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THE TECHCONS

Chris Jay Hoofnagle*

ABSTRACT

Selling sometimes involves trickery. How should we decide what trickery is “swindling” versus ordinary “selling”? One method is elucidated in Yale Law Professor Arthur Leff’s curious, lost-to-history book. In “Swindling and Selling: The Story of Legal and Illegal Congames”, Leff showed how market structure is a powerful factor for distinguishing illegal confidence games (“congames”)—what he called “swindling”—from legal “selling.” Leff demonstrated how con artists weave narratives to convince marks they have a monopoly over some desirable asset. Con artists then manipulate marks to mistakenly believe they possess a monopsony over its capture.

This essay revisits Leff’s mostly forgotten approach and applies it to internet swindling techniques: the TechCons. Leff’s 50-year-old, pre-internet framework provides a powerful rationale for why internet frauds still exist, despite the revolution of information availability brought by the Internet. A market structure analysis also explains how the internet makes ordinary cons more powerful. TechCons are different from pre-internet cons in important ways; the internet enables con artists to cast a wider recruitment net, but also to deepen injury to fraud victims caught in it.

Finally, this essay applies Leff’s framework to three controversial internet activities: phishing, cryptocurrencies, and online advertising. Application reveals that market structure interventions may be effective tools in deterring swindling while allowing selling. It also highlights a critique of the law and economics movement. Leff’s thinking was profoundly influenced by law and economic approaches. Yet, he also believed that lawyers’ focus should be on real, individual

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consumers rather than notional ones with perfect rationality. Leff's focus on transaction costs and the roles cast by businesses for consumers to play offers a rich, realist, and entertaining method to understand technology sales and cons.

INTRODUCTION

Congames existed long before the Internet. Contemporary con artists recast congames for the Internet medium, and in so doing, kept their basic narrative logic while making congames more powerful. This essay uses a framework developed by Arthur Allen Leff to explain how this came to be.

Part I dives into Leff's "Swindling and Selling: The Story of Legal and Illegal Congames ("S&S").¹ In S&S, Leff applies a market structure analysis method to explain congames. Leff's market structure approach clarifies the boundaries of ordinary selling, where deception and trickery are sometimes used, yet seen as tolerable warts on the marketplace. Published in 1976, Leff's S&S is now out of print, not available electronically nor by audiobook, and relatively unknown among consumer protection thinkers.² Leff's untimely death at just 46 years of age further cast this work in the shadows.

This essay resurrects Leff's theory of fraud in order to show how modern cons are adapted in the internet medium. Explained in much greater detail below, Leff shows how con artists weave narratives to convince marks they have a monopoly over some desirable asset. Con artists then manipulate marks to mistakenly believe they possess a monopsony over its capture. The paradigmatic example is the "Spanish Prisoner," where the con artist claims to possess special, secret knowledge: a way of freeing a jailed aristocrat (the monopoly). Only the mark is in a position to free this prisoner (the monopsony), who will enrich the mark once released.

Why resurrect a 50-year-old book on physical space congames? Leff's work provides a counternarrative to the consumer protection critique of Richard Posner. In a withering critique of the Federal Trade Commission (FTC), Posner articulated a vision for consumer protection that primarily relied upon consumer skepticism and competitive markets to police fraud.³ Posner's views, republished

¹ ARTHUR A. LEFF, SWINDLING AND SELLING: THE STORY OF LEGAL AND ILLEGAL CONGAMES (The Free Press, 1976).

² According to Google Scholar, the book has only been cited just over 60 times.

³ Richard A. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47 (1969).

and magnified by business advocacy organizations,⁴ profoundly influenced the course of the FTC and consumer protection to this day. Posner argued, among other things, that common law tort remedies could address consumer frauds, and that attention to frauds against the poor were unjustified.⁵ Partly influenced by Posner, the FTC de-emphasized the policing of *unfairness* in the marketplace and focused on practices considered deceptive.

Leff's account helps explain why competition did not fully rescue the consumer from cons. Part 2 discusses the puzzle presented by the internet, which would seem to be a Posnerian competition dream. The internet would seem to make cons more difficult, because of how it lowers search costs. Yet, cons have not gone away, and Leff's framework explains why the internet can make cons more powerful.

The internet changes the basic relationship structure between marks and cons. While Leff did not predict the internet, his framework applied to it helps one see the relationship shift and the dangers the shift presents.

Part 2 explains the most prevalent potential swindles on the internet. Con artists have refactored all of Leff's classic offline cons into online ones, primarily through the email medium. Just as con artists of previous centuries weaved tales of imprisoned aristocracy who could be freed with a small bribe provided by a mark, con artists of the 21st century describe similarly situated African kings just waiting to share their riches with stranger-saviors. The essay turns to cryptocurrencies and online advertising, and explores how these business models have shared traits of congames. In refactoring cons, con artists made their swindles more powerful in the internet medium, despite a lower-transaction-cost and competitive marketplace. Leff's framework nicely explains why this is the case.

Finally, Part 3 makes a broader point about Leff and the implications of his observations. Leff was a critic of the law and economics movement, but not of economics itself. His work is profoundly economic in conceptualization. But Leff's unit of analysis was different, and he accepted inputs from other disciplines, making him different from Posner.

Leff's work goes beyond just making sense of congames. His method speaks to the role of lawyers and sets them apart from law and economic scholars focused on macro-level phenomena. Leff insisted

⁴ RICHARD A. POSNER, REGULATION OF ADVERTISING BY THE FTC (Am. Enter. Inst. For Pub. Pol'y Rsch., 1973).

⁵ See Posner, *supra* note 4, at 79 ("My skepticism [of FTC programs emphasizing protection of the poor] is reinforced by the absence of theoretical reasons for expecting fraud to be rampant in sales to the poor.").

that lawyers pay attention to the individual consumer's experience in actual transactions. He dismissed as Panglossian marketplace accounts that characterized consumers' desires as reflected in what they were willing to pay and willing to buy.

One cannot help but think that if Leff had been able to continue his work, consumer protection would be different today. This is because Leff's criticism of law and economics, particularly as embodied in Richard Posner's work, was both incisive and hilarious. Leff lampooned a view that underpinned the revolt against consumer protection starting in the late 1970s.

Posnerian law and economic approaches shape both how problems are understood but also what we think to be solutions. Leff urged us to pay attention to real consumers in real transactions. The challenge consumer protection regulators now face is that while the internet might give us more information about the marketplace, it might also obscure the realities of individual transactions through personalized experiences. Personalization could generate more situations where con artists can weave a monopoly/monopsony narrative to rope marks without being detected by consumer protection authorities.

Leff's framework suggests that consumer protection focus on recognizing and busting the monopoly/monopsony dynamics inherent in congames. Thus, authorities might use marketplace reform to protect consumers, rather than information forcing remedies, such as notices. In this, Leff is like Posner. Ultimately, both sought a competitive marketplace with incentives that would deter fraud. But Leff's approach, in its interdisciplinary richness, provides explanations of why the competitive internet market still falls short.

SWINDLING AND SELLING

Leff's S&S is a breakthrough work on consumer protection.⁶ Despite its analytical clarity and contributions, the work is not available in any format, and for that reason, this Part thoroughly synthesizes Leff's framework to introduce it to the unfamiliar reader. This Part begins by explaining Leff's assumptions and framing, then it summarizes Leff's market-structure approach for contemplating transactions.

⁶ Nobel Laureate Richard H. Thaler devoted his 2010 Sullivan & Cromwell Fellowship Lecture at Yale to "The Behavioral Economics of Swindling and Selling: A Lecture in Honor of Arthur Leff."

Leff's Assumptions About the Marketplace

Three major assumptions are introduced below: the notion that transactions are governed by actors with economic rationality, that swindling and selling are so closely related that the law distinguishes between the two with *mens rea*, and finally that participating in bubbles may be logical and bubbles create special dynamics that complicate the evaluation of transactions.

Leff's book is subtitled "The Story of Legal and Illegal Congames" because the work tackles a puzzle: what exactly is the difference between ordinary selling and illegal swindling? It turns out that the contours between these phenomena are unclear, because the law and consumers do accept some kinds of artifice in transactions. The book emphasizes *story*: the narrative techniques of swindlers and sellers.

Two challenges: whence the deal and why me?

All swindling and selling involves two challenges, according to Leff. First, the seller must explain where the deal came from—the "whence the deal?" question. Attractive deals are ones where the benefit of the transaction comes from thin air, some distant third party, or a plausible explanation of why the seller would give up some value or revenue.⁷ Second, the seller must explain why such a good deal should be shared with a buyer.⁸ Sellers need a good "why me" justification to convince the buyer that the transaction is a legitimate deal. In short, deals have to make sense.⁹ In the following sections, the answer to these two questions will be explained in each congame.

Underpinning both narrative challenges is the assumption that buyers are both economically rational and skeptical.¹⁰ To protect themselves from being conned and to protect their conscience, buyers want

⁷ See Leff, *supra* note 2, at 10 ("[E]very selling or swindling pitch will have in it someplace, express or implied, some explanation of the other party's surprising willingness to lose or of some third party's quiescence in the face of his loss, or some convincing depiction of the wealth-producing powers of thin air.").

⁸ See LEFF, *supra* note 2, at 10 ("[E]very customer/mark must also be given a credible explanation of why the seller/conman is splitting with him.").

⁹ See LEFF *supra* note 2, at 27 ("[A]ll swindling to some extent involves creating, dramatically presenting, and manipulating illusory competitive advantages for both the parties to the illusory deal.").

¹⁰ See LEFF *supra* note 2 at 13 ("Successful plays demand a convincing dramatization of the fundamental processes of microeconomics.").

a legitimate narrative—a convincing *story* for a deal.¹¹ Buyers also have protective and psychological reasons to seek explanation of a deal. Otherwise, we might buy the wrong good (a low-quality good or a good that is stolen) or make a deal that harms someone we care about.

Economic rationality imposes a limit on transactions: Leff insists that swindling and selling never includes gifts—that is free offers.¹² Instead, all transactions involve trades of something for something.

Leff dramatizes efforts to overcome the two challenges (whence the deal and why me) using Erving Goffman's notion of roles.¹³ Leff explains that swindlers require con artists to place marks inside a play where the mark is both the audience and a character cast as an economically-shrew person pursuing a great deal.¹⁴ Leff writes:

...one of the fundamental thrusts of all salesmanship—it is not only by characterizing goods that goods are sold, but by bringing about the customer's recharacterization of himself. Every selling situation, "lawful" or not, involves the creation of a drama and of roles in that drama designed to move toward the same denouement, a completed sale.¹⁵

Creativity is why we call con artists *artists* rather than strongmen or simple crooks. Con artists are creatives, admired by Leff, and

¹¹ The idea that sales require economically rational participants is so central that even sellers who advertise "crazy" deals mime a kind of mental illness so that everyone knows it is an act. Leff observes,

"Just as Happy Harry and Sunshine Sam, the Mad Russian and the Addled Armenian, were intended not to be seen but to be seen through, so here the frump-to-goddess progression is meant to be discounted as a realistic promise. Not disbelieved; discounted. Behind Sunshine Sam one is to see a slightly friendlier maximizing businessman whose pose is so transparent as to engender trust. Behind Harriet's magical mutation at the touch of the milk-fairy's wand one is to see some strong likelihood of improved health and muscle tone-and a wild, unlikely chance at sexual nirvana." See Leff, *supra* note 2, at 171

¹² See LEFF *supra* note 2, at 11 ("[T]he picture that emerges when one studies a large number of swindling and selling techniques is of a society by and large profoundly skeptical about the possibility of love and gifts, at least from strangers.").

¹³ See LEFF *supra* note 2, at 182-83 ("Every selling situation, "lawful" or not, involves the creation of a drama and of roles in that drama designed to move toward the same denouement, a completed sale.").

¹⁴ See LEFF, *supra* note 2, at 51 ("[O]ne of the most powerful selling techniques involves giving the customer a role by letting him see through another role that seems to have been tendered to everyone else, including him, thereby hiding from him the fact that he never gets out of the audience, always remaining, instead, a customer.").

¹⁵ See LEFF, *supra* note 2, at 182.

often portrayed in popular media as charismatic, even as heroes. These heroes weave two kinds of storylines: First, short cons, situations where the con arts collect only as much money as the mark carries. Second, the “long con,” a daring feat, is different because the con artist sends the mark away to get more and more money.¹⁶

Swindling is selling through the looking glass

In S&S, Leff introduces swindling before selling because of the fundamental similarity between the two. In fact, swindling is so similar to selling that the law uses *mens rea* to distinguish between the two.¹⁷ Leff discusses advertising strategies—regular selling—as “cognates of congames.”¹⁸

Bubble Logics

The logic of bubbles is an important theme, and it reveals complex dynamics in swindling. First, focusing on consumers, anyone can find oneself in a bubble without realizing it. Bubbles like the housing collapse in 2008 have their own momentum and self-affirming forms of evidence. Not only were buyers willing to pay premiums for homes in that bubble, mechanisms that should have tempered prices, such as home inspections and valuations, became corrupted such that they affirmed high prices. To a consumer such in a bubble, the situation may appear to be a legitimate and still a fantastic deal.

Second, turning to investors, one can make a fortune in a bubble. Some participants in bubbles—whether or not they perceive the bubble—win big, and these early movers help grow bubbles and make them resilient to critique.¹⁹ For instance, the early winners of Ponzi’s original postal stamp arbitrage scheme did in fact capture big returns. Early winners then became a clique that promoted the scheme and defended against critics.

¹⁶ Short cons are a major plot device in *Better Call Saul* (AMC Networks Inc.). The 1990 film *The Grifters* dramatizes the challenges and risks of a long con. *The Grifters* (Cineplex Odeon Films 1990).

¹⁷ “The problem is that for purposes of social and legal control, swindling and selling are frequently not sharply differentiated from each other in either structure or process. For purposes of both definition and treatment, the objective criteria fail at critical junctures. The legal response to ambiguity in this area of its concern has therefore tended, as it has in so many other areas where objective states of the world are morally equivocal, to make subjective mental states legally determinative.” LEFF, *supra* note 2 at 183.

¹⁸ *Id.*

¹⁹ *Id.* at 69.

Third, some investors know they are in a bubble and think themselves shrewd actors who will sell before the collapse.²⁰ This second dynamic emerges explicitly in the discussion of cryptocurrencies in Part 2.

Leff's work integrates sociological, economic, legal, and psychological themes in selling. For instance, psychology provides a powerful explanation of why con artists escape punishment: several forces come to bear on the mark that lead to impunity for the swindler. In Leff's dramaturgical framing, the mark conceives of himself of not just economically rational, but smart. Smarter than others, because the mark is going to capture a fantastic deal. The clash between play and reality creates cognitive dissonance in the mark, so weighty that most marks never pursue justice. Doing so imperils marks' dignity.

Even the ancients recognized²¹ that no one wants to think himself a patsy.²² Going to the authorities risks not only acknowledging that one is a fool—marks are often involved in some kind of unscrupulous graft.

Even further from not pursuing justice, some marks will never accept they were swindled.²³ Some marks make heroes of their swindlers.²⁴

What is Swindling?

Leff takes the reader on a tour of modern con games to answer the question of what is swindling. Instead, Leff's tour is grounded in a marketplace structure analysis of cons, thereby saving the reader from an endless listicle of con artist story lines. At the highest level, con games exist where con artists have composed false economies, ones where there are artificial monopolies or oligopolies among sellers and monopsonies and oligopsonies among buyers. These false economies

²⁰ *Id.* at 65.

²¹ Thucydides observed, "it is generally the case that men are readier to call rogues clever than simpletons honest, and are as ashamed of being the second as they are proud of being the first." ROBERT STRASSLER, *THE LANDMARK THUCYDIDES: A GUIDE TO THE PELOPONNESIAN WAR 200* (Free Press, paperback ed. 2008).

²² "It appears that there is, in these cons, much more for the marks to lose than money." LEFF, *supra* note 2, at 84.

²³ "What is more to the point is the 'clinically common' experience (reported by all conmen) of not being able to blow off the mark because he wants another play. That is, the mark isn't merely avoiding the consequences of facing his rip-off; he cannot even bring himself to see himself as a rippee." *Id.* at 87.

²⁴ "[O]scar Hartzell, who ran the bizarre Drake Estate swindle of the late twenties, found little trouble in continuing to raise very large sums of money from their 'believers,' even when they had to be addressed to them in jail." *Id.* at 84.

provide a narrative valorizing the conman's control over an asset, and the mark's privileged position to capture it.

The Spanish Prisoner: A Conceptually Perfect Con

In Leff's marketplace-structure approach, the Spanish Prisoner is the perfect con because it represents pure monopoly and monopsony.

In the Spanish Prisoner, the con artist convinces the mark that giving a small sum of money will help bribe an official in some other country. The bribe causes the official to release a very rich prisoner, who will reward the mark as a savior. Convincing the mark typically involves handing over some kind of token granting access to the asset, such as a claim check for a foreign banking account.

Leff's 1976 rendition of the Spanish Prisoner is uncanny for how familiar it is to today's internet users. Leff's rendition could be cut-and-pasted into an email today. Yet, when Leff wrote, his Spanish Prisoner occurs through the postal mail.²⁵ In it, the mark, Doctor Tzourous, receives an intriguing message promising riches for a small investment from a T. Dorakis:

Honored Professor Doctor Tzourous:

Only my extremeness of condition influence me to adress to you so far away this pray of aid. Please do read with sympathetic it cost my last hidden drachmae to guards to bring letter out for sending.

Myself I am chief helper to Minister of Finance in real government not Colonels. Your name is known to us as friend though far away from free American press papers. Now I am in gaol by usurper colonels. Freedom of me is value but more of loved Hellas in chains now. I prayer help—myself and nation...²⁶

Where does the deal come from in a Spanish Prisoner? Typically, the explanation is theft because the prisoner has control over a huge fortune. Here, Dorakis' fortune can be unlocked by a small bribe to a jailer, a step that could only be taken by the patriotic, well-resourced, and discreet Dr. Tzourous. Leff observes that the theft narrative gives Dorakis a monopoly over the asset, a powerful relationship that implies availability of huge reward. In fact, the kinds of huge

²⁵ *Id.* at 86.

²⁶ *Id.* at 20-21.

rewards typical of swindling typically require something like a monopoly to explain how a single person can control so much money.²⁷

Why should Dorakis share these rewards with Dr. Tzourous? The prisoner has a monopoly over the huge financial reward, but he needs a collaborator to unlock it. Because of the need for secrecy, the mark has monopoly over the mechanism to release the reward.²⁸

Leff starts S&S with the Spanish Prisoner because of its underlying economic model.²⁹ The Spanish Prisoner binds its participants in *bilateral monopoly*.³⁰ The bilateral monopoly of the Spanish Prisoner helps explain why so many marks never go to the police—Dr. Tzourous plays a role where he thinks he is in on a crime (the bribing of a foreign official).³¹ Swindling probably enjoys low enforcement likelihood because so many of those swindled are themselves dishonest or act dishonestly. In some cases, the mark is in league of a swindle against the state itself.³² Some marks become durable true believers; even after a scheme is exposed as phony, some marks return for another attempt.

The following subsections cover congames that are structurally similar to the Spanish prisoner: ancient estates, bait and switch, and

²⁷ “[T]he conman’s answer to the first key question—Whence the wealth?—is an embroidered version of the following: ‘I have a monopoly over a uniquely valuable piece of information.’” *Id.* at 25.

²⁸ “[W]hat is most lovely about the Prisoner is that the second critical question—Why are you splitting with me?—can be answered in almost identical terms, with no dramatic dissonance to mar the power of the overall tale. ‘I am sharing with you,’ answers the conman, ‘not because I love you, nor because I’m a fool or an idiot. I am sharing with you because I have to: I may have a monopoly over a secret, but you have a monopoly over me.’” *Id.*

²⁹ “To summarize, the Prisoner is a form of bunco in which two monopolies are personified and then dramatized in a play in which they are the absolutely irreplaceable complements of each other for the production of a particular (usually very large) bundle of wealth. Viewed that way, the Prisoner becomes the theoretical limit toward which all effective swindling (and, as we shall see, all salesmanship as well) tends. It is as close to the masquing of absolute mutual need as one can get in any reasonably credible (and moneyconnected) real-life situation.” *Id.* at 28.

³⁰ “...in the Prisoner two extremes—monopoly and monopsony (that is, a buyer’s monopoly)—are created and then thrown together, with nothing and no one else, into the same play.” *Id.* at 32.

³¹ “During the most effective period for successful regulation of an activity—while it was going on—the victim was a happy member of the cast.” *Id.* at 182.

³² “...all swindles are at least for some period of time consensual crimes. ... Thus, until late in the play they are not natural allies of the regulators, but are made to see themselves as in league against the protective agents of the state.” *Id.*

godcons. The section goes on to discuss Ponzis, which depart in structure, along with Ponzi-like variations, pyramid and referral sales.

The Ancient Estate Swindle

Ancient estates swindles are those where the con artist claims that some old defect in a property title entitles a group of inheritors to a vast fortune. Ancient estate cons are public swindles, even public campaigns to unite some terrifically-valuable property to its rightful owner—maybe you, dear reader. How does the con artist profit? Leff explains: “If he can just get a little bit of funding from those persons in whose hands the property rightly belongs, he will be able to assure their title and make them inconceivably wealthy—taking for himself, he admits, a very large but thoroughly justified share for his own efforts on their behalf.”³³

From a market structure perspective, the ancient estate is similar to the Spanish Prisoner, but the number of marks is much larger. That is, the con artist has some kind of monopoly hold on the condition that could release the vast fortune. But the potential recipients of the fortune must be limited, otherwise the fortune is diminished. Ancient estates thus live between the Spanish Prisoner and the publicly-marketed Ponzi; the con artist has a monopoly, but the con artist faces an oligopsony of marks.

Leff provocatively but apologetically paints class action lawsuits³⁴ and repatriation movements³⁵ as legal forms of an ancient estate swindle. In both lawful forms, some advocate convinces a delimited group to believe that they are owed riches or lands wrongfully separated from them. In class actions, class counsel reap millions while consumers reap dollars. In repatriation movements, political leaders gain power, even adulation, but land transfer is rarely if ever realized. The marks in a repatriation movement might develop resentment to

³³ LEFF, *supra* note 2, at 76.

³⁴ *See id.*, *supra* note 2, at 78 (“I would look for an example of that generally beneficent modern legal development, the class-action suit on behalf of some large class of injured claimants, all coordinated by a conman with a law degree.” Leff even predicts investment financing in class claims).

³⁵ *See id.*, *supra* note 2, at 79 (“[T]he form of any irredentist movement is the form of an Ancient Estate dodge: the leader gathers the claimants into a force with which he hopes to press the claim successfully, taking as ‘payment’ for his absolutely essential organizational skill and services whatever it is that leaders get out of leading, which might even include feelings of ethical and political rectitude.”).

some other group of people, or even die if they choose to try to seize the lands.³⁶

Stolen goods scams, which typically are short cons, inhabit the same category of competitive dynamics as ancient estates. The holder of stolen goods acquired them for a low price, and has a monopoly on their sale. The *whence the deal* narrative defines *why split the deal with me*: not everyone will buy stolen goods, making it a oligopsonic marketplace.³⁷

Bait and Switch

Bait and switch schemes are false sales. Bait advertising attracts a consumer to a store, but once there, the consumer finds that the store is unwilling or unable to sell the advertised product. The switch comes in the form of some higher-cost alternative.

In market structure analysis, bait and switch is equivalent to the Spanish Prisoner. The offeror has what Leff refers to as a “spatial” monopoly over the buyer.³⁸ Leff emphasizes that the swindle works by imposing transaction costs on the consumer—the cost of going elsewhere, the sunk costs of traveling to the store, etc. causes the consumer

³⁶ See *id.* “...in a perhaps rather bizarre fashion one can think of today’s Northern Ireland and Middle East conflicts as considerably more nastily financed and operated Ancient Estates, with the national bliss assertedly at the end of the liberation process as the vastly valuable boodle to be divvied up among the true believers.”

³⁷ See *id.* at 32 (“...*this* retailer must sell at a lower price because, given his method of goods acquisition, he faces a radically curtailed resale market. As a thief, he has only two courses open to him. He can sell the goods to someone else for ultimate resale, or he can peddle at retail himself. If he chooses to sell to a fence he faces a viciously tight oligopsony, a small group of buyers who, so it appears, cartelize instinctively and who haggle over terms, if at all, only very nastily. (This explanation of the economics of the fence industry is, in fact, frequently made to any mark who asks why the thief is doing his own peddling.) But if he does go the retail route himself, he must do so without advertising or settled-site merchandising advantages. And in either case, he can sell only to people who are willing to take the risks (moral and material) of dealing with crooks—that is, only to other crooks.”).

³⁸ *Id.* at 107.

to just buy from the swindler.³⁹ Even if the consumer ultimately gets a “fair deal,” she has been swindled.⁴⁰

Leff’s conclusion is opposite to the views developed by Richard Posner. In Posner’s now classic critique of the FTC, bait and switch was among the trivial concerns the agency pursued, which led to his conclusion that the agency was ineffectual and even perverse. Posner saw little wrong with trickery *he* deemed minor because the trickery did not involve price information.⁴¹ Posner saw bait and switch as a kind of harmless misrepresentation, one that the consumer should protect herself from, presumably by shopping elsewhere.⁴² But Leff’s more capacious lens helps one see why Posner’s remedy leaves the consumer harmed even if the consumer ultimately secures a fair deal.

The Godcons

Leff carefully assures the reader that religion is not a con. But religion creates the conditions for a powerful swindle: a “Godcon.” Godcons are swindles where the con artist convinces others to part with their money in order to obtain divine grace.⁴³

³⁹ *Id.* at 108 (“Put at its most abstract, what happens to a customer in a store is very like what happens to a person in cognitive dissonance and sunk-cost-fallacy situations: the present and actual has a competitive advantage over the future and hypothetical. The stock I already own appears somehow different from any other I might own simply because I have already invested in it and it is there. Once I am in an Ancient Estate dodge, the possibility of prospering through it seems better than that attending any alternative uses of my money. Or to put it another way, whatever alternatives there are, are not around to present themselves as alternatives.”).

⁴⁰ *Id.* at 107-108 (“...you were swindled the minute you were moved to voyage to that store rather than any other. Once there you had already spent time, labor, and money to go there rather than elsewhere. That you got a ‘fair’ deal there means little; you were defrauded of the ‘sunk cost’ of going there rather than elsewhere the minute you went. If you had left that store without buying, whatever you bought elsewhere would have had tacked onto the price you paid a second shopping cost.”).

⁴¹ POSNER, *supra* note 5, at 23 (In FTC “contest” cases, “the consumer is told he has ‘won’ a contest when in fact everyone wins, the purpose of the contest being to lure the consumer into buying some product of the seller’s. There is no product misrepresentation: the consumer gets what he pays for. The phony contest is merely an attention-getter. If the practice imposes any harm on anyone, it is trivial.”).

⁴² *Id.* at 20 (Posner notes that in three cases he cites, the companies were in fact willing to sell the bait item if pressed, and so the FTC’s objection was to the disparagement of the bait item. Posner’s tunnel vision obscured other deceptive practices afoot—in all three cases, the sellers were engaged in other related pricing or feature deceptions.).

⁴³ See LEFF, *supra* note 2, at 57 (“A ‘Godcon’ is a congame in which the conman (with or without a supporting cast) induces one or more marks to trade money and

Godcons are smart swindles for three reasons: First, the whence the deal and why the questions are easily answered—the deal comes from an infinite holy being who wants to save you, dear reader. Second, the reward of the transaction can come out of thin air—divine grace, infinitely available and non-rivalrous, costs no one anything. Third, Godcons make no verifiable claims that can be disputed by the consumer.⁴⁴ Only *mens rea* distinguishes a Godcon from concord among the faithful.

Ponzi Schemes

Ponzi Schemes employ some kind of specious business model to mask an age-old swindle: taking money from new investors to pay off old ones. Ponzis are swindles because there is no wealth generation. There is only wealth transfer, a kind of transfer that ultimately is unsustainable, because the need to pay redeeming early investors will eventually outrun the source of new marks. Eventually Ponzis collapse, but before their collapse, the lucky can capture great rewards while impoverishing a much larger group who did not get out quickly enough.

Ponzis require the con artist to hold a monopoly on a “grey box” for consumers to invest in. A grey box is an investment vehicle with a “divisible secret” one that can be shared with investors without giving the entire scheme away.⁴⁵ The grey box requirement makes Ponzis relatively rare. It takes genius to make such a grey box and as

other things of this-world value in exchange for the promised delivery of quantities of exceedingly valuable divinely manufactured goods. The conman, that is, sets himself up as a broker of Grace.”).

⁴⁴ See *id.* at 55 (“... (1) [T]he source of the wealth to be split—the third party—can be credibly portrayed as being infinitely rich and willing to stand still for continually repeated touches; (2) the mechanism of the play is such that many marks can take part in it simultaneously, in full consciousness of each other’s participation; and (3) the cooling out of the marks in the drama is so brilliantly conceived that not only will they not run to the police, but even after being taken they will never realize that they have been, and will therefore continue to return again and again to be taken some more.”).

⁴⁵ *Id.* at 75 (“Lacking a genuine, government-sanctioned monopoly, however, Ponzi operators must always, to some extent, fall back on secrecy as the source of their extraordinary promised profit. Thus the usual gray box is filled with what one might call a ‘divisible secret’—that is, one enough of which can be told openly to convince the relevant public that something valuable exists, but enough of which can simultaneously be held back as to make the open part of the secret unstealable by any competitor.”).

more participate in the Ponzi, it takes extraordinary luck and trickery to keep the curious from realizing its contents.

Alternatives, such as black box business models do not work as Ponzi schemes because they cannot be trusted—there’s no way to answer the whence the deal question. Conversely, white box business models cannot support a Ponzi, because competitors could just steal the economic engine inside a white box.⁴⁶

Regardless of what specific grey box is concocted, the heart of a Ponzi scheme is always the same: existing investors are paid off with money from new investors. Ponzis rob Peter to pay Paul and in the process enjoy huge gains.

“Charles” Ponzi’s shared secret, at least for his first swindle,⁴⁷ was based on arbitrage in international postage stamps. Charles Ponzi found a way to buy these stamps at an artificially low price and planned to cash them in for great profit.⁴⁸ Of course one problem was that the stamps were not a normally traded commodity, making their liquidity questionable. There are also obvious countermeasures to large-scale arbitrage of stamps: if governments detected the scheme, they could simply adjust the price or refuse to remit stamps at volume.

Charles Ponzi thus satisfied Leff’s source of the deal problem: the money came from the thin air of international arbitrage. No individual victims were identified so investors could feel comfortable about the deal. Leff’s second question—why trade with me?—was answered in Ponzi’s theatrics. A romantic who may have believed in the logic of his scheme, Ponzi was a populist who answered the “why me” question with a desire to share the wealth with the world. Everyone could profit from this thin-air-money-generating mechanism. Ponzi had a monopoly on his grey box, but made it available to any consumer in the market.

Bernard Madoff’s scheme also robbed Peter to pay Paul. The core of Madoff’s Ponzi was falsified trade reports, which gave Madoff’s group a record of improbably great returns.⁴⁹ Falsifying reports is a bad grey box, as statistical analysis would reveal the timing to be too lucky or a product of illegal insider tips. And so Madoff cleverly turned his improbably good trades into a good grey box by answering Leff’s “why me” differently than Ponzi. Ponzi was the

⁴⁶ *Id.* at 69 (“Exchange disequilibria that are gross are not very durable; even fairly subtle arbitrage differentials melt quickly in the hot sun of greed.”).

⁴⁷ MITCHELL ZUCKOFF, *PONZI’S SCHEME: THE TRUE STORY OF A FINANCIAL LEGEND* 6, 93 (Random House Trade Paperbacks) (2005).

⁴⁸ *Id.* at 93

⁴⁹ Lionel S. Lewis, *The Confidence Game: Of Others and of Bernard Madoff*, 50 SOC’Y. SCI. & PUB. POL’Y. 283, 292 (Spring 2013).

populist who told courted the common person with a tale of riches. Madoff's Ponzi scheme worked by recruiting a coterie, in-group investor club. Known as "affinity fraud," Madoff limited investment to communities he was a member of.⁵⁰ Like Ponzi, Madoff held a monopoly over a grey box. Unlike Ponzi, Madoff made investment available to an oligopsony of investors.

Madoff realized that his grey box would be discovered to be empty if he had too many investors. Conversely, by keeping it a private club, the implicit threat was that the overly curious individual might just be ejected from the gravy train. Exclusivity and some apparent oversights in failing to investigate the scheme turned an otherwise obvious fraud into a two-decade long, \$65 billion dollar Ponzi.

Elizabeth Holmes' con exemplifies a different, brilliant strategy: taking a black box and converting it into a grey one. Holmes, daughter of a former Enron vice president, marketed a literal black box (the Edison) that could perform blood tests with tiny amounts of blood from a pricked finger. Holmes' scheme would have come crashing down had it been a white box, one that public authorities could inspect. Thus, Holmes used several strategies to convert the black box product into a grey box: Holmes recruited a political-celebrity board of directors that included George Schultz. Holmes artfully employed the "drop out genius" narrative, one that lent validity to the idea that her grey box would work, because the old-guard experts were out of touch. Holmes also used legal tools to insulate herself and the company from scrutiny. Finally, Holmes used the standard technology optimism narrative, although hers had a strange internal consistency: Holmes claimed she started Theranos because she was afraid of needles, but fingertip pricks involve a needle called a "lance". This inconsistency did not bother the public.⁵¹

Pyramid Schemes

Pyramid Schemes present themselves as ordinary selling opportunities. But in a pyramid, the con artist sells the right to sell; conversely, the mark inveigles others to purchase this right to sell, from who the mark extracts extra commissions. As Leff puts it, the mark is "...offered *the play itself*, for him independently, and for his own

⁵⁰ Hurt 2009.

⁵¹ I have some sympathy for Elizabeth Holmes, because many technology startups weave fantastical narratives about the potential of their technologies. Theranos went beyond other companies in testing actual patients who relied upon the company's technology to their detriment.

benefit, to cast and perform...”⁵² And indeed pyramid schemes involve recruiting independent contractors rather than employees, making the marks responsible for the enterprise without inuring responsibility to the con artists.⁵³

Leff presents the pyramid sale from the perspective of an entrepreneur seeking the least expensive distribution channel for products. From an entrepreneur’s perspective, pyramids make sense because they relieve the entrepreneur from the hard work of actually selling a product at retail in a competitive marketplace: “to prosper while running a Pyramid Sale swindle all the entrepreneur need do is talk a large number of people into doing a sales job for him at a price to the entrepreneur materially less than the ordinary wages for such a job, the difference being made up in plausible helpings of pie from someone else’s sky”⁵⁴

Legitimate selling involves competing with cutthroat entities like Wal-Mart and Amazon. But pyramid sales opt out of the normal competitive marketplace for both buyers and sellers by creating a oligopoly/oligopsony for some members-only, separate brand of goods. That is, they move out of the competitive marketplace into a club arrangement.

On one hand, one could envision a club marketplace being a useful vehicle for certain consumers pursuing specialty products. But pyramids and multi-level marketing schemes (MLMs) feature mass-market products, like shampoo, which is unlikely to reap huge awards from a small club. Fundamentally, pyramid sales and their legal counterpart, the MLMs scheme, do not make sense in a competitive economy, except in this entrepreneurial sense that Leff presents.

Pyramid schemes are tantalizing for the mark because as the mark recruits new participants, these new sellers owe commissions to the mark.⁵⁵

Pyramid schemes have particular social relevance today because of the Internet. Both pyramid schemes and MLMs use internet

⁵² See LEFF, *supra* note 2, at 101.

⁵³ Pyramids differ from Ponzis because in the latter, new entrants fund the exit of older investors and there is no product, just a transfer of wealth. Pyramids are more durable, with older investors staying in the game, making much of their money from newer investors, but always involving sales of something.

⁵⁴ *Id.* at 104–105.

⁵⁵ Leff gives a portrait of a such a pitch: “not only will one earn 40% on one’s own personal sales, but one can also earn, as a ‘General,’ 5% on the sales of one’s Colonels, 7% on the sales of one’s Majors, 9% on the sales of one’s Captains, 12% on the sales of one’s Lieutenants, and 15% on the sales of one’s troops-not to mention 3% on the sales of other Generals ‘directly sponsored’ by oneself.” *Id.* at 148.

“influencers” as independent contractors to sell their products. The influencer approach appeals to many young people as a legitimate form of work. There are many examples of people who have made real money by making and posting videos on YouTube of themselves unboxing products that they are sent free or by making videos of an influencer enjoying nice vacations in exchange for promotion on social media. The work involved is unskilled: spending one’s time on the web, clicking, commenting, self-promoting. The benefits accrue to the individual in the form of attention, popularity, and for some, the riches of celebrity.

From the advertiser’s perspective, the influencer approach is a great bargain. It is expensive to produce real commercials with professional actors and buy airtime for said commercials. All these things involve substantial investment. Advertising also raises regulatory risks, because representations must be substantiated and not be false.

Influencer advertising relaxes both economic and regulatory risk. It is a matter of giving away a free product or service (perhaps one that the merchant could not sell and the merchant can write down the giveaway as a business expense) to get an influencer to make a commercial that is broadcast free on web services. Freed from corporate controls, influencers might make all sorts of false claims or neglect to mention their sponsorship. They are of course liable for falsity, at least in theory, but in practice, enforcement is rare and if punishment comes, it almost never involves fines. The standard FTC enforcement action results in a promise by the influencer to not suppress sponsorship information again.

Both Ponzis and pyramid schemes benefit a kind of commitment momentum, a bubble logic as discussed above.⁵⁶ The marks in these schemes inflate the bubble on their own and eventually become a driving force in the success of the fraud.⁵⁷ These actors may discourage skepticism, as it drives down their potential reward.

⁵⁶ Bubble mania is so compelling that it can organize around an entirely empty economic vehicle. Leff gives the example of the chain letter. *Id.* at 66.

⁵⁷ “First, as a matter of economic rationality, if the mass of marks make up each individual mark’s audience, then they constitute his pool of potential customers as well. If all those other guys are believers (and by having initially joined they have necessarily proven that), then they form for him a pool of people more likely than the public at large to go on believing in the ‘product.’ This becomes, then, a rational source of economic security for each mark. That is, the operator’s little gray box, that which purportedly produces the ‘company’s’ wealth, is neither the most direct nor the most important source of security for any ‘investor.’ The primary security for anyone who buys shares in anything is not the earnings but rather the likelihood that if and when he wants out, someone will be there to buy him out.” *Id.* at 80.

The “why me” question of pyramid sales is easily answered: the con artist strokes the egos of marks by explaining their recruitment based on their charisma and rich social network. Pyramid schemes also operate on individuals’ desire for autonomy and self-respect, here given to people in the form of self-employment. Americans like to support small businesses and there is psychological value (even without economic success) in working for oneself. The small business owner role holds much more attraction than an ordinary wage labor job—even if the total hourly wage of a pyramid is less than an ordinary job working for a typical boss.

Leff recognizes that overlooking the opportunity cost of one’s labor is key element in pyramids.⁵⁸ And it is this oversight that makes pyramid schemes corrosive of dignity and social life. The need to sell infiltrates all of the mark’s interactions, making their social activities inauthentic and ploys for inviting others into the scheme. Even commenting on others’ posts on social media is part of the “work” of a pyramid scheme, as marks drop product references in an attempt to market and sell.

Worse yet, according to the FTC, “Most people who join legitimate MLMs make little or no money. Some of them lose money. In some cases, people believe they’ve joined a legitimate MLM, but it turns out to be an illegal pyramid scheme that steals everything they invest and leaves them deeply in debt.”⁵⁹ Disclosures from some of the largest MLMs in the early 2010s paint a dismal picture: Only 25% of Herbalife sellers even received a check in 2011, and of those that did, the median payment was just \$637. Suppose that those Herbalife sellers worked just 40 hours in all of 2011. Their hourly wage would fall short of \$16 an hour.

Popular cosmetics company Nu Skin’s sales arrangement was even worse: “only 12.7% of Nu Skin’s 80,613 active salespeople in the U.S. received a commission check. And more than half of the \$114.2 million in U.S. commissions it distributed that year went to less than 1% of salespeople, a group of roughly 113 salespeople dubbed ‘Blue Diamond Executives.’”⁶⁰ From Leff’s perspective, Nu Skin convinced

⁵⁸ “If, through some artifice, a swindler could lure a mark into contributing his labor to their venture at well below its normal market price, he would prosper mightily. If he could, in addition, make the mark pay extra for the privilege of working for less than the market return, he would profit fantastically. It was through the development of such artifices that the Pyramid Sale version of the good old-fashioned Ponzi was born.” *Id.* at 102.

⁵⁹ Commission 2018.

⁶⁰ Hicken 2013.

tens of thousands of people to sell its products without having to pay them!

While the FTC and others say that most MLMs do not make money, there are a myriad of websites encouraging the curious individual, saying that is possible to beat the odds. Most fail at MLMs, but you dear reader, are special. You are not a statistic. Most people are quitters but you are not.

Such rhetoric is emotionally appealing. People who want to believe they can be successful discount the statistics and overvalue their own prospects.

Referral Sales

Referral sales are closely related to pyramid schemes, so related that perhaps they are not worth mentioning. Yet, referral sales will help provide clarity to dynamics below concerning the promises of personalized online advertising in Part 2. In a referral sale, the con artist extends some benefit to the mark based on the mark's provision of sales leads. Just like a pyramid scheme, one's position in the exponentially-growing network matters.⁶¹

The whence the deal and why me questions relate to the power of a social network to sell. The mark indeed does have goodwill with friends; sharing that goodwill comes at a low perceived cost to the mark. As Leff explains, the deception comes in the *magnitude* of the value of goodwill. Leff writes: "no one's good will (in that sense) is worth eight hundred dollars [the cost of the central vacuum system being sold door-to-door]. Most people's is worth, say, about \$2.34 ..."⁶²

The modern version of this goodwill mismatch is in personal information transactions, deals where one pays for something with

⁶¹ "The mark's value to the scheme (and thus the value of his referrals to himself) is a function of the number of other marks he can bring into the scheme. But the value of each of their contributions is a function of the same thing—the number each of them can bring in. Thus, as in any pyramid gimmick, the mark's wealth depends on his position on the pyramid. If he were relatively low, there would be a vastly depleted pool below him, and each of those below him would find, available to each of them, an even more vastly depleted pool. If it were sensible for the higher mark to buy in, it would be much less sensible for anyone lower to do so in the hope that many more would still be available to join. But to buy in without such assurance (or hope) would be to buy a vacuum cleaner system for eight hundred dollars cash. The only way everyone could earn his Pullaire free would be for the chain to go to infinity, and infinity (except for mathematicians) doesn't exist." See LEFF, *supra* note 2, at 98.

⁶² *Id.*

personal data, such as contact information, that can be used later for marketing lists. On its face, it does seem that selling one's data is both a rational choice and a valuable commodity, because it comes at such a low cost to the individual while yielding many benefits. Yet, any one person's data is worth far less than \$2.34; \$0.0234 is a realistic price for contact information of any given American.⁶³ Returning to Leff's point, while trading personal referrals appears to be a legitimate trade, "most of that with which the marks would pay for their goods would still turn out to be money."⁶⁴ The goodwill is locked up and not marketable as an individual consumer, but at the same time individuals' goodwill has tremendous value to the network.⁶⁵

Where does the business ultimately extract value from in a referral sale? Leff explains that while the consumer thinks her contacts will pay the bill, referral sales are always backstopped with some kind of credit agreement that takes effect if the referrals fail. These credit agreements in Leff's era were strengthened by the holder in due course doctrine. That doctrine made purchasers of securities immune from defects in seller contracts. And so, sellers could defraud a consumer, and then quickly sell the underlying credit agreement to a bank. Regardless of the fraud, the consumer had to pay the bank. We will see below that other innovations in consumer replacement have replaced the holder in due course mechanism.

The next section of this part turns to Leff's framework for selling.

⁶³ It is outside the scope of this article, but selling personal information is not remunerative for individuals, because individuals cannot enforce a copyright-like licensure of data, nor can they demand competitive prices for data. Once contact information about an individual is learned, perhaps free from a public record, it can be resold by third parties limitlessly and stealthily.

⁶⁴ See LEFF, *supra* note 2 at 98.

⁶⁵ The mark's "good will was (economically) totally lacking in value so long as it remained in his hands, unattached to any business. The mark's good will in the Referral Sale swindle is thus in precisely the same analytical category as his mere availability in the Spanish Prisoner, the Ponzi, and the Pay-Off. It is something to contribute that is worth much more to someone else than to oneself." *Id.* at 99.

Table 1: Leff's market structure analysis of the traditional cons. Red cells denote swindles. Yellow denote regulated activities. Green denote competitive marketplaces.

Buyer Dynamics Seller Dynamics		Monopsony	Oligopsony	Competitive Marketplace
		Competitive Marketplace		
Oligopoly	Defense Contracting	Competitive public utilities, class actions	Franchising, gambling, organized religion, multi-level marketing	
		Pyramid schemes	Godcons	
Monopoly	Spanish Prisoner, bait and switch	Public utilities, repatriation movements	Sole seller situations (Squaresville Pitch, trade secret, IP), sales, loss leaders	
		Ancient estates, stolen goods, private Ponzis	Public Ponzis, cults	

Selling

“All swindling is selling.”⁶⁶ Yet not all selling is swindling. Both contain the same challenges and logic. At the highest level, swindling can be seen as a grotesque parody of selling.⁶⁷ Selling's bargains are smaller and story lines less baroque than in swindling.⁶⁸

To explain Leff's exegesis on selling, this section first visits Leff's assumptions about market structure and how selling mirrors swindling. It then turns to the core advertising strategies that are considered lawful even if they contain elements of swindling.

⁶⁶ “[O]ne can understand much of selling only by seeing it as a response to the same problems of customer resistance faced by professional bunco artists, a response which cannot help but have, in many cases, the same logical form.” *Id.* at 111.

⁶⁷ “[T]he magnitudes of the elements of ‘the sell’ deployed in a congame tend to be so large as almost to parody the microeconomic principles being dramatized ...” *Id.* at 16.

⁶⁸ “[T]he absolute magnitudes of bargains in normal selling contexts are almost always much smaller than the promised returns in the usual bunco tales. The buyer (as contrasted with the mark) is rarely promised a shot at the moon, but only a somewhat lower price on a piece of goods.” *Id.* at 140.

Market Structure and Incentives for Truthfulness

For decades now, consumer protection commentators and the FTC have recognized Leff's point that certain market relationships—primarily, the free market competitive environment—reward honest selling practices. Sellers who attain their riches through repeat sales have high-power incentives for reliability, good customer service, and have incentives that tilt towards honesty (but do not guarantee it).⁶⁹

Those who make riches from single transactions enjoy a different reputation—these sellers have opportunities for opportunism, and thus “They can behave like classic conmen.”⁷⁰ Leff explains that such selling “... is the source of the low popular opinion of real-estate brokers, door-to-door Bible salesmen, and used car dealers.”⁷¹

Swindling's Counterparts in Selling

Each form of swindling has a lawful counterpart in selling. Sellers, like swindlers, need to explain the genesis of the deal and why it is being offered to the consumer.

The “whence the deal” question poses a particular challenge in selling. Leff explains that in a thoroughly competitive marketplace accompanied by information symmetry and total freedom of choice, bargains shouldn't exist at all. In fact, bargains might cause dissonance, because the fact that bargains do exist mean that most of us are getting something else—maybe even an “antibargain.”⁷² The bargains that do exist will be both small and ephemeral, as competitors should move in and capture gross opportunities.⁷³ To prevent dissonance, sellers must weave plausible explanations for bargains, just as swindlers do.⁷⁴

⁶⁹ “[I]n economic terms, the opportunity cost of foregoing any future sales from one's pool of potential customers usually exceeds the short-run gain to be derived from palpable-lie salesmanship.” *Id.* at 159.

⁷⁰ *Id.* at 159.

⁷¹ “With respect to selling big-ticket items (that is, items with large profit margins to make up for relatively infrequent sales), a context in which the seller cannot expect much repeat business from the client anyway, there is a good deal of direct lying.” *Id.*

⁷² “[I]f bargains do exist, then there must be antibargains, offers of less for more; bargains entail antibargains.” *Id.* at 119.

⁷³ *Id.* at 125.

⁷⁴ “[E]ven in ordinary selling, both the seller and the customer will still have to be given roles in a joint drama which will explain and make unexceptionable and unexceptional their mutual good fortune in appearing onstage together. And that play will have to be dramatically (and economically) coherent. If the setting is a store, with the seller cast as a maximizing seller and the buyer altercast as a hard-shopping

Table 2: *Leff's Parallel Lives: Swindling is selling through the looking glass*

Swindling	Selling
The Spanish Prisoner	The Squaresville pitch: a seller has a monopoly on some discount, but it operates in competitive marketplace of buyers
Ancient estate	Repatriation movements
Pyramid schemes	Clear parallels in "multi-level" marketing, which often have referral sales techniques as well
Ponzi schemes generally	The sufficiency switch—the claim that a product will deliver something it cannot—is a "false lottery," like a Ponzi
Bait & switch	The "loss leader" is a dramatic discount that a seller is willing to give in hopes the consumer will buy other items
Godcons	Organized religion has the elements of a fantastic, public Ponzi scheme

The Squaresville Pitch

The "Squaresville" is honest selling in Leff's framework. Squaresvilles are deals that come from the seller's marginal advantage, a small price differential that the seller enjoys because of efficiency or maybe just good luck. The whence the deal question in Squaresvilles could be based on some form of market advantage that is durable and that cannot be eroded by competitors. For instance, the seller that enjoys a trade secret or some product attribute that cannot otherwise be copied (e.g. water from the seller's pure mountain spring). The why give the deal to me question is easily answered too—volume. Selling to everyone is a maximizing strategy.⁷⁵

Sales and Deals

Leff distinguishes sales and deals from Squaresvilles. While Squaresvilles spring from seller advantages, sales and deals come from seller misfortunes. The "fire sale" might be based on the misfortune of

customer, then the bargain must be explained in terms that allow for *joint* maximization." Leff 1976, 118.

⁷⁵ *Id.* at 122.

an actual fire that damaged merchandise. The clearance sale is based on the misfortune of buying too much stock.

Sales and deals operate on buyer virtue narratives. That is, the buyer shrewd enough to capture one of these discounts is the smart actor, while those paying full price are the marks.

Multi-level marketing

Multi-level marketing (MLM) activities were discussed above because of their similarities to pyramid schemes. MLMs impose an oligopoly on access to some good, and sell to individuals the right to sell the good.

Are MLMs pyramid schemes? Or for that matter, why isn't any hierarchical selling arrangement a pyramid? Policymakers have agreed upon a test that looks at the nature of selling within the organization. It is legal to sell the right to sell—this is in effect what all franchises do. It is also legal to sell in a club arrangement, for instance through membership warehouses like Costco and Sam's Club. But then the economic engine is itself selling the right to sell, the scheme is a pyramid, a swindle rather than a sale. Franchises and Costcos make their money selling products. Pyramids make their money selling the club model itself. One sign of a pyramid is a high rate of member purchases, that is, a situation where members of the organization represent a significant number of sales.⁷⁶

If the primary “consumer” of the firm is other people seeking a business opportunity, the scheme will quickly exhaust itself, because it grows exponentially. But if the firm mainly gets its revenue from bona fide customers, it is selling, because its growth is governed by normal economic constraints.

A full discussion of the difference between MLMs and pyramids is outside the scope of this essay,⁷⁷ but here's some sage advice: there is some signal from businesses that do protest too much.⁷⁸

Loss Leaders

A “loss leader” is a dramatic discount that, unlike a bait and switch, the seller is willing to sell. Loss leaders are real offers that the

⁷⁶ Imagine buying a McDonald's franchise and finding that 30% of one's sales were to employees of the restaurant.

⁷⁷ Fed. Trade Comm'n, *supra* note 60.

⁷⁸ *Is Amway a Pyramid Scheme?*, AMWAY, <https://www.amwayglobal.com/answers/is-amway-a-pyramid-scheme/> (last visited Nov. 24, 2024).

consumer can capture. With loss leaders, sellers attempt to convert the consumer's inertia into even more buying.⁷⁹

Loss leaders create a puzzle for the Posner worldview: if, as Posner believed, companies could create fake sweepstakes and bait advertising so long as there was no price misrepresentation, why should a store ever offer a loss leader? If one can use deceptive attention getters so long as they do not misrepresent prices directly, why bother with the real thing?

Leff on the Strategy of Advertising

Leff saw advertising as an economically essential activity and he admired the *mētis*⁸⁰ of advertisers.⁸¹ At the same time, Leff frowned upon the advertising that simply played on materialist values, seeing a kind of con: the idea that buying so-and-so will make one happy.⁸² The game theory of advertising that Leff paints has special relevance for thinking about online advertising in Part 2.

Recall that Leff saw competitive markets as tilting sellers toward honesty, but not guaranteeing truthfulness. What Leff meant by this is that even in lawful selling, there is a kernel of falsity that pervades advertising.

Leff had a modern conception of advertising that holds that advertising *makes markets* for products, rather than the other way around, where products naturally attract consumers.⁸³ Modern advertisers script narratives to fit people to products.⁸⁴ Leff thought most these narratives were dubious.

⁷⁹ LEFF, *supra* note 2, at 138.

⁸⁰ *Mētis* is a concept best represented by Odysseus—the complicated, cunning, sometimes unprincipled, problem solver.

⁸¹ LEFF, *supra* note 2, at 149.

⁸² The causal link between buying a product and happiness “...may eventually block, for many people, the very perception of alternative possibilities, such as that many kinds of salvation don’t come from outside, or if they do, don’t come from things, or if they do come from things, don’t come from marketable or marketed things. The antidote to loneliness may be a change in oneself, not in one’s toothpaste.” *Id.* at 173.

⁸³ “...you can differentiate (or identicalize) a good, and change its value, not only by modifying its physical or dynamic characteristics, but by changing the people into whose hands it is to come. Hence, ascribing multiple functional characteristics to things for sale, and simultaneously transforming the people at whom those things are aimed so as vastly to increase their desire to make use of one or more of these protean functions, is one of the principal jobs that advertising takes on.” *Id.* at 157.

⁸⁴ “The designers of much of modern advertising have perhaps learned, to some substantial extent, how to get something of the same salesmanship effect (that buying

Product fitting strategy presents several challenges. First, Leff thought that most products were not really different from each other⁸⁵ or even that effective. Advertisers' challenge thus requires script writing about some advantage or feature that consumers will believe about an otherwise fungible thing.

A second challenge comes in defining the product, which in turn controls the size of the marketplace. In Leff's terms, how one writes the script necessarily casts people as potential consumers and outcasts others who do not fit the script.⁸⁶ For instance, a product marketed toward women casts an entire gender as consumer, but outcasts men. Thus, an advertiser might be tempted to script the broadest narrative possible, so that all people are cast as potential consumers.

The problem that emerges from an every-man script is that if the product is for everyone, it is for no one.

A third challenge emerges from product claims. Explicitly causal claims imperil sellers, because the consumer might hold the seller to account if the promised effect never materializes. Thus, the key is to imply causation without stating it directly and to choose effects that could be blamed on other problems than the product. The next section elaborates on two implied causation strategies.

Two Advertising Strategies: The Sufficiency Switch and Calvinist Causation

Because making direct, causal claims is perilous, advertisers pursue two other strategies. According to Leff, these two strategies enable sellers to make implicit but unverifiable product claims: the "sufficiency switch" and "Calvinist causation." Both strategies share a element fundamental common to swindling: swapping out the promised thing for something of lesser value.⁸⁷

so-and-so causes happiness) by modifying people to fit goods, rather than the other way around. By 'casting' the goods as having a certain causative relationship to highly desirable self-identities of people, to the extent that people accept the alleged causation they themselves are altercast as people who are indeed causally manipulated by goods in just such a way." *Id.* at 173.

⁸⁵ "[T]here tend, by and large, to be few real differences between competing products, especially in markets in which the most advertising money is spent" *Id.* at 138.

⁸⁶ "[C]asting your goods in a particular way altercasts some potential customers as compatible with those goods, but simultaneously outcasts many, many others." *Id.* at 154.

⁸⁷ The con artist's switch "... is like a piece of DNA living independent extracellular life as a rather raffish virus. In all swindles, without exception, there must come a point at which the mark fails to get the deal he expected, when what has been

The *switch* in sufficiency switch directly invokes the specter of the con game. The idea is that the product may be sufficient for reaching some end, but that end is never realized. The advertiser is in essence playing a shell game with the consumer, but in a perfect game, the consumer never realizes it.⁸⁸ In Philip Nelson's terms, the sufficiency switch is a strategy that turns products into experience goods.⁸⁹ That is, goods that cannot be evaluated until after they are consumed. Even after consumption, some goods cannot formally be evaluated—these goods require credence, a leap of faith that they deliver upon claims.⁹⁰

Sufficiency switches pervade advertising. A basic example plays on one's insecurities surrounding appearances: To get the girl/guy, one needs clear skin free of acne. To get that clear skin, buy so-and-so acne product. Of course we hope that so-and-so will work, but the goal of getting the girl/guy is more complex than clear skin. Perhaps so-and-so gave one a shot at the romantic interest, but we can blame scores of other variables for a failed (or successful) effort. A well-designed advertising scheme will maintain the consumer's credence in a product by allowing the consumer to point the finger at other factors.

Leff saw two kinds of consumer injury in sufficiency switches. First, sufficiency switches sell the consumer a lottery ticket—the chance at getting the girl/guy. But unlike a real lottery ticket, the product sold does not offer any way to win. Sufficiency switches are thus *false lotteries*. Through the swindling/selling looking glass, the sufficiency switch is like pyramid schemes. Pyramid schemes also operate by offering people a chance to play in a rigged game.

The false lottery nature of sufficiency switch implies a second harm: money spent on so-and-so is not spent on something that might actually work, or on something else entirely. The sufficiency switch comes at the opportunity cost of buying something else. Yet to be clear, the sufficiency switch is legal selling, not illegal swindling.

The second product claim strategy, Calvinist causation, is the message attached to positional items, what Veblen termed *conspicuous*

offered fails to be tendered and is replaced instead by something far less valuable, like nothing at all." *Id.* at 155.

⁸⁸ "What he would prefer to do, were it possible, would be to deliver something less than promised to the buyer and have him never find out." *Id.* at 160.

⁸⁹ Phillip Nelson, *Information and Consumer Behavior*, 78 J. POL. ECON. NO.2, 311, 311–29 (1970).

⁹⁰ Michael R. Darby and Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J.L. & ECON. NO.1, 67, 67–88 (1973).

consumption. As Leff puts it, Calvinist causation⁹¹ claims are not causal. The product does not make one affluent, beautiful, or healthy. Instead, desirable individual qualities cause the consumer to buy the item.⁹²

Calvinist causation is a safer way to make product claims because upon examination, there is no claim made. Leff says,

Since purchase and use of the product are not presented as “scientifically” causative at all, but merely exemplary of something which has already happened, if at all, well before the transaction takes place, the seller cannot be blamed if the product “fails.” One cannot, after all, blame a thermometer if it’s too cold outside. All one can do is credit it if it accurately reflects the actual temperature, over which it neither has nor claims any control. Its function is the function of any symbol—effectively to communicate reality—and it is to be valued not for that reality, but for the power with which it communicates its message.⁹³

What is Leff’s critique of Calvinist causation? Leff found it distasteful and empty. He worried about the misery and unfulfillable expectations of materialistic people. But he also thought that materialism could crowd out a truth about happiness: most likely to make us happy—from nature to a loved one’s caress—just can’t be bought.⁹⁴

⁹¹ Of course this is named for John Calvin: “The logical form of a Calvinist Causation ad, then, is that all beautiful people drink Schrecklichkeit Beer, not that all who drink it are beautiful. That (at least logically) implies this: if you drink the beer you are not securely lovely, but if you don’t drink it, you haven’t got a chance. (If you are saved you will be virtuous, but being virtuous is not proof of salvation.) Thus there is no cure for the anxiety of non-election. You can never be sure. You must always remain guilty.” LEFF, *supra* note 2, at 168.

⁹² “[D]rinking the beer will identify you (to others, yes, but more important, to yourself) as already one of that set of beautiful people. The polarity of causation is reversed: drinking the beer doesn’t make you lovely; being lovely makes you drink the beer.” *Id.* at 167.

⁹³ *Id.* at 168.

⁹⁴ “The things outside whence joy comes may be other people, especially if one does not regard or treat them the same way one treats products. And if there are things outside of one that will make one happy, they may be public goods, like ‘nature,’ and not vendable things like trailers and minibikes in or on which to explore nature. But since those nonthings are nonvendable, they will not, or at least not to the same extent, be the subject of mass-media advertising; there is no reason to invest in messages touting the salvation potential of free or at least nonsalable sources of joy. Thus there may be in this country (and increasingly in the world) a systematic misattribution of power among the various alternative modes of cause and vocabularies of

Turning to technology, those valuable things can never be achieved from scrolling, even if infinite.

Combining the Categories

With Leff's framing fully in view, one could see how certain businesses could come right up to the edge of swindling. The Holy Trinity of suspect selling comes together where one combines a competition-limiting market structure with a product naturally poised to enjoy sufficiency switch characteristics. Consider MLMs like Herbalife. That company was pursued by the FTC, although the agency never pinned the label "pyramid" upon it.⁹⁵ Herbalife combined the oligopoly selling techniques of a MLM with nutritional supplements, a field known for broad, unsubstantiated health claims.

Few of us would seek out a witch doctor nowadays. Yet, we replaced poppets and potions with nutritional supplements, which imitate the appearance of regular medicine without the noisome requirements of FDA clearance and the need for its inventors and distributors to have an education in science.⁹⁶ Taken by millions of Americans, the market for them was estimated at over \$48 billion in 2021 according to Grand View Research.

Nutritional supplements are the perfect fodder for advertising, the sufficiency switch, and the MLM structure. Without a plausible causal claim strategy, nutritional supplements need advertising to make markets for products. If nutritional supplements were effective, they would be synthesized into super-powerful formulae by mainstream drug companies and sold for a fortune. Because drug companies do not do this, we should suspect that most nutritional supplements are not efficacious at all. Here is where Leff's point about advertising casting and outcasting shines: nutritional supplement makers understand market-making; they make claims that so-and-so will treat many ailments, ones that are not even plausibly related.

effect. It may begin to appear to many people that happiness comes, and comes only, from things you can buy." *Id.* at 173.

⁹⁵ *Herbalife Will Restructure Its Multi-level Marketing Operations and Pay \$200 Million For Consumer Redress to Settle FTC Charges*, FED. TRADE COMM'N, (July 15, 2016), <https://www.ftc.gov/news-events/news/press-releases/2016/07/herbalife-will-restructure-its-multi-level-marketing-operations-pay-200-million-consumer-redress>.

⁹⁶ Creators of nutritional supplements must make safe products, but unlike pharmaceutical companies, their products are not subject to pre-market safety or efficacy review. This means that anyone can order chemicals online and mix them together and go to market with a nutritional supplement.

MLMs turn out to be nicely fitted for the broad casting of advertising, because they can plausibly deny false advertising. The distributed nature of direct selling means that an army of independent contractors (those internet “influencers”) can use “word of mouth” marketing to prattle on about miracles and the multiple conditions supplements can treat.

Mainstream marketers know that advertising representations must be truthful and substantiated, particularly when health claims are made. A mainstream company would never let itself get caught claiming that essential oils could cure cancer or the like. But in a MLM scheme, the “independent business operators” are set loose to sell and they are desperate and there is no reason to think they even know about advertising rules.

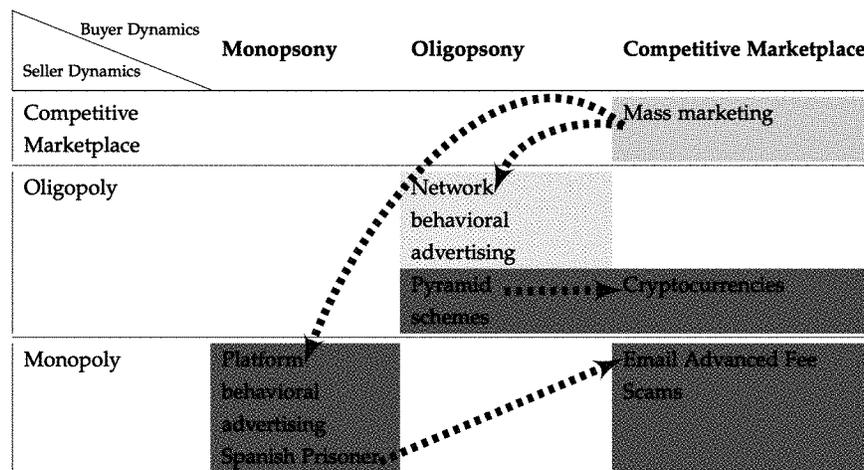
Finally, the sufficiency switch distracts the consumer from the ultimate failing of nutritional supplements. Why didn’t I lose weight on so-and-so? Well maybe it was that extra dessert...

The next part turns to the TechCons—the most common congames of the internet era and situates them in Leff’s market structure framework.

THE TECHCONS

With Leff’s framework clearly in place, we can explore the TechCons—the kinds of confidence games dependent on the internet. Substantially all of Leff’s schemes are recast through the medium of the internet, primarily through email. However, in being recast, the internet changed the market structure of these congames, empowering fraudsters systemically and asymmetrically. Most obviously, the internet created a worldwide target pane for marks. It also loosed Ponzi schemes and parallel MLM schemes. Finally, the internet even changed marketing, making a surveillance monopoly in the service of targeted advertising.

Table 3: How the internet changes Spanish prisoner scams, pyramid schemes, and advertising



Email Scams (Spanish Prisoners)

Almost all the traditional congames have found a new medium in the internet, particularly through email. That is, the use of email to rope marks. The so called Nigerian 419 fraud is Leff's Spanish Prisoner, but cast as African prince rather than a Greek. This version of fraud has many forms of inducement, including versions of romance (an online relationship leads to the new paramour asking for money), a "you've won a lottery" narrative (with a request to pay a fee to obtain the award), the ancient estate swindle with promises of fantastic inheritance, and employment offers (with requests to make payments to someone who controls the formal hiring approval).

Phishing and ransomware would fall outside of Leff's framework, because neither involves anything akin to selling. Phishing is a pure trick; nothing is offered or purchased in it. Similarly, ransomware is like kidnapping. There is a transaction, but it is dominated by coercion rather than convincing.

Law enforcement refers to these as "advanced fee" scams. They all share a similar dynamic, even if the inducement to the scam is different: the mark pays a small up front fee to capture some large reward later. Notice that like Leff's framework, these scams have rewards that arise from "thin air," and the same whence the deal and why me narratives as a Spanish Prisoner.

The internet makes Spanish Prisoner schemes worse in two important ways. First, pre-internet Spanish Prisoners were labor intensive and con artists were limited in targeting opportunities. Once roped, the mark occupied the con artist's cycles. As Leff explained, the con artist and mark were locked in a true bilateral monopoly.

Recast on the internet, con artists have nearly unlimited targeting opportunities. Con artists can blast various inducements, even personalized ones, to countless potential marks. In effect, this moves email scams from the limits of bilateral monopoly to one where the con artist can target the entire marketplace of "consumers." Before the internet, the con artist working a Spanish Prisoner had to find marks in person in real spaces. Now con artists can spread traps everywhere and see who steps in them. Bilateral monopoly does set in once the con artist hooks a mark, but it is easy for the con artist to exit if the mark looks like a dead end. Furthermore, the email version of the Spanish prisoner lacks the in-person risks and transaction costs of managing a mark. The email based con artist can manage many marks at once.

The second major change comes in converting short cons into long cons. The in-person Spanish Prisoner is inherently a short con, in which the con artist is likely to only obtain the money the mark is carrying. This is because in order to convert it into a more remunerative long con, the con artist must "put the mark on the send" to obtain more money. This is a dangerous proposition in the physical world because the mark could recognize the scam and return with the police.

Internet Spanish prisoner cons are spectacularly rewarding. A 2020 analysis by the FTC reported that the agency had received over 30,000 complaints about online romance scams, with a median loss of \$2,500, more than ten-times the loss of other scams. Victims over 70 paid a median amount of \$9,475⁹⁷—much more than any short con could produce.

How could this be? When Spanish Prisoners are remote there is more potential for a long con. This is because online scams involve value transfer mechanisms such as bank wires that can lead to fleecing the mark without any physical risk to the con artist. The con artist can simply urge the mark to send more and more money, while never meeting in physical space.

⁹⁷ Emma Fletcher, *Romance Scams Take Record Dollars in 2020*, FED. TRADE COMM'N (Feb. 10, 2021), <https://www.ftc.gov/news-events/data-visualizations/data-spotlight/2021/02/romance-scams-take-record-dollars-2020>.

Cryptocurrencies (Candidate Ponzi Schemes)

Cryptocurrencies are methods for transferring value based on “blockchain” technologies. The most well-known cryptocurrency is Bitcoin, which was created in 2009.⁹⁸

Blockchains use a method of logging, a “ledger,” that makes tampering very difficult, and this ledger can be public so that anyone can inspect transactions on the ledger. Some think blockchain technology itself is a promising technology for tamper-proofing records, for instance public land transfer records.

Many entrepreneurs saw cryptocurrency as the “killer app” of blockchain. That is, they saw currencies based on blockchain as a disruptive technology that could capture markets dominated by banks and credit card networks. Entrepreneurs realized that the real money was in payments, because providers might charge per-transaction fees and amass a fortune.

Cryptocurrencies’ benefit is an ideal of “math-based money,” as opposed to the messy, politically-based fiat currencies we are chained to. But there’s more. Such cryptocurrencies were said to be anonymous, decentralized, secure, and resistant to interference by boogymen (take your pick—the banks or the government). Cryptocurrency fanatics’ claims are dubious,⁹⁹ but not relevant for purposes of this analysis. For purposes of Leff’s framework, the question is not whether cryptocurrencies are anonymous, decentralized, secure, and/or resilient, but rather whether cryptocurrencies share the characteristics of Ponzi schemes. I write “share the characteristics” quite deliberately because criticizing cryptocurrencies and saying that they are Ponzi schemes is perilous.

Like Ponzis, cryptocurrencies are undeniably a speculative investment asset. As late as 2011, it was possible to buy a single Bitcoin for \$1. By 2017, the trading value exploded: single Bitcoin traded as high as \$19,000. Subsequent booms and busts raised the price to over \$65,000 in 2021. Shortly thereafter, the price plummeted to below \$15,000, but as of this writing, it reached a new high of \$64,000. Some people have made vast fortunes trading in Bitcoin.

Ponzi had copycat conmen. Interestingly, Bitcoin has tens of thousands. As of this writing, Crypto.com reports that there are almost 70 cryptocurrencies that have a market value over \$1 billion.

⁹⁸ SATOSHI NAKOMOTO, BITCOIN: A PEER-TO-PEER ELECTRONIC CASH SYSTEM 1 (Aug. 21, 2008).

⁹⁹ Nicholas Weaver, *Risks of Cryptocurrencies*, 61 COMM’N OF THE ASS’N FOR COMPUTING MACH. No. 6, 20, 20–24 (May 23, 2018).

Like Ponzis, the operator of and initial investors in cryptocurrencies, whether they realize that a fraud is afoot or not, make lots of money, some even become billionaires. Success in cryptocurrencies has opened the field to retail investment, and now it is easy for the average consumer to invest in cryptocurrencies. These retail investors are the late comers to a long-in-motion scheme. They are likely to lose their shirts.

Recall that Leff wrote that Ponzis are rare, because to answer the “whence the deal” question, the Ponzi operator has to present a grey box, one that has a “divisible secret.”¹⁰⁰ Leff specified that Ponzis had to be “possible, publicizable, and complicated.”¹⁰¹ These descriptions fit cryptocurrencies nicely. Cryptocurrencies are literally based on a divisible secret—the public/secret key system that underlies public key cryptography. Users publish their public key, which corresponds to and proves ownership of a private key that unlocks the stored value. When people exchange cryptocurrency, they do so by attesting to a value transfer based on their public keys.

More broadly, technology provides opportunities for convincing “grey boxes” that might lure investors. A valuable trade secret or patent is a legitimate grey box either for secrecy, or for the monopoly that intellectual property conveys to rights holders.

¹⁰⁰ LEFF, *supra* note 2, at 70, 75.

¹⁰¹ *Id.* at 70.

Table 4: Understanding modern Ponzi's in Leff's framework

Swindle	Whence the Deal?	Why me?
Ponzi Schemes Generally	A "grey box" generates wealth from "thin air" or a plausible, seller-controlled monopoly	Swindlers have to have a plausible narrative for "sharing" the deal
"Charles" Ponzi's scheme	Trade in arbitrated postal stamps (impossible to make liquid)	Populist dream of universal wealth
Madoff Ponzi	Fantastic stock market returns (from falsified trades)	Affinity marketing to in-group
Theranos	Secret, miraculous diagnostic device (device was literally a black box that did not work)	Dreams of democratizing healthcare
FTX	Exchange holding "stable" cryptocurrencies and selling its own "FTT" coin (speculative investments, "borrowing" from investors to self-deal)	Cryptocurrencies' general notion of great wealth unlocked by broad, democratic use of putatively decentralized finance

In the case of cryptocurrency, the grey box is the public ledger supporting value transfer. This box is grey, not white, because despite being public, only sophisticated actors have ever seen the ledger, fewer can make sense of it. The ledger technology underlying cryptocurrencies, in Leff's terms, are complicated but plausible schemes.¹⁰²

Bubble logic pervades cryptocurrency regimes, giving weight and legitimacy to value claims. Recall that actors in a bubble may know about the scheme,¹⁰³ and that foxes¹⁰⁴ and even true believers

¹⁰² *Id.* at 75.

¹⁰³ Peter Thiel's Fund Wound down 8-Year Bitcoin Bet before Market Crash, FIN. TIMES (Jan. 18, 2023), <https://www.ft.com/content/0a1d5597-7145-4035-987b-ff033bba3d75> ("In April 2022, about the same time that Founders Fund sold out of most of its cryptocurrency holdings, Thiel said he was optimistic about the future of bitcoin. He told a cryptocurrency conference in Miami that 'we're at the end of the fiat money regime' and suggested its price—which was then trading at about \$44,000—could increase by a factor of 100.").

¹⁰⁴ "Thus the mechanism in any retail bunco play need not be sufficient to convince the mark of its gross profitability but need only convince him that it has convinced, and might continue to convince, others who do not understand it. Thus he

may make a fortune so long as they get out early. Evidence of early success is sufficient for the many later investors.¹⁰⁵

Technology also provides an answer to Leff's second question: if the deal is so good, why give it to me? The answer comes in the overflowing optimism of Silicon Valley, best captured by John Perry Barlow's dreamy, dubious, even delusional *A Declaration of the Independence of Cyberspace*.¹⁰⁶ Barlow painted a populist future of technology, free of old guard oppressors. Silicon Valley TechCons frequently cast themselves as populist technology liberators freeing The People from the backwardness of existing institutions. In the case of the cryptocurrencies, the fantasy is busting the lazy rent-seeking of an international bank conspiracy, escaping the eye and rapacious hand of big brothers, and on a larger level, cleaning the stain of humans and their politics in money. Math-based money will make all our dreams come true.

Dreams are part of cryptocurrencies' grey box. Effective marketing of cryptocurrencies requires the idea that great payoffs are at hand for the true believers. In the case of cryptocurrencies, the true believers conceive of themselves as smarties, ones that know more about math than the plebs. Leff writes:

The point is that the gimmick in the Ponzi gray box cannot be presented in such a way that it would be convincing to everyone. If it were that clear and powerful, and could be so presented, it would defy understanding why so great a payoff is being offered by the entrepreneur. Thus, every such mechanism must be not only believable but understandably *unbelievable* as well. That is, if it were perfectly clear that there was an inexhaustible diamond mine or a nonpolluting perpetual-motion machine in the sole control of the conman, he would not need to pay his "backers" much more than ordinary interest. Since, however, there are other reasons

can accept a scheme with slight surface plausibility which he finds he does not quite understand on the ground that others are also investing and they presumably must understand it better than he." LEFF, *supra* note 2, at 81.

¹⁰⁵ "[T]his same mass of marks has, in addition to its economic or marketplace significance, a psychological effect which also tends to retard the swiftness with which the bubble bursts or the pyramid crumbles. The marks are not just each other's present partners and future potential customers; as an audience, their mass mutual presence also validates for each of them his own participation in the scheme. If all those people believe in something, it can't be total twaddle, can it?" *Id.*

¹⁰⁶ John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELECTRONIC FRONTIER FOUNDATION (Feb. 8, 1996), <https://www.eff.org/cyberspace-independence>.

...why he cannot yet make public his irrefutable proofs, some people will not believe. Those who do believe, now, when so many others do not, must be compensated for their greater faith (and superior prescience). In a Ponzi type of open operation, then, the mark's relative scarcity, and thus his value, lies not in anything as vulgarly pictorial as the stone walls and bars which seal the prisoner and his sure thing from other collaborators, but rather in a strongly asserted psychological differentiation: the world is made up of believers and skeptics, and the mark is one of the former.¹⁰⁷

Cryptocurrency always had a whiff of fraud to it. Some wily actors in the industry seemed to even say this aloud. In an interview with the Financial Times, Sam Bankman-Fried, the son of two Stanford law professors and CEO of FTX, a cryptocurrency exchange now in ruin because of wild speculation and misuse of funds, seemed to agree that fraud was rife. But his strategy was to acknowledge fraud while limiting it to bad apples. Bankman-Fried, in response to a question about whether cryptocurrencies were worthless, said, "By number of Ponzi schemes there are way more in crypto, kinda per capita, than in other places. But by size of actual Ponzis, I'm not sure that it is particularly unusual. It's just like a ton of extremely small ones."¹⁰⁸ Elsewhere Bankman-Fried critiqued Bitcoin as incapable of functioning as a payments network, thereby calling to question what utility¹⁰⁹ Bitcoin could possibly have. In yet another interview, Bankman-Fried described one practice as more or less a Ponzi scheme.¹¹⁰ Bankman-Fried was sentenced to 25 years in prison in 2024.

Sam Bankman-Fried's rhetoric finds parallel in MLM schemes (see above). A consensus has emerged that most people lose money in MLMs. The tactic then becomes to say that there are some bad apples, but the clever can avoid those and make millions. Those investing in

¹⁰⁷ LEFF, *supra* note 2, at 82.

¹⁰⁸ Joshua Oliver, *Crypto Billionaire Sam Bankman-Fried: 'I Got Involved With No Clue What a Blockchain Was,'* FINANCIAL TIMES (May 13, 2022), <https://www.ft.com/content/83bc681a-a0f9-43bb-b627-c6daca4e4a0a3>.

¹⁰⁹ Joshua Oliver, *Bitcoin Has No Future As a Payments Network, Says FTX Chief,* FINANCIAL TIMES (May 16, 2022), <https://www.ft.com/content/02cad9b8-e2eb-43d4-8c18-2e9d34b443fe>.

¹¹⁰ The full transcript is as long as it is jaw dropping. Bankman-Fried ends it with, "...then it goes to infinity. And then everyone makes money." Jamie Powell, *FTX/Defi: If It Looks Like a Duck And Quacks Like a Duck...*, FINANCIAL TIMES (Apr. 25, 2022), <https://www.ft.com/content/eac0e56c-f30b-4591-b603-f971e60dc58b>.

cryptocurrencies can tell themselves they are smart enough to spot the hidden, valuable assets.

Cryptocurrencies even exhibit the insider/outsider dynamics of cults—complete with mobs who attack critics.¹¹¹ The Financial Times has some of the most critical analysis of the field, with the result that its reporters are endlessly harassed by a cryptocurrency clique. The Financial Times’ Jemima Kelley wrote about her experiences after attending a crypto conference:

...I was summarily turned into various memes and video montages that totally clogged up my notifications for about 36 hours. There was the usual name-calling and trolling, but also some nastier than usual tweets and messages calling me the kind of offensive and misogynistic things that I can’t repeat here, and one that suggested I should die by suicide. I was aware that the people attacking me had a huge financial incentive to invalidate my criticisms, so that helped me to not take any of it too seriously. I even found some of the memes funny. But after a while, the sheer weight of negativity began to fill me with gloom about the number of people prepared to be so vile on the internet. What I found particularly disconcerting was that most of the people I had met at the conference—with one notable exception—had been pleasant to me, despite disagreeing with my views. These same people were now, a couple of hours later, calling me a “dumb b**ch” on the internet.¹¹²

In summation, cryptocurrencies share the characteristics of Ponzi schemes, but this author would not say definitively that they are Ponzi schemes.

My own opinion is that cryptocurrencies are here to stay, regardless of the Ponzi dynamics present in the cryptocurrency sector. Cryptocurrencies are useful for people who live in kleptocratic regimes where their wealth may be seized at any moment. In this view, the volatility of cryptocurrency is less than the risk presented by changes in government policy that are confiscatory. Cryptocurrency will always

¹¹¹ “It is perfectly clear that people can form aggregates which are internally competitive among the members of the group, but which form a cooperative unity with respect to outsiders.” LEFF, *supra* note 2, at 15.

¹¹² Jemima Kelly, *The Problem With Social Media Is That It Is Not a Real Place*, FIN. TIMES (Oct. 27, 2022), <https://www.ft.com/content/371d53f2-a862-4b7a-a806-b209ecb384a9>.

operate on a simmer as long as there are rich people fearful of governments.

Is Online Behavioral Advertising a Swindle?

In online behavioral advertising (OBA), a sophisticated platform matches consumers to advertisements based upon companies' willingness to pay and consumers' previous web use. Implementing OBA requires a byzantine system of consumer identification and tracking, of publisher networks that host content that attract consumers' eyeballs, of auction systems that select different advertisements to display from different companies wishing to reach consumers. This all happens in seconds, making the process a fantastic technological feat.¹¹³

Who is swindled by OBA?

As a first matter, who is the mark of OBA platforms? There are at least three potential classes of marks: publishers, consumers, and businesses that buy ads. Confusingly, the latter category represents the "advertisers," the merchants, and other businesses marketing to the consumer.

In the 2000s, the author was in the room when the OBA industry made a pitch to two groups. To newspapers and other publishers, online advertisers said that the era of the subscription was over. OBA would allow newspapers to drop their paywalls and make their content available to the world, to realize the dream that journalists and publishers devote their lives to: informing the largest number of people possible about the world. Revenue lost from subscription would be dwarfed by a world-wide market that received targeted ads, ones that would compensate the publisher. The trade required publishers to make their content more widely available, but critically, and less well understood, the trade meant publishers would hand over control of their advertising placement operations to OBA platforms.

Ordinary consumers received a similar pitch, with a similarly-obfuscated operational mechanism: Allow OBA platforms to collect data about you and you will not only receive free content, you will

¹¹³ ANTONIO GARCÍA MARTÍNEZ, *CHAOS MONKEYS: OBSCENE FORTUNE AND RANDOM FAILURE IN SILICON VALLEY* 40 (HarperCollins Publishers, 2016) ("Here's something you may not know: every time you go to Facebook or ESPN.com or wherever, you're unleashing a mad scramble of money, data, and pixels that involves undersea fiber-optic cables, the world's best database technologies, and everything that is known about you by greedy strangers. Every. Single. Time.").

receive advertisements tailored to you, marketing that you want to see. Note that like Leff's swindling framework, promises to publishers and consumers alike proposed a benefit—free content and massive audiences—from thin air.

Businesses that bought advertisements were promised a utopia. The old saying attributed to John Wanamaker (half my advertising is wasted...) would cede to a new world where every ad hits the right consumer at the right time with the right message.

In a literal sense, such perfection in advertising targeting cannot be realized, at least if the goal is to make timely sales.¹¹⁴ Internet users see hundreds if not thousands of advertisements a day. Thus, there is a matching problem with far too many advertisements for products a person could possibly want. But even if a magical online advertising system could choose, let's say, 1,000 matches a day, one would quickly run out of money.

But consider how dynamics change when the purpose of the advertisement is to shift attitudes rather than loosen the pocketbook. For instance, brand advertisers seek to change impressions of their product offerings as a whole. Similarly, ideological actors, like governments and extremists, are selling ideas and concepts rather than tangible things. Consumers can “buy” everything advertised to them by such actors, because the “purchase” is made through clicks. That is, if the advertisement merely proposes that the consumer pay attention to the advertiser's content, that is a price the consumer can afford. Thus, advertisers who want clicks, such as ideological actors attracting eyeballs to their materials, can benefit from each targeted message. To make this point directly: OBA can deliver on the promise of roping audiences to brands and to movements. This makes OBA an effective tool for disinformation fabricators and for extremists.¹¹⁵ Fabricators make billions from OBA platforms.¹¹⁶

There is another important factor undermining OBA platforms' promises to publishers: OBA platforms can follow consumers across high-value and low-value publisher sites. This has implications for ad targeting that can undermine publishers. Suppose a business wants to

¹¹⁴ Brand awareness and other goals may be served by targeted advertising.

¹¹⁵ Karen Hao, *How Facebook And Google Fund Global Misinformation*, MIT TECH. REV. (Nov. 20, 2021), <https://www.technologyreview.com/2021/11/20/1039076/facebook-google-disinformation-clickbait/>.

¹¹⁶ Matt Skibinski, *Special Report: Top Brands Are Sending \$2.6 Billion to Misinformation Websites Each Year*, NEWSGUARD, <https://www.news-guardtech.com/special-reports/brands-send-billions-to-misinformation-websites-news-guard-comscore-report/> (last visited Dec. 18, 2024) (NewsGuard estimates \$2.6 billion).

reach readers of the New York Times. With OBA, one could place relatively expensive ads on the New York Times' website. Alternatively, one could spend far less touching the same readers when they are on other websites. That is, OBA can find substitutes for advertising on high-value sites on low-value ones.

OBA's promise was a sensible narrative for businesses that buy ads, yet proof of OBA's efficacy in well-controlled experimental conditions remains elusive, in part because academics are limited to simulations of networks or are dependent on data access from platforms themselves. The literature that does exist points to nuanced effects, with some personalization driving consumer engagement, while too much often creates feelings of intrusiveness.¹¹⁷

We know that the waste that Wannamaker complained of did not go away. Waste simply comes in other forms in OBA. Many clicks on targeted ads are not hits but misses—everything from the consumer's "fat thumb" to armies of bot networks that click on ads. What the advertising industry considers a hit is itself almost unbelievable. Google defines an impression as "...counted each time your ad is shown on a search result page or other site on the Google Network."¹¹⁸ Note the passive voice and the problem that something that "is shown" does not mean it is seen. Even worse, advertising platforms charge businesses when their ads are "viewable," which according to industry standards, only requires half the ad to be on screen for a single second.¹¹⁹ Again, there is no requirement that a human view these ads.

We also know that OBA platforms can charge more for targeted advertising than non-targeted ones.¹²⁰ Indeed, it is possible to target people based on their interests, their history, and even their present location, making OBA a great tool for advertisers. But these capabilities do not exist in a static market. The market is dynamic, complicating the simple narrative that OBA will deliver more for participants. As more ad-buying business competitors adopt OBA, they all pay more to target the same group of consumers.

The big winners of the OBA revolution are unquestionably the OBA platforms like Amazon, Facebook, and Google—not the small

¹¹⁷ Kaan Varnali, *Online Behavioral Advertising: An Integrative Review*, 27 J. OF MKTG COMM'NS, 93 (2021).

¹¹⁸ *Impressions: Definition*, GOOGLE, <https://support.google.com/google-ads/answer/6320?hl=en-GB> (last visited Dec. 18, 2024).

¹¹⁹ *Overview of Viewability and Active View, Report on Performance*, GOOGLE, <https://support.google.com/admanager/answer/4524488?hl=en> (last visited Nov. 29, 2024).

¹²⁰ Sophie C. Boerman et al., *Online Behavioral Advertising: A Literature Review and Research Agenda*, 46(3) J. OF ADVERTISING 363, 363 (2017).

business owner nor the content publishers courted by the OBA industry. Smaller winners include the many businesses that have used OBA successfully.

There are also clear losers. One of our nation's most accomplished newspapers, The Washington Post, is now owned by Amazon founder Jeff Bezos, who purchased the publication for only \$250,000,000. Perhaps The Washington Post owes its continued existence to Bezos' purchase. After all, many of its competitors are now gone. Amazon alone makes more money in advertising revenue than all newspapers combined, globally. And the publishers we do have are those that dance to the tune of OBA: advertising-in-disguise clickbait farms.

Table 5: OBA swindles several classes of marks.

The Mark	The Con
Advertisers (the companies that buy ads)	Charged more to reach audiences that cannot buy or cannot even see the ad
Publishers	Lose control of subscriber base, undermined by targeting subscribers on low-cost sites
Consumers	Fantasy of 1-to-1 marketing requires total information awareness, bilateral monopoly

OBA Requires Bilateral Monopoly

OBA already has several whiffs of swindling. The when the deal question is answered with a "thin air" reward: "free" content for consumers and magically-revenue-generating, worldwide audiences for publishers. Like many congames, OBA asks consumers to give something of little value (their attention and monitoring of computer use) to unlock the vast riches of a free internet.

Online advertising would seem to be ordinary selling rather than swindling. Most advertisements, substantively, are not swindles.

Yet, online behavioral advertising's promise requires a market structure common to the Spanish Prisoner and bait and switch when one examines the technical requirements of its operations. That is, in order to deliver targeted advertisements and to ensure that such marketing is effective, a technical mechanism must monitor the user comprehensively. Every opportunity for the user to see an advertisement in any media, for instance on the web or in email, must be accounted for. Not only that, there is a risk that one could see an advertisement online but then decide to buy the product in a store. That would mean that a business spent money placing an advertisement that triggered a sale but is ignorant of the effect. Therefore, the monitoring must continue into brick and mortar stores and into payment mechanisms. Indeed, the online advertising business model has seeped into the code that underlies physical transactions, making in-person sales less private and data about them available to third parties to ensure measurement of advertising.

This model is similar to the monitoring aperture operated by Google. Google has a presence on over 90% of websites;¹²¹ but in addition to that, because Google operates key internet infrastructure (such as cloud, submarine cables, and DNS) and consumer devices (Android operating system on mobile phones) and consumer software (the Chrome Browser), Google can monitor more or less everything that everyone does that touches the internet. The monitoring includes physical presence, because of Google's applications and Android hardware, and some payment, because of Google intermediating value transfer. In short, Google is so dominant in user surveillance that it has a unique monopoly on user information and attention. Users cannot avoid Google's aperture, and most would not realize its presence because of how embedded Google's hooks are into internet and physical architectures. For users, Google is a black box.

From the user's perspective, a single monitoring monopoly might be a good thing. After all, consider the alternatives. First, there could be a truly competitive market for monitoring and targeted advertising. In a true competition scenario, all companies would access to all consumers' activities. This in effect would result in a world of no privacy, where any human activity could be monitored to target ads by any seller.

A second alternative is an oligopoly of trackers via a small number of companies monitoring users for the purpose of tailoring advertisements. This would seem to be an optimal middle ground,

¹²¹ Ibrahim Altaweel et al., *Web Privacy Census*, TECH. SCI. 1,1 (2015).

because one could imagine a market structure that enabled users to choose among OBA platforms.

But the current market reality embraces both monopoly platforms and smaller ones. This is because publishers get to decide which OBA networks to employ. The practical result is that users are tracked by platform monopolies and by smaller networks.

A third alternative is a ban on online behavioral advertising, replaced by a system where companies can advertise based on context (tennis racquets on sports websites) and good guesses (our intended audience is 65+ years olds and so we market pickle-ball racquets instead). The upside to this approach is that users may be tracked at checkout, but not as much in their ordinary browsing around the Web. A downside is that boutique sellers of goods and services will have less ability to do micro-targeting.

In summary, OBA platforms made many promises to other businesses and consumers alike. For the businesses, OBA was not a con. This is because we expect businesses to be sophisticated and to investigate proposals on their own. Publishers and ad-buying businesses alike were not swindled; they agreed to market arrangements that appeared to be profitable but that systemically undermined them.

OBA maneuvers consumers into the equivalent of the Spanish Prisoner: consumers are in a bilateral monopoly with OBA platforms like Amazon, Facebook, and Google.¹²² These platforms have data about consumers' most intimate activities; in essence everything that the user searches for and all the websites they visit—even pornographic ones.¹²³ Consumers cannot exit these relationships. The platforms have the data and will always have operational justifications for keeping it, even if the consumer demands deletion.

Yet, OBA is not a swindle for the consumer either. This is because the consumer never had a choice in the matter. Consumers never chose OBA over some other kind of transaction, nor could they. This makes OBA more like ransomware or phishing where a third party chooses the economic relationship (coercion or trickery) with the consumer. The bilateral monopoly imposed by OBA on consumers was chosen by publishers and advertisers.

¹²²“One’s personal information is, in the transaction cost economic sense, an asset unique to each consumer; consumers are therefore in bilateral dependent trading relations with the firms that obtain this information.” Chris Jay Hoofnagle & Jan Whittington, *Free: Accounting for the Costs of the Internet’s Most Popular Price*, 61 UCLA L. Rev. 606, 625 (2014).

¹²³Ibrahim Altaweel et al., *Privacy on Adult Websites*, Workshop on Technology and Consumer Protection (*ConPro '17*) (2016).

LEFF'S FRAMEWORK AND CONSUMER PROTECTION

The final part of this article gives more context to Leff's larger project and explains how it is both critical of economists but ultimately suggests economic remedies for consumer protection problems.

In 1974, Leff wrote a biting critique of Posner's seminal "Economic Analysis of Law". Now in its 9th edition, Posner's tome is over 1,000 pages, but more importantly, its logic and themes profoundly shape discussions about regulation. Posner was perhaps the most important influence on President Reagan-era reform on the FTC's consumer protection mission. Much of Posner's critique of the agency was converted into affirmative policy as the FTC's Policy Statement on Deception.¹²⁴

Some 20th century libertarians liked to conceive of their theories as having the same clarity and command as the view from an Austrian mountain. But Leff inverted this self-conception, ridiculing it as "tunnel vision."¹²⁵ That is, in analyzing the law through economics, Posner went beyond merely applying a lens; he donned blinders. Leff explicitly dismisses the Posnerian approach, which looked to consumers' behavior in the marketplace to determine their true desires.¹²⁶

The power of Leff's critique come both in the epistemological challenge¹²⁷ to Posner's view, but also in the mocking of the law and economics enterprise. Leff compares Posner's work to a chainsaw manual, a guide for natural remedies, and even as a kind of *Don Quixote* narrative, with a character who conquers all windmills with the same lance.

Leff nevertheless concludes that Posner's "Economic Analysis of Law" was a bright contribution, but one where the method became the inquiry instead of the phenomenon studied.

Leff saw the law as requiring more than a single lens. He argued that there cannot be a "whole story" about human activity.¹²⁸ That

¹²⁴ FTC Policy Statement on Deception, Cliffdale Associates, Inc, 103 F.T.C. 110, 174 (1984) (appended).

¹²⁵ Arthur Allen Leff, Commentary, *Economic Analysis of Law: Some Realism About Nominalism*, 60 Va. L. Rev 451, 452 (1974).

¹²⁶ "What people want' is presented in such a way that while it is in form empirical, it is almost wholly non-falsifiable by anything so crude as fact." *Id.* at 456.

¹²⁷ "Since (economic analysis of law's) basic intellectual technique is the substitution of definitions for both normative and empirical propositions, I would call it American Legal Nominalism.' *Id.* at 459.

¹²⁸ LEFF, *supra* note 2, at 148.

is, any disciplinary approach used alone was the equivalent of spelunking.¹²⁹

Leff argued that lawyers had to operate at a different resolution in the marketplace.¹³⁰ Instead of the low-resolution, macro view made possible through strong assumptions such as the absence of transaction costs, Leff saw those transaction costs as the most important part of swindling and selling.¹³¹ Those costs both formed the difference between swindling and selling and constituted the rich, entertaining, even wondrous landscape of the consumer marketplace. Indeed, one sees in Leff not only a practical approach that recognized the utility of advertising, but one that also admires the creativity of con artists and advertisers alike.¹³²

Leff's view is not antithetical to theory. Indeed in S&S, Leff praises economic approaches, and his framing of swindling emphasizes a market structure approach. Leff succeeds in binning swindles so that we do not need to get mired in too many details. Leff encourages Posner specifically, praises his intellectual gifts, and writes that the law and economics field will continue to shed light on the marketplace. Yet, Leff concludes with this:

(Posner) should keep in mind what I think is the most lovely moment in *Don Quixote*. When asked by a mocking Duke if he actually believes in the real existence of his lady Dulcinea, the Don replies:

“This is not one of those cases where you can prove a thing conclusively. I have not begotten or given birth to my lady, although I contemplate her as she needs must be...”

One can understand the impulse, and be touched by the attempt, but the world is never as it needs must be. If it ever so

¹²⁹ “[I]t was Posner’s conscious choice in writing the book to deal only with what is, and then to exclude any description of that is-ness in any uncongenial vocabularies, say, those employed in sociology, anthropology, or psychology. This decision has the natural collateral effect of excluding any *data* relevant to the categories used by those disciplines but not by Posner’s.” LEFF, *supra* note 125, at 470.

¹³⁰ “...for lawyers, it is the actual behavior of actual people in actual transactions that is of particular interest.” LEFF, *supra* note 2, at 181.

¹³¹ “...when you think you are describing a curve, you are really describing the graph paper.” LEFF, *supra* note 125, at 458.

¹³² LEFF, *supra* note 2, at 149.

seems, it is not the thing illuminated one is seeing, but the light.¹³³

Leff meeting the challenge of the TechCons

Leff's exhortation to focus on the lived experiences of real consumers will become even more important with the advent of machine learning models that have human-like writing composition capabilities. As these models are deployed for advertising purposes, the shared experience of the consumer marketplace may start to fracture.

The reason why is not obvious. One might assume that the internet gives investigators and others more ability than ever to understand marketplaces. And in fact, researchers can use the transparency of the internet to make large-scale price comparisons and other analyses.

The problem comes in personalized experience online. It is astoundingly difficult to study personalized online activities; academic studies attempting to do so are magisterial in design.

Consider two likely scenarios. First, adversaries are likely to use personalization for various forms of predatory marketing, such as pyramid schemes. And since platforms make money by placing ads, platforms will have high power incentives to find consumers likely to click on content and advertising kind to pyramid scheme models. Lawyers are not likely those kind of users and are more unlikely to see those fraudulent ads.

Second, and even more troubling, the emergence of highly-capable, text-generating machine learning technology means that advertisers might soon be able to truly deploy one-on-one personalized advertising. This kind of software can generate unique text and graphics in response to specific contexts. Deployed by advertisers, generative software could take the hard work out of one-on-one targeting (which is impossible practically speaking for most sellers). In such a world, there is neither more mass advertising nor a shared experience that can be monitored for violations of law.

These two scenarios show how near-term technological advances may make it difficult for lawyers attuned to a macro-level, ideal consumer decision maker model to rise to the challenge of understanding consumers' lived experiences.

¹³³ LEFF, *supra* note 125, at 482.

Marketplace interventions

Leff's marketplace analysis naturally highlight market-based approaches to interdict congames. Most obviously, public policy could make a priority of breaking the con artist's monopoly/monopsony relationships. Several strategies could be employed. First, to prevent the relationship, consumer education could use "technique rebuttal." This is a form of consumer education that does not focus on teaching every method of scam under the sun, but rather teaches the frameworks that typify scams. Thus, the consumer would be warned of all transactional relationships that present with the deal only available from one seller that in turn only has one buyer.

Second, consumer protection could intervene in the regular private ordering of some scams. Participants in MLM schemes, for instance, are governed by business contracting norms. Leff's framework shows why that is inappropriate: MLM participants are really employee-consumers rather than business partners. Instead of selling to the public, MLM participants end up buying products themselves and selling them in-network to other consumers. MLM participants need consumer-level protections to break out of the false monopoly/monopsony imposed by the business model.

Third, Leff's model suggests that Ponzis can be identified by the grey box strategy. Consumer protection authorities could be attuned to spotting grey boxes and using their investigative authorities to peek inside. Authorities need not reveal what is in the box to the public; merely looking is likely to prompt the seller into a more transparent or fair model.

Finally, Leff's model presents a method for case selection and prioritization. Those business arrangements to maneuver the consumer into the monopoly/monopsony relationship are the first to bust.

CONCLUSION

In S&S, Leff wrote a powerful, market-structure analysis of consumer fraud. That work is more or less lost to history. Leff explained that con artists attempted to impose a false economy on marks. In a perfect congame, such as the Spanish Prisoner, this false economy was a bilateral monopoly. But in other, less perfect congames, the con artist moved the mark into some otherwise undesirable market relationship, such as an oligopoly.

Regular selling is sometimes difficult to distinguish from swindling, because selling often incorporates minor deceptions. But the difference is that those deceptions occur in ordinary, competitive

consumer marketplaces, where consumers have more choice among sellers, and in turn sellers are making offers to all consumers rather than to a targeted individual.

This essay contributes to Leff's work by placing modern, internet-based con games in his market structure framework. It argues that most con games have been refactored into advanced fee email schemes, and that these are much more powerful because con artists can easily target people worldwide, because they can lead marks into a long con without ever encountering the mark in person.

Ponzi schemes still exist on the Internet, despite the availability of information that might help marks see them as such. Bubble logic and the claque of early investors who win in Ponzi schemes still make these cons profitable. For example, cryptocurrencies share the character traits of earlier Ponzi schemes, right down to Leff's claim that they must offer a "grey box" business model to swindle people. The blockchain is a perfect grey box—technically transparent but actually inscrutable to the retail investor.

Online behavioral advertising has been critiqued for many reasons. This essay adds a new way of thinking about OBA. If we want to realize the promises of OBA, we have to place consumers into a monitoring environment characterized by monopoly where nothing is secret to the advertising platform. In other words, OBA requires a bilateral monopoly market structure.

Recognizing that OBA has the same fundamental dynamics as the Spanish Prisoner or the bait and switch might cause use to decide to reject OBA, or to subject OBA to rules similar to those imposed on other monopoly actors.

Finally, consumer protection lawyers should both adopt Leff's focus on the individual consumer in real transactions, but also humble us, in recognition that we lawyers are not ordinary consumers. We see the market like lawyers, not like consumers. We must subordinate our instincts and assumptions about the market to understand the realities faced by ordinary consumers.