies from neighboring agricultural areas where they had authority and power to do so, and where coercion was ineffective or insufficient they sought to induce supplies from other areas by providing benefits to the merchants trading in the

258. See *supra* text accompanying notes 10-11.

259. See generally LE GOFF, *MARCHANDS ET BANQUIERS*, *supra* note 25, at 42-69.

260. For a discussion of patterns of city government, see MUNDY, *supra* note 32, at 413-59.

261. For a discussion of the changes and variety, see A.B. Hibbert, *The Economic Policies of Towns*, in 3 *CAMB. ECON. HIST. EUR.* 157, 179-206 (Michael M. Postan et al. eds., 2d ed. 1966).

262. For a similar list, see 1 ELI F. HECKSCHER, *MERCANTILISM* 128-30 (Mendel Shapiro trans. & E. F. Söderlund ed., 2d ed. 1955).

263. City government was not, of course, impartial in its treatment of interest groups; the group with the most political power was obviously in the best position to protect its own interests.

264. For a discussion of the centrality of "provisioning" as a policy goal, see, e.g., Hibbert, *supra* note 261, at 172-79.

needed goods.²⁶⁵ Seldom could cities afford not to be concerned with the attractiveness of their markets to suppliers.

Because cities lived from trade, a second theme of government policy was to increase the amount of commerce flowing through the city. Commerce was a primary source of income not only for merchants, but also for other economic groups such as artisans and lawyers. Moreover, tolls and fees from commerce were a principal source of revenue for city governments.²⁶⁶

Given the small size of cities and the high degree of interdependence among members of the urban populace, city governments also had to be concerned with the perceived equity of their policies. The urban preachers strengthened the communitarian ideal in the thirteenth century, requiring governments to take seriously the interests and demands of all significant segments of the community.²⁶⁷ Violence and disruption could be triggered not only by food shortages, but also by perceptions of unfairness in the treatment of particular groups.

2. The Norms

The economic conduct norms developed by cities to achieve these objectives shared a common characteristic—they were perceived not merely as restrictions on conduct, but also as symbols of community cohesion and as tools for the enhancement of community welfare.

a. *Protecting the Market*

These norms were designed, above all, to protect the market. A fair and efficient market was the key to achieving urban policy goals, and cities recognized that rules were necessary to assure that markets functioned as intended. Despite the lack of theoretical guidance, cities developed remarkably similar market protection rules.²⁶⁸

One set of norms centralized and consolidated all transactions on the public market.²⁶⁹ Cities often required that certain categories of goods be sold on the central market and prohibited all other sales of such goods within

265. Important among the many means of attempting to coerce supplies from surrounding territories were so-called "staple rights" (*Stapelrechte*) by which the king or territorial prince ordered that all goods of a particular category sold within the territory must pass through a particular city. For a discussion, see *id.* at 162.

266. See Carlo Cipolla, *The Italian and Iberian Peninsulas*, in 3 *CAMB. ECON. HIST. EUR.* 402-404 (Michael M. Postan et al. eds., 2d ed. 1966).

267. See generally MUNDY, *supra* note 32, at 431-42.

268. See 1 HECKSCHER, *supra* note 262, at 130.

269. Roman economic policy had limited the number of markets in order to improve their effectiveness, but laws to compel sales on markets were apparently developed only during the medieval period. VERNON A. MUND, *OPEN MARKETS* 15 (1948).

the city or the surrounding territory.²⁷⁰ Such measures tended to lower prices and to reduce price fluctuations by impeding hoarding and other forms of market manipulation. They also facilitated supervision of the market, thereby tending to minimize fraud and other deceptive practices and increasing the attractiveness of the market to both buyers and sellers. Moreover, centralizing all transactions on the market served the government's revenue purposes by increasing market fees and tolls.

Market centralization measures were also related, however, to justice concerns and the transcendent norms. They were tied, for example, to the concept of just price, because the determination of just price required that the market price reveal the "estimation of the community,"²⁷¹ and this was difficult to establish unless all sales were on the same market. These provisions also served the cause of monopoly prevention by making the market more transparent and thus impeding the manipulation of supplies. Finally, they reinforced the market's role as a symbol of equity and community cohesion by assuring that everyone bought and sold on the same market and on the same terms.

The widespread prohibition of forestalling—i.e., the purchase of goods for resale before they reached the market—reflected a similar interweaving of policy objectives with transcendent norms.²⁷² Forestalling could undermine a city's supply maintenance goals by allowing goods to be diverted elsewhere. Moreover, the insertion of an intermediate buyer between the producer and the market tended to increase market prices. Consequently, provisions against forestalling served important policy goals. They also supported the just price norm, however, by concentrating sales on the central market and thus improving the market's ability to reflect a just price, and they discouraged monopolistic manipulation of supplies.

Most cities also had provisions that specifically forbade market manipulation. Here the primary concern was with a group of practices loosely labeled "engrossing," in which merchants sought speculative profits through withholding or otherwise manipulating supplies.²⁷³ City legislation typically prohibited all withholding of supplies from the market with the intent to influence price. Such laws were closely related to the Roman law concept of monopoly, and it is likely that they were consciously based on it, because

270. See, e.g., BECHTEL, *supra* note 11, at 91-92.

271. See *supra* text accompanying notes 221-23.

272. For a discussion of the evolution of the term during the medieval period, see MUND, *supra* note 269, at 43-45.

273. Forestalling was also, of course, a form of manipulation, and during this period it sometimes referred to all forms of manipulation, including engrossing. See *id.* at 44. For a discussion of the evolution of these terms in England, see WILLIAM LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA* 32-39 (1965).

those who wrote the legislation typically would have been familiar with the relevant Roman law provisions.

City governments also sought to protect the integrity of the marketplace through extensive standardization. Goods were subject to increasingly detailed regulations concerning their weight, size, components, quality, manner of production and place of origin.²⁷⁴ Such product requirements were part of an ongoing campaign to assure fairness in competition in the domestic market and to protect the reputation of the city's goods in foreign markets.

The concept of just price was an important impetus to standardization, because application of that norm presupposed the comparability of prices. It could operate effectively only where goods could be placed into clearly-defined categories; and where the goods within each category were essentially identical. Application of the transcendent norm of just price thus created constant pressure on local officials to create regulations that supported it.

Related to this concern for standardization and product quality was the regulation of deceptive practices, for even if products were substantially identical, deceptive sales practices could undermine confidence in the market and deprive the city of related material and political benefits.²⁷⁵ There were often strict codes of market behavior designed to prevent misleading "advertising." In some cases any attempt to draw attention to one's wares violated the market code. The underlying idea was that the goods should simply be presented for sale, not in any way "pushed" on the buyer.

b. *Price Regulation*

When shortages reduced political tolerance for free market outcomes, cities often regulated prices, at least for some goods and under some circumstances.²⁷⁶ In particular, they tended to establish maximum prices for staple items such as bread, meat and wine. Such controls were seen as necessary for communal peace, because shortages and rapid price increases in staple items led to charges of exploitation and were a frequent cause of popular unrest. Price controls appear to have been employed initially only when shortages threatened, but they often became more permanent.

These regulations also were intertwined with the operation of transcendent norms. The concept of just price not only shaped expectations and claims in regard to the operation of the market, but it also encouraged and legitimated

274. See, e.g., 1 WILLIAM J. ASHLEY, AN INTRODUCTION TO ENGLISH ECONOMIC HISTORY AND THEORY 178-81 (pt.1, 1931); ALFRED J. DOREN, DAS FLORENTINER ZUNFTWESEN VOM VIERZEHNTE BIS ZUM SECHZEHNTE JAHRHUNDERT 528-81 (1908).

275. See, e.g., RUDOLPH EBERSTADT, DAS FRANZÖSISCHE GEWERBERECHT UND DIE SCHAFFUNG STAATLICHER GESETZGEBUNG UND VERWALTUNG IN FRANKREICH VOM DREIZEHNTE JAHRHUNDERT BIS 1581 102-120 (1899).

276. See generally ERNST KELTER, GESCHICHTE DER OBRIGKEITLICHEN PREISREGELUNG (1935).

price regulations. If a smoothly-functioning market created prices that were "just," a dysfunctional market—e.g., one affected by abnormal conditions such as drought—might produce unjust prices, unless public authorities stepped in to prevent such outcomes. Later in the period and during the following century just price doctrine thus led to the requirement that the community's political representatives establish "fair" prices in situations where the market could not produce equitable results.²⁷⁷

c. *Guilds and the Cartel Problem*

Particularly after the thirteenth century, a new threat to the market appeared in the form of guilds. Such associations proliferated rapidly, and they increasingly used power over output to raise market prices and achieve higher profits.²⁷⁸ These monopolistic practices eventually created widespread popular resentment, and—especially after the scourge of the black death in the mid-fourteenth century—guilds often became the objects of scorn and hatred.

City governments generally opposed the monopolistic practices of guilds (except where guilds controlled city government) and frequently prohibited guilds from conspiring to raise prices.²⁷⁹ City councils recognized that such cartel practices raised price levels and undermined community cohesion and political stability. Moreover, attacks on guild practices by theologians and urban preachers generated political pressure to restrict guild activities.

City controls on the monopolistic practices of guilds were often impeded, however, by the political power of guilds.²⁸⁰ Guild leaders frequently were influential members of city councils and important persons in the cities, and thus they were often in a position to prevent significant restrictions on guild activities. Regulation was also impeded by a lack of effective means of distinguishing between collective arrangements that merely served to standardize products and improve quality, and those that were primarily attempts to raise prices and improve profits.

B. *Economic Associations and Self-Regulation*

Guilds and other economic associations also regulated the conduct of their members, and this further atomized the already diffuse regulation of economic conduct. Not only did each city have its own policy norms, but there were also many organizations within each city that played important and largely independent roles in regulating economic activity.

277. See De Roover, *Just Price*, *supra* note 218, at 425.

278. The classic account of the cartel activities of guilds is GUNNAR MICKWITZ, *DIE KARTELLFUNKTIONEN DER ZÜNFTE UND IHRE BEDEUTUNG BEI DER ENTSTEHUNG DES ZUNFTWESENS* (1936).

279. See, e.g., *id.* at 24-26.

280. See Hibbert, *supra* note 261, at 201-06.

Merchants created, in effect, a private legal system for their transactions with each other.²⁸¹ Beginning in the cities of Northern Italy in the twelfth century, commercial courts developed in major cities and towns. These courts were created, administered and staffed by the merchants themselves, and they often exercised exclusive jurisdiction over transactions among merchants, at least where non-local transactions were involved. Cities and territorial political units generally did not oppose the establishment and maintenance of this private legal system, because it relieved them of the costs of adjudicating disputes among merchants in local courts and reduced the potential for political conflicts that would have been generated by suits involving large numbers of foreign merchants from many different polities.

These courts applied the "law merchant," a body of transactional rules based primarily on mercantile customs.²⁸² This body of law was not studied in the universities, although its articulation and elaboration were influenced by Roman law. While its formal enforcement mechanisms were limited, merchants perceived themselves as part of a brotherhood whose independence from secular political control was essential, and this generated high levels of cooperation and compliance.

Guilds also acquired broad authority to regulate the conduct of their members.²⁸³ Cities frequently permitted guilds to establish and administer rules relating to matters such as working conditions, relations between masters and apprentices, terms of sale and quality and amounts of production.²⁸⁴ Guild courts were often the exclusive resort of guild members who wished to complain about such regulations, and in some cases non-members were required to seek redress of grievances in such courts for alleged failure by a member to adhere to guild regulations.

As with the law merchant, cities allowed guilds such extensive regulatory authority because to do so saved city resources. It obviated the need for cities to engage in costly and complicated regulation of potentially troublesome issues. Moreover, guilds could be expected to give adequate consideration to the needs of the community, because they depended on community support, and they could be expected to heed the moral precepts of the church, because they were often closely tied to the church and frequently carried out religious functions. Finally, guilds often were in a position to secure a higher degree of compliance with their regulations than city laws were likely to command.

281. See BERMAN, *supra* note 28, at 333-55.

282. For a discussion of differing views on the nature and roles of the law merchant, see J.H. Baker, *The Law Merchant and the Common Law before 1700*, 38 CAMBRIDGE L. J. 295 (1979).

283. For a discussion of the political roles of guilds and their justifications, see BLACK, *supra* note 252, at 44-75.

284. See generally ÉMILE COORNAERT, *LES CORPORATIONS EN FRANCE AVANT 1789* 187-226 (1941); DOREN, *supra* note 274, at 681-92.

Cities generally reserved the right to require changes where they did not consider guild regulations to be in the best interests of the entire community, and sometimes guild regulations required city council approval.²⁸⁵ In practice, however, the political power of guilds often prevented significant interference with their activities.

C. *Economic Regulation and the Territorial State*

Cities were free to regulate economic conduct because kings and feudal lords generally had little interest in such regulation. Economic regulation was not normally considered to be among the ruler's responsibilities until at least the fourteenth century,²⁸⁶ although in England and France this idea was developing during the thirteenth century.²⁸⁷ Territorial political roles were largely defined within the context of feudal relationships, and there little attention was paid to markets.²⁸⁸ Moreover, outside of Italy, feudal lords generally lived in the countryside and hence often had little direct contact with urban and commercial concerns.

Even where they might have wished to engage in such regulation, territorial rulers had limited means to do so. They typically did not have large bureaucracies that could be used to devise and implement economic policy. Furthermore, the difficulties and uncertainties of transportation, particularly land transportation, prevented effective gathering of information and coordination of policy efforts other than in relation to small geographical areas. Markets generally were local institutions, and their regulation was perforce a local matter.

Finally, to the extent that territorial rulers were interested in commerce at all, their interest was primarily in the tax and toll revenues it produced. They wanted merchants to travel in their territories and participate in their markets, because tolls and market fees were often significant sources of revenue.²⁸⁹ They recognized, however, that regulation tended to reduce such revenues by making participation less attractive, and this provided an incentive not to interfere.

285. See Sylvia L. Thrupp, *The Gilds*, in 3 CAMB. ECON. HIST. EUR. 232 (Michael M. Postan et al. eds., 2d ed. 1966).

286. Aquinas was among the first to add an economic policy component to the duties of the ruler. Edward Miller, *The Economic Policies of Governments: France and England*, in 3 CAMB. ECON. HIST. EUR. 284 (Michael M. Postan et al. eds., 2d ed. 1966).

287. See *infra* note 290 and accompanying text.

288. In the early Middle Ages the King's domestic role was basically to keep the peace. See Miller, *supra* note 286, at 282. For a discussion of the evolution of the king's roles during this period, see ULLMANN, *supra* note 100, at 130-58.

289. For a discussion of the fiscal situation of rulers during this period, see CAROLYN WEBBER AND AARON WILDAVSKY, *A HISTORY OF TAXATION AND EXPENDITURE IN THE WESTERN WORLD 174-204* (1986).

Although late in the period royal legislation began to supplant the regulatory measures of cities in some areas,²⁹⁰ there often was little change in the norms themselves.²⁹¹ Royal legislation typically incorporated existing urban regulations, changing only the source of authority and the means of enforcement. Royal officials gradually took over judicial and administrative functions previously performed by city officials, but the basic pattern of regulation had already been established and often was merely transferred to the royal governments.

D. Economic Policy and the Normative Framework

The regulation of economic conduct by policy institutions thus was separate and distinct from transcendent regulation, utilizing separate processes and discourses for distinct purposes. Cities, corporate bodies and states regulated economic conduct in order to achieve their own objectives, justifying their norms primarily by reference to those objectives and making no claims to abstract or absolute validity. They developed and applied norms that were local and particularistic, but they were both constrained and supported by the transcendent norms of the church and the universities.

VIII. LAW, VALUES AND ECONOMIC CONDUCT

The extraordinary circumstances under which Europeans responded to the market generated a unique conception of the relationship between law and economic conduct. Law emerged as an autonomous body of thought and a sphere of social activity that was separate from both custom and the will of the ruler, and the regulation of economic conduct came to be seen as part of law's domain. Accordingly, the market was perceived in relation to principles and institutions of justice, and the perception that the market was subject to these principles allowed its awesome new force to be seen as more a promise than a threat.

A. The Framework

The texture of this relationship was extraordinarily rich, with universities, various institutions of the church, cities, guilds and mercantile legal systems all participating in shaping it. Moreover, the jurisdictional claims of these

290. This was most noticeable in England and France, where the consolidation of royal power led to increased royal control over markets. Increasingly powerful central authorities realized that such regulation created opportunities to increase tax and toll revenues. Moreover, from a political perspective, the ability of cities to regulate their own markets was the cornerstone of their autonomy, and thus an effective means of enhancing royal power was to encroach on local prerogatives in this area. For England, see generally MAURICE POWICKE, *THE THIRTEENTH CENTURY: 1216-1307* 618-43 (1953).

291. This is a dominant theme in Eli Heckscher's classic *MERCANTILISM*. See 1 HECKSCHER, *supra* note 262, at 128-36.

systems often overlapped, subjecting the same individual or group to a variety of different normative claims.²⁹²

This framework juxtaposed norms, values and institutions rather than requiring their integration within a single political institution such as a state.²⁹³ It allowed each normative system to pursue its own objectives and to develop norms and supporting concepts and rationales according to its own values and methods. No single institution had the power either to determine that any particular objectives or values were more important than others or to eliminate one in favor of another.

A key structural element was the delineation of separate regulatory spheres for transcendent and policy norms. Transcendent norms were the creatures of the universities and the church, and they sought their own goals through their own methods, while cities, states and corporate bodies sought different goals with different methods. The interaction between these spheres was primarily symbiotic rather than confrontational or competitive, allowing the development of both regulatory enterprises.

Transcendent norms and institutions were the core of this framework, subjecting the economic processes of the new market society to universal moral and ethical standards, with little concern for the policy objectives of secular political institutions. They were not instruments of a particular government and thus not bound by policy objectives. They were perceived as valid because they were seen as "just," and they were seen as just because they corresponded to eternal truths.

They derived immense power from the intellectual and moral traditions in which they operated. Each was imbedded, for example, in the normative traditions of the church, and thus participated in the power and authority of that tradition, and each drew on the intellectual authority of Roman law and Aristotelian thought.

Associated with powerful images and fundamental concepts of justice and morality, the transcendent norms penetrated deeply into popular consciousness. In particular, they were supported by a nearly universal religion, and thus they were forcefully promulgated by its institutions and represented symbolically on its buildings and in its art. Everyone knew that a usurer was to be scorned, even if many might not have recognized all forms of officially usurious conduct.

Their force was also related to the functions they performed. They were direct and palpable responses to new and acute threats and harms. The fundamental changes in social relationships brought about by commercializa-

292. Which norms were applicable and which institutions would apply and enforce them might depend on questions such as the type of conduct, where it took place, or the nationality or social position of the actor or of those affected by the conduct.

293. For a discussion of the theoretical relationships among these systems, see, e.g., KOSCHAKER, *supra* note 76, at 89-90.

tion and urbanization exposed individuals to new forms of dependence and vulnerability and created new perceptions of harm, and the norms generated in response to these threats quickly came to be seen as fundamental and necessary.

They were also fundamental in the sense that they structured perception. They served not merely as constraints on economic conduct; they shaped knowledge about such conduct. They were the lenses through which economic phenomena were perceived. At the popular level, the church was instrumental in imbuing transcendent norms with this power. Yet they served the same function for the lawyers, philosophers, and theologians who dominated the intellectual life of the period, because they both absorbed and influenced the discourse of those groups.

Cities, states and corporate bodies operated within regulatory spheres that had little connection with that of the transcendent norms. These institutions imposed norms on economic conduct in order to achieve specific policy goals, and they utilized a different type of discourse. They were not generated in the search for truth, and they made no claims to abstract or universal validity. Moreover, their scope of application generally was limited, often extending only to the members of a particular guild or the inhabitants of a particular town.

The regulatory spheres of transcendent and policy norms were not coequal. The transcendent norms were just that—transcendent. They were forces around which policy institutions had to construct their own norms, and the regulatory space they occupied was foreclosed to policy institutions. Moreover, political institutions generally had to accommodate transcendent norms, often adapting their own laws to reflect or support them.²⁹⁴

This also meant that there was frequent overlap, with the same basic ideas often operating in different systems. The usury norm, for example, was basically developed in canon law, but it was also included in many urban and royal legal systems. As a result, a norm that was part of a city's laws was supported by the imagery and values of the church. Such overlaps reinforced the influence and societal penetration of individual norms by supporting them with disparate rationales, utilizing them for differing objectives and applying them in different ways to different groups.

B. From Framework to Tradition

An important aspect of the Western response to the market has been the extraordinary durability of the transcendent norms that were its central feature. These norms did not disappear as the circumstances under which they were created changed. The usury, just price and monopoly norms continue even today to operate in some form in most, perhaps all, Western legal systems.

294. See, e.g., *supra* text accompanying notes 268-77.

True, the precise content and significance of the individual norms have varied over this long history, but their core ideas have remained intact. The relationship between law and economic conduct that they represent has been transformed into a tradition within Western thought and practice.²⁹⁵

This tradition includes not only the norms themselves, but also the values and perceptions associated with them. To apply the usury norm, for example, is implicitly to affirm the moral obligation to protect borrowers from exploitation by lenders. Similarly, use of the concept of just price—or a modern avatar such as unconscionability—affirms a message that concepts of justice are relevant to prices. At least in part as a result of such messages, principles of morality and justice continue to be perceived as relevant to the regulation of economic conduct in Western countries. Here, in contrast to much of the rest of the world, economic conduct norms are imbedded in languages other than those of command.

The framework's internal structure was critical to the formation of this tradition. The separation of transcendent norms and their associated institutions from secular policy processes tended to shield them from the growing power of kingdoms and, later, nation-states. Those norms were transmitted through abstract, non-contingent discourse by the "transcendent" institutions of the church and the universities, whereas policy norms were transmitted as "local knowledge"²⁹⁶ by local institutions. As a consequence, the two transmission processes did not interfere with each other.

Timing was also a factor. This framework for economic conduct was the initial response to the market and its concomitant social dislocations and fears, and as such it established the interpenetration of ethical-philosophical, religious and legal norms as a dominant pattern of thought. Subsequent ideas relating to the regulation of economic conduct thus had to seek acceptance and compete for legitimacy against deep-rooted perceptions and values.

The "transcendence" of the norms also contributed to their durability. These norms were tied neither to a particular time nor to a particular place, and they were unfettered by relationships to particular polities. They were understood not as responses to particular temporally-located problems, but as principles of the moral order of the universe; their claims were to universal validity. Consequently, changing factual conditions did not necessarily undermine their status and authority. They were durable precisely because they were not means to particular ends, but ends in themselves.

They also became interwoven with fundamental changes in perception. Peter Brown has observed that in the early Middle Ages the sacred and the profane were inextricably intertwined, not parts of different types of reality, but common and often indistinguishable components of the same reality, and that

295. For an insightful discussion of the concept of tradition by a leading sociologist, see EDWARD SHILS, *TRADITION* (1981).

296. The term is drawn from CLIFFORD GEERTZ, *LOCAL KNOWLEDGE* 167-234 (1983).

during the later Middle Ages the sacred and profane began to disengage.²⁹⁷ A similar disengagement took place with regard to economic conduct. Early in the period there was no identifiable category of economic conduct, but by the end of the period economic conduct had begun to be disengaged from other forms of social conduct. A third disengagement involved the separation of law from religious and political authority. Virtually indistinguishable from these forms of authority at the beginning of the period, law had acquired a separate identity by the end of that period.

Economic regulation took shape in the context of these basic changes in perception and was molded by them. The emergence of economic conduct as a separately identifiable type of conduct focused attention on the potential harms of the market; the removal of the sacred from the profane emphasized the need to protect the sacred (religious values) from the profane (the market); and the emergence of law as an autonomous force provided a means of providing that protection.

A normative tradition emerged because these transcendent norms became part of the conceptual framework through which the market was viewed. They were constructed as instruments for understanding the world and thus performed analytical and interpretive roles far beyond those of modern positive law. Knowledge about economic conduct developed out of the norms that regulated it, making the norms part of perception itself and thus all but indispensable.

The broad popular support for these norms has sustained the tradition. Perceived as protections for the "common man" as well as for the "common good" of society, they often have been employed as symbols in popular movements. Monopoly and usury were, for example, major themes of the popular movements surrounding the Protestant Reformation of the sixteenth century,²⁹⁸ and popular moral sentiment against monopoly has been a recurrent theme in the history of antitrust legislation.²⁹⁹

The diachronic force of these norms owes much to the church and the universities. They remained powerful for centuries and carried with them not only the norms themselves, but also the claims, expectations and discourse that sustained their normative and intellectual power.³⁰⁰ For example, although the roles played by the church changed dramatically over the centuries, and the

297. Peter Brown, *Society and the Supernatural: A Medieval Change*, 104 DAEDALUS 133 (1975).

298. See, e.g., NELSON, *supra* note 138, at 29-72; FRITZ BLAICH, DIE REICHSMONOPOLGESETZGEBUNG IM ZEITALTER KARLS V: IHRE ORDNUNGSPOLITISCHE PROBLEMATIK 10-17 (1967).

299. LETWIN, *supra* note 273, at 54-70.

300. "Ideals pass into great historic forces by embodying themselves in institutions. The power of embodying its ideals in institutions was the peculiar genius of the medieval mind" 1 RASHDALL, *supra* note 46, at 3.

ecclesiastical courts lost all but vestiges of their influence, the church continued to apply the usury and just price norms and to require study of many of the related texts.³⁰¹ Similarly, the study of Roman law continued as the core of legal education in much of Europe into the eighteenth century, and it remained important in countries such as Germany into the last century.³⁰²

Finally, the durability of this normative tradition has rested on the continuing threat of the phenomena to which the norms were a response. The halting and uneven march of the market has continued, subjecting ever broader segments of social life to its influences, and thus the norms have remained relevant because the problems to which they were a response have remained.

C. *The Search for Prometheus*

The market's central role in the development of Western civilization has often been noted. The commercialization of European society that began a millennium ago has provided the material base for the cultural, artistic and intellectual flowering of that civilization, and the market as both process and model has played a central role in shaping social and political thought. Markets have produced material benefits elsewhere, but in the West the market has been integral to the development of a civilization. The market as Prometheus, the protector of man from the wrath of the gods, has become a familiar image.

Less often noticed is the other face of this relationship—the influence of norms, values and traditions on the market. These forces have shaped the market, influencing the perception and evaluation of economic conduct, molding expectations of it and framing society's claims on it. In the normative tradition whose origins we have analyzed here the critical trope has been the idea that the regulation of economic conduct is not primarily a matter of state policy, but of fundamental—and enforceable—principles of justice. Thus, the Western conception of law has helped to protect the market from state interference, and it is in this sense that it may be seen as a progenitor of the market's Promethean roles. In the West, the story of the market as Prometheus is interwoven with the story of the law as Hercules—the god who “unbound” Prometheus.

301. In England the role of the universities in the transmission of some components of the framework was perhaps never as great as it was on the continent, and it certainly diminished significantly from the fourteenth century on. By that time, however, the tradition had been established. Moreover, the Church's role as a transmission medium was essentially the same in England as on the continent. For a comparison of the Church's roles in England and in Italy during the late medieval period, see BRENTANO, *supra* note 43.

302. Roman law as a subject evolved over time as its uses changed, and the commentaries of later scholars often became more important than the Roman law texts themselves. For our purposes, however, the point is merely that there was an ongoing intellectual tradition rooted in the study of the same texts.