

1: INTRODUCTION: CONTRACTS AS CONSUMPTION IN RELATION

1.1 Consumption as crisis

In 2004 the Worldwatch Institute's annual State of the World Report took as its focus "The Consumer Society". This report helped reinforce growing concerns with consumption due to problems with environmental sustainability and global justice. The clear message is that the industrialized world, and especially North America is simply consuming too many resources and causing too much environmental damage. Increasingly elites in the developing world and in economies in transition are emulating these lifestyles. The Report makes for challenging reading because of the barrage of incontrovertible numbers. The North Atlantic countries, with 11.8 percent of the world's population, take up 60% of the world's private consumption expenditures.¹ More money is spent on pet food in Europe and the United States (\$17 billion) than would be needed to achieve the world goal of clean drinking water for all (\$10 billion).² Environmental degradation linked to consumption is staggering: In just the past 50 years, industrial fleets have fished out at least 90 percent of all large ocean predators—tuna, marlin, swordfish, sharks, cod, halibut, skate and flounder;³ carbon dioxide levels in 2002 were 18 percent higher than in 1960, and estimated to be 31 percent higher since the onset of the Industrial Revolution in 1750. Almost no consumer goods are left unscathed, from housing (using wood that depletes the few remaining old growth forests), to clothing that relies on soil damaging cotton crops, to transportation with its consequent repercussions for both depleting fossil fuel reserves and also global warming.

This thesis concerns the relationships between the private law of contracts and sale of goods and the problem of consumption. These laws both enable the current consumption system and also play a role in the subjectivity and practices of consumers. Contracts and property stand at the centre of the "commodity economy"⁴ and consumption is thus at the centre of the "binary relationship between law and capitalism"

¹ Worldwatch Institute. *State of the World: The Consumer Society*. (New York: W.W. Norton & Co., 2004) at 6 (Table 1-1)

² State of the World at 10, (table 1-6)

³ State of the World, at 17, (Table 1-7)

⁴ Duncan Kennedy, "The Role of Law in Economic Thought; Essays on the Fetishism of Commodities" (1985) *American U. L.R.* 34 at 939-1001.

recognized by Weber and reinterpreted by critical legal scholars.⁵ The development of Western market economies, the consumption of commodities and of the law of contract are mutually interdependent and have evolved in continuous interrelationship. This thesis argues that contract law provides a conceptual and practical core to market-place activity. In the face of serious problems with the market—widespread ecological decline or poverty wages for the producers of luxury goods for Western consumers—a new way is needed of thinking about consumption, contract and markets. In particular, acts of consumption and market place exchanges need to be understood in terms of relationships.

A relational conception of exchange is an ecological conception in two ways. First, it adopts the ecologists mantra that we should think about the world “as sets of relationships rather than separated objects”.⁶ An ecologist sees a tree not just as the brown and green bits sticking up above the ground, but also as the roots, and the *processes* of the tree—the water absorption, sunlight uptake, the insects that fertilize it, and the fungi that help it draw its nutrients. Contracts for sales of goods are market exchanges for the goods we come to use, and so play a key stage in the larger process of how we as humans stand in relationship to the natural world. The perspective is ecological in the second sense that it is concerned with re-invisioning contracts in a way that helps to reconstitute the nature of our human to human and human-to natural world relationships. The traditional picture of contracts as solely exchanges between persons based on mutual agreement has been part of how Western modernity has created a disengaged, disentangled, and distanced consumer who understands herself independently from her ecological and social relations. Repairing our relationship to the natural world requires, first and foremost recognizing the relationship, seeing how it has begun to go awry, and then putting it on a new footing.

⁵ David Trubek “Max Weber on Law and the Rise of Capitalism” (1972) *Wis. L. Rev.* 720
Claire Cutler *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy*, (Cambridge University Press, 2003); E. P. Thompson, “The Moral Economy of the English Crown in the Eighteenth Century” (1971) *Past and Present* 50 at p. 76, Patrick Atiyah, *The Rise and Fall of Freedom of Contract*, (Oxford: Clarendon Press, 1979). Morton Horowitz “Historical Foundations of Modern Contract Law” (1974) 87 *Harv. L. R.* 5 Kennedy, “The Role of Law in Economic Thought; Essays on the Fetishism of Commodities” *ibid.*

⁶ David Suzuki and Amanda McConnell (2002). *The Sacred Balance*. Vancouver: Greystone and David Suzuki Foundation. At p. 198

The thesis employs two methods. It uses a discursive analysis of legal frameworks and theories about contract. The thesis also uses an historical analysis of legal practices to illuminate the shifting terrain that has led to our current concepts of consumer transactions. These concepts underlie the ways in which law informs our subjectivities as consumers and in the current crisis of consumption. At the same time, new concepts of sustainable consumption involve contested concepts of exchange. This thesis argues that by adopting a concept of exchange in terms of wider relationships and involvement in the social life of goods, contract can be refashioned as embedded within social and ecological relations. In order to truly understand the social dimensions of consumption, we need to have an understanding of laws' enabling and constitutive role in it. By examining contracts as the a core concept in the legal system I hope to show its relevance to anyone interested in environmental sustainability or social justice, as well as the need for a dialogue between more traditional sociological approaches to law and the growing academic work in disciplines linking environment and society, such as political ecology and environmental sociology.

1.2 Outline of thesis

Chapter One outlines the problems of consumption and the link to contract, providing an introduction to the topic. It articulates the way viewing consumer transactions as a type of relationship implies a critique of traditional concepts of consumption and contract activity.

Chapter Two explores three different sociological accounts of contract which, in different ways, point towards a response to this argument from neutrality. Drawing on first, realist and critical legal studies and, second, relational contract theorizing, the thesis argues that contracts need to be understood in their social context and as a specific type of exchange relationship. Contract law must be understood in conjunction with a variety of legislative measures governing contract activity, such as employment law or environmental law. Third, the law and economics approach is analyzed. This approach recognizes the realist challenge that traditional contract and regulation be seen as a unified body of law. However, this approach recreates and naturalizes the same problematic notion of exchange that critical legal studies and relational approaches seek to avoid. This suggests the need to take a sociologically-grounded approach to understanding the exchange process, the role of commodities, and the function of law in

the economy, in order to make links between contract activity and wider ecological and economic systems.

Chapter Three provides a theoretical discussion of ways of seeing consumer transactions in terms of links to wider economic, social and ecological concerns. The Chapter is divided into three distinct parts. The first part draws on Actor Network Theory (ANT) a technique of conceptual and social analysis. The approaches suggest that consumer transactions can be understood as depending on the discourses and practical formation of subjects (persons) objects (consumer goods) and exchange. Consumer transactions will take on different characteristics depending on how these elements, as well as the exchange process itself are understood.

The second part of Chapter Three concerns the objects of exchange. It explores the concept of commodity networks as developed in interdisciplinary studies of commodities from diverse subjects such as geography, anthropology, environmental studies and agricultural sociology. The concept of commodity networks provides a social-theoretic framework for understanding the way consumer transactions are part of larger socio-economic and ecological relations. Consumer goods are understood as processes, and as a series of relationships between interdependent persons, ecosystems and resources. Commodity networks are viewed as also involving a range of evaluative concerns. This requires we see commodity networks as potentially problematic, and that we can take up a reflexive and critical approach to different ways in which commodities are seen as ethically significant. Key approaches to the critique of the commodity economy are thus canvassed.

The third part of Chapter Three reintroduces legal concepts into the picture. Drawing on commodity network theorists, law is seen in terms of its role in commodity networks. The chapter outlines a “legal commodity network analysis” as a novel approach to understanding law in its social and ecological context.

Chapter Four examines the development of our current legal concept of exchange, as found in contracts law and sale of goods. The chapter examines the way concepts of “subject”, “object” and “exchange” are interdependently understood and applied in law. The chapter provides a historical analysis, focusing on the development of key concepts

as they became worked into judicial practice and case law. The chapter centres on a close reading of cases on implied terms in nineteenth century England and which are central in the development of the *Sale of Goods Act*. What emerges is a concept of the consumer as self-interested, of objects as functional things for human use and of exchange as autonomous and “discrete” transactions. Sale of goods law provides the conceptual core for twentieth century law concerning consumer transactions, wherein consumer protection provides limited and piece by piece transformations. As such law continues to maintain and facilitate the traditional core concept of exchange and in so doing, enable and facilitate various commodity networks.

Chapter Five discusses current discourses of sustainable consumption, seeking to show how different understandings of exchange are central to concepts of consumption and how to transform it. While there remain a diversity of sustainable consumption initiatives and theories, many point towards the need for considerable changes in contract activity, the structures of the market and the problematization of commodities. At the same time, the predominant approaches favoured by governments and international legal institutions tend to emphasize individualized choice and market-based concepts, providing yet more context for the ancient constitution of marketplace choice to reappear. I argue that the “network” approach developed in Chapter Three helps provide a better approach to sustainable consumption and how market exchange should be understood in sustainable consumption policy .

In particular, the network conception, in seeing contracts as part of larger commodity networks, suggests that changes to contract law should be meshed with, and understood as part of, the broader project of designing commodity networks. Many of our concerns over the exchanges we enter into are actually concerns over the way commodities have spillover effects, on peoples and ecosystems, or, following the ANT approach, how commodity networks are configured. The chapter argues that both individual voluntary approaches, such as the decision to buy fair trade goods over mainstream coffee, or collective, regulatory approaches, such as the decision to ban coffee picked by prison labour, represent different forms of commodity network design: In each case stakeholders in the network are attempting to impose a framework to intentionally guide how networks are formed. The issue then becomes one of what principles should guide network design. The chapter argues that the concept of

sustainability suggests a number of design principles, such as that commodity networks not involve the sacrifice of ecosystem integrity, or that the basic needs such as for adequate housing and nutrition and protection of human rights of all persons involved in the network are met. The chapter argues that conceiving of networks in this way runs counter to the ideals of free consumer choice and consumer sovereignty. However, it is acknowledged that this way of looking at contract, and commodity networks, whether originating in the situated practices of green consumers or through international sustainable consumption discourses remain as a small subset of approaches in a marketplace in which traditional concepts of exchange still thrive.

Fair trade goods remain voluntary and yet are thriving, which suggests two separate potential defences of our current contract law framework and which an ecological approach needs to consider. One defense points out that contract allows for differently structured contracts, including altruistic ones, and so under determines the form of exchange relationships. In response, Chapter One argues that the relational conception is a unique approach, that while allowed by a current regime, stems from a unique concept of consumer transactions at odds with the underlying ideas behind our dominant contract law. Just because our current contract law allows for fair trade goods, that does not mean it best promotes or reflects the thinking behind such goods. Chapter two argues that contracts and contract law are not neutral, but reflect particular concepts of the exchange transaction, and of the structure of markets. In fact, the doctrine of *caveat emptor*, discussed at length in Chapter Four, works to make it very difficult for consumers to know about the processes behind products and so thwarts process-identifying decision-making in many contexts. Contract law does more than provide for voluntary exchanges, it helps constitute how such exchanges occur and the thinking that motivates certain types of transactions.

The second defense notes that at the core of contracts is the idea of a system of private ordering. The strength of contract law, then, is that it allows novel formations such as fair trade goods to originate. At root, this is an argument about the supremacy of the market. In Chapter Five I discuss voluntary approaches to sustainable consumption, of which fair trade goods are one type. I argue that voluntary approaches are inherently weak, as they ignore classical problems arising from conflicting values between persons in competition, such as the prisoners' dilemma. While these arguments support a

regulatory approach and collective action, they also suggest that the root of such regulation is the realization of shared values. The distinct contribution of the argument is to frame regulation not as an intervention into otherwise free contracting, but as the realization of values that are implicated in contractual activity.

1.3 Problems with contracts

Industrial market economies are made up in large part by daily consumption decisions. At the same time, a range of cultural values, political discourses, consumers' self-understandings and instituted practices work to maintain the view that consumption is something separated from environmental and social impacts. Much of the problem can be ascribed to social values concerning concepts of consumer transactions and marketplace freedoms. While environmental activists and lawyers might take the need to protect the environment as self-evident, examples of widespread popular opposition to consumption taxes, such as the failure of United States' President Clinton's gas tax initiative in the 1990s, suggest widespread delinking of consumption with environmental concern.⁷ Part of the problem stems from the way social and political power inheres in social organizations, corporations, state bureaucracies and groups that profit from the very forms of intensive appropriation and use of resources that are problematic.⁸ One approach scholars can take is to try to clarify our ethical concepts to find the proper normative foundations for environmental protection.⁹ An alternative approach is to look to the wide variety of practices and institutions that contribute to our existing evaluative orientations. Law is one of those institutions.

The information consumers can have, the responsibilities that are shared, the concepts of persons exchanging, the objects of trade, the terms upon which parties can make agreements and the values that are deemed appropriate all come to bear on contract making and are shaped by legal doctrine. Currently, the law of sale of goods is the most central law concerning consumption. While usually the body of law identified as consumer protection is singled out, in fact these various laws are limited to health and

⁷ J. Salzman "Sustainable Consumption and the Law" (1997) 27 *Environmental Law* 4 at 1243-1293.

⁸ Michael M'Gonigle "A Dialectic of Centre and Territory: The Political Economy of Ecological Flows and Spatial Relations" in *Nature, Production Power: Towards An Ecological Political Economy*. (eds. Fred Gale and Michael M'Gonigle. Northampton, Mass: Edward Elgar, 2000).

⁹ See, for instance the works collected in *Ethics of Consumption; the Good Life, Justice and Global Stewardship*. (ed. D. A. Crocker. Lanham, MD: Rowman and Littlefield, 1998).

safety concerns, particular protections relating to sales techniques or sales contracts and consumer information. These do not govern many pertinent aspects of consumption especially concerning the way consumption relates to wider ecological and social problems. These laws presuppose the laws of contract and sales. Contracts and Sale of Goods are especially relevant because they enable, facilitate, regulate and structure aspects of the goods economy and consumer transactions.

Contract law doctrines and practices make a difference in how consumption happens. The feudal Assize of Bread in England determined not only prices but the times of the day food could be bought and whether items could be resold. Practices of the market such as “market overt” ensured London shoppers throughout the eighteenth and nineteenth century that a simple purchase would guarantee title and that they need not ask as to the origins of the goods or if they were stolen.¹⁰ The doctrine of “caveat emptor” (buyer beware) worked to ensure that market participants only knew the physical features of goods that they could inspect. Consumers became accustomed to ignore the histories and wider linkages of the goods they bought. The provisions in the *Sale of Goods Act* concerning fitness of purpose, if effective, would have the effect of ensuring that most goods on the market are in fact fit for their purpose. So contract provisions act to regulate what gets made. In this thesis I want to examine the way contracts and sale of goods embody a particular concept of exchange that helps enable the flow of commodities, and diverts peoples’ attention from their problematic aspects.

Nineteenth century English contract and property law worked to facilitate markets for consumer goods, and property enshrined the sense in which we think of goods as objects for us to trade. The industrial revolution of eighteenth and nineteenth century England was made possible by concerted government action and legal reform in areas of employment and price controls on foods—in this way the “free market” was constructed.¹¹ Sale of goods law retains at its core the common law of contracts, and it exists as a series of modifications of contract. The rules of formation are the same,¹² as are the various rules covering defenses such unconscionability, duress or unfair bargaining power.¹³ Current Sale of Goods Acts in the Anglo-American world derive in

¹⁰ J.H. Baker *Introduction to English Legal History*. (London: Butterworths 1979) at p. 216

¹¹ Karl Polanyi, *The Great Transformation* (London : V. Gollancz Ltd., 1945)

¹² G.H.L. Fridman *The Law of Contract in Canada*. (Scarborough, Ont: Carswell, 1999) at p. 37

¹³ Fridman, *The Law of Contract in Canada*, *ibid.* at p. 370

large part from the codification of by Judge Chalmers in the late nineteenth century.¹⁴ Understanding the assumptions and presuppositions of Sales of Goods takes us into the development of contract, and returns us to the world of laissez faire markets in the nineteenth century.¹⁵

When we position law as the source of solutions, we risk losing sight of the ways in which the problematics of consumption can be tied to the current workings of our legal system. I want to turn that around, and look at how law is intertwined with our consumption practices, how our discourses and self-understanding are interpenetrated by legal languages and institutions. I want to take up a reflexive relation to these practices, to their historical roots and continuities, and the ways these traditions and practices constitute us.¹⁶ In looking at the legal aspects of consumption we should understand actual practices of consumers and, especially as they enter into consumer transactions, the discourses whereby consumers describe their practices—including the role of law as one discourse among others, and the self-understanding of consumers—again, partially constituted by law. A review of the literature reveals there is little writing on law and consumption that looks to the legal-historical roots of the problem, and a tendency towards specific proposals for legal reform that see law as a novel intervention into an otherwise seemingly natural order. The legal roots of our current consumption practices go back much further, and are coextensive with the development of markets and their legal enablement and regulation.¹⁷ We need to historicize the current form of conceptualizing the market as the obvious mode for our consumption, show the close relationship of our concept of consumer transactions to legal conceptions that are tied to the workings of capitalism, and show how many public law interventions—such as consumer protection law-- only work to perpetuate this conception.

¹⁴ Baker, *Introduction to English Legal History*, *ibid.* at p.296, *Sales of Goods Act 1893*, 56 & 57 Vict. C. 71, s.11-14).

¹⁵ In Chapter 3 I will explore the details of these developments more thoroughly.

¹⁶ Michel Foucault “What is Enlightenment?” *Ethics Subjectivity and Truth. Essential Works of Foucault 1954- 1984 Volume One.* (ed. P. Rabinow. New York: The New Press, 1997).

¹⁷ See, for instance, the articles in *Consumption and the World of Goods.* (Ed. Brewer and Porter. Routledge, 1993).

1.4 Seeds of change

Initiatives to provide new ways to consider sustainable consumption range from emerging international law norms to novel state policies. Agenda 21, the agreed plan of action at the Earth Summit in 1992, included a chapter on problems of consumption. At the 10 year follow up summit in Johannesburg in 2002, the international community reiterated that “fundamental changes in the way societies produce and consume are indispensable for achieving global sustainable development”.¹⁸ The 1999 Revisions to the United Nations Guidelines for Consumer Protection included provisions for sustainable consumption. International organizations such as the Organization for Economic Cooperation and Development, environmental non-governmental organizations, advocacy groups, and state environment ministries have begun to assemble a range of instruments that use law to address environmental impacts of consumption. Proposals include ecological labeling laws, product bans, consumption taxes and specific regulations in sectors such as housing and transportation. Many of these new guidelines and policies do not fully address the ways in which environmental law measures relate to consumption or to existing social practices and values. Extensive debates now address the proper analytic and normative frameworks in which to study consumption and by which to initiate proposals for change.

Governments are now beginning to take small steps towards sustainability through recycling programs, eco-labeling and, greenhouse gas emission control programs. Emerging social and academic movements now challenge not only consumption practices and preconceived notions of consumer subjectivity. New discourses of sustainability and ecological transformation focus on renewing the concept of the consumer as engaged, conscientious and an active participant in transformation.

The 2004 State of the World Report is, in this context, less a novel wake up call than representative of an increasingly mainstreamed movement towards awareness of problems of consumption. A large amount of academic, non-governmental and journalists’ research work has gone into uncovering the hidden linkages between production and consumption. Most famously Naomi Klein’s *No Logo* reveals the exploitive sweatshops that lurked behind the well-publicized façade of name brands such as the Gap and Nike. The Worldwatch Institute is only one of a large number of

¹⁸ Johannesburg Plan of Implementation at para. 15.

environmental organizations, governments and environmentally oriented businesses now regularly implore consumers to “do their part”. Whereas sociologists and cultural theorists in the 1960s and 1970s generally took a dim view of the consumer, preferring to emphasize the way consumption was instead driven by industrial producers—consumption was simply the passive twin of productive needs—academic discourse now focuses much more on the need to “revive” a “politics of consumption”¹⁹. A number of recent works seek either to show how problematic our current consumption has become,²⁰ or remind us of how in earlier periods in our history consumerism and political power were conjoined in the noble and progressive “citizen-consumer”.²¹

One of the main focal points of this new emphasis on consumer responsibility has been a tremendous growth in fair trade goods, ecological labels, boycotts, and other devices whereby individual consumers can attempt to do things differently. Non-governmental organizations, North-South solidarity organizations and private businesses have stepped in where governments have feared to tread, and now consumers can buy “process related products”, advertised as such through “value-labels”. Organic foods or fair trade coffees make up for higher price premiums through higher quality standards. However, value-labels are importantly “process-identifying”, making features of the methods of production important, as opposed to “product related”, seeing an object’s physical characteristics as the only method for picking out or choosing between products.²² Due to the concerted efforts of recent non-governmental organizations, journalists and anti-globalization activists, consumers in much of the world can now purchase certified forest products, fair trade coffee, tea and cotton, and “ethical” mutual funds. Brands such as

¹⁹ J. Schor “The New Politics of Consumption” (1999) *Boston Review*. Summer

²⁰ See, A.T. Durning, and J.C Ryan. *Stuff: the secret lives of everyday things*. (Seattle: Northwest Environment Watch 1997) William Rees and M. Wackernadel *Our Ecological Footprint: Reducing Human Impact on Earth*. (Gabriola Island, BC and Philadelphia, PA: New Society Publishers, 1995). State of the World—The Consumer Society *ibid*. Also see, for instance, the collections *Confronting Consumption*. (Ed. Conca, Maniates, Princen. Cambridge, Mass: MIT Press, 2002), *Exploring Sustainable Consumption: Environmental Policy and the Social Sciences*, (ed. Maurie Cohen and Joseph Murphy: Elsevier Science Ltd, 2001).

²¹ See Lizabeth Cohen, *A Consumers’ Republic: The Politics of Mass Consumption in Postwar America*. Toronto, Ont: Random House- Vintage Books, 2003) at p. 20.

²²The language of product related and non-product related process and production methods is used in the international trade law context. See, for instance, Organization for Economic Cooperation and Development *Process and Production Methods (PPMs): Conceptual Framework and Considerations on Use of PPM-Based Trade Measures*. (Paris, Organization for Economic Co-operation and Development 1997). at p. 9

Nike or the Gap now employ codes of conduct for their overseas operations.²³ These schemas represent attempts to restructure commodities around social and environmental values. They vary in terms of whether the pressure for change comes from consumers, industry groups, or non-governmental organizations. Value-label goods respond to perceived ethical problems behind products, but vary widely in terms of what problems are addressed, and the ways in which commodity chains are reformed. In almost every case consumer concern is refashioned as driving the change in these commodity systems

These value-labels, along with green consumerism generally, give rise to a number of distinct questions. Can these value-labels or forms of corporate responsibility be successful in bringing about widespread environmental or social change if they do not also engage state action? Can they accurately represent the interests of all stakeholders? Do value-labels and green consumerism simply reaffirm the values of consumer choice?²⁴ Whether or not these concerns are well-placed, we can still recognize that value-labels and green consumerism suggest some strong critiques of the ways commodity systems and consumption have been organized in the past. They suggest that a multiplicity of ways exist in which commodities and trade can be structured, even within the narrow confines of market exchange and contract-based relations. Corporate codes of conduct concern the exchange relations companies engage in with suppliers or workers, that is, responsibility in contracting, while value-labels concern the exchange relations consumers engage in.

Fair trade goods represent the best of these schemes. They are organized by non-governmental organizations and committed to paying a just wage and helping farmers with cooperative management. A system of certification works into contracts between coffee producers and distributors (and by extension consumers) a complex arrangement

²³ Different ethical products are catalogued in Deb Abbey *Global Profit and Global Justice*. Gabriola Island, BC: New Society Publishers, 2004). See also Michelle Micheletti, *Political Virtue and Shopping: Individuals, Consumerism and Collective Action*. (San Francisco: Palgrave Macmillan, 2003)

²⁴ Emily Walter "From Civil Disobedience to Obedient Consumerism? Influences of Market-based Activism and Eco-certification on Forest Governance" (2003) 41 *Osgoode Hall L.J.* 3 531 – 565 arguing that Forest Stewardship Council wood certification system "provides legitimation for the neo-liberal ideology of growing and trading our way to prosperity....it implicitly supports the larger ideology of attack on non-market forms of social ordering and experimentation with alternative, democratic forms of collective governance" at para. 63.

of price undertakings, price stability for producers, improved access to finance or capital, greater value retention for producers, improved market access and economic security and skills development.²⁵ Sustainability requirements include programs for moving away from the use of pesticides, herbicides and industrial fertilizers, and small coffee farmers usually retain tree canopies that maintain local biodiversity. Consumers pay a price premium to guarantee these features. In the case of coffee, farmers are paid a set price of US\$1.26 per pound, which is often higher than the actual benchmark price at international coffee exchanges, and at least twice as much as they would receive through non-fair trade channels. Northern consumers pay retail prices that are comparable to other gourmet coffees.

These labels and codes, and green consumerism generally, suggest a concept of consumption as *relational*: The act of buying and selling goods connects persons (consumers) to larger systems and to a multitude of different persons, places, and ecosystems. Fair trade schemes seek to reconstitute consumption as a relationship of solidarity and interconnection. They attempt to overcome some of the ways consumers are otherwise locked out of concern for others.²⁶ The relational conception implies an account of the ways in which consumption and particular consumer transactions link up with wider commodity systems and economy and ecology. It also implies a kind of ethics concerning how persons relate to other people, places and ecosystems through consumption. The relational conception suggests a deeper study of the ways in which systems of commodities can be governed and even the problematics of alternative commodity systems.²⁷

²⁵ See FLO Standards. Also Peter May, Gilberto C.C. Mascarenhas and Jason Potts "Sustainable Coffee Trade: The Role of Coffee Contracts" (United Nations Conference on Trade and Development and International Institute for Sustainable Development, 2004).

²⁶ See Ian Hudson and Mark Hudson "Removing the Veil: Commodity Fetishism, Fair Trade and the Environment" (2004) 16 *Organization & the Environment* 4 at 413-430; David Goodman and Michael Goodman "Sustainable Foods: Organic Consumption and the Socio-Ecological Imaginary" in *Exploring Sustainable Consumption: Environmental Policy and the Social Sciences* (ed. Maurie Cohen and Joseph Murphy, Elsevier Science Ltd, 2001) at 97-119; Sarah Whatmore Lorraine Thorne "Nourishing Networks: Alternative Geographies of Food" *Globalising Food: Agrarian Questions and Global Restructuring*. (ed. D. Goodman and M. J. Watts. New York, Routledge, 1997) at p.. 287-304

²⁷ For a growing literature on the problems of value-labeled goods see Adelle Blackett "Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct" (2001) 8 *Ind. J. Global Leg. Stud.* 401; Alex Hughes "Accounting for Ethical Trade: Global Commodity Networks, Virtualism and the Audit Economy." In *Geographies of Commodity Chains* (ed. Alex Hughes and Suzanne Reimer, London and New York: Routledge, 2004) at p. 215; Ulrich Hoffman and Tom Rotherham, "Environmental Requirements and market

Many concerns over consumption are intimately tied to the results of globalization of the circulation of commodities. Concerns about distant sweatshops, underpaid coffee farmers or tropical lumber are in large part concerns internationally sourced consumer goods that are made in ways that do not meet the traditional standards of the industrialized welfare states. This suggests that one of the key reasons that these relational aspects of exchange have remained largely unexamined until recently is that domestic legislation in the past satisfied many of the worries involved. If Canadian consumers were to pause to worry about the conditions of those who grew their wheat, for instance, they could look to labour laws, the Canadian Wheat Board that helped with farm gate prices, and government farm support programs. So long as these systems applied to most goods and functioned to maintain the appropriate standards, it was not overly important that the thinking behind such measures was not particularly organized around consumer concern per se. Globalization, as it were, helped problematize these processes by showing that in many cases our normal consumption practices were fraught with problems. However, once we become concerned about the ways we as consumers are implicated through exchange relationships with potentially damaging relations with other persons and ecosystems we can also take up a critical position towards the standards of industrialized “productivist” economies that disproportionately contribute to escalating environmental problems.

This relational conception, this thesis argues, is implicit in not only value-labeled goods, but a wide range of sustainable consumption measures that seek to change the way persons consume in light of larger ecological crises. Sustainable consumption initiatives embody a relational conception not only of consumption but the exchange of goods that is an important part of consumption. Alternatively, the tradition of contracts and sale of goods law points the other way. This tradition views exchange as an isolated act whereby individuals exchange goods insulated and so detached from their social and ecological backgrounds. The result is that the inherently relational aspects of the contracting process are obscured, hidden and so removed from the consideration of contracting parties. Many of our problems with consumption can be traced to this tradition. This has become the modus operandi for much of the world economy, linked

access for developing countries: promoting environmental—not trade—protection” in *Trade and Environment Review* (United Nations Conference on Trade and Development, 2006) at pp. 1-60

together by extensive networks of trade links and commodity flows, exchanged on the basis of contract provisions.

1. 5 Subjects, objects and exchange as critical activity

Concerns over product lifecycles, the “the world behind the product” or processes all concern the ways goods gain value and come to market. In the relational approach to consumer transactions we need to consider the transaction as part of this larger story, and consider our own consumption as part of the larger process of the circulation of goods. Adopting a relational perspective implies a form of critical activity. Marketplace activities, the current legal system, and a variety of theories of law and markets work to maintain a concept of a consumer transaction as framed by and limited to a relationship between two persons and concerning a discrete object. Seeing consumer transactions in the wider context involves unpacking discourses and practices concerning the objects involved in transactions (in terms of mere things or as embodying larger processes) subjects that enter into transactions (consumers, persons or buyers and sellers), and the nature of the transaction process itself.

At first blush the concept of commodities appears simple: We can talk of particular “things” or “objects” and we can exchange these things. However, many of our problems with consumption stem from this deceptive simplicity. The limited vocabulary which allows us to talk in general terms about commodities, and to have a legal framework covering commodities in a general way, also forces degrees of abstraction which lead to many of the very problems we seek to understand. The same general legal frameworks and core ideas are used whether we are moving containers of microchips or trucks full of trees. We can talk about goods in such generic terms because we treat them as isolated from, detached, and disentangled from their historical links to modes of production and origins in ecosystems. But once we start to problematize the commodity economy in terms of its environmental effects or harms visited on workers and even consumers’ own personal well-being, we begin to see that consumer transactions are, in fact, part of larger relations to other people and ecosystems.

Once we adopt a relational conception of consumer transactions we see that any particular consumer transaction involves complex interrelationships. We begin to notice

the different supply lines, the international sources for components, the sheer complexity of consumer goods as well as the ways they are designed to interact with consumers' wants and desires. Concerns about consumer transactions are part of a wider project of social theorists interesting in showing that "If we pick up a paw paw, a prickly pear, a kumquat, or any commodity we have in our hands a bundle of social, cultural, political, economic, biological, technological, geographic, historical and other relations which ensured that it traveled from those places, to that shelf, in that form, at that time and at that price".²⁸ Theorists working in this project have developed the concept of "commodity networks" to explain the complex workings of the process whereby goods come to consumers for consumption.²⁹ Alternative concepts include "commodity chains", "value chains" or "systems of provision". Viewing goods in terms of networks or chains is way of adopting a relational approach to consumption: These are complex interlinkages of consumers, producers, distributors and ecosystems all of which play a role in the process of the formation, distribution, consumption and disposal of goods.

The relational approach also implies that we question subjects. Human wants, self-understanding, and material and cultural ambitions are worked into commodities and commodity networks. The relational perspective employed here is thus also a critical perspective: Asking how persons are related to wider ecological, social and economic processes also involves asking not only how persons contribute to these processes, but how these processes, in turn, are part of how persons come to think and act in the ways that they do. For example, we can consider a simple practice, such as eating bananas with breakfast cereal. The historian informs us that this originated when the United Fruit Company and the Standard Fruit Company in the late nineteenth and early twentieth centuries developed a trade in bananas from Central America, that this involved widespread damage to the tropical rainforest, and that the United Fruit Company was instrumental in overthrowing a thriving democracy and establishing a military dictatorship

²⁸ Ian Cook, Phillip Crang and M. Thorpe, "Tropics of Consumption: 'Getting with the fetish' of 'exotic' fruit?" *Geographies of Commodity Chains*. (ed. A. Hughes and S. Reimer. London: Routledge, 2004) at p. 174

²⁹ Commodity network theorists include: Deborah Leslie and Suzanne Reimer. "Knowledge, ethics and power in the home furnishings commodity chain" in *Geographies of Commodity Chains* (ed. Alex Hughes and Suzanne Reimer. New York and London: Routledge, 2004) at 250; Alex Hughes and Suzanne Reimer "Introduction" in *Geographies of Commodity Chains*. (ed. Alex Hughes and Suzanne Reimer. London and New York: Routledge, 2004) at p. 1.; Goodman and Goodman "Sustainable Foods: Organic Consumption and the Socio-Ecological Imaginary" *ibid.* Laura Reynolds "The Globalization of Organic Agro-Food Networks" (2004) 32 *World Development* 5 at 725-741

in Guatemala in 1954 due to threats of land reform. The banana trade also required American consumers, and bananas with breakfast was marketed in concert with breakfast cereal makers. Commercial interests developed something we see as “normal” and became part of our daily practices, simultaneously implicating ourselves, parents and grandparents in global harms.³⁰ This is a fact about *us*. This was a practice we engaged in: We developed a taste for bananas, we chose bananas at the grocers and we assumed it was just fine to eat bananas with our cereal. Exploring the way we exist in relations involves, then, involves a critical attitude towards not only the objects of consumption but also our own formation, an approach that Michel Foucault has called an “historical ontology of the subject”.³¹ The historical development of the “consumer” will be central in this process. In turn, this can be linked to the objects of contract and the ideas of exchange used by persons in contracts and commodity networks.

When we start to see consumption as problematic, we are also calling into question our traditional legal and economic frameworks whereby it has been presumed to be normatively acceptable for people to buy whatever the market provides. Critiques of consumer culture have suggested that “the benefits of any act of consumption... must be weighed against the environmental consequences that inevitably result”.³² This requires a new way of seeing consumer transactions. Rather than being guided by concerns as to what two parties can negotiate in their self-interest, substantive considerations concerning balancing potential harms that arise for other persons and the environment need to be considered. This reflects the idea that both scholars and individual consumers should second guess the existing legal frameworks that regulate consumer goods and work that into judgments concerning consumer transactions. This involves a further understanding of regimes that are already in place, and their normative basis. The consumers’ decision to buy organic food, for instance, may reflect a lack of trust in the regulatory apparatus concerning conventional agriculture, and a desire to substitute a different body of values.

³⁰ Richard Tucker “Environmentally Damaging Consumption: The Impact of American Markets on Tropical Ecosystems in the Twentieth Century”. *Confronting Consumption* _ibid. pp. 178 to 195

³¹ Foucault “What is Enlightenment?”, *ibid.* at p. 319.

³² B. A. Harsch “Consumerism and Environmental Policy: Moving Past Consumer Culture” (1999) *26 Ecology L.Q.* 543 at p. 55

Problematizing consumption also leads to a critical analysis of the links between law and ecology that goes beyond the normal confines of environmental law and natural resource management. Writers from diverse traditions are beginning to analyze more basic legal principles and institutions: Sean Coyle and Karen Morrow consider the philosophical underpinnings of property and its relationship to nature;³³ Cynthia Giagnocavo and Howard Goldstein the idea of rights;³⁴ Douglas Kysar has written about the need to place environmental law in the broader context of an ecological economics;³⁵ and Michael M'Gonigle's green legal theory seeks to place an analysis of legal institutions in the context of an ecological political economy, explaining the way law is linked to the ways in which centralized power structures such as nation states rely on excessive appropriation of ecological services.³⁶ For many writers, the failures of traditional environmental law in many ways stem precisely from the inability to comment unfavourably upon, much less offer solutions concerning, consumption related problems. This stems from the ways much environmental law is often linked to industrial "productivism", an unsustainable economy based on the linear throughput of materials and resources and liberal philosophies that uphold the sovereignty of the consumer.³⁷

Recognizing one's relations with the wider society and ecosystems also resonates with environmental philosophers' calls for recognition of the biotic community or an ecological sense of inter-being. By recognizing the ways in which different persons and ecosystems share a common existence and interrelationship persons can develop strong emotional,

³³ Sean Coyle and Karen Morrow *The Philosophical Foundations of Environmental Law: Property, Rights and Nature*. (Oxford and Portland, Oregon: Hart Publishing, 2004).

³⁴ Cynthia Giagnocavo and Howard Goldstein "Law Reform or World Re-Form: The Problem of Environmental Rights." (1990) *McGill L. J.* 35 at 345.

³⁵ Douglas Kysar "Law, Environment and Vision." (2003) 97 *Northwestern U. L. R.* 2 at 675-731.

³⁶ M'Gonigle "A Dialectic of Centre and Territory: The Political Economy of Ecological Flows and Spatial Relations", *ibid.*

³⁷ Michael M'Gonigle and Paula Ramsay "Greening Environmental Law: From Sectoral Reform to Systemic Re-Formation." (2004) *Journal of Environmental Law and Policy* 14 at 331-357; Harsch "Consumerism and Environmental Policy" *ibid.* Note, however, some liberal consumption theorists do believe that collective action problems legitimate widespread interference with consumer sovereignty. See Joseph Heath "Liberal Autonomy and Consumer Sovereignty" *Autonomy and the Challenges to Liberalism* (ed. J. Anderson (ed). Cambridge University Press, 2005) at 204-225. For an analogous environmental theology concerned with the process behind products, see the "eco-kashrut" of Zalman Shachter Shalomi, in *Jewish With Feeling: A Guide to Meaningful Jewish Practice* (with Joel Seigel. New York: Penguin, 2005) reinterpreting traditional Jewish kosher laws as an ecological practice of spiritual connection with the Earth.

evaluative and spiritual connections to those beings with which they co-exist.³⁸ From the embodied viewpoint of a person who values relationships of reciprocity and mutual respect with other persons and other beings, this implies a strong critique of our market system. One central feature of that system is the ways in which parties are free to negotiate the terms of contracts without concerns as to distant effects on other people and ecosystems. This has allowed hard bargaining, and exploitation, but also the development of systems of commodities based on massive environmental harms and relentless pursuit of the profit motive. Such an evaluative approach, if raised to the level of a basis for regulating contract, may conflict with liberal concepts of neutrality. Alternatively, it may enrich the debate concerning the ways in which we can design our human activities to correspond with our reflectively held values. It can play a role in forums of democratic deliberation in which neutrality is understood in terms of access to participation rather than constraint of legitimate forms of dialogue.³⁹

³⁸ Michael M'Gonigle. "A New Naturalism: Is There a (Radical) 'Truth' Beyond the (Postmodern) Abyss?" (2000) *Ecotheology* 8 at 20-39.

³⁹ Concerning participatory decision-making as a form of neutrality that can handle environmental issues see Makku Oksanen "Liberal Neutrality and Consumption: The Dispute over Fur." *Exploring Sustainable Consumption*, (ed. Joseph Murphy and Maurie Cohen, 61-78: Elsevier Science, 2001).

2. CONTRACTS, SOCIOLOGICAL APPROACHES AND RELATIONS TO OTHER THINGS

2.1 Introduction

Contract law since the nineteenth century has faced a continuing problem with third party effects. Value-labels such as fair trade coffee involve consumers taking steps to ensure that they minimize certain third party effects of their contracting behaviour. Contract law allows for such terms, but makes no provision to mandate such terms. Value-labels serve as a flag, indicating that without the special labels, other, often mainstream, goods involve serious negative repercussions for workers or the environment. As such value-label goods help us understand how contract law relates to such negative effects.

Most contract scholars, especially those who adhere to the idea that contracts involve mutual promises by persons who voluntarily reach agreements, would reject the idea that third party effects are even relevant to contract theory. Fair trade goods, and value-labels generally, can prosper under our existing contract regime. Moreover, unwanted third party effects are often handled through regulation: Traditional “end of pipe” restrictions on pollution discharges into rivers, for instance, can be understood as attempts to reduce the effects of market-place activity. Most contracts scholars would likely argue that contract law and environmental regulation are distinct subject areas, and that the failure of environment ministries to do their job does not bear on contract theory or doctrine.

However, such an approach rests on a set of assumptions concerning what properly counts as contract law. In fact, contract theory is a highly contentious realm, and the current body of contract law in the Anglo-American tradition is only a small subset of the various legal regimes and systems for handling contract and contract-like relationships. In this chapter I argue that a wide construal of contract is possible and desirable, one that draws out contractual activity to merge with the wider social and ecological relations that exchange helps forge. On such a wider, relational concept of contract, third party effects do matter.

The dominant approach to contract law and doctrine has conceived of contracts as involving the mutual promises of two persons. In the nineteenth century the approach was known as the “will theory”, and was the primary driver behind attempts to systematize and rationalize the law of market exchange. Even to this day, law students throughout the Anglo-American world are taught in their first year law school contracts courses the core principle of “neo-classical contract law”, that what matters is the intention of the parties to the contract: This defines how contracts are interpreted, but also defines the underlying metaphysics of what contracts are understood to be. Construing contracts in terms of the intentions of the parties implies that contract law is itself neutral concerning contract activity: It plays no special role in shaping the decisions of contracting agents and need bear no responsibility for the fact that some people choose to use contracts to act in unethical ways. Courts will refuse to uphold patently illegal contracts, but generally will not inquire into the substance of contracts to check whether bargains are fair, or whether the object of the contract, such as sale of goods, involve a series of unfair, or ecologically unsound, practices.

Contract scholars such as Ernest Weinrib, Charles Fried, and Stephen Smith argue that the promises approach best articulates the underlying idea of contract law. Alternatively, theorists such as Patrick Atiyah and Grant Gilmore have suggested that an alternative explanation of contracts cases is of contract as a form of responsibility stemming from a relationship of reliance. The difficulty such approaches face is that judges and lawyers have largely taken on board will theories and promises theory: Initial moves in the 1960s and 1970s to give a role in contract law to the “reliance interest” have not developed to encompass the field as a whole, but remained a small counter example against the totalizing nature of the doctrine the parties intentions.⁴⁰ This suggests that the theorist antagonistic to the promises approach should look to theory not merely as a way to provide a systematic model for historical and existing judicial decisions, but rather as a normative theory that provides the ground for how contract *should* be decided. On such an approach, contract doctrine is understood as a potentially malleable human

⁴⁰ A. H. Kasteley "Cogs or Cyborgs?: Blasphemy and Irony in Contract Theories" (1995) 90 *Northwestern University Law Review* 132, summarizing twenty years of contract since Grant Gilmore's *Death of Contract*. See also Stephen Smith (2004) *Contract Theory*. Oxford University Press, for the view that the promises theory comes closer to other approaches to matching the body of judges decisions in contract.

institution, one guided by normative vision. A number of sociologically informed accounts of contract law take up this approach.

In this chapter I survey three different sociologically informed accounts of contract law; the law and economics approach, relational contract theory, and critical contract theory. Each these theories considers the normative basis for contract law in wider social values, the effects of contractual activity and the application of contract doctrine on the wider society, and the backdrop of a variety of laws that modify and shape contracting activity and so can be considered as contract law in the wider sense. If contract law is understood as one legal doctrine amongst many that shapes the economy and society, then there are firmer grounds for altering contract doctrine in the fact of widespread social and environmental problems. The objective of the chapter is to understand how contract law and doctrine, as well as different theories of contract, make sense of the idea of the autonomy and neutrality of contract. Realist and critical legal studies approaches show that contract making cannot be removed from its social context and considered free of evaluative concerns. By breaking down the distinction between private and public laws of contract, critical legal studies approaches provide the basis for a socially informed understanding of contractual activity that can take issue with the dominant paradigms in contract doctrine. Critical legal scholars provide the basis for acknowledging that issues of fairness and ecological concern can be configured as contract problems. The cost for the theorist is a lack of guidance in resolving a multiplicity of conflicting values at stake. The second approach, Ian Macneil's relational contract theory, provides a broader sociological informed understanding of exchange transactions and suggests an understanding of fair trade goods in terms of relationships. However, the relational contract approach adheres to a two party concept of contracts. By understanding contract as involving only the parties who form agreements, rather than the broader community, the approach reconfigures problematic contractual formalism. The third approach, law and economics, promises a complex framework for understanding contracts in social context and in guiding regulation. However, it imports a formalism at the level of its basic building blocks—the concept of consumer preferences. The conclusion is that a wider understanding is needed as to the nature of exchange and the role of commodities in society and the economy, and their relationships to ecosystems. Before beginning the discussion of the three sociologically informed contract theories the chapter expands on the problem of neutrality.

2.2 Spectres of neutrality in contracts

Traditional contract law in nineteenth century England came to have dominance through the English speaking world, and worked with a concept of contract as a system for enforcing the mutual promises of two persons. So called “classical contract law” worked with a doctrine of privity, which held that third parties affected by the contract had no particular rights to either be parties to legal cases or to be heard before the court as stakeholders.⁴¹ Contract law effectively had no account of third party effects, except where the purposes of the contract were clearly illegal. When in the nineteenth century it became increasingly clear that contracting activity did have such effects, such as in the case of industrial pollution or the need for public health measures, the state began to respond with legislation proscribing certain contract activities. The result was that contracts could still be understood as a realm of private activity, and legislation a justifiable interference into that contract activity.⁴² This created a division of labour whereby an administrative prosecution for violating a pollution ban was handled by different laws (and often different tribunals) than two party disputes concerning private conflicts over contracts. In the twentieth century classical contract law began to give way to the now dominant “neo-classical” contract law. In the newer version, courts could at times second guess the explicit wording of a contract to read from the social context a subtler understanding of the parties’ intentions. However, the doctrine of privity continues to this day.

Value-labeled goods suggest a rethinking of contract, because relations to third parties and ecosystems are seen as internal to the contract in the sense that terms for ensuring decent treatment of workers and the environment become included in the contract.⁴³ Value-labels help draw our attention to the fact that many of the contracts people enter

⁴¹ *Tweddle v. Atkinson* (1861) 121 E.R. 762 For contemporary cases of privity which show its problematic nature still survives see *Kitimat (District) v. Alcan, Inc.* [2005] B.C.J. No. 58, 2005 BCSC 44: The municipality in a one industry town was denied standing to contest non-compliance in a contract between the government and the one industry that affected the livelihoods of members of the town. For general discussion see Fridman, *The Law of Contract in Canada* *ibid.* at p. 186; H. Kincaid, “The UK Law Commission’s Privity Proposals and Contract Theory” (1994) 8 *J.C.L.* 51

⁴² J. Gordley “Contract, Property, and the Will--The Civil Law and Common Law Tradition” in *The State and Freedom of Contract.* (ed. H. N. Scheiber. Stanford, California:, Stanford University Press, 1998) at p. 72

⁴³ For example of how value-labels become terms of contracts see May, et. al.”Sustainable Coffee Trade” *ibid.*

into are problematic: Non-fair trade coffee, for instance, does not account for substantively unfair prices paid to farmers, or non-organic vegetables perpetuates environmental harms to agricultural land. With value-labels, consumers refuse to accept given social divisions of labour whereby they are to defer to just any consumer goods companies or to state regulators to ensure these concerns are met. Further, these labels suggest that the traditional Anglo-American concept of contract law fails to account for a wide range of values potentially involved in contract making. Contract law and practices of the market create a “frame” around the exchange process, drawing our sensibilities to only a few features that are important, and leaving presupposed and taken for granted historical and conceptual developments and social interactions.⁴⁴ Part of the significance of value-labeled goods such as fair trade coffee is that they break through this frame to draw into the exchange process wider linkages.

This is an issue both for the general social phenomenon of contracting activity as well as for the law of contracts that regulates and enables that social phenomenon. One argument concerns the ethics of contracting itself. Value-labels may well show that there are a range of virtues that can be exercised in decisions concerning contracting activity.⁴⁵ This shows that many individual contracting agents could broaden their conception of what a consumer transaction involves. Value-labels can then be configured as a tool in the deconstruction and critique of a widely held and practiced formalized concept of consumer transactions. In buying a consumer item, shoppers need to think not only of price, but also consider how workers have been treated or the environmental effects of the production, use and disposal of the good.

A further argument concerns whether this is a problem for contract law per se. If it is a problem we might look to both courts and legislatures to look for ways of re-designing contract law, and even provide a normative basis for activist judges to initiate reforms through re-interpretation of case precedent. We could imagine, for instance, a reconstrual of the implied terms in contract to include a rejection of goods made under conditions of child slavery, as has been reported in the case of chocolate imported from

⁴⁴ See Michel Callon "An Essay on Framing and Overflowing: Economic Externalities Revisited by Sociology." In *The Laws of the Markets* (ed. Michel Callon, Basil Blackwell and The Sociological Review, 1998)

⁴⁵ Micheletti, *Political Virtue and Shopping* *ibid.*

western Africa.⁴⁶ This may well represent a marked departure from current precedent, but a more radical judge may also feel justified in making the leap. Most *Sale of Goods Acts* provide that goods should be fit for their purpose, and there is no case law that rules out the idea that a history of slavery renders a product unfit for consumption.⁴⁷ Such maneuvers, if adopted, may enable judges to effect sweeping changes to commodities and consumption. The rationale for refusing to uphold child slavery tainted chocolate may refer to basic human rights. The implied terms machinery might be further pushed to include basic labour standards, terms protecting against ecological harm or even fair trade standards for all consumer goods.

The whole idea that contracts could be so transformed depends on a prior question concerning whether contracting activity is neutral with respect to these larger questions. There is a long tradition in legal and economic thought that sees the upholding of contracts as something neutral and distinct from government intervention. We find this in the classical economists such as Ricardo, Smith and Bentham,⁴⁸ and in any number of legal contracts cases in the past 200 years in the Anglo-American world.⁴⁹ It is also well enshrined in the “Washington Consensus” discourses of regulatory reform and institutional restructuring performed by international lending agencies and development banks in the 1990s.⁵⁰ According to this view, contract making carries no particular evaluative concerns, works to facilitate economic exchange, and is a natural and obvious feature of any market economy. A capitalist economy can therefore adopt a system of contracts and property protection and allow the market to do its work.

⁴⁶ This is the subject of the United States Harkin-Engel Protocol, which specified that the chocolate industry commit to ending child slavery in its supply chain by July 1st, 2005. The rights activist organization the International Labour Rights Fund filed a petition with the U.S. Customs Service on May 30, 2002, to initiate an investigation and enforcement action under section 307 of the Trade Act of 1930, 19 U.S.C. §1307 (1997). The law prohibits the importation of goods made by forced labor or child slavery. (Source: ILRF Press Release October 25, 2004 “Leading Human Rights Watchdog to sue U.S. Custom Service for not enforcing Laws Against Child Labor “. The case was dismissed on a procedural point: *International Labour Rights Fund, Global Exchange and Fair Trade Federation v. United States and Chocolate Manufacturers Association*. Court No. 04-00543 United States Court of International Trade August 29, 2005 Juge Judith M. Barzilay

⁴⁷ Note: To the best of my abilities I could not find such a case. I cannot rule out that someone else could. Please contact the author if you do.

⁴⁸ Patrick Atiyah, *The Rise and Fall of Freedom of Contract*, *ibid.* at p. 327

⁴⁹ The view is implicit in the classical law of contracts. I discuss this in a subsequent chapter. It still survives in contemporary Canadian Charter of Rights jurisprudence, see Andrew Petter and Allan C. Hutchinson “Private Rights and Public Wrongs” (1998) 33 *U. of T. L. J.* 3

⁵⁰ Kerry Rittich *Recharacterizing Restructuring: Law, Distribution and Gender in Market Reform*. (Kluwer Law International, 2002) at p. 130

Someone who defends this doctrine of neutrality might argue that problems of persons contracting for unethically made goods in no way infringes upon the legitimacy of a concept of contracts as mutual promises. The defender of orthodox contract doctrine may well acknowledge that deficiencies in global governance do create a range of ethical issues for consumers, and for society as a whole. The defender may still argue that these are problems either for regulators to worry about, or for consumers themselves to adopt as part of a concept of shared responsibility for environmental and global justice problems. In such a “legal division of labour” account, contract law has little to do with problems with commodities such as the environmental impacts of how they were grown or the wages paid to farmers. Contract and sale of goods simply facilitates their exchange. Commodities originate as natural resources and labour inputs, and throughout the twentieth century and especially since the Second World War, there have been forms of labour and environmental regulation in the industrialized states. Contracts, it might be thought, simply represent the exchange of goods and problems of regulating commodities can be deferred to property lawyers, environmental lawyers and legislatures. While fair trade goods point to deficient standards in less developed countries, this either reflects the economic and political situation in those countries or could be handled through forms of international agreements. On this reading, value-labels represent merely a voluntary approach on the part of consumers to attempt to better existing production related standards and represent little challenge to the normal contracting process. Indeed, it might even be argued that value-labels represent one of the successes of freedom of contract in that they open up vast possibilities for consumers to come to act differently, even where regulators feel themselves constrained from acting.

A strong current in legal scholarship and even contract doctrine itself suggests an alternative reading of contracts. The neutrality doctrine depends on the problematic idea of contracts as a formal construct, as embodied by the concept of mutual promises. In the classical doctrine of contracts, attempt was made to construe all contract activity in terms of the intentions of the contracting parties. The courts’ role is to uphold private agreements, and the content of these agreements is designed by the parties themselves. On this account the courts do not “intervene” in the normal workings of the market by using their power to protect the interests of certain parties secured by

contractual relations. Rather, the natural activity of the courts is to uphold contracts made between formally equal parties.

Such an extreme view of contract has fallen out of favour both in legal theory and in the courts. In the first decades of the twentieth century the United States Supreme Court gave constitutional protection to freedom of contract. On this basis the Court prohibited minimum wage or maximum work hour laws, as well as laws limiting freight rates for railroads.⁵¹ By the time of Roosevelt's New Deal, debates concerning freedom of contract were central to American politics. Legal realist scholars responded by insisting that contract law had to be understood in its social context, that contract doctrine could only be justified in the context of knowledge of its workings in the society and economy. Realists came to hold that legal and economic constructs such as "private property" and "freedom of contract" are not self-executing nor is their content self evident.⁵² Rather, they are open concepts, replete with internal puzzles with inevitable ideological and distributional choices. As such there is nothing "natural" about laws for the enforcement of contracts. Rather, the legal enforcement of contracts served to uphold existing economic and power structures.

The realists came to recognize that contracts involved issues of inequality of wealth and bargaining power. For instance, the construal of contracts as between formally equal individuals presupposes a degree of substantive equality.⁵³ Courts at times confront contracts involving extreme forms of abuse, such as where an impoverished and partially deaf alcoholic is tricked into selling his fishing boat for a song by a clever and

⁵¹ *Lochner v. New York* (1905) 198 U.S. 45 *Adair v. U.S.* (1908) 208 U.S. 161 *Coppage v. Kansas* (1915) 236 U.S. 1 invalidating legislation prohibiting employers from forcing workers to disavow union membership. *Adkins v. Children's Hospital* (1923) 261 U.S. 525 Invalidating a minimum wage law in District of Columbia. Beginning in 1935 the U.S. Supreme Court rendered a number of decisions invalidating new Deal legislation, including *Morehead v. New York ex rel. Tiplado*, (1936) 298 U.S. 587 a decision striking down state minimum wage legislation.

⁵² Rittich *Recharacterizing Restructuring*, *ibid.* at p. 133 citing Morris Cohen "the Basis of Contract" 46 *Harvard Law Rev.* 553; F. Cohen, "Transcendental Nonsense and the Functional Approach" (1935) 35 *Columbia Law Review* 809, Robert Hale "Coercion and Distribution in a Supposedly Non-Coercive State" (1923) 38 *Political Science Quarterly* 47, Hale, R. "Bargaining, Duress and Economic Liberty" (1943) 43 *Columbia Law Rev.* 605

⁵³ Michael Trebilcock. *The Limits of Freedom of Contract* (Cambridge, Mass: Harvard University Press, 1996). Anne Yeatman "Contracts, Status and Personhood" in *The New Contractualism?* (ed. B. S. Glyn Davis and Anna Yeatman. South Melbourne: Macmillan Education. 1997) at p. 2.

unscrupulous businessman.⁵⁴ In the nineteenth and early twentieth centuries the response of courts in the heyday of classical contract theory was often to maintain a strict enforcement of contracts on the basis of the mere existence of the contract. In taking themselves to uphold promises between two equal and arms-length individuals, the courts would not look into specific terms. Realist scholars pointed out that this fails to address a number of issues concerned with initial entitlements and the background conditions to contract. These will crucially influence the bargaining power of contract participants. Contract and property serves to uphold the position of parties prior to the contract, where prior distributions of wealth condition parties bargaining position in the contract. Realist scholars such as Robert Hale argued in the 1930s and 1940s that contract law thus needs to be viewed in the social context of the states' upholding of property rights, traditional allocations of wealth, and the functioning of the market economy. These serve to comprise the framework in which bargains are made.

The decision whether to uphold a particular promise is not an inevitable private decision, but a public venture that engages the state, and, potentially public deliberation concerning public policy issues. The state plays a significant role, both initial and ongoing, in regulating the distribution of economic gains from market processes because of its role as guarantor of the private ordering system. A sharp boundary between the state and the market becomes incoherent and impossible to maintain. Once private power becomes viewed as a delegation of sovereignty it becomes impossible to distinguish between private and public law as ways of regulating and structuring markets. As Kerry Rittich has recently summarized the realist approach, "Rights do not come before regulation; rather regulation is a mode of creating and reconfiguring rights."⁵⁵

The results of the realist movement were twofold. On the one hand, it helped drive changes to the law. Contract law came to increasingly consider issues such as extreme

⁵⁴ As in *Harry v. Kreutziger* (1978) 95 D.L.R. (3d) 231 (B.C.C.A) a leading Canadian case on unconscionability.

⁵⁵ Rittich *Recharacterizing Restructuring* *ibid.* at p. 138, drawing on M. Cohen "Property and Sovereignty" (1927) 13 *Cornell L. Q.* 8; M. Cohen "The Basis of Contract" (1935) 46 *Harv. L. Rev.* 553; R. Hale "Coercion and Distribution in a Supposedly Non-Coercive State" (1923) 38 *Political Science Quarterly* 47; R. Hale "Bargaining Duress and Economic Liberty" (1943) 43 *Col. L. R.* 605; R. Hale "The Supreme Court and the Contract Clause" (1944) 57 *Harv. L. Rev.* 512 ; M. Horowitz "The History of the Public/Private Distinction" (1982) 130 *U Penn. Law Review* 1423

forms of bargaining inequality. Classical contract gave way to neo-classical contract law, which survives to this day in the Anglo-American world. In the neo-classical tradition, contract still is understood as the mutual promises of the parties, and the contract as constituted by the parties' intentions. However, judges are more free to "open up" the contract to see if certain terms are unconscionable, or to use commercial practice and social context to ascertain parties intentions where the contract does not make this clear. This acknowledges the conceptual presupposition that the persons are capable of contracting as self-sufficient and rational agents, and works both procedural and substantive considerations of bargaining power and fair conduct into the concept of contract. Neo-classical contract law exists alongside various legislative provisions that also impact on contract. A range of legislative rules can now govern anti-competitive behaviour, health and safety requirements or employment standards. Issues of prior distributions of wealth in contractual settings may be ameliorated through social welfare policies in Northern industrialized countries, although these are also subject to considerations of wealth maximization and efficiency. Likewise there are few explicit restrictions on the extent of environmental laws incursion into contract, although, again, legislatures may well invoke questions of wealth accumulation to justify weak environmental regulation and acceptance of private ordering systems.

The second innovation was that increasingly legal scholars became impatient with restricting their study to the letter of contract doctrine, and instead started to investigate into the normative basis behind contract law and to analyze its social function. Scholars did not need to try and search out justifications for existing doctrine, as though they were forced to assume legal doctrine was de facto correct. Rather, they could ask how contract law could or should be in light of social needs and values. Since the 1970s three such approaches have remained prominent: Critical legal studies (CLS), relational contract theory and law and economics. Each of these approaches continue to have adherents and lively debates continue between each approach. Each approach seeks to reconsider the normative basis for contract and also to consider the ways in which contract law and practice works as part of the wider social order. CLS provides the most radical critique, seeking to call into question the legitimacy of contract law itself. Relational contract theory and law and economics are in part attempts to meet CLS halfway, simultaneously accepting its call for contract law to be normatively justified by social values, but in doing so providing different sets of values to provide the basis for

the justification. Fair trade goods pose a set of novel questions concerning the relationship of contract to ecological problems and forms of extreme poverty in commodity supply chains. Fair trade goods also indicate the ways in which the current arrangements of legislation and private law fail to address massive problems associated with consumption. The question arises as to what these three theories of contract might contribute to our understanding of the relationship between new concerns about sustainability and contract law.

2.3 Critical legal studies

CLS continues the realist tradition. The central CLS concern is that contracts in fact contain a multiplicity of different evaluative frameworks that contradict one another. The result is that contract law is inconsistent and cannot live up to the formalistic ideals of the idea of contract as mutual promises. Contract is largely inseparable from a range of public law measures. In the context of the new problematics of consumption, CLS implies that these *are* problems *for contract law, legislation and the market economy* that allows unfair and unsustainable global trade. No area of law is so sacrosanct that it should not be open to transformation to accord with our values.

Critical legal studies (CLS) scholars note that once substantive considerations are considered as relevant to contract, there arise serious doctrinal inconsistencies. Contract law can be widely construed to include legislation such as employment law, family law, or anti-competition law. However, once one takes into account the total contract framework one sees contradictory traditions. The twentieth century provides a series of positive law innovations introduced piecemeal, resulting in the construal of contract law (widely understood) as a series of technical issues balancing divergent interests.⁵⁶ When an attempt is made to read the overall framework in terms of an underlying normative vision the result is radical inconsistencies and contradictions.

Robert Unger sees disagreements structured according to philosophical poles of individualism and communitarian conceptions. The principle of freedom of contract is thus circumscribed by a counter principle: “the freedom to choose the contract partner

⁵⁶ Coyle and Morrow *The Philosophical Foundations of Environmental Law* *ibid.* They make this point concerning property law in the twentieth century at p. 96

will not be allowed to work in ways that subvert the communal aspects of social life”.⁵⁷ The exercise of a profession is not viewed in law as a mere contractual relationship, but brings special responsibilities such as professional liability: “it is based upon a network of personal interactions rather than upon either a fully articulated bargain or an exercise of direct governmental regulation”.⁵⁸ Laws that restrict contract in non commercial settings such as family and friendship are a further example of community based counter principles to traditional ideals of contract as free agreement of the parties. “These norms elucidate more clearly than any others the boundaries of the principle of freedom to contract and the vision of human coexistence within and outside commerce that these boundaries imply.”⁵⁹

The same polarities resurface considering judicial determination of contract disputes. Duncan Kennedy notes, for instance, how disagreements concerning contract stem from alternating political conceptions. Judges and legal scholars will disagree concerning outcomes in contract law according to their views as to individualism or altruism, as well as on self-determination as opposed to paternalism.⁶⁰ Faced with the common occurrence of inequalities in the marketplace, judges must apply a vague concept of economic duress that balances on the one hand, the need to maintain a system of private ordering, and on the need to keep the contractual regime from becoming a “power order”, in which courts give unqualified support to any economic activity. Should the doctrine of duress apply to poor consumers faced with high retail prices by large supermarkets, or to embattled unions negotiating wage roll-backs in one industry towns? From the viewpoint of individualism and private ordering, laws about duress are merely counter principles. As Unger notes: “if we start from the assumption that the underlying institutional and imaginative order can and should be changed, the counter principles lose any stable, natural and contained relation to the principles”.⁶¹ Judges have no choice but to draw “unstable, unjustified, and unjustifiable lines between those contracts that are voidable and those that are not”.⁶²

⁵⁷ Roberto Unger *The Critical Legal Studies Movement*. (Cambridge, Mass: Harvard University Press, 1983) at p. 61

⁵⁸ Unger, *The Critical Studies Movement* *ibid.* at p. 61

⁵⁹ Unger, *The Critical Studies Movement* *ibid.* at p. 62

⁶⁰ Kennedy, D. (1976). "Form and Substance in Private Law Adjudication." *Harvard Law Review* 89 1655.

⁶¹ Unger, *The Critical Studies Movement* *ibid.* at p. 39

⁶² Unger, *The Critical Studies Movement* *ibid.* at p. 39

The conclusion reached by scholars such as Kennedy and Unger is that there is no such thing as a determinate legal regime associated with freedom of exchange.⁶³ Nineteenth century economic formalists appealed to the idea that a perfectly competitive market would determine the outcomes in law. However, the bundle of rights that make something property in fact influence what that thing is worth in exchange. Different legal regimes will generate different types of property, which will create different allocations of resources. Because legal rules are constitutive of the market, market efficiency alone cannot determine what the rules will be. In the property context, the legal system must always make decisions that balance, on the one hand, a commodity owner's use of a thing with the consequences for someone else. Free exchange runs up against similar problems. "Free exchange presupposes that we can define coercion and fraud as independent of different values".⁶⁴ So while it is commonly held (by both right and left) that the nineteenth century featured a "free market economy" in fact this involved a number of evaluative presuppositions on the part of judges and lawyers concerning property and contract which could not themselves be explained solely in terms of a free market.⁶⁵

Far from being a neutral arbiter, the "market" is itself made up of particular interactions between persons, in which particular regimes of property and contract are operable. These rules cannot be understood simply as the expression of the market. This body of law, "is, in so much as it actually functions in the world, the collection of particular rules, not the general principles."⁶⁶ As such the legal system comes to bear on the working economy of capitalism through particular rules applied in particular cases by individual judges.⁶⁷ A detailed analysis of these subrules and their application shows that one

⁶³ Kennedy, "The Role of Law in Economic Thought; Essays on the Fetishism of Commodities" *ibid.* at p. 961; See also N. Anderson and F. "From Substance to Form: The Legal Theories of Pashukanis and Edelman" (1983) *Social Text* 7 at 69-84 make the point slightly differently, pointing out that liberal democracies and fascist dictatorships are different configurations of law and capitalism, at p. 73

⁶⁴ Kennedy, "The Role of Law in Economic Thought; Essays on the Fetishism of Commodities" *ibid.* p. 961

⁶⁵ Kennedy, "The Role of Law in Economic Thought; Essays on the Fetishism of Commodities" *ibid.* at p. 961

⁶⁶ Kennedy, "The Role of Law in Economic Thought; Essays on the Fetishism of Commodities" *ibid.* at p. 999.

⁶⁷ Kennedy, "The Role of Law in Economic Thought; Essays on the Fetishism of Commodities" *ibid.* at p. 998

cannot derive the subrules and their application from the general principles. When we “break up the law block” we see the internal incoherence and contingent constitutive role of law makers, themselves equipped with a complex of legal, ethical, political and social views.⁶⁸ Rather than broad rules governing conduct, there will be a web of particular decisions and interactions that guide the practice. These radically underdetermine how decisions can go.

These observations add up to the conclusion that we cannot conceive of law, or the treatment of the ownership and exchange of goods in law in terms of some rigid form, when in fact what we will have is a complex of principles, sub-rules and their manifold and pluralistic application in particular contexts, which will resemble one another in diverse ways. Judges will rely very much on their own background values and cultural orientation in maintaining the system, by reference to understood concepts of the existing legal and social order. For critical legal scholars, private law of contract, while generally understood as a neutral device for facilitating the joint action of disparate parties, is in fact a way of regulating exchange relationships, and carries with it assumptions about the subjectivity of the contracting parties and the mode in which exchange happens. Attempts to conceive of contract according to strict formalist principles are in fact ways of imposing an individualist conception which simply ignores the distributional and moral concerns that arise in particular contract cases. Particular judgments concerning contract necessarily involve evaluative decisions. Merely invoking the formal framework of contract law will not thereby provide sufficient guidance for judges, lawyers or anyone trying to apply the law. This is not a difficulty with following rules per se, and judges can and do regularly identify cases of breach of contract or unconscionable terms. The difficulty is instead one that arises from the complexity of particular contexts and the intrinsically normative basis of judicial activity.⁶⁹

CLS approaches suggest fair trade goods can be seen as an alternative to unfair trade: The courts and the state are implicated in enabling and enforcing networks of commodities in which coffee farmers (and others) are paid unreasonably low wages.

⁶⁸ Kennedy, “The Role of Law in Economic Thought; Essays on the Fetishism of Commodities” *ibid.* at p. 997.

⁶⁹ For a discussion of debates on rule-following and critical legal studies see See Ahilan T. Arulanantham “Breaking the Rules?: Wittgenstein and Legal Realism” (1998) 10 *Yale L. J.* 1853, also the compilation *Wittgenstein and Legal Theory* (ed. Dennis Patterson, Boulder, Co: Westview Press, 1992).

CLS critiques the negation of social values due to market conditions, and such an analysis is easily extendable to environmental values, although actual CLS proponents rarely did this. “Fairness” in fair trade can be construed, as per CLS values, in terms of the substantive power relations between producers and distributors. Critical legal studies casts the decision as to whether to uphold unfair contracts as resting on the contingent values of judges or legislatures, rather than the clear application of normative principles. Alternative concepts of fairness utilizing substantive values of power relations, altruism and community serve as a reference point for critique of the existing complex of case law that continues to uphold relatively formalist accounts of contracting. The purchasing practices of fair trade “enacts an alternative theory of contractual exchange.”⁷⁰

Commentators on fair trade goods have also given them a radical interpretation in keeping with the political motivations of the CLS schools: Elizabeth Barham argues that they represent “one historical manifestation of social resistance to the violation of broadly shared values by systemic aspects of “free market capitalism”.”⁷¹ Others have framed the issue in a softer tone, acknowledging fair trade goods as more of a social movement working within capitalist social relations to provide a way of doing things differently. As Michael Goodman and David Goodman explain, fair trade and green consumerism can represent a “re-ordering of society’s metabolic relations with nature via the growth of new producer-consumer networks cemented by shared social values and commitments”.⁷² This provides hopes for overcoming impersonal market relations and lead to “socially re-regulating and re-linking production, trade, and consumption in a manner that bridges the widening global/local divide”.⁷³

Critical legal studies sets the stage for analyzing law in terms of its social context, and the multifarious values that can come to bear on contracting and its role in the social world. While CLS scholars were focused on issues of distributive justice in the face of

⁷⁰ A. H. Kasteley, "Cogs or Cyborgs?: Blasphemy and Irony in Contract Theories." (1995) *Northwestern U. L. R.* 90: at 132

⁷¹ Elizabeth Barham "Towards a Theory of Value-Based Labeling." (2002) *Agriculture and Human Values* 19 349-60 at p. 351.

⁷² Goodman and Goodman "Sustainable Foods: Organic Consumption and the Socio-Ecological Imaginary" *ibid.* at p. 97

⁷³ Laura Reynolds and D.L. Murray "Yes, we have no bananas: Re-regulating global and regional trade" (1998) *International Journal of Sociology of Agriculture & Food* 7 at 7-44

capitalist power relations, they also suggest new ways of understanding linkages between values, social configurations and society, economy and ecology. Various environmental laws do impact on contractual freedoms such as where gasoline taxes make buying petrol more expensive, or where trades in endangered species are outlawed. There is no reason not to include environmental values into the mix of normative principles that clash for dominance in the inconsistent mix of legal governance. Once private law is recognized as political in the same way as public law, the distinction between public and private ordering gives way, and the wider community can, through democratic dialogue and participation, move to adopt various types of collective reconciliations of the competing norms.

In characterizing judicial decision-making as both intensely evaluative and formally unconstrained, CLS purports to open the door for techniques of radical adjudication which seek to extend common law precedents towards communitarian objectives. On the one hand it does signify the wide range of evaluative considerations and conflicting viewpoints that can be brought to bear on particular contract decisions once placed in their social (and ecological) context. While radical politics could favour fair trade goods, and radical judges could in particular cases refuse to uphold unfair commodity exchanges, such possibilities arises from the space of indeterminacy and contradiction in the existing normative order. With regard to judicial decision-making it risks underestimating the degree to which particular legal doctrine still does function to constrain judicial decisions. There are a host of doctrinal and system-imposed reasons why judges would be unlikely to imply a contract term of sustainability. Judges would likely see such a decision as being subject to appeal and would resist the shocks and radical indeterminacies it would throw into the judicial process. They would likely feel that the matters in question as best left to legislatures, even if their reasons were pragmatic rather than strictly principled. The CLS response can then be to argue that legislatures can legitimately and should seek to change the social order surrounding contract activity and even the terms of contracts themselves. However, the CLS approach then needs further accounts of how legislatures respond to and incorporate public deliberation and how such deliberation can proceed or be structured. CLS thus provides the stepping stones, but not the complete picture for a socially, economically and ecologically situated understanding of contract and exchange.

2.4 Contracts in context and contracts in relation

Ian Macneil's "relational contract theory" comes closer than any others to give voice to the idea of fair trade goods as embodying a concept of consumption as relationship. Macneil further extends the legal realist approach to provide a rich sociological account of the role of contract making in the social order. He emphasizes how contracts are embedded in complex social relationships. To that end, he argues that the values emphasized by traditional contract law are only one of many ways in which people can choose to, or already find themselves, relating. For Macneil, contracts are embedded in social practices existing in a context of norms independent of the parties' promises and agreements.⁷⁴ Actual practices, rather than legal typification per se, are what cement the relations between people in exchange. Understanding contracts requires thinking about exchange.⁷⁵ Actual contracts are not about law, but rather "getting things done in the real world—building things, selling things, cooperation in an enterprise, achieving power and prestige, share and competing in a family structure".⁷⁶ Contract is always a social act involving multiple layers of relationships.

In one sense relational contract theory serves as an extension of neo-classical contract law, providing a framework for understanding those contracts in which the parties plan a long-term relationship. These include requirement and output contracts, franchise agreements, some employment contracts, and marriage.⁷⁷ Here, the approach looks at aspects of the longer term relations that affect how the parties contract, what the terms of contract are and can be, and how they are interpreted, and what other 'norms' govern the relationship outside of the legally recognized contract. In some contexts parties continue relationships and proceed to act together in ways that contradict their initial agreements.

The deeper challenge of Macneil's relational contract theory is that all contracts are relational. Relational contract theory suggests that obligations evolve in the course of long-term relations, that obligations cannot always be derived from an originary act of

⁷⁴ Ian Macneil *The New Social Contract*. (Cambridge, Mass: Harvard University Press, 1980) at p. 7

⁷⁵ Macneil *The New Social Contract* *ibid.* at p. 5

⁷⁶ Macneil *The New Social Contract* *ibid.* at p. 5

⁷⁷ James W. Fox "Relational Contract Theory and Democratic Citizenship" (2004) 54 *Case W. Res. Rev.* 1 at p. 8

initial agreement. Rather there are a range of norms other than the express or implied consent of the parties.⁷⁸ This emerges from and accounts for the fact that relationships characterized by ongoing exchange are often defined by particular traditions, customs, habits, status, kinship, command or religious obligations. His approach is best understood as a legal theorist's contribution to social theory and economic sociology. He seeks to show how legal concepts of exchange help structure and influence the manifold relationships in which participants in Western industrialized societies find themselves. While partially structured by contract law and state law, this extensive array of relationships makes up the social world largely distinct from citizen-state relations. At the same time, contract relations are widely construed to include diverse areas such as employment law and family law that have at times been governed by, and are still largely influenced by contract law. While Macneil does not mention networks per se, he does hold that societies are made up of complex contractual relations widely construed.⁷⁹ "If one presses the term contact to encompass all exchange relations interlinked up to and including the world economy, all contracts are part of larger contacts up to and including that world economy."⁸⁰

Macneil notes that a particular concept of exchange and contractual norms dominates economic and social thought. "Discreteness is the separating of a transaction from all else between the participants at the same time and before and after".⁸¹ It is typified by simple exchanges of goods or services for money. It is exemplified by an ideal of contracts as constituted by explicit agreement and nothing else. It works as "an artificial technique" for "divorcing transactions from their social context" and has had paramount success over several centuries of capitalist development in Western social and economic thinking. It is a "technique of power" that is effective in virtue of its ability to provide focus and precision.⁸² "It enables people to deal precisely with one thing at a time—to keep their eyes on the ball---a vital factor in much human endeavour".⁸³ Macneil's analysis of contacts rests on a different picture than the discrete ideal would

⁷⁸ Paul Gudel. "Relation Contract Theory and the Concept of Exchange" (1998) *Buff. L. Rev.* 46: 763 at p. 770.

⁷⁹ Macneil, *The New Social Contract*, *ibid.* at p. 92

⁸⁰ See also Ian Macneil. "Values in Contract: internal and external." (1983) 78 *Northwestern U. L. Rev.* 2 pp. 340-419 at p. 342, note 4.

⁸¹ Macneil, *The New Social Contract*, *ibid.* at p. 60

⁸² Macneil, *The New Social Contract*, *ibid.* at p. 63

⁸³ Macneil, *The New Social Contract*, *ibid.* at p. 63

imply: “Man is both an entirely selfish and an entirely social creature, in that man puts the interests of his fellows ahead of his own interests at the same time that he puts his own interests first”⁸⁴ As Gudel describes this position, “we have as much interest in solidarity as we do in capturing for ourselves as much of the exchange surplus as we can. Our interest is in sustaining the proper combination of solidarity and reciprocity. Utility maximization is not the only human motivation that functions in exchange relations”.⁸⁵

Like the critical legal scholars, Macneil’s approach does not limit the sphere of contract to the specific cases that contract law handles. Contracts extend to a variety of different practices and social relations that have been come to be governed by legal regimes other than contract law. This helps to show how a range of values and understandings distinct from contract law doctrine are relevant to understanding different modes of relationships and that contracts cannot be understood simply in terms of the mutual promises and agreements of the contracting parties. The concept of contract is extended to cover any range of relationships in which there is some element of consent, even including relationships such as in families or workplaces where the consent element has far diminished importance. Macneil identifies two level of “values”: Internal values of contract and external values of society responding to contract. These values are reflected in the goals and means of people engaged in contract, internal principles and rules governed by contract behaviour, and in external social responses to contract. In particular, values internal to the contract are generated by the relations of the parties, and are reflected in a number of contract norms which are variously present in any contract. Macneil suggests ten norms that govern contractual relations: (1) role integrity, (2) reciprocity, (3) implementation of planning (4) effectuation of consent, (5) flexibility (6) contractual solidarity (7) protection of the restitution, reliance and expectation interests, (8) creation and restraint of power, (9) propriety of means and (10) harmonization with the social matrix.⁸⁶ This list serves to illustrate the internal norms that drive contract: The idea of contract as promises would draw on only the norms of role integrity, implementation of planning, effectuation of consent and creation and restraint of power.

⁸⁴ Macneil “Values in Contact” *ibid.* at p. 348-9

⁸⁵ Gudel, “Relation Contract Theory and the Concept of Exchange” *ibid.* at p. 785

⁸⁶ Values in Contract, at p. 347, and Ian Macneil “Relational Contract Theory as Sociology” (1987) 143 *Journal of Institutional and Theoretical Economics* 272, at p. 274-76

Macneil's schema suggests a way of understanding one aspect of value-labelled goods such as fair trade coffee. The Fair Labour Organization standards govern relationships between coffee buyers (usually roasting companies) and sellers (typically small farmers' cooperatives). They are to enter into long term and stable contractual relations⁸⁷ and these echo many of the relational considerations Macneil considers. The standards include the provision that a contract will be made for the first part of the growing season with a letter of intent for the rest of season, to be confirmed by purchase contract as the harvest progresses.⁸⁸ A further provision requires sixty percent pre-financing, so that small coffee producer organizations have access to credit and investment money as needed through the growing season.⁸⁹ Part of fair trade systems are that coffee growers receive a fair price for their coffee, one that reflects their needs for a decent life, rather than mere market rates and prices are set as part of the standards. Macneil's conception calls for detailed examination of exchange relations, applying a complex taxonomy of different norms that operate simultaneously. On the face of the FLO certification standards, fair trade coffee represents an example of not only a long term relational contract but one governed by values of social solidarity, and enhanced sense of reciprocity in relations. Recent empirical analysis bears out that the system works largely as planned concerning these relationships.⁹⁰ The guaranteed price does pay as much as double convention market prices, access to credit has improved and workers cooperatives and organizational capacity has been strengthened.⁹¹ At the same time the tight constraints of the FLO certification system reintroduce the discrete norms, making planning and detailed contractual specifications replace face to face interpersonal relationships, and ongoing negotiation.

For Macneil, contractual relations are generally viewed by most persons in society as enhancing social solidarity, by virtue of the fact that "an exchange-surplus is produced

⁸⁷ Fair Trade Labelling Organization *Fair Trade Standards for Small Farmers Organizations*. (Version 12/05, 2005 Available at www.fairtrade.net.) at Part C, paragraph 2.

⁸⁸ *Fair Trade Standards* *ibid*, part C, paragraph 2.

⁸⁹ *Fair Trade Standards* *ibid*. Part C paragraph 5.

⁹⁰ Laura Reynolds, D. Murray, and P. Taylor "Fair Trade Coffee: Building Producer Capacity Via Global Networks" (2004) *Journal of International Development*. 16. 1109-1121

⁹¹ P. Taylor "In the Market But Not of It: Fair trade Coffee and Forest Stewardship Council Certification as Market-Based Social Change" (2005) 33 *World Development* 1 at 129-147

by deals”.⁹² But “Affirmative views of exchange can easily change and parties be seen as trading in harm rather than in good. This happens, for instance, wherever one side is seen as hogging the exchange-surplus or otherwise misusing power”. Fair trade serves as a way of ensuring that the coffee commodity chain does not “rapidly convert the psychology of exchange from that of goods to that of harms”.⁹³

Relational contract theory does suggest a much broader understanding of transactions as embodying relationships. Gudel writes that Macneil’s account construes humans as both selfish and social, but that Macneil conceives the pay off of an exchange as something separate from the exchange itself: the selfish side benefits from exchange. Gudel notes, however, that relational contract theory provides a deeper overriding lesson, in terms of the need for philosophical reflection on the motivations behind contract. Gudel thus invokes an Aristotelian notion that contracts might involve “actions performed for the value of the action itself”.⁹⁴ Just as a sports fisherman fishes for the activity itself and not just for the final product, contracts can be about maintaining relationships. In this light the discrete-relational distinction forms a continuum from contract done for the sake of profit on one end to those done for the sake of maintaining relationships themselves on the other. For Gudel, “towards the relational end of the continuum, possession of any exchange surplus begins to share equal time with the satisfaction gained from the activity of the relationship itself”.⁹⁵ This in turn suggests that we can see even discrete transactions as potentially involving much wider relational aspects where the purchase of goods is construed as about maintaining relationships that are good in themselves.

Macneil’s approach does not explicitly deal with, and would need to be extended to provide an account of, the relations produced between *consumers* and small coffee producers or the ecosystems in which coffee farming happens. Advocates of fair trade as well as researchers have noted that “Fair Trade’s re-personalized trade relations are animated by an alternative set of moral values or civic norms, including fairness, trust and equality among consumers and producers”.⁹⁶ This stands in contrast to traditional

⁹² Macneil, *The New Social Contract* at p. 103

⁹³ Macneil, *The New Social Contract* at p. 103

⁹⁴ Gudel, “Relation Contract Theory and the Concept of Exchange”, *ibid.* at p. 787

⁹⁵ Gudel, “Relation Contract Theory and the Concept of Exchange” *ibid.* at p. 788

⁹⁶ Taylor “In the Market But Not of It” *ibid.* at p. 139

modes of trade which foster anonymity and render caring and solidarity unnecessary sentiments as the consumers' role in the commodity market is limited to the use of the powers of exit.⁹⁷ The difficulty here is that Macneil adopts a two –party framework for contracts while the consumer producer relation involves at least two stages, one linking consumers to merchants and a further linking merchants to coffee growers. In fact commodity networks can have multiple intermediaries.

In treating simple exchanges of goods as approximately discrete relationships Macneil misses the way commodity networks engender wider social relations. As a recurring example of what could count as the closest possible proximation to a discrete transaction Macneil chooses the purchase of gasoline at a service station along a superhighway. In an earlier formulation of his theory Macneil wrote that this represented an example of a discrete relationship, because of its short term duration and easy measurement of gallons of gas for dollars.⁹⁸ In later revision he acknowledges that a number of social relations arise. These include “Customs dictating which side of the pump a car going a particular direction should use, that the driver should move his car while he goes to restroom, and that he should not smoke around the gas tank”, “that the station attendant should clean the windshield and ask to check ‘under the hood’”.⁹⁹ These are all integral parts of the relations between the parties. Even putatively discrete transactions are “deeply embedded in a wide range of interconnected relations”.¹⁰⁰ However, what any ecologist would quickly surmise is that he has not included the various ecological relationships inherent in the gasoline and its use in automobiles. The approach needs to be extended to include the ways in which ecological relationships are also part of contract, and how person to person relationships of exchange also embody wider linkages to distant other people and places. Further, understanding the particular exchange (of gasoline for money) also requires an analysis of the social power of oil companies, car makers and the transportation system itself.

A possible explanation for this oversight refers to the ways in which Macneil's approach focuses on the norms generated out of, and so “internal” to contract and the contracting

⁹⁷ Hudson and Hudson “Removing the Veil: Commodity Fetishism, Fair Trade and the Environment”, *ibid.* at p. 418

⁹⁸ Ian Macneil “Many futures of contract” (1974) 47 *S. Cal. L. Rev.* 691

⁹⁹ Macneil “Values in Contract: internal and external.” *Ibid.* at 342.

¹⁰⁰ Macneil, I. “Many Futures” *Ibid.* at p. 342

parties. Macneil stresses the ways in which particular interrelationships vary depending on the values and practical arrangements between the parties. The reference to contract values serves a descriptive function, to elucidate how normativity is realized in different contractual contexts, rather than to equip the theorist with a critical basis with which to judge particular contracts. James Fox argues that the approach thus fails to account for a variety of non-contract based values that govern contracts in family, employment and labour law, in particular values of citizenship. Once issues of citizenship are introduced, the contract bears a relationship with the state and political community and is no longer constrained by the two party framework.¹⁰¹ Specification of minimum hours laws reflect a recognition that contracts also involve basic aspects of a persons' integrity, the protection of which concerns the wider political community. Labour regulations also have a collective nature: A company suffers if its competitors enjoy more lenient laws. The internal/external division merely reintroduces contract formalism that divorces contract making from its wider context. More forcefully, Kasteley argues that "relational contract theory is not helpful in addressing the practices of exploitation, powerlessness and marginalization that contract ideology justifies or conceals".¹⁰² The difficulty is that the approach is quietist as to whether transactions may be discrete, exploitative or marginalizing.¹⁰³

Macneil does recognize that a variety of norms do circulate in the social world: "once contract is perceived to encompass all aspects of life, there can be no supracontract norms that are not particularly contractual"¹⁰⁴. For Macneil, norms such as "distributive justice, liberty, human dignity, social equality and inequality, and procedural fairness are then contract norms, to the extent that they are essential to contractual behaviour, they are common norms, not just relational norms".¹⁰⁵ Norms can be worked in to contracts as social values that are not particularly related to contractual relationships. Rather, Macneil is intent on showing how a plethora of different relationships and values embodied in contract relations constitute the moral order. His interest is in showing how particularly contractual norms provide social values: "the norms generated internally in billions of contractual relations are the most important in determining the value patterns

¹⁰¹ Fox, "Relational Contract Theory and Democratic Citizenship" *ibid.*

¹⁰² Kasteley, "Cogs or Cyborgs?" *ibid.* at p. 154

¹⁰³ Kasteley, "Cogs or Cyborgs?" *ibid.* at p. 155

¹⁰⁴ Values in Contract, at p. 350

¹⁰⁵ Values in Contract, at p. 350

of the overall society in which they occur”.¹⁰⁶ The difficulty here is two fold. First, the choice of contract norms rather than “supracontract norms” for prioritization seems arbitrary. Second, there seems no particular way of ordering Macneil’s plethora of norms. While fair trade goods might be understood as a vehicle for building bottom up relations of solidarity, there is no particular overarching norm justifying their imposition. They remain one form of exchange amongst others.

The similarities between relational contract theory with critical legal studies are striking. The politics of relational contract theory and critical legal studies do not coincide: Macneil at times talks disparagingly of protection of union workers job security as interfering with the internal norms of worker-employer relations.¹⁰⁷ However the two approaches do share an acknowledgment of divergent values present in actual contract doctrine and a critique of the ways in which a narrow reading of exchange relations as discrete imposes individualist values. Both approaches draw on the wider context of social relations to show the effects of contract doctrine on influencing and shaping underlying contractual relations. The difficulties that plague CLS and relational contract theory are also similar. As Randy Barnett has argued, by cutting out of contract theory the discrete notion of consent embodied in the promises model of agreement, Macneil has made it too difficult to tell when one has entered into a relationship that has legal consequences, and when contract law will be applied: His theory is too encompassing in that it is unable to distinguish between legally enforceable and legally unenforceable exchanges.¹⁰⁸ It thus shares with critical legal studies the status of being a fundamentally external critique: the breadth of sociological analysis which provides an account of the workings of contract relations and the values involved at the same time effectively disqualifies it as an account of contract law doctrine. The critique of the narrow range of values embodied in contract finds itself unable to squeeze itself back into that box. Once out of the box the account is confronted by a bewildering array of social values that come to bear on contract and the existing legal regime appears incapable of handling the excess.

¹⁰⁶ Values in Contract, at p. 351

¹⁰⁷ See Macneil “Values in Contract” *ibid.* at p. 372, discussing the case of *Edward B. Budd Manufacturing Co. v. N.L.R.B.* 138 F. 2d 86 (3d Cir. 1943); and Kasteley, “Cogs or Cyborgs?” *ibid.* offering a critical legal studies based critique of relational contract theory.

¹⁰⁸ Randy Barnett “Conflicting Visions: A Critique of Ian Macneil’s Relational Theory of Contract (1992) 78 *Va. L. Rev.* 1175

2.5 Law and economics of consumption

Law and economics has served as one of the dominant forms of legal scholarship in North America. It draws on welfare economics which uses the market model of preference maximization and utility to define well-being. Welfare economics has been the predominant approach in economic theorizing on consumption since its inception in the late nineteenth century.¹⁰⁹ It also has underscored consumption policy in Western industrialized countries for most of the last century.¹¹⁰ Law and economics shares with relational contract theory and critical legal studies the legal realist perspective that legal doctrine, both common law and legislative, is not self-justifying, but must be understood and justified in virtue of social context. Moreover, in seeking to provide a rationale for law on the basis of economic principles, the approach can view law as an entirely regulatory endeavour and show little deference for common law principles that conflict with the public interest (as construed economically). The analysis also gives attention to social context: The analysis of how regulation should be structured depends on detailed analysis of economic conditions and persons' preferences. However, the case of fair trade goods shows how this approach re-instates contract formalism about the exchange process at the level of the model of preferences and choice.

In the law and economics paradigm it is assumed that "individuals and communities will (or should) attempt to maximize their desired ends (which may be of infinite variety) by doing the best they can with the limited resources (means) at their disposal".¹¹¹ At root is the idea of desired ends, which are understood as individual preferences. The economic analyst will assume that "most individuals are motivated by rational self-interest, in the sense of maximizing their individual utilities, subject to whatever constraints are imposed on the choices open to them".¹¹² In classical economics in the nineteenth century utility was equated with particular subjective states. Since the (economists') neoclassical revolution in the 1870s utility refers to "preferences".

¹⁰⁹ John Gowday "Contemporary Welfare Economics and Ecological Economics Valuation and Policy" *Internet Encyclopedia of Ecological Economics*. (International Society for Ecological Economics, 2003); B. Fine "From Political Economy to Consumption" in *Acknowledging Consumption: A Review of New Studies*. (ed. D. Miller. London and New York: Routledge, 1995) at p. 128.

¹¹⁰ Lucia A. Reisch, "Sustainable Consumption as a Consumer Policy Issue" In *The Ecological Economics of Consumption*, (ed. Lucia A. Reisch and Inge Ropke, Northampton, Mass:Edward Elgar, 2004).

¹¹¹ Trebilcock. *The Limits of Freedom of Contract* *ibid.* at p. 3.

¹¹² Trebilcock. *The Limits of Freedom of Contract* *ibid.* at p. 3

Preferences refer to states of affairs that persons choose. Preferences are linked to commodities as what can be bought and sold in markets, or for which analogues of markets can be imagined. Choice can then be understood in terms of choosing the one or bundle of commodities one prefers.¹¹³ Preferences will shift depending on the prices to be paid for goods allowing for the mapping of how consumers may respond to price signals.

At a normative level the concept of “efficiency” allows for the calculation of whether a particular transaction, legal change or policy proposal would increase utility. As Fine describes neo-classical welfare economics, “consumption is reduced to the theory of the demand for goods”. For Fine, “the consumer is treated as a self-employed firm which seeks to produce utility as cheaply as possible and makes demands for inputs according to their prices”.¹¹⁴ The consumer need only judge whether a given commodity would serve her interests, and so does not need to have knowledge of the wider processes and interconnections consumer goods embody. She need only know the price of the good and her own preferences. This allows for systems of commodities to reach levels of complexity far beyond the normal knowledge of typical consumers. In these accounts, consumer transactions are always *prima facie* good, a realization of a way to maximize preferences.¹¹⁵ Laws are then understood in terms of their contribution to preference-maximization.

Law and economic scholars can take the position that contractual relations be “Pareto optimal”-- both parties are made better off or equal relative to their initial position before contracting. If Pareto optimality becomes a constraint on government regulation, then no policy or legal change is justified which renders any person worse off. The result is a general presumption of non-interference with market choice except in the case of harms. There would be no justification for government or court mandated implied terms in contracts in general.¹¹⁶ Alternatively, according to “Kaldor-Hicks” efficiency particular

¹¹³ See H. Varian. *Intermediate Microeconomics: A Modern Approach* (Second Ed. W.W. Norton & Company, 1990)

¹¹⁴ Fine “From Political Economy to Consumption” *ibid.* at p. 128

¹¹⁵ Trebilcock. *The Limits of Freedom of Contract* *ibid.* at p. 60

¹¹⁶ Hence the normal defense of implied terms in Sale of Goods is that they are “default rules” which help ease the contracting process, but for which parties can contract out. They only hitch in the theory is that in many jurisdictions legislation makes implied terms as to fitness for purpose mandatory.

projects, policies of wealth distribution or laws are justified on the basis that the improvements to everyone's utility would be such that the winners could hypothetically compensate the losers until they are indifferent and still stay ahead.¹¹⁷ This allows for a variety of regulations, and law and economics need not be identified with free market "neo-liberalism". By comparing the prices paid when provided by a public or regulated systems, as opposed to market conditions, the approach can argue for various interventions. Microeconomics textbooks commonly include a discussion on the provision of public goods and the analytic models can be extended to show how situations arise where the state can provide goods more efficiently than free markets.¹¹⁸

Consumer sovereignty can thus give way to a variety of modes of regulation that help avoid problems of free-riders or bias in the market towards private goods.¹¹⁹ Once calculations are permitted as to how to best maximize individual utility, utility can be increased regardless of whether consumers have been consulted or approved of the measure. The approach can suggest a strong rationale for regulation and government action based on hard numbers and calculations. The preponderance of "bads" over "goods" can be identified as caused by problems of collective action which state intervention can help alleviate.

The basic micro-economics concept of preferences is methodologically individualist. However, treating utility as something aggregated for the total society, Kaldor-Hicks efficiency calculations favours collective action coordination concerning how to structure consumption. In the normal case individual exchanges are seen as being utility creating, and the market as presumptively efficient. Moreover, the market is appreciated for its ability to handle levels of complexity that planning cannot. However, in particular contexts the approach may well prescribe collective consumption in the forms of parks, or public transit, regulation to offset environmental harms, all paid for through the taxation system. This can include the introduction of commodity ad-valorem taxes that provide disincentives for consumers to engage in polluting or otherwise ecologically harmful consumption decisions. Fair trade goods can be analyzed in terms of their effectiveness in realizing individuals' preferences, as well as compared to alternative

¹¹⁷ Trebilcock. *The Limits of Freedom of Contract* *ibid.* at p. 7

¹¹⁸ See, for example, Varian *Intermediate Microeconomics*. *Ibid.* at p. 558 to 581

¹¹⁹ Heath "Liberal Autonomy and Consumer Sovereignty" *ibid.* at 219

strategies including taxes, command and control production regulation or outright bans.¹²⁰

The law and economics movement faces a number of criticisms of its construal of subjects (persons), exchange, and environmental harm. Mark Sagoff argues it is an appropriate model for considering public environmental concerns such as parks protection.¹²¹ Margaret Radin worries about this model serving as the basis for laws concerning reproductive technologies or as a model for understanding democratic politics.¹²² A framework based on utility maximization simply conflicts with moral frameworks that recognize basic human rights, the values of personhood or the intrinsic worth of ecosystems, parks, species and other environmental features. The nature of these issues is such that they cannot be accurately represented by scalar orderings (usually in terms of money equivalence) and so require public deliberation. If we have moral obligations to future generations to ensure that our economy works within ecosystem carrying capacity, as ecological economists argue and which concepts of sustainable development suggest, then this should simply take precedence over preference weighings that do not support that outcome.¹²³

The law and economics theorists may still respond that these criticisms are largely valid, but represent external constraints that limit the application of the approach, rather than showing inherent difficulties with microeconomic modeling. Michael Trebilcock, for instance, wishes to uphold as much as possible the “system of private ordering” while acknowledging the “central importance both of formulating an appropriate set of background legal entitlements in the shadow of which a private ordering regime must necessarily operate, and of sensitivity to various forms of transaction-specific failures

¹²⁰ L. Valentini and V.S. Venice “Environmental Quality Provision and Eco-labelling: Some Issues” WTO Working Paper ERSD-2005-02 June, 2005; S. Bansal, S.Gangopadhyay: “Tax/Subsidy policies in the presence of environmentally aware consumers”, (2003) *J. Environ. Econ. and Management* 45 at 333-355; T. N Carson and L. Gangadharan “Environmental Labelling and Incomplete Consumer Information in Laboratory Markets” (2002) *J. Environ. Econ. and Management* 43 at 113-134; C. Dosi and M. Moretto “Is Eco-labelling a Reliable Environmental Policy Measure?” (2001) *Environmental and Resource Economics*, 18 at 113-127; M.F. Teisl, B. Roe, R. L. Hicks “Can Eco-labels Tune a Market? Evidence from Dolphin-Safe Labelling” (2002) *J. of Env. Econ. and Management*, 43: 339-359.

¹²¹ Mark Sagoff. *The Economy of the Earth*. (Cambridge, Mass: Harvard University Press, 1987).

¹²² Margaret Radin *Contested Commodities*. (Stanford, Cal: Stanford University Press, 1996).

¹²³ Kysar “Law, Environment and Vision” *ibid.* at p. 684, Douglas Kysar “Climate Change, Cultural Transformation, and Comprehensive Rationality”, (2004) 31 *Boston College Env'tl. Affairs L. Rev.* 555

which may require legal responses”.¹²⁴ He is sensitive to realist concerns about assumptions in contract law. He argues that we can only justify the exchange of goods and services on the assumption that a party to contracts is not in a situation of desperation whereby they have no alternatives. One source of such desperation can be forms of poverty that effectively remove choice as to whether to act as a prostitute or accept wages that do not provide for even sufficient food. This admits that substantive concerns about bargaining equality are presupposed by the exchange. However, respect for autonomy values leans towards favouring private ordering. A liberal respect for autonomy values and wealth creation suggests that we can first meet these background conditions and then allow individuals to pursue, in the market, their own life plans. Prostitutes can then ply their services.¹²⁵ Particular practices of production and consumption can still be modeled using microeconomics and limited by the imposition of external values such as distributive justice and autonomy at the level of state taxation policy and legal frameworks such as rights based constitutions. While critical legal scholars have noted that the formal structure of contracts depends on prior legal questions,¹²⁶ the liberal law and economics approach suggests this can be alleviated by ensuring that initial conditions of wealth and opportunity that might cause injustice or oppressive bargains are practically dealt with and need not overturn the private ordering perspective. Political questions concerning contracting are thus removed from the contract and property context and deferred to public law interventions.¹²⁷

This suggests an analogous argument that the liberal law and economics scholar might make in the environmental context. Attempts at environmental regulation on the basis of cost-benefit analysis cause intractable problems concerning how to measure the ways persons might have subjective concern for environmental issues. When confronted with issues like global warming, the heady mix of issues concerning how to value species, future generation well-being, environmental services, loss of human life, and risk adversity result in cost-benefit analysis studies importing researchers own evaluative concerns.¹²⁸ A better response may be to treat analysis of efficiency as presupposing

¹²⁴ Trebilcock. *The Limits of Freedom of Contract* at p. 57

¹²⁵ Trebilcock. *The Limits of Freedom of Contract* at p. 42

¹²⁶ Kennedy, “The Role of Law in Economic Thought; Essays on the Fetishism of Commodities” *ibid.*

¹²⁷ Trebilcock. *The Limits of Freedom of Contract* at p. 100

¹²⁸ See Kysar “Climate Change, Cultural Transformation, and Comprehensive Rationality” *ibid.* critiquing Lomborg, B. (2001) *The Skeptical Environmentalist: Measuring the Real State of the*

some base line levels of environmental sustainability. This would require ensuring certain environmental protections are treated as prior to efficiency concerns and so removed from the purview of welfare notions of tradeoffs and fungibility. Consumption policy could then be structured according to normal law and economics principles within these constraints. This construes the normal market much like how emissions trading schemes are envisioned by ecological economists. We first set the total level of acceptable pollutants through processes of public deliberation or acknowledgement of ecosystem limits, and then trade pollutants within these limits. Of course this level of acknowledgment of environmental values already moves the conception considerably away from a free market or even autonomy based regime, and no clear provisions are given as to how to balance the competing values.

Even if those conflicts were worked out, the approach still faces serious difficulties concerning the articulation, and measurement, of preferences in those cases where welfare notions are deemed to be at play. We may be able to reach widespread agreement on the moral imperative to act to stop large scale environmental catastrophe and share a belief that our market simply presupposes some base line of environmental services. However, in localized cases (*this* marsh versus the proposed shopping mall) we will be confronted with difficult problems of reconciling environmental values, personal autonomy and utility maximization. Economic modeling and cost-benefit analysis are still predominant tools for resolving these disputes and work from the microeconomic concept of preferences.

Recognizing that consumption is a way of relating to other ecosystems and other people brings a level of concern about values and relationships to every daily consumer transaction. This affects the very idea of utility in the welfare economics model. This is not only a problem of preferences, but of the whole structure of how exchange is understood, and the implied concepts of persons, things and relationships. As ecological economists such as Herman Daly, communitarians such as Charles Taylor and post-structuralists such as Foucault have argued, to see a person as interrelated with others is to drop the idea of the abstract individual, and instead to adopt the “person

World; Nordhaus (1992) “An Optimal Transition Path for Controlling Greenhouse Gases” 258 *Sci.* 11315; Nordhaus (1994). *Manning the Global Commons. The Economics of Climate Change*; Nordhaus and Joseph Boyer. *Warming the World: Economic Modeling of Global Warming* 5-7 2000.

in community”¹²⁹ whose self-understanding develops through relationship and dialogue with others.¹³⁰ This means that preferences will be formed against a backdrop of existing opportunities and the matrix of discourses and practices making up a persons social context and which inform her practical judgments.¹³¹ These concerns suggest decision-making needs to be informed by more flexible processes of deliberation which include reflection on the evaluative discourses, material practices, and practical systems which inform persons’ subject position.

In seeing the consumption of goods as embodying persons’ relationships to distant other people, places and ecologies the wider relational analysis challenges the idea that the articulation of preferences can capture the range of ethical and evaluative interdependencies that consumption involves. In part this is a problem with monetary valuation. We value things in many different ways,¹³² and not all objects of human desire and value can be represented as commodities.¹³³ Many non-human entities such as ecosystems cannot be easily traded away: They are at root nonfungible. There are competing senses of what counts as the good life for a person, and a variety of approaches insist that there are meaningful “third person” accounts to be had of not only a persons basic needs, but what makes for decent quality of life: these conflict with, and are arguably superior to the blanket postulation that persons expressed or exhibited preferences are the best measure of well-being.¹³⁴ By treating preferences in networks as discrete goods that are fully articulable, the law and economics model misses the entire ethics of relationship. When we describe workers as exploited, for instance, we are making a claim about unfair allocations of profit accruing from the worker-owner relationship: one side is hogging the surplus value and causing disproportionate harm to

¹²⁹ Herman Daly *For the Common Good*. (Boston, Mass: Beacon Press, 1989) at p. 159-164

¹³⁰ Charles Taylor *Sources of the Self*. (Cambridge, Mass: Harvard University Press, 1989). Michel Foucault “The Subject and Power” in *Power. Collected Papers of Foucault Volume Three*. (Ed. P. Rabinow. New York: New Press, 2000).

¹³¹ Duncan Kennedy. “Cost-Benefit Analysis of Entitlement Problems: A Critique” (1980-1981) *Stan. L. Rev.* 33 at 387; Cass Susstein “Endogenous Preferences, Environmental Law.” (1993) *22 J. Legal Studies* 2 at 217-54.

¹³² Elizabeth Anderson, *Value in Ethics and Economics* (Cambridge, Mass: Harvard University Press, 1993) at p. 2.

¹³³ Radin *Contested Commodities* *ibid*.

¹³⁴ For objective theories of well-being see Tim Jackson, Wander Jager and Sigrid Stagl “Beyond insatiability—needs theory, consumption and sustainability” *Ecological Economics of Consumption* . (ed. Lucia A. Reisch, Inge Ropke Northampton, Mass: Edward Elgar, 2004). discussing the work of Abraham Maslow, Manfred Max-Neef, Amartya Sen and Martha Nussbaum.

the other. The law and economics model has no way of even seeing this problematic.¹³⁵ This problematic can be explored by looking at the role of ethical goods in the market ideal.

2.6 Ethical goods in the market ideal

In the relational approach to consumption and exchange, part of the explanation for value-labeled goods makes reference to the self-reflection and values of consumers concerning the persons, ecosystems and processes behind the product. In the market ideal, however, they are appraised in terms of being alternative *goods*, that is, as a new niche product that reflects the preferences of a particular sub-class of conscientious consumers. The evaluative concern and reflection is folded into a subjective state of the consumers and deprived of its relational aspects. Douglas Kysar, seeking to justify ethical or value-labeled goods from within the market model writes that such goods provide the “procedural utility that consumers might derive from participating in a marketplace that afford the opportunity to “vote” through private consumption on important matters of public policy”¹³⁶ and elsewhere, “manufacturers of process-distinguishing goods, in essence, are selling consumers a voice”.¹³⁷

Prima facie, the presence of ethical goods on the market would seem to offer a challenge to the assumption of egoism (self-interest maximization) in the market ideal. Not only have non-governmental organizations, advocacy groups, and journalists worked (often selflessly) to develop different types of commodity networks that improve working conditions or environmental impacts, but the fact that such networks are flourishing suggests consumers are willing to look into the processes behind products and look for more altruistic or responsible ways to consume.¹³⁸ However, welfare economists have long held that the theory defines utility in terms of preferences, and preferences can themselves be altruistic. The difficulty has always been that it is not so clear how such altruism or responsibility could be reflected in market conditions.

¹³⁵ Macneil, Ian *The New Social Contract* .ibid., at p. 103.

¹³⁶ Douglas Kysar “Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice” (2004) 118 *Harv. L. Rev.* 2 at 525-640.

¹³⁷ Kysar “Preferences for Processes” *ibid.*

¹³⁸ Barham “Towards a Theory of Value-Based Labeling.” *ibid.*

To make up for this shortfall, law and economics scholars invoked the concepts of moralisms to explain how the market ideal could accommodate such altruistic attitudes. In one of the seminal law and economics papers, Guido Calabresi and A. Douglas Melamed confront the issue of how a person (they call him Marshall) is affected when another person (Taney) sells himself into slavery.¹³⁹ For Calabresi and Melamed, Marshall's concern for Taney's freedom from enslavement is something that can be conceived in a commodified form, as a discrete object that reflects his concern. This is a moralism, a way of shifting our other-regarding values into a form which can be traded off in calculations concerning the best way to do things—as commodity-things. In an ideal market Taney's masters would have to compensate Marshall and this explains, for Calabresi and Melamed why we have a law against slavery: The law provides an efficient way of distributing such commodified concern.

One type of moralism predominant in the literature concerns “environmental externalities”. In some externalities cases there is a meaningful market price, but no coordination between firms. In the typical case, one company saves money by polluting a river while the downstream fishers lose money because there is less fish: In practice, we would expect the firms to reach some kind of arrangement. In considering the values of a non-polluted river in terms of its value to the wider ecosystem, or the mere knowledge as such to area residents, it might be possible to estimate ecosystem services, tourism opportunities, or damage to other monetizable human uses. In many cases there are no market prices at all such as for the aesthetic or environmental value of the river. In order to then legitimate state intervention following theories of public goods and market failure, the environmental economist attempts to institute a form of shadow price, reflecting what the price would be under alternative conditions, such as what consumers might be willing to pay. But such estimates would either be pure speculation or necessarily distorted by the attempt to shoehorn complex values about intrinsic worth into dollar figures.¹⁴⁰ The difficulty with moralisms is that they can be postulated concerning any possible issue and used to bootstrap a speculative calculation of the costs and benefits of any social policy: Once Manhattanites concerns

¹³⁹ Guido Calabresi and A. Douglas Melamed, “Property Rules, Liability Rules, and Inalienability: One view of the Cathedral” (1972) *Har. L. Rev.* 1089 discussed in Radin *Contested Commodities*, *ibid.* at p. 23

¹⁴⁰ For longer discussions see Sagoff. *The Economy of the Earth* *ibid.* For a sustained critique of law and economics see Radin *Contested Commodities* *ibid.*

for the Grand Canyon can be postulated as part of the calculation of its worth, so can the psychic displeasure of conservatives concerning abortion.¹⁴¹ So while markets obviously do not provide the full range of values, moralisms provide too easy a way to pretend that the ideal of public aggregation of preferences could solve these problems. The pro-market defender can now point to ethical or sustainable goods and say they are a way to put moralisms on the market and give them substance—a new found *commodification of altruism*.

If fair trade goods are to work accurately as moralisms, then the use of such goods must eliminate any “surplus” obligations. Otherwise, consumer concern is not sufficiently captured. However, ethical goods will pose a problem of “framing” networks replete with “overflows”. As Michel Callon observes, externalities are those things that are precisely difficult to include in market calculations. Talk of ‘internalizing’ externalities amounts to attempts to incorporate externalities into the frame of exchange transactions through setting up a way of including them in market reasoning. However, the process inevitably creates further matters that are still related to, but remain outside of, either the negotiations of market participants or the theorists or civil servants attempting to understand the process. In the case of the purchase of a motor car, for instance, the transaction requires a reduction of the elements to something that can be handled, and made sense of in terms of an instantaneous transaction. The paradox is that any transaction carries with it a host of associations and linkages to the outside world: “The framing is never over. The debt cannot be settled”.¹⁴²

The specification of a particular evaluative feature, such as “rainforest friendly” will only touch one aspect of a multitude of different significant elements that are part of the process involved in networks. The purchase of “rainforest friendly” goods may reflect a second best compromise where some, but not all, of a persons’ values are reflected in the product. We might want tropical wood made in a way that reflects workers demands, but accept wood made in compliance with minimal labour standards instead. But even if we can make the goods reflect the workers demands this may create additional obligations and mutual interdependencies between us, precisely because of the new

¹⁴¹ Kennedy. "Cost-Benefit Analysis of Entitlement Problems: A Critique" *ibid.* at p. 400-401

¹⁴² Michel Callon "Actor-Network Theory--the Market Test" in *Actor Network Theory and After*, (ed. by John Law and John Hassard. London: Blackwell, 1999) at p. 189

ways we have created relationships, or because new ways of understanding the workers (and so further linkages) have opened up.

It is in this light that a variety of critics of codes of conduct and value-labels worry that they serve to obscure as much as reveal. Many labels codify and reflect aspects of products many of us do care about—such as whether food is organic or not— but simultaneously fail to address many other concerns we have. These include; the treatment and social lives of immigrant workers, the distance food is transported, greenhouse gas emissions caused by production and distribution, the amount of packaging and processing involved, or whether the commodity network is part of a large agro-industrial corporation or is run by “movement” farmers who see social justice and sustainability values as more important than profit.¹⁴³ Value-labels identify certain aspects of processes, but they are not truly process-identifying. As Antony Wild writes, “even Fair trade coffee is carried down to a tropical dock in truck belching diesel fumes, shipped thousands of miles across the worlds’ oceans, and hauled up and down a Western nation’s motorways eventually to find its way onto the shelf of supermarket built on an out-of town green-field site frequented by shoppers who arrive in gas-guzzling cars from the surrounding towns and villages. This, in itself, is hardly sustainable.”¹⁴⁴ Consumers of such coffee may or may not know this depending on the ways in which they understand and imagine the wider world.

The prices we pay for goods do not reflect all the social and environmental values concerned. Moreover, we cannot expect them to do so through a clear notion of true costs. The relational aspects of consumption decisions will not be erased through an exact determination of the right price. Rather, economic balancing techniques such as cost-benefit analysis serve a heuristic purpose, as an aid to approximation which both employ evaluative criteria and will need to be further supplemented by evaluative concerns. In many cases engaging in exercises of weighing trade offs will simply clash with our sense of what is meaningful and valuable. Faced with intractable problems over cost-benefit analysis and the endogeneity of preferences, ecological economists have shifted away from welfare economic frameworks to favouring processes of public

¹⁴³ Goodman and Goodman, *ibid.* Raynolds “The Globalization of Organic Agro-Food Networks” *ibid.*

¹⁴⁴ Anthony Wild *Coffee: A Dark History* (London: Fourth Estate, 2004) at p. 270

deliberation.¹⁴⁵ Once law and economics can no longer make use of a simple ideal of exchange and preference maximization it is faced with simply a range of competing values in the economy. Values of autonomy help provide justification for the current market system and systems of contract and property, but only if they are not seriously weighed against concerns about social inequality, relationships of solidarity or environmental devastation. These concerns casts us right back into the CLS inspired space of evaluative discourse and democratic dialogue.

Ultimately, the relational conception suggests that persons should begin to appreciate the larger evaluative questions concerning their relationship to commodities and the connection between the consumer goods they might initially want to have and the repercussions for others. Preferences and externalities cannot, in such a context, be so cleanly divided: Ones desire for meat, for instance, is not totally disengaged from the death of the animal. Once we adopt the relational conception, we see that the various interconnections and linkages are equally part of the contract. Once we start breaking down “frames” there appears to be no principled basis to distinguish internal from external elements of contracts. “External” concerns that arise from public deliberation or moral values are not outside of the contract, but alternative ways of typifying what is important in the contract. A distinction between internal and external values relate either to the parties’ failure to appreciate these wider concerns, or conflicts between the parties interests and values and those of other people. In such cases this invites further deliberation and follow up action both by the contracting parties and the wider community as to the facts, assumptions, concerns, and misconceptions behind the evaluative dissonance.

¹⁴⁵ Gowday “Contemporary Welfare Economics and Ecological Economics Valuation and Policy” *ibid.*; J. H. Spangenberg “The society, its products and the environmental role of consumption” in *The Ecological Economics of Consumption*. (Lucia A. Reisch and Inge Ropke. Northampton, MA: Edward Elgar, 2004).at 32-59 at p. 53.

2.7 Conclusion

In discussing critical legal studies, relational contract theory and law and economics we find there is little to defend a sharp distinction between public and private law. Private law will be repleat with evaluative concerns. Environmental concern establishes the need to problematize consumption. Rather than a two-party model, we need to invoke other people that relate to the transaction, the wider social body of social relations, ecosystems and economics and state or social regulatory structures. This paves the way for a socio-legal analysis of transactions that can draw from a wide and diverse array of approaches in the humanities and social sciences that examine the micro-level of exchange transactions and the philosophical underpinnings of commodity exchange. At the same time, such an approach needs to incorporate Macneils' insights about the diversity of the ways in which contractual relationships occur, given the values, ideals, practices, and self-understandings of the participants in contractual relations and the wider relationships. Such an approach also must remain sensitive to the critical legal studies observation that there are a multiplicity of values at stake. Rethinking consumer transactions is a task for all persons who find themselves involved in social injustices or environmental harms through their consumption activities.

The analysis of social theories of contract suggests that there is no a priori reason based on the concept of contract alone that can defend the division of labour between contract and other arms of the law. This suggests new configurations in the way contract law and judicial activity are seen. Dropping the division of labour between contract and other forms of law may provide grounds for judges to consider a much wider range of social and ecological issues in contracts.

Michael Trebilcock argues that there are a variety of pragmatic reasons for maintaining a division of labour: Concerns about social justice should be handled by legislation and policy. Court rooms are poor places to adjudicate complex social issues. Moreover, important stakeholders or victims of the effects of contract would have no realistic access to the courts.¹⁴⁶ However, pragmatic considerations for the division of labour might seize to be justified in particular contexts. Increasingly we are finding states failing to take action in the face of morally repugnant commodities (such as those involving

¹⁴⁶ Trebilcock, *Limits of Freedom of Contract* *ibid.* p. 249

child slaves) or commercial activity that threatens the long term sustainability of the climate as we know it.

Dropping the division of labour suggests there may be a number of avenues available for state regulation of contracting behaviour. If environmental issues are voiced as “harms” liberal values legitimate regulation of consumption. However, consumption involves a wide range of values concerning persons’ relationships to commodities as well as different evaluative orientations towards what counts as harms, especially in the environmental context. Rather than taking an instrumental relationship to ecosystems in terms of only human productive uses, or imposing a flat biocentrism that negates human involvement whatsoever, a relational approach promises a middle ground wherein ecosystems and ecologies can be ascribed value, and persons are conceived of as in relationship to these systems. State or court initiated regulation is not the only possible response: fair trade goods provide an initial attempt to harness consumer values and the market place. This suggests that what is at issue is an underlying concept of exchange, as well as the persons and things involved in such consumer transactions.

3. THE LAW OF COMMODITY NETWORKS

3.1 Introduction

This chapter develops a concept of law as enabling, contributing to, and regulating *commodity networks*. The core idea is that law plays a number of roles in relationship to the flow of commodities, and commodities can be understood in terms of complex networks of relationships. By drawing on social science frameworks for tracing the social life of goods such as coffee, I explore the role of law in relationship to commodity networks. This approach helps to show how laws such as contract and Sale of Goods are deeply linked to wider economic, social and ecological concerns.

In Part One of the chapter I outline Actor Network Theory (ANT), a mode of sociological analysis developed by Bruno Latour, Michel Callon, John Hassard, John Law and others. ANT builds on the idea of social interactions as relationships. I explain how ANT can be used to understand central concepts of contract such as subjects, objects and exchange. Part Two develops the concept of commodity networks. Traditionally the study of commodities has focused on “commodity chains” and elaborated the political economy of how goods are produced and taken to market. More recently, ANT inspired scholars have borrowed the concept of networks to provide an account of commodities which includes social, economic, ecological and discursive aspects. I elaborate the ways in which such accounts can also include evaluative concerns and the *problematic* nature of commodities. The ethics of consumption and the normative realm of commodity networks are intimately connected. ANT concepts of commodity networks and exchange converge: Networks are linkages of exchange relationships, and exchange relationships are part of larger networks. In Part Three a “legal commodity network” approach is developed, as an application of social theory to understanding law. Legal institutions and frameworks can then be understood in relationship to commodity networks.

PART ONE: SOCIAL THEORIES

3.2 Actor network theory

Actor Network Theory (ANT) seeks to explain interactions amongst both humans and non-humans (animals, plants, physical objects). The key point of analysis is the relations that these entities—or “network nodes”—bear to other elements in the network. Although adopting the label of a “theory” the approach does not seek to create an overarching narrative or a general picture of social relations. According to Latour, ANT seeks to “render visible the long chains of actors linking sites to one another without missing a single step”.¹⁴⁷ The approach is open-ended because any number of linkages and associations can constitute networks. ANT can be used to describe any number of entities, such as an airplane which undergoes extensive transformation as different groups, technicians and designers reach compromises on its construction and manufacture. ANT can also analyze the formation of a government policy handbook on reproductive technologies.¹⁴⁸ In each case, ANT scholars examine the ways in which different elements come to develop together and in relation to each other, whether the emphasis is on planned activities or more random “assemblages”.

In ANT, the agency in a network is driven by both humans and non-humans; material objects have a transformative capacity within the networks of which they are a part. The approach holds that “intention” in the sense of human conscious decision-making is not a necessary feature of an “act”. ANT thus rejects the philosophical move which seeks to define action in terms of conscious humans. Donald Davidson, for instance, argues that an action is an event in the world that is intended by a human, acting on the basis of conscious decisions. For Davidson, the actor must be able to develop an attitude towards their actions and its effects.¹⁴⁹ However, for ANT this presupposes a unity of authorship, and fails to account for the ways in which people are themselves made to act through outer or inner forces, compulsions or by virtue of having taken on discourses circulating in the social realm. By positioning the agent as a cohesive unit, Davidson’s approach potentially misses both the ways persons are assembled out of

¹⁴⁷ Bruno Latour, *Reassembling the Social: An Introduction to Actor Network Theory* (Oxford University Press, 2005) at p. 173

¹⁴⁸ Ani Dugdale “Materiality: Juggling Sameness and Difference” in *Actor Network Theory and After* (ed. John Law and John Hassard. London: Blackwell, 1999).

¹⁴⁹ Donald Davidson “Action, Reasons, and Causes” (1963) in Donald Davidson *Essays on Actions and Events*, (2nd ed. Oxford: Oxford University Press, 2001)

relations, discourses, and practices, but also the way persons act in concert with others. For Latour and other ANT theorists, everything that can be observed to cause an effect on the course of action can be described as an actor. Action can be distributed across many actors, since an effect may have various authors.

Actor network theory is nominalist—it dictates that networks are always localized, working in real places, with specific elements (people, plants, pieces of paper) and at specific times. The ANT approach is best understood not as a theory but more a mode of understanding all parts of interlinking systems as “relational”. Borrowing from language philosophy that holds the meaning of a word or symbol is understood in relation to other words or symbols, the account sees any element in the network as only understood by reference to other elements—they are thus co-defined. The emphasis is thus on the ways different elements work together and develop together either in virtue of being relatively coordinated efforts or coming together as an assemblage: “The semiotic approach tells us that entities achieve their form as a consequence of the relations in which they are located. But this means that it also tells us that they are *performed* in, by, and through those relations.”¹⁵⁰ Networks are interlocking webs of relations between individual elements who/which produce, reproduce, are formed by, and transform those networks over time.¹⁵¹ Networks thus clearly confront typical “chicken and egg” causation problems by asserting the mutual interconnectedness and co-determination of the various elements. Rather than attempt to resolve such conundrums the approach concerns itself with tracing associations and drawing rich descriptions of the multifarious interactions involved in networks and which are often

¹⁵⁰ John Law “After ANT: complexity, naming and topology” *Actor Network Theory and After* (ed. John Hasard and J. Law. Oxford: Blackwell, 1999) at p. 4

¹⁵¹ While ANT motivated studies have tended to stress intentionally designed human systems, the theory as a whole borrows from and seeks to clarify (in fact re-expresses in much more comprehensible terms!) the post-structuralist theorizing of Gilles Deleuze and Felix Guattari in *A Thousand Plateaus*. (Minneapolis, Minn: University of Minneapolis Press, 1987). There the emphasis is on assemblages, in which human systems are understood in terms of the co-development of interdefined systems such as ecosystems. The erasure of the human-nonhuman division there works to make biological systems central, as opposed to mechanistic science which ultimately rides on a sharp distinction between subjects and (mechanistically understood) objects. For an ANT inspired account of that distinction as originating in legal distinctions between *persons* (subjectivities) and *things* (commodities) see Alan Pottage “Introduction: The Fabrication of Persons and Things” *Law, Anthropology and the Constitution of the Social: Making Persons and Things*. (ed. Alain Pottage and Martha Mundy. Cambridge: Cambridge University Press, 2004) and also Alain Pottage “Persons and Things: an ethnographic analogy” (2001) 30 *Economy and Society* 1 at 112-18.

disguised under obfuscating terms such as “the social”.¹⁵² ANT thus de-emphasizes linear causation and emphasizes interacting processes, and investigates the contingency of associations, institutions and practices.

ANT accounts rarely deal with more than a small number of nodes in a network of chain due to the concentration on tracing specific linkages.¹⁵³ Such close attention to deal can cause the ANT influenced researcher to shy away from large scale or big picture analysis, or too focus on “less ambitious theoretical projects”.¹⁵⁴ For Latour, the researcher’s task is one of description and tracing associations and developments between different elements. The breadth and detail of the analysis becomes a question of the particular descriptive abilities and time constraints of the research agenda. The approach does seek to move away from “Big Picture” analyses that do not provide specific linkages: “Size and zoom should not be confused with *connectedness*”.¹⁵⁵ Latour refers to “big pictures” “as “panoramas” which “see *nothing* since they simply *show* an image painted (or projected) on the tiny wall of a room fully *closed* to the outside.”¹⁵⁶ Part of the core idea of ANT is that many of our preconceived ideas are the product of a failure to pay close examination to origins, genealogies and connections. So close description and tracing of connections is in fact a way of deconstructing and reassembling our ideas. For this reason, Latour favours “oligoptica”, small sites that do not see the whole, “but what they see, they *see it well*”. Panoramas lack the details needed to challenge assumed world views. Alternatively, oligoptica provide the possibilities for creating “extremely narrow views” that can establish the connections that make up the whole.¹⁵⁷ Latour’s examples of oligoptica are “centres of calculation” such as a Wall Street tradition room where huge amounts of information linking the global economy are concentrated. In many ways consumer transactions, always taking place in specific locations such as in a home using a computer and internet, or in a large scale suburban shopping mall, can also be examples of small sites that have “oligoptical” characteristics. Discourses and practices of subjects, objects and exchange

¹⁵² Latour, *Reassembling the Social*. Ibid.

¹⁵³ C. M. Coughenour “Improving conservation agriculture” (2003) 68 *Rural Sociology* 2 278-304; L. Busch and A. Juska “Beyond political economy: actor networks and the globalization of agriculture” (1997) 4 *Review of International Political Economy* 4 at 688-708

¹⁵⁴ F. H. Buttel “Some reflections on late twentieth century agrarian political economy” (2002) 41 *Sociologia Ruralis* 2 at 64-81.

¹⁵⁵ Latour, *Reassembling the Social*, ibid. at p. 187

¹⁵⁶ Latour, *Reassembling the Social*, ibid. at p.187

¹⁵⁷ Latour, *Reassembling the Social*, ibid. at p. 181.

and linkages to the wider economy and ecosystems all are embodied in consumer transactions. Latour acknowledges that a stock market trading room “is not a wider, larger, less local, less interactive, less an inter-subjective place than the shopping center in Moulins, France or the noisy and smelly market stands in Bouake, Ivory Coast”. Consumer transactions are key relations through which the social world is composed but also interconnected.

The assertion that the each element is to be understood relationally dovetails nicely with the work of Michel Foucault.¹⁵⁸ Foucault studied the way the subject is “subjectivized”, that is, how the subject is constructed by economic, social and political conditions, and the specific role of language and communication in that formation. Actor Network Theory and Foucauldian critical genealogies can be seen as complementary and at times intersecting approaches. Foucault’s genealogies show “the historical construction of a subject through a discourse understood as consisting of a set of strategies which are part of social practices”.¹⁵⁹ Understanding the subject, for Foucault, was a matter of understanding the ways that power acted on the minds and bodies of persons, through intellectual discourses, and through systems of thought and practical applications. Foucault studied the ways institutions such as prisons and schools also involved mode of acting and self-understanding on the part of persons within such institutions. Subjects find themselves always already engaged in social practices and practical systems that work on conduct and self-understanding. The analysis of the subject in relationship to practical systems is easily assimilable to the idea of persons in relationship with networks. Prisons and schools are also networks that enroll students and prisoners in their operations.

In Foucault’s later period he moves away from a strictly constructionist understanding of subjectivity to describe how persons can take up an “agonistic” stance to relations of power. He thus suggests that many social formations can be understood as already the result of a stabilization of relations of power between different subjects, and also as potentially unstable. Agents can transcend their given subject position, seek to change

¹⁵⁸ This is suggested by Law, *ibid.* at p. 4, although I draw on different aspects of Foucault than Law does.

¹⁵⁹ Michel Foucault “Truth and Juridical Forms” in *Power: Essential Works of Foucault 1954-1984 Volume Three*. (ed. P. Rabinow. New York: The New Press, 2000) at p. 4. See also Michel Foucault *Discipline and Punish*. (Vintage, 1979).

how they act and demand that things be done differently. Throughout his earlier work Foucault construed power as something exercised by persons on others. The later Foucault suggests that we can analyze relations of power and freedom also from the side of agents' struggles of freedom. He thus says that "the forms and the specific situations of the government of some by others in a given society are multiple; they are superimposed, they cross over limit and in some cases annul, in other reinforce, one another".¹⁶⁰ In saying that power is the "conduct of conduct", Foucault acknowledges that persons often agree to enter into power relations, and that power involves the active participation of subjects in the process.

Adopting these Foucauldian insights enable ANT to consider discourses as yet one more element of networks that bind persons and materials. It gives new meaning to the ANT assertion that, as John Law states "the form, content and properties of humans in networks are not fixed, but emerge and change in the course of interaction and co-development with the network". As Law says, "people are processes of transformation, compromise and negotiation".¹⁶¹ It stresses the way the relationships that form persons also involve the way persons act on themselves and on others, paving the way for persons to emerge as *agents* in network formation. In acting on networks people act on themselves and *perform* themselves.¹⁶² As Foucault emphasizes, these processes of transformation and compromise will take on a discursive form as well as practical configurations, and manifest themselves in terms of how we think about and describe ourselves, and act in relationship to networks. Characterizing such relationships as in part voluntary also allows for an analysis of the workings of discursive and practical arrangements of power in contract-based relationships with networks.

ANT thus represents a series of techniques for coming to understand particular areas rather than an overarching theory of the functioning of society. Rather than supplying a large scale normative or structural critique it points towards discovering smaller

¹⁶⁰ Foucault "Subject and Power" *ibid.* at at p. 345

¹⁶¹ Michel Callon and John Law "After the Individual in Society: Lessons Collectivity from Science, Technology and Society." (1997) 22 *Can. J. of Sociology* 2 at 165-82 at p. 171.

¹⁶² See also Michel Foucault's "On the Genealogy of Ethics", "Technologies of the Self", "Ethics of Concern for the Self as a Practice of Freedom" in *Ethics Subjectivity and Truth. Essential Works of Foucault 1954- 1984 Volume One.* (ed. P. Rabinow New York: The New Press, 1997). Also Michel Foucault *The Care of the Self: The History of Sexuality Volume 3.* (Vintage Books/Random House, 1988).

complexities. Latour thus takes the approach that “action is possible only in a territory that has been opened up, flattened down, and cut down to size in a place where formats, structures, globalization, and totalities circulate inside tiny conduits, and where for each of their applications they need to rely on masses of hidden potentialities”.¹⁶³ ANT is not the only way of exploring these terrains, and does not fashion itself as meant to replace other approaches to understanding complex systems but rather to complement such approaches.

3.3 Subjects and objects

The Actor Network account specifically provides novel interpretations of key elements in exchange relationships. In terms of subjects, the network analysis stresses that human beings can only be understood by virtue of the various relations and associations they bear with other humans and non-humans. According to Latour, “To obtain ‘complete’ human actors, you have to *compose* them out of many successive layers, each of which is empirically distinct from the next.”¹⁶⁴ Latour further argues, “To be a realistic whole [person] is not an undisputed starting point but the provisional achievement of a composite assemblage”.¹⁶⁵

In contrast to the view embedded in ANT, the particular discourses that have shaped us and are now dominant, humans are thought of as subjects and non-humans as objects available for human control. The “modernist” conception contained within this dominant discourse misses the ways in which humans are formed by and constituted by the non-human, by the objects they use, the texts they read, the discourses they use and which form them, and by the relations and associations they bear with other humans and non-humans. ANT provides us with a framework and methodology with which to study the ways in which people are formed, constituted or “formatted” in virtue of particular relations as well as how they form themselves in these relations. One fruitful terrain where ANT may be applied is the study of human relationship with objects, including consumer goods, as well as human to human relationships through consumer transactions.

¹⁶³ Latour, *Reassembling the Social* *ibid.* at p. 252

¹⁶⁴ Latour, *Reassembling the Social* *ibid.* at p. 208

¹⁶⁵ Latour, *Reassembling the Social* *ibid.* at p. 93

Key to the Actor-Network methodology is a refusal to accept vague concepts such as “the social” or “lifeworld” when these serve as mere “place fillers”, hiding what in fact amounts to a lack of understanding of underlying processes and interactions. Rather, by striving to piece together the complex associations and relations we begin to get an understanding of the elements of networks. Humans, on this account, cannot be presupposed to have a set “ontological makeup” –such as is often presupposed in “humanist” social theory. Rather, persons remain to be explained in terms of their relation through networks. Part of this ontological makeup will include the formations of the self that Foucault describes, as persons become who they are in the course of interacting with practical systems.

The same approach applies to objects. Actor-network theory emphasizes that studies of networks cannot distinguish at any fundamental level between humans and non-humans. Non-humans (what the old modernists call things or objects) will often be the carriers of associations between humans. Non-humans, including animals as well as physical entities such as lecture notes, rocks or automobiles, can play an active role in networks. Actor-Network theory thus stresses the ways objects themselves act on, and so are part of, the dense webs of relations that we have come to call “the social”. Latour thus highlights that “the meandering path through which most of the ingredients of action reach any given interaction is traveled by the multiplication, enrollment, implication, and folding of non-human actors”.¹⁶⁶ The ANT approach calls upon us to start looking into objects to see the roles they play in “assembling the social.” They work on, constitute and are available to, subjects as “plug-ins”—any of a range of practices, discourses, technologies or objects that form subjects or which subjects can make use of in remaking themselves.¹⁶⁷ Moreover, ANT challenges us to look at how discourses of subjects and objects are part of this process, and thus see the way texts as objects impart understandings and so help constitute subjects.

Dropping the sharp division between subjects and objects also forces researchers to question the way ideologies and discourses have shaped our relationships to other humans and to non-humans, and also worked to obscure for us the very operations of discourses and practices. The ANT approach involves identifying the way discourses

¹⁶⁶ Latour, *Reassembling the Social* *ibid.* at p. 193

¹⁶⁷ Latour, *Reassembling the Social* *ibid.* at p. 207-10

and practices constitute the ways in which humans and non-humans are assembled together and formed together. By tracing associations, interconnections and historical developments the aim is to unpack contingent formations that are normally seen as natural, and reveal the ways they are “constructed” out of discourses, practices, and the contingencies of historical institutions. ANT also highlights the ways discourses and practices are intertwined, and associated. The approach thus involves a slow and difficult process of uncovering and identifying what are often taken as obvious features. ANT helps us to uproot dead metaphors of standard usage that are frequently assumed to be “natural” elements around us, and showing how they have been put together, manufactured, assembled or contingently appeared.

A further result of dropping the strict “subject object dichotomy” is to recognize the ways in which value is construed as adhering only in subjects. The approach specifically disclaims the “fact-value” distinction whereby facts are understood to be neutral and values to be a feature of human projection and interests. Network analysis seeks to re-include non-humans. However, for Latour, non-humans should not be styled as part of “nature” which is independent of the social world. Instead, non-humans such as ecosystems, animals and plants are incorporated into networks in virtue of our relations to them. They play a role in the various associations that help constitute us and with which we work. In the old modernist picture, subjects are taken as the locus of concern and the social is taken to exclude objects. Objects are rendered as “lifeless” and “inert” and so not the possible object of evaluative concern, unless as projected by human subjectivities (in terms of their interests or emotive responses). Objects are “things” or, alternatively, “matters of fact” over which there is little room for politics or contentious disputes, and so the understanding of them can be relegated to natural sciences. Alternatively, once objects are re-included in the “social”, brought back into the “common world”, and given a “voice”, they are transformed from matters of fact to “matters of concern”. This paves the way for a new political ecology that incorporate environmental ethics concerns about the value of ecosystems, plants, animals and the biosphere.

Latour sees the concept of “nature” as an artifact of the “modern”—the nineteenth century cleavage of subjects, and objects, matters of fact and matters of concern. These cleavages are an attempt to try to bring unity to our understanding of the physical world by way of stripping out its evaluative import through a fact-value distinction.

However, once we stop using the concept of nature, there re-emerges the possibility of the non-human being seen as value-laden, as composed of beings with which we share a common place on this planet. Overcoming the fact value distinction is a way of reinitiating a value laden understanding of the non-human. Once this is done, the non-human becomes “hot”-- a field of contention over which there are a multiplicity of disputes. These disputes range from how we humans are to measure the non-human, what the role of non-humans are given by us in human and non-human associations, how we value non-humans, and how we include non-humans in a common world with humans.

3.4 Exchange

In this section I use insights from ANT to highlight a number of interesting features about exchange relationships. First, in a market dominated society, exchange will be one of the prime modes in which humans relate to other humans and non-humans. Because the “social” is not pre-given, but rather composed of the various associations humans are involved in, exchange relations play a key role in composing “the social” in market societies. The form that exchange takes is thus central to understanding the range of associations with which we relate to other people, and relate to ourselves. Second, in relating to other people, through exchange of goods, we are also relating to objects themselves.

Likewise, the articulation—both in concepts and in practice—of how one interacts in these associations is part of the way persons engage in practices of self-formation. A person becomes who she is in virtue of many various interrelations, and the daily practices by which she reconstitutes these relations. The range of discourses and practices of exchange, then, are ways of understanding ourselves, our relations to other people and to objects. There is a dense web of interrelationships here between concepts of the self, of others, of humans and non-humans and of exchange itself that are variously articulated in different ways in different cultures, epochs and economies.

Consumer transactions are complex exchanges because they also involve the objects exchanged, other persons with which one exchanges, the distant persons and ecosystems further down the line of the commodity chain, as well as other people who

might also want the goods or with whom one intends to involve in one's ownership or use of the goods. A range of factors influence particular exchange relations. These include; what the exchanging parties think they are doing, how other people typify their acts, the discourses in circulation, the makeup and the histories of the objects traded, and the role of persons and ecosystems involved in the making and distribution of the goods. Moreover, these elements are all interrelated and affect each other. The relational conception of exchange contained within ANT concerns not only the ways in which consumers are connected, involved and related with other parts of these practical systems but also the ways in which each of these other parties to consumer transactions are likewise historically, economically, socially and ecologically constituted. The theory, then, can work at (at least these) two levels: First we have a general account of the importance of exchange and the way it constitutes the social, and second, we have a discussion of particular exchange processes and the discourses and effects surrounding it. Understanding exchange, then, involves understanding the subjects and objects of exchange and the wider commodity networks involved.

PART TWO: COMMODITY NETWORKS

3.5 ANT and commodity networks

Geographers, agricultural sociologists, environmental studies researchers and others have taken up ANT to help develop studies of commodities. In diverse works by Alex Hughes, Suzanne Reimer, Laura Reynolds, David Goodman and Michael Goodman and Sarah Whatmore and Lorraine Thorne, particular commodities such as bananas, coffee or wooden furniture are studied not only in terms of the goods that arrive in stores to be bought, but in terms of the manifold different processes which enable their production, distribution, consumption and disposal. Fundamental to this research is that commodities are understood as processes rather than as mere objects: They embody relations between different persons and ecosystems. The ANT approach is directly applicable to the study of commodities in terms of re-invigorating an analysis of objects as parts of networks, as having been worked on by human labour, as having been engineered, designed, manufactured, as representing a distinctly human transformation of ecosystems, and in many cases simply being parts of ecosystems, animals, plants and rocks transported, milled, cut up, cured, put on display or put on E-Bay and then traded for cash or kind. Whereas through the 1990s political economists and materialist

geographers spoke of commodity chains, ANT inspired theorists speak of commodity networks. This allows for a broader concept of commodities in terms of their social uses, their symbolic significance, their effects on human subjectivity.

In the following sections the commodity network approach is outlined. I argue that invoking discourses as contributing to networks provides a distinct evaluative dimension to networks. The ANT processes of denaturalizing and reassembling networks also forces us to consider the tensions, disputes, conflicts and conceptual incommensurability involved in commodities. Viewing commodities from an ANT perspective also helps to understand the ways they are “uncertain and reversible” and “never given in the order of things”.¹⁶⁸ The network perspective also demonstrates how particular acts of exchange cannot be separated from the networks of which they are a part. Understanding exchange then also requires understanding particular commodity networks, and vice versa.

Commodity researchers are attracted to the network approach because it combines both “vertical” and “horizontal” consumption approaches.¹⁶⁹ Vertical approaches tend to be materialist and follow the “commodity chain” as “the interrelated system of production processes and economic transactions that creates a commodity such as coffee, and brings it to the point where it is purchased and used by the final consumer.”¹⁷⁰ Horizontal analysis look at the social context, meaning, and strategic interactions involved at each stage in the commodity process. Following ANT principles commodity networks can only be made knowable by accounts of their workings “on the ground”, that is, in their specific material form. Studying commodities as networks shows “their reach depends upon intricate interweavings of situated people, artifacts, codes, and living things and the maintenance of particular tapestries of connection across the world”.¹⁷¹

Vertical analysis. In so called ‘vertical’ consumption studies, researchers typically choose individual commodities or sets of commodities such as bananas, coffee, running shoes or t-shirts and trace the linkages between different elements in the commodity

¹⁶⁸ Law “After ANT: Complexity, Naming and Topology” *ibid.* p. 4

¹⁶⁹ Hughes and Reimer “Introduction” at p.23

¹⁷⁰ John Talbot, *Grounds for Agreement: The Political Economy of the Coffee Chain.* (Lanham, MD: Rowman & Littlefield, 2004) at p. 6

¹⁷¹ Whatmore and Thorne “Nourishing Networks: Alternative Geographies of Food” *ibid.* at p.288

chain. Researchers thus seek to explain the ecological inputs, working conditions, systems of governance, and salesmanship by which a product is made, distributed and delivered into the hands of consumers. Gereffi is widely credited with coining the term “global commodity chains” to designate the complex and global scale of production and distributions systems which often do not have direct ownership.¹⁷² His initial work focused on the linear connections along the chain to foreground connections between commodity production in peripheral regions of the global economy and retail and consumption in the richer core. Later work by Gereffi reveals a complex typology of different types of commodity governance structures. Commodity chains vary from relatively open markets, where uncoordinated buying and seller ensures linkages between distance consumers and producers, to vertically integrated systems wherein centralized corporate bureaucracies exercise managerial control of subsidiaries and affiliates.¹⁷³ In Table 1 I have reproduced a representation of the coffee commodity chain to help the reader by way of a pictorial representation of such chains.

Another type of vertical analysis is provided by environmentalists, which trace the way materials and energy flow through the linear system of commodity production, use and disposal. Popular social-environmental critique of consumer goods in works such as Ryan and Durning’s (1997) *Stuff: the Secret Lives of Everyday Things*¹⁷⁴ stress material flows and waste. Spatial metaphors for analyzing consumers’ impacts have been developed such as the “ecological footprint”.¹⁷⁵ Ecological economics such as Herman Daly have focused on analyzing the economy in terms of linear throughputs of materials and such analyses assume commodities as the way materials and flows are move in the economy.¹⁷⁶ Material flow accounting is emerging as a branch of ecological economics, using a variety of tools for trying to trace the ways in which energy and materials enter into the economy and in which solid, liquid and gaseous waste are released into the

¹⁷² Gereffi G. Miguel Korzeniewicz, and Roberto P. Korzeneiwicz “Introduction: Global Commodity Chains” In *Commodity Chains and Global Capitalism*, (eds. Gereffi and Krozeneiwicz. Westport, CT: Praeger Publishers, 1994, 1-14).

¹⁷³ Gary Gereffi, John Humphrey, and Timothy Sturgeon. "The Governance of Global Value Chains." (2005) 12 *Review of International Political Economy* 1 78-104

¹⁷⁴ Alan Durning and J. C. Ryan. *Stuff: the secret lives of everyday things*. (Seattle, Wash: Northwest Environment Watch, 1997).

¹⁷⁵ William Rees, and M. Wackernadel *Our Ecological Footprint: Reducing Human Impact on Earth*. (Gabriola Island, BC and Philadelphia, PA: New Society Publishers, 1995).

¹⁷⁶ Herman Daly “On Economics as a Life Science” *Economics, Ecology, Ethics: Essays Toward A Steady-State Economy*. (Ed. H. Daly. San Francisco, Cal: W. H. Freeman and Company, 1980).

environment. This is based on tracing the lifecycle of commodity chains—the life of a product from resource mining to final disposal.¹⁷⁷ The life-cycle analysis of products is central to industrial ecology which seeks to design products and their production so as to minimize consumption of resources from the inception of products.

Vertical analyses also help identify the manifold of players in a chain. This helps the research gain an understanding of the politics of chain governance. In analyzing the coffee commodity chain, for instance, John Talbot notes not only the usual nexus of consumers, distributors, roasters, importers and primary producers, but a number of other agencies that effected commodity chain design and price. In many producer countries, marketing boards set quotas in the 1960s and 1970s. The United States, in an attempt to forestall the spread of communism, helped organize and maintain an International Commodity Agreement (ICA) which used quotas to maintain price levels. The first agreement was operative from 1962 to 1972, and three subsequent ICAs with varying success lasted until 1989.¹⁷⁸ This involved an International Coffee Organization which served as an overseeing body.¹⁷⁹ National governments abused marketing board control to keep producer farm gate prices down and to expropriate the difference between those prices and international prices. International lending agencies and banks, such as the International Monetary Fund and World Bank were instrumental in dismantling quota systems and marketing boards in the 1980s, and also contributed to the encouragement of further countries increasing production of coffee. Increasingly, the coffee commodity chain is controlled by a few multinationals: The industry is controlled by four main companies, Nestle, Altria (formerly Philip Morris), Sara Lee/Douwe Edberts and Procter & Gamble, in that order, accounting for sixty percent of world consuming markets.¹⁸⁰ The contemporary coffee system also relies on futures markets, which involve various speculators, investors, mutual funds, pension funds and the Goldman Sachs Commodity Index. The commodity chain analysis runs from an analysis of the global unity of the economic system to the territorial fragmentation of its political system of nation-states. As Talbot notes: “The states try to regulate the

¹⁷⁷ Spangenberg “The society, its products and the environmental role of consumption” *ibid.* at p. 39 to 42.

¹⁷⁸ Talbot, *Grounds for Agreement*, *ibid.* at p. 105

¹⁷⁹ Talbot, *Grounds for Agreement*, *ibid.* at p. 61

¹⁸⁰ Talbot, *Grounds for Agreement*, *ibid.* at p. 103

production processes that occur within their borders, but they are constrained because these processes are linked to others located in different nation-states”.¹⁸¹

Commodity chain approaches can provide extensive mapping of transformations to the system. For instance, through the 1980s and 1990s the main multinationals favoured a low price, high volume coffee policy. As a reaction, a high end gourmet luxury market has evolved, with alternative roasters such as Pete’s Coffee, but also various retailing multinationals such as Starbucks. These utilize, in part, alternative chains. Ethical trade organizations, such as Transfair or the Fairtrade Labelling Organization depend on this gourmet trend. They also bring a new set of players. This includes non-governmental organizations as coffee entrepreneurs, as well as chain auditors who exercise additional quasi-regulatory controls.

Commodity chain approaches using vertical analysis have provided in depth, and detailed understandings of the material inputs into commodities and also the institutional structures and power relations in the chain. They have also contributed theorizing concerning the geopolitical economy and the role of chains in establishing global power relations. Global commodity chains analysis sought to explain the way profits and power flowed to the centre by way of commodity chains, thus following the emphasis on core and periphery. Individual commodities such as coffee reproduce these structural features of the world economy: “the simplest stages of the chain, coffee growing and initial processing, are located mainly in poorer, peripheral countries, while the most dynamic stages, such as the development of new coffee beverages for niche markets, are located mainly in the developed countries”.¹⁸² The approach can easily be extended to an ecological political economy, which can include the ways in which chains depend on an appropriation and conversion of ecosystem wealth.¹⁸³ The power dynamics which maintain global commodity chains and existing structures of power in chains are also ways in which existing human use and abuse of ecological systems are maintained. The chain analysis helps identify particular players such as multinationals or governments that act politically to protect the chains (and so forms of ecosystem usage) upon which they depend.

¹⁸¹ Talbot, *Grounds for Agreement*, *ibid.* at p.7

¹⁸² Talbot, *Grounds for Agreement*, *ibid.* at p.7

¹⁸³ M’Gonigle “A Dialectic of Centre and Territory: The Political Economy of Ecological Flows and Spatial Relations” *ibid.*

Horizontal analysis. Alternatively, “horizontal analyses” seek to situate acts of consumption in the social field in which actors lead their everyday lives. Horizontal analyses add cultural, psychological and social theoretic components to vertical analyses. Here the emphasis is on the uses of such goods in the framework of individuals’ and groups’ social lives, the strategic motivations for agents’ participation in networks, and the discourses and self-understanding that agents’ employ. Many theorists stress the strategic and at times competitive nature of consumption in terms of establishing, and reinforcing, social position and social interconnections for consumers. We see these ideas in Pierre Bourdieu in *Distinction*, in Mary Douglas and Baron Isherwood’s *The World of Goods* and much earlier in Thorsten Veblen’s *The Theory of the Leisure Class*. Analogous horizontal analyses of corporate behaviour also reinforce the competitive and strategic nature of decision-making making of firms involved in the manufacture and distribution of commodities. This can include offloading harms onto the environment,¹⁸⁴ or using environmental and social standards as a way of positioning themselves as industry leaders or to set industry standards that favour their existing product lines.¹⁸⁵ One aim of social theorists such as Bordieu and Douglas and Isherwood is to improve upon the minimal frameworks supplied by traditional welfare economics. As we see in Chapter 2, welfare economics focuses on a quantitative formulation of preferences for particular individuals. Alternatively, Bordieu and others look into the social relations and self-understanding to which consumption contributes. Horizontal studies are often “cultural” and address the symbolic aspects of consumption, including the significance and meaning that consumers attach to consumer goods.

Adopting a commodity network approach that integrates vertical and horizontal approaches helps to conceptualize the multi-stranded ways in which different nodes (consumers, firms, states, and ecosystems) are connected. The commodity network approach allows for the representation of the organization of social and cultural ties in economic linkages, and captures the patterns of interdependence existing between different sets of actors in the economy. Networks connect together firms through vertical commodity relationships, but also bind together additional agents through the multi-

¹⁸⁴ Thomas Princen "Distancing: Consumption and the Severing of Feedback". *Confronting Consumption*. (ed. Conca, Maniates and Princen. Cambridge, Mass., MIT Press, 2002).

¹⁸⁵ Hoffman and Rotherham, “Environmental Requirements and market access for developing countries” *ibid.* at p. 22

directional flows of information and materials that variously support these exchange relationships.¹⁸⁶ The network metaphor can be extended to include sites of design, research and development, non-governmental organizations and consumer groups which impact on networks.¹⁸⁷

Environmental studies researchers use network analysis to link consumers with ecologies: Michael Goodman and David Goodman, for instance, see food networks such as organic agriculture in California as “a dual combination of metabolic relations between agricultural nature and social labour in production and the corporeal and symbolic act of human goods consumption”.¹⁸⁸ ANT also helps us see the particularity of market based commodity networks. By stressing the role of translation and transformation, ANT focuses on the historical contingency and specificity of particularly Western capital intensive systems. It can thus integrate historical accounts of the development of networks. ANT scholars have made comparative analyses of alternative trade goods such as fair trade coffee and organic produce,¹⁸⁹ and also considered non-Western forms of exchange and the ways these contribute to different modes of subjectivity.¹⁹⁰ It helps no one to underestimate the complexity of studying commodities. Studying even one commodity such as coffee will make up a life’s work.¹⁹¹ Commodity network analysis in fact reinforces the cultural and historical specificity of our current market-based global commodity system and suggests we analyze alternative network configurations.

3.6 Networks, subjectivity and normativity

In an effort to describe the ways that consumers effect networks, geographers have used the concept of “circuits of culture”. This conceptualizes the dynamic relationship between producers and consumers of advertising. It consider the ways in which

¹⁸⁶ Hughes and Reimer, “Introduction” *ibid.* p. 5.

¹⁸⁷ Alex Hughes “Retailers, knowledges, and changing commodity networks: the case of the cut flower trade” (2002). *Geoforum*, 31 at 175-190.

¹⁸⁸ Goodman and Goodman "Sustainable Foods: Organic Consumption and the Socio-Ecological Imaginary" *ibid.* at p. 98

¹⁸⁹ Whatmore and Thorne “Nourishing Networks: Alternative Geographies of Food” *ibid.*, Goodman and Goodman "Sustainable Foods: Organic Consumption and the Socio-Ecological Imaginary" *ibid.*

¹⁹⁰ Pottage “Persons and Things” *ibid.*

¹⁹¹ See, for instance Talbot, *Grounds for Agreement*, *ibid.* Wild, *Coffee*, *ibid.* Anthony (2004) *Coffee: A Dark History* Fourth Estate, providing an historical analysis. Waridel, Laure (2002) *Coffee With Pleasure: Just Java and World Trade*. Montreal: Black Rose Books.

geographical knowledges of commodity systems are shaped and reshaped, and examines how particular cultural artifacts move through the circuit. Commodity networks can also be thought of as circuits: Meaning is transformed in different moments inhabited by different social practices, across the network, and these “feedback” across the network.¹⁹² Actor Network Theorists speak of “dense webs of interaction” between different sites in the network and “action at a distance”. Consumers’ viewpoints, motivations, drives or relative ignorance can form a part of explaining networks: Consumers are part of these networks. Commodity networks are places in which meaning and significance circulate, therefore they also involve information, knowledge and understanding. Thus it is important to trace not only commodities, but also discourses, knowledges and representations, and modes of self-understanding through networks.¹⁹³

Consumer choice should also be configured as part of networks. Ann Dugdale offers an ANT inspired study of the process whereby intra-uterine devices (IUDs) came to be approved and partially regulated through an Australian government administrative process. The regulation consisted of a mandatory consumer information leaflet. She notes that the consumer can only decide to use an IUD because two companies that make such devices went through the approval process to market them in Australia: “The consumer is thus part of a commercial arrangement in which Organnon Australia, its’ Minuteload IUD, Medical Industries of Australia, its Copper T 280A IUD, the medical profession, and the IUD consumer information leaflet have organized IUD insertion and made it a consumer choice”.¹⁹⁴ Emphasis on discourses and self-understanding can help bring out the ways in which agents can also transform networks through choice.

Geographies of consumption have given special attention to “imaginaries”-- the projected ideals and (at times mistaken) understandings of other agents and places by which agents and nodes plan their activity in the network. Networks thus can be understood to create “distancing” effects: Thomas Princen describes how consumers and firms will continue to distribute and consume goods despite the risks this poses to the sustainability of an ecosystem, because the network’s own configuration divorces

¹⁹² Leslie and Reimer “Knowledge, ethics and power in the home furnishings commodity chain” *ibid.*; Hughes and Reimer “Introduction” *ibid.*

¹⁹³ Dugdale “Materiality” *ibid.*

¹⁹⁴ Dugdale “Materiality” *ibid.* at p. 130

consumers and managers from environmental and social feedbacks.¹⁹⁵ Phillip Crang refers to commodity networks as “displacements”. Processes of consumption occur in specific geographical contexts. These contexts can also be understood as themselves “opened up by and constituted through connections into any number of networks, networks which extend beyond delimited boundaries where imagined and performed representations about origins, destinations and forms of travel surround the various flows of people, goods and services in these networks; and where consumers (and other actors in commodity systems) find themselves positioned and position themselves in terms of their entanglements with these flows and representations”.¹⁹⁶ Consumers (and other elements of the network) will thus conceptualize the place based context of other elements as imaginaries. Geographic imaginaries will be discursively constructed by historical, literary, and commercial (advertising) sources amongst others. For example, bananas come from a “heavenly tropics of natural abundance”.¹⁹⁷

Geographic (social, or ecological) imaginaries is just one of many ways of understanding the ways that agent’s actions in the network is based in part on their understandings of the network, understandings that are inevitably partial and often mistaken. Researchers can then map discursive claims made by producers and represented in advertising or product labels and which are (partly) instilled in consumers. These representations and claims can be compared to the material, ecological and social practices that constitute the respective imaginaries of place, social relations or sustainability.¹⁹⁸

Once we acknowledge the role of discourses in the shaping of, and interactions within, networks, we need to acknowledge the evaluative dimension. Discursively constituted understandings and self-understandings are also evaluative and normative. Commodity network analysis can use qualitative and evaluative language to both describe and to quote the ways humans in networks think of and value other people, places and ecologies in the commodity networks. Actors within networks and researchers use “thick

¹⁹⁵ Princen, “Distancing” *ibid.*

¹⁹⁶ Phillip Crang "Displacement, Consumption, and Identity." (1996) *Environment and Planning A* 28, 47-67 at p. 47 Note that while Crang uses the term “networks” he does not explicitly draw on the ANT inspired concept of the term. But his work both contributes to, and can be understood in virtue of, such a conception.

¹⁹⁷ Cook, Crang and Thorpe, “Tropics of Consumption: 'Getting with the fetish' of 'exotic' fruit?” *ibid.* at p. 174.

¹⁹⁸ Goodman and Goodman "Sustainable Foods: Organic Consumption and the Socio-Ecological Imaginary" at p. 98.

descriptions”¹⁹⁹ in understanding network elements and their relations to other human and non-humans. The description “rainforest ecosystem” conveys a whole host of associations and linkages that differ from “tree farm”, “natural resource base”, “colonial plantation” or “carbon sink”. What description we use to understand a node changes how we think of it, how we view the network of which it is a part and the actual formation of the network. Further, networks are, in part planned and designed, utilizing discursive practices as “modes of ordering”. Modes of ordering are “ways of telling about the world... what used to be, or what ought to happen”, and materially embodied in networks. Networks “perform multiple modes of ordering” which “influence the ways in which agents are enrolled in networks”.²⁰⁰ Whatmore and Thorne argue that fair trade goods feature an ordering characterized by “connectivity”, where “stories are told of partnership, alliance, responsibility and fairness” and “concerned with the empowerment of marginalised, dismissed and overlooked voices, human or non-human”.²⁰¹

Research on the “politics of shopping” brings out some of the different, and potentially conflicting evaluative orientations that consumers can have towards elements of commodity networks. Michelle Michelletti documents the different ways in which social, ethical, and political issues are embedded in seemingly simple consumption decisions. While most of the time the politics of products are latent or invisible, they become visible when citizens give them public significance and begin to see how they compare with their philosophy of life and political persuasions.²⁰² Michelletti largely focuses on the ways in which persons act as “political consumers” through attempting to influence commodity systems through campaigns such as responsible coffee, “No Sweat” advocacy against sweatshop labour, institutions such as Forest Stewardship Council certified wood products, or Fairtrade coffee. For Michelletti, these efforts show that there is a political connection between our daily consumer choices and important global issues of environmentalism, labour rights, human rights, and sustainable development: “There

¹⁹⁹ The term came into philosophical popularity with the work of Williams, Bernard. *Ethics and the Limits of Philosophy* (Cambridge, Mass: Harvard University Press, 1985) at p. 142. Hillary Putnam, in “Objectivity and the Science-Ethics Distinction” *The Quality of Life* (ed. Martha Nussbaum and A. Sen, Oxford: Clarendon Press, 1993) argues *against* Williams for the inevitability of their use.

²⁰⁰ Whatmore and Thorne “Nourishing Networks: Alternative Geographies of Food” *ibid.* at p. 294; drawing on Law, J. (1994) *Organizing Modernity*. Oxford: Basil Blackwell.

²⁰¹ Whatmore and Thorne “Nourishing Networks: Alternative Geographies of Food” *ibid.* at p. 295

²⁰² Micheletti, *Political Virtue and Shopping* *ibid.* at p. ix

is, in other words, a politics of consumer products, which for growing numbers of people implies the need to think politically—privately”.²⁰³

Micheletti’s reasoning could apply to any element of the network. For example, advocacy efforts towards corporate practices reflect ways that the situated position of managers and companies require the due exercise of the virtues. Alternatively, corporate social responsibility measures, vis a vis “supply chain risk management”²⁰⁴ and codes of conduct also represent a form of counter-politics through which companies can respond to citizen advocacy. Micheletti’s approach is useful in showing how the larger project of commodity network analysis, while seemingly very complex when we attempt to generalize over many commodities and complex networks, is also a task that many of us already engage in, albeit in a sporadic and limited fashion. In effect, we engage in these tasks each time we decide on environmental, ethical or political reasons to avoid or to try to buy specific products. What emerges from Micheletti’s work, coupled with commodity network approaches, is a conception of the commodity network as shot through with ethical, evaluative and political dimensions and interrelations: Commodity networks are made up of mutually dependent self-understandings and discursive contestations. We can describe the evaluative relationships that are possible across the whole network and open up the space for “a critical analysis of the surpluses that flow through and are produced by” the commodity network and its components.²⁰⁵ Commodity networks are networks of relationships and so involve relational values

Michel Callon refers to “hot” and “cold” situations: hot situations are in dispute and cold situations remain taken for granted. Analogously, commodity networks are often “cold” in the sense that they are seen as uncontentious, and are removed from the sphere of debate through the technique of relegation to the private. Once problematized, commodity networks can begin to heat up. Facts and values become entangled and we have disagreements over not only the knowledge that is relevant in understanding them, but also in decision-making processes concerning what to do about them.²⁰⁶ Environmental ethics, for instance, is in large part about how we should view the materials and resources that get worked into networks. Ecologists worry about how to

²⁰³ Micheletti, *Political Virtue and Shopping*, *ibid.* p. 2

²⁰⁴ This term is used by PriceWaterhouseCoopers on the sustainability section of their website.

²⁰⁵ Crang, *ibid.* p. 57.

²⁰⁶ My use of hot and cold follows Callon “An Essay on Framing and Overflowing” *ibid.* at p.261

measure the “resilience” of ecosystems, philosophers worry about intrinsic value and resource economists about extraction value. The fact we are already engaged in practices that instantiate particular interpretations give huge weight and social influence on those interpretations: That so many commodities rest on resource exploitation helps to normalize (and normalize naturalizations of) such practices. Existing structures work to cool down networks, to ease us in our daily shopping, to stop a visit to the supermarket from becoming seen as either a forum for the display of the virtues, or a labyrinth of practical ethics dilemmas, depending on one’s orientation.

3.7 Normative problems with commodities

If commodities are ineluctably political and shot through with normative concerns, then understanding commodities also means taking up a reflexive position to ways in which commodities have been valued and also critiqued. The evaluative approach to commodity network analysis recognizes that commodities are evaluatively loaded, but also that there are a number of different ways in which commodities have been problematized. The approach requires, then, gaining a foothold onto the ways in which commodities can be questioned. Micheletti, for instance, focuses on social movements, labeling schemes, boycotts, “buy-cotts” (targeting a particular good, industry or country of origin to favour rather than avoid), and voluntary standards to show how consumer goods have been problematized. These larger coordinated or semi-institutionalized movements or trends tend to represent broad-based compromises amongst persons and groups that share goals concerning consumer goods, but for very different reasons. People with different ethical orientations will identify and judge ethical salience in more diverse ways. I want then to introduce into the discussion a variety of debates concerning the normative dimension, and discuss a variety of critiques that challenge the normative basis for the commodity economy.

a. Standard microeconomic view. In the standard micro-economics textbook one will find the assumption that consumer transactions represent an agreement between parties to maximize their preferences. Both parties end up better off and *prima facie*, so does society as a whole. The same analysis can be done at the production stage—workers take jobs producing commodities because they are better off than under alternative

options. The result is that commodities are beyond the purview of normative critique.²⁰⁷ Central to liberal democracies is the assumption that the state should be neutral and not intervene in the commodity economy; excepting situations where harm or market failure arises. Difficulty arises with environmental concern, as here we seem to have a case of market failure increasing to become the norm rather than the exception. Fair trade goods also suggest markets fail to provide many commodity producers basic living standards.

b. Information critique An informational critique sees commodities as complex and so largely opaque to consumers. Many arguments for value-labels stems from a recognition that many products involve harms to distant persons and ecosystems. Don Mayer, for instance, argues that overconsumption is a problem with consumers and their connection to the effects of their actions: ““There is overconsumption, not because free market economic theory is misguided, but because the pervasiveness of negative externalities means that price does not give consumers or corporations the feedback necessary either to optimally allocate resources or to consider the moral consequences of particular production or consumption decisions.”²⁰⁸ Consumers lack the requisite information in a perpetual power imbalance with producers. The rational buyer needs information about the price of a product, its qualities, who produced it, and what kinds of warranties are part of the bargain. However, at times that information is deliberately obscured by marketing tactics: “Where large corporations compete with each other for “shelf space” and largely control what is sold and where, it is difficult for the average consumer to have access to local products or to know much more about nationally distributed products than their price or general appearance.”²⁰⁹

Douglas Kysar advances the informational approach. He has recently analyzed the way a “process-product distinction” is emerging as a vehicle for regulating consumer choice in international trade law and American domestic public law. This works to safeguard producers and corporate rights to retain process-related information concerning

²⁰⁷ See, for example H.R. Varian *Intermediate Microeconomics: A Modern Approach*. (Boston, Mass: W.W.Norton & Company, 1990)

²⁰⁸ D. Mayer Institutionalizing Overconsumption *The Business of Consumption: Environmental Ethics and the Global Economy*. (ed. P. H. Werhane, Roman and Littlefield Publishers, Inc., 1998) at p 71

²⁰⁹ Mayer, *ibid.* p. 72

goods.²¹⁰ For Kysar, “proponents of labeling and other efforts to downstream process information seek to counterbalance this constitutive anonymity of markets by making transparent to consumers the relationships that their decisions have with distant actors and distant places.” Consumer information is potentially a device for transforming markets: Labeling proponents hope that “individual purchasing decisions will begin to approximate the conceptual and rhetorical significance that “voting with one’s dollars” has been given within the framework of market liberalism”.²¹¹ In these market approaches law is implicated in the problems of commodities in terms of how consumers are either denied or potentially given information—through government sponsored labels, or mandatory labeling, or the maintenance of corporate proprietary information that denies consumers their “right to know”.

Commodity network analysis can acknowledge agents lack of information but also suggest that market-based approaches make assumptions about consumer motivation, the ability to handle knowledge, and the ways in which individualizing choice in large measure already determines aspects of social organization. Informational approaches seek to maintain neutrality between different normative viewpoints by assuming away the complex features of persons’ reactions to, and relationship with commodities. They leave out from their account an understanding of the way persons are motivated to buy things and the social contexts of consumption. So they exclude from their analysis the ways that persons fit into and contribute to commodity systems and the ways in which power circulates, forms and perpetuates commodity networks.

c. “Failures of regulation” critiques: Commoditization. Governments of industrialized countries do regulate commodities; at the locus of consumption they regulate health and safety features, and at the site of production environmental and labour conditions. Environmental policy discourse is increasingly focused on avoiding environmental degradation and “internalizing costs” in the life-cycle of products.²¹² Regulation for implanting these policies may thus be directed to different stages of the life-cycle chain: production, distribution, sale, use and disposal. While government implementation of

²¹⁰ Kysar “Preferences for Processes” *ibid.*

²¹¹ Kysar “Preferences for Processes” *ibid.* at p. 100

²¹² I have included a schemata of a life-cycle analysis as Figure 2, found at page 102 in this chapter. This is discussed in the conclusion of the chapter. Chapter Five offers further discussion of life-cycle analysis and sustainable consumption.

such policies are offset by the economics of resource flows, in some cases, governments will implement process-related measures, such as banning the import of tuna that is caught in a way that harms dolphins.²¹³ Jack Manno argues that focusing on improving consumer goods through drivers such as value-labels or ecological taxes can at best create a series of efficiencies, such that particular goods have less impact.²¹⁴ Manno argues that this does not touch on the *amount of stuff* that people have. Stuff is commodities, and we cannot eliminate all the harms involved. Production efficiency suffers from Jevons' Paradox, after Stanley Jevons, who found in 1864 that increased coal-use efficiency of British steam engines ended up making steam power cheaper and stimulated increased coal consumption. The same paradox can be seen in the United States car market, where greater fuel efficiency has led to simply more vehicles and greater distances driven.

Manno's solution, then, is to reduce "commoditization". Instead of developing things to function as commodities we should seek the opposite. Rather than private cars we should strive to towards public transit, rather than seeking entertainment from individual televisions we should attend community theatre. He thus describes services and goods as having high or low commodity potential. Commodities are characterized by alienability, being standardizable, autonomous, convenient and mobile. Low commodity potential goods and services "have potential to satisfy human needs with less material and energy; they form the basis of need-reduction and cooperation strategies and an economy of care and connection that facilitates consumption efficiency".²¹⁵ Here the legal system is implicated at a much deeper level. Manno notes that "Western-style economic development has flourished largely because societies invented legal and institutional mechanisms that favored commoditization and expansion".²¹⁶ Manno thus invokes commercial law as central to the unleashing of the energies of commoditization and suggests a basket of public law interventions including ecological taxes, increased research and development into low commodity potential goods, tax shifting to support

²¹³ Organization for Economic Cooperation and Development. *Process and Production Methods (PPMs): Conceptual Framework and Considerations on Use of PPM-Based Trade Measures*. Paris: Organization for Economic Co-operation and Development, 1997) at p. 9

²¹⁴ Jack Manno "Commoditization: Consumption Efficiency and an Economy of Care and Connection". *Confronting Consumption*. (ed. K. Conca, M. Maniates, and T. Princen, Cambridge, Mass: MIT Press, 2002).

²¹⁵ Manno, "Commoditization" *ibid.* p. 73

²¹⁶ Manno, "Commoditization" *ibid.* p. 97.

job creation over capital intensive production, and subsidizations to support non-commodity related tasks such as environmental restoration.

Manno provides an interesting problematic of commodities in terms of their relationship to energy and material use which echoes the wider concerns of ecological economists as to tracing the relationships between the economy and material flows. Simply calling for lower commodity potential goods, however, seems a rhetorical maneuver that covers over all the reasons the commodity economy is so popular—especially by virtue of complex technological improvements, labour saving devices and cultural flourishing (such as through books, stereos or works of art). Further, increasing taxes on goods can be expected to reduce the amount of stuff people have, and so work as a market-based measure for shifting consumption away from commodities. This points us towards developing a much more comprehensive understanding of the life of goods, the ways consumption can be affected by policy, and the relationship of the consumer to larger policy.

d. Anti-Commodification based critiques. The Marxist tradition takes an even dimmer view of commodities. The conflict between viewing things as products or in terms of larger processes is part of a long history of the critique of consumer goods on the basis of “reification”. This follows from the premise that our understanding of commodities is limited, that they appear to us as objects rather than as relations between persons. The process-product distinction can be found in a particular reading of Marx’s critique of the “commodity form”. Goods in the market place are commodities, and Marx thought both people in the street and also political economists of his day saw goods as having exchange value in themselves and not in virtue of the relations such commodities embodied. So “commodity fetishism” became one of Marx’s term for the ways we are radically dissociated from the relations we have with the workers who make the goods or the natural environments from which they come.²¹⁷ This in turn has spawned a long line of critique worried about the way commodification turns relationships into things. Lukács,

²¹⁷ Karl Marx *Capital. Volume 1* (London: Penguin, 1976) at p.163 to 177 Kennedy, “The Role of Law in Economic Thought; Essays on the Fetishism of Commodities” *ibid.* E. B. Pashukanis *Law and Marxism : a General Theory* trans. Barbara Einhorn (London: Pluto, 1983). G. J. Armstrong, “From the Fetishism of Commodities to the Regulation of the Market: The Rise and Decline of Property” (1988) 82 *Northwestern U. L. Rev.* 79.

following Marx, speaks of *processes*, and worries that commodities “no longer appear as the products of an organic process within a community”.²¹⁸

In this Marxist tradition, social interactions under capitalism are commodified. For instance, the legal and conceptual understanding of work is in terms of exchanging services for labour as workers come to think of their own bodies, skills and time as “things” to be traded for money. The fact that something is treated as a commodity turns that thing into a *thing* through being treated as fungible, commensurable and having money equivalence. In trading things for money we assume that things are interchangeable with one another and so also assume things can be compared, replaced and manipulated as objects; we see things (and persons understood as things) in terms of exchange value instead of intrinsic value. Commodification is thus anathema to seeing a person as intrinsically important and unique. Commodities take on the malevolent form as always resting on the misuse of human labour. This “things” analysis can also be extended to the process of exploitation of the non-human world, as ecosystems, or particular animals and plants become reduced to commodities for trade.²¹⁹

As Margaret Radin has studied in detail, these accounts presuppose that our social and economic life is either already “completely commodified” or on the slippery slope towards such a state of affairs. Marxists, while recognizing that discourses shape states of affairs, also at times missed the ways in which much of our world is not commodified or nowhere near so. In fact, a series of social and legal mechanisms do protect us, and our actual social practices and understandings of key features of our lives—our workplaces, our homes, and our relationships are “incompletely commodified”.²²⁰ In the face of a society still predominantly organized around the market provision of goods and services, minimum wages and maximum hours legislation or the range of international labour rights such as rights to collective bargaining may help preserve pertinent aspects of the

²¹⁸ Georg Lukács “Reification and the Consciousness of the Proletariat” in *History and Class Consciousness*. (Trans. Rodney Livingstone. Cambridge, Mass. MIT Press, 1972) at p. 91

²¹⁹ See, for instance, Bruno Latour *The Politics of Nature*. (Cambridge, Mass: Harvard University Press, 2004) where the process of commodification is identified as central to the human, non-human distinction and thus the further distinction between humans as valuable and the non-human as non-valuable. Also Norman W. Spaulding III “Commodification and Its Discontents: Environmentalism and the Promise of Market Incentives” 16 *Stanford Environmental Law Journal* 293

²²⁰ Radin, *Contested Commodities* *ibid.*

personhood of workers, and principles of ecosystem management can help maintain, say, forest ecology. These systems may represent a fragile compromise allowing for the benefits of a commodity economy while reducing its detriments. Questions can still arise as to whether particular objects should be put on the market, but increasingly the relevant questions will be how (if possible) to structure market relations and commodity systems to not be inconsistent with our values.²²¹ Systems of “supply chain governance” ranging from voluntary codes of conduct, to international commodity agreements suggest, then, a partial answer to a number of commodification worries.²²²

e. “Cultural” critiques of commodities. Cultural Marxists emphasize the way fetishization is deeply ingrained in consumer culture. Frederick Jameson considers the “effacement of the traces of production” from the commodity and pins this on the consumer. “This sees the matter from the standpoint of the consumer: it suggests the kind of guilt people are freed from if they are not to remember the work that went into their toys and furnishings. Indeed the point of having your own object world, and walls and muffled distance or relative silence all around you, is to forget about all those innumerable others for a while; you don’t want to have to think about Third World women every time you pull yourself up to your word processor”.²²³ This form of “reification in [the] consumer packaging sense” is, for Jameson “the indispensable precondition” on which consumer culture rests.²²⁴ A further approach reinterpreted claims about fetishism as claims about aesthetic and psychological attachments to consumer goods. In the 1930s Walter Benjamin described world exhibitions as “places of pilgrimage to the commodity fetish” and thereby instigated a chain of writers that saw in commodities a form of magic derived from its presentation, an erotic fascination with material objects which displaces an otherwise normally lived life through the “sex appeal of the inorganic”. In theatres of presentation of objects such as large scale department stores with fixed prices, objects assumed lives of their own, magically made animate not because of their status as autonomous and abstract values but because of their

²²¹ Joanne Williams and Viviane Zelizer “To Commodify or Not to Commodify: That is Not the Question” *Rethinking Commodification* (New York University Press, 2005) at .362

²²² These approaches are taken up in Chapter 5.

²²³ Frederic Jameson. *Postmodernism, or, the Cultural Logic of Late Capitalism*. (Durham, NC:Duke University Press,. 1991) at p. 315

²²⁴ Jameson *Postmodernism* Ibid. p. 315 More than one writer has invoked the popular film *The Matrix* to identify the image of vivid juxtaposition of a seductive virtual consumer spectacle veiled from the grim reality of exploitation. See Joseph Heath and Andrew Potter *Rebel Sell: Why the Culture Can’t be Jammed* (Toronto: Harper Collins, 2004) at p. 101

sensuous appeal.²²⁵ These critiques in the 1960s got conjoined with a concern with materialist accumulation and a worry, often identified with John Kennet Galbraith's *The Affluent Society* and Vance Packards' *The Hidden Persuaders*, that producers were driving consumption through advertising so as to increase profits.

The result was a strong critique of commodities as inducing a kind of consumption for consumptions sake. The spectacle of the commodity becomes the desired object.²²⁶ As Guy Debord writes: "The pseudo-need imposed by modern consumption clearly cannot be opposed by any genuine need or desire which is not itself shaped by society and its history...Its mechanical accumulation liberates unlimited artificiality, in the face of which living desire is helpless".²²⁷ Likewise, Herbert Marcuse, whose *One Dimensional Man* was so central to radical thought in the late 1960s writes: "The people recognize themselves in their commodities; they find their soul in their automobiles, hi-fi sets, split-level homes, kitchen equipment."²²⁸ Here the whole problem of consumer information that Mayer and Kysar discuss seems to provide a key link in commodified consciousness.²²⁹

Such critiques remain popular-- Debord's work features prominently in *Adbusters* a popular magazine dedicated to critique global capitalism and consumer society and is a key source of the "culture jamming" movement²³⁰-- but the weight of consumption studies and social sciences has for the most part turned away from such approaches, preferring instead to look at the wider social context in which consumption operates. The horizontal analysis provided by writers such as Bourdieu stress the social role that

²²⁵B. Brown "The Tyranny of Things (Trivia in Karl Marx and Mark Twain)." (2002) 28 *Critical Inquiry* 2 at 442-469

²²⁶ See Guy Debord. *Society of the Spectacle*. London: Rebel Press, [1967], 2005). "The spectacle is a permanent opium war which aims to make people identify goods with commodities and satisfaction with survival that increases according to its own laws" Chapter 2, paragraph 44.

²²⁷ Debord, *Society of the Spectacle*, *ibid.* Chapter 2, paragraph 68

²²⁸ H. Marcuse *One Dimensional Man: Studies in the Ideology of Advanced Industrial Society*. Beacon Press, 1964) at p.9; quoted in Marshall Berman *All That Is Solid Melts into Air: The Experience of Modernity* (London, Penguin, 1983) at p. 29 Throughout the 1960s worries about consumerism also extended to fears that mass production created homogenization and uniformity through economies of scale, worries that have subsequently been largely eclipsed by niche marketing and a plethora of cheap and varied goods. See Tibor Scitovsky, "On the Principle of Consumer Sovereignty" (1962) *American Economic Review* 262-268 and the discussion thereof in Heath "Liberal Autonomy and Consumer Sovereignty" *ibid.* at p. 216

²²⁹ Similar views are canvassed with appreciation by Harsch "Consumerism and Environmental Policy" *ibid.* at p. 557-9

²³⁰ Naomi Klein, *No Logo* (Toronto: Vintage, 2002) at p. 282

commodities play; in establishing cultural identity, social position, interpersonal ties and through symbolic production of meaning. If consumption is tied to social prestige, it may become difficult for individuals to opt out of socially constituted consumption standards and practices. The worry then arises that the “new left ideologues”, confuse false needs with what they simply do not like.²³¹ Consumption studies are then critiqued as “self-legitimation for middle class intellectuals who use other people’s deployments of consumer goods and styles to justify their own lifestyles”.²³²

Commodity network analysis suggests we need not oscillate between blanket acceptance or rejection of consumption habits. If particular practices are linked to distant harms and centralizing network structures we should take steps to end these practices and reform networks. This will include, as one step in wider societal transformation, taking up a reflexive position to our own wants and desires when we can see these were formed through naivité or unwanted social domination. Recognizing the ways in which we are interrelated with and formed through commodity networks implies taking up a reflexive position to our subjectivity and transforming ourselves and our practices.

f. Authenticity critiques. A further cultural critique of commodities, what we might call the “authenticity” critique, is associated with the philosophy of Martin Heidegger, who stresses the way goods serve as a way we know the world, albeit one shaped by the utilitarian considerations implicit in consumer goods. Technology, including commodities, serves as a way in which aspects of the world are revealed to people.²³³ However, they are compromised by virtue of the way commodity networks conceal as much as they reveal. Technological devices, such as dams on rivers, provide us with a way of knowing the river. The dam and hydroelectric project connect us to something we would not otherwise have contact with, but it also provides a unique form in which the river is presented to us. The river becomes something available for our use, in a process whereby the commodity network both transforms the river itself but also covers

²³¹ Jackson Lears “Reconsidering Abundance: A Plea for Ambiguity” In *Getting and Spending: European and American Consumer Societies in the Twentieth Century* (ed. C. McGovern, M. Judt and S. Strasser, 449: Cambridge University Press, 1998) See also Heath and Potter *Rebel Sell* at p. 105: “Budweiser bad, single-mat Scotch good; Hollywood movies bad, performance art good...”

²³² Phillip Crang and B. Malbon Consuming Geographies: A Review Essay. (1996) 32 *Transactions of the Institute of British Geographers* 4 at 704-711.

²³³ Martin Heidegger “The Problem Concerning Technology” *Basic Writings*. (Harper Collins, 1977) at 287-317

over that transformation to us. While we do not as consumers necessarily learn the details of the hydroelectric system we glean an understanding of the river as something available as a natural resource. Some deep ecologists have seen in these writings a strong critique of an instrumental view of the natural world, suggesting instead that we should intrinsically value nature.²³⁴ Alternatively, understanding commodity networks, both in their spatial expansion and historical origination, may provide the means for dislodging us from such an instrumental view by providing us new ways of knowing and mapping our relationships.

Albert Borgmann, developing this theme in a slightly different direction, worries that the complexity of commodities is part of the larger project of “paradigmatic consumption” whereby human engagement with material reality becomes attenuated.²³⁵ Commodity networks work to provide us particular goods for particular purposes, and in doing so eliminate potentially unpleasant experiences of daily life, and unpleasant experiences of the production of goods. The comforts provided by consumer goods are oriented towards liberating us from the pains and confinements of hunger, illness, cold, ignorance and immobility. But in doing so, commodity networks—and the complex technological innovations behind them—also abstract a particular valued function from its tangible circumstances. For Borgmann, the defining development of modern technology is the rise of the “device paradigm”. This is the conjunction of an easily available commodity and a sophisticated and impenetrable machinery. “What is abstracted may be called the commodity, and the technological substrates it rests on, the machinery of a device”.²³⁶ This fundamentally changes the nature of consumption: “In the experience of consumption, the consumer good detached itself from the context of its production and became instantly and easily available. Consumption became unencumbered enjoyment”.²³⁷ Commodities, as “technological devices” suggest erroneously that the pleasures of these things can be detached from their actual context and made available by some technological device. The result is a widespread social disengagement as we lose sight of richer practices that put us into relationships with other people and places.

²³⁴ See, for example, the collection of essays in *Heidegger and the Earth: Essays in Environmental Philosophy*. (Ed. L. McWhorter. Philadelphia, Pa: Thomas Jefferson University Press, 1992).

²³⁵ Albert Borgmann "The Moral Complexion of Consumption." (2000) 26 *The Journal of Consumer Research*. 4 418-22 at p 419

²³⁶ Borgmann, "Moral Complexion of Consumption" at p. 420

²³⁷ Borgmann, "Moral Complexion of Consumption" at p. 420

Pessimism concerning commodities as hiding an underlying reality is a hall mark of critiques of modernity and capitalism. However, geographers of consumption Ian Cook, Philip Crang and Mark Thorpe note the potential for error in such critiques: “Commodity fetishes are by no means neatly woven’ veils” which simply mask the origins of consumer goods”. The everyday lives of consumers and business personal and the work of NGOs, activists, educators and other cultural workings leads to “strategic rupture and recombination” of these veils.²³⁸ Simple concerns with device paradigms or veiling ignores the ways agents’ understandings of commodities are produced through reference to distant origins. This occurs through advertising, interior design aesthetics, and by playing on pre-existing cultural references. Referring to bananas as one contested commodity, Cook Crang and Thorpe note the function of a historical European understanding of the tropics as a terra nullius of natural abundance, ripe for colonial picking.²³⁹ Simple talk of veils and device paradigms are a specific case of ignoring what Noel Castree refers to as “the semiology of commodity surfaces”, that is, the multiple and complex meanings that attach to goods. The result is that we do not analyze, and so do not question, and therefore potentially reinscribe, the very semiotic we are seeking to understand.²⁴⁰ Informing consumers that banana production in fact uses cheap labour and destroys rainforest may simply be framed in, play into, and perpetuate stereotypes of tropical paradise and its “passive” population. Without also questioning the discursive construction of space and place—the tropics as a paradise and distant workers as recipients of Western progress-- we risk again reinscribing commoditized views of people and places. Ignoring these imaginaries amounts to ignoring agents’ subjectivities. By excluding the positive aspects of consumption which would help us understand why consumers do consume, we are susceptible to a “rhetoric of moral outrage and blanket disapproval”²⁴¹ that completely misses the role consumption places in expressing cultural values, situating oneself in the social world and creating social connections and interdependencies.

²³⁸ Cook, Crang and Thorpe “Tropics of Consumption: 'Getting with the fetish' of 'exotic' fruit?” *ibid.* at p. 174

²³⁹ Cook, Crang and Thorpe “Tropics of Consumption: 'Getting with the fetish' of 'exotic' fruit?” *ibid.* at p. 174

²⁴⁰ Noel Castree “Commodity Fetishism, geographical imaginations and imaginative geographies” (2001) *Environmental and Planning A* 33, 1519-1525 at p. 1520

²⁴¹ Castree “Commodity Fetishism” at p. 1520

These responses to critiques of commodities are in part an opposition to an implicit formalism: Marxists such as Evgnii Pashukanis explicitly talked about a “commodity form”, but any theory that discusses commodities in general risks moving from a high level of abstraction to overgeneralization. Critiques of commodities thus risk bringing on board the same kind of formalism that critical legal studies scholars have complained about in legal approaches to contract and property.²⁴² A good reason to reject this formalism about commodities is that it misconstrues both our evaluative orientation towards them, the complex history of how they have been considered and the many variations of practices and formations that actually occur.²⁴³ Once we take into account these aspects we also gain fertile ground for critiquing networks and finding ways to do things differently. Given the complexity of networks learning more about them will always be a task, and so critiques will always be provisional, and reforms revisable.

3.8 Network communities

The topology of the commodity network provides the common space in which various human and non-humans coexist. Actor Network approaches to commodity networks stress alternative mappings. Rather than assuming an integrated spatial mode of organization, such as depicted in Cartesian maps, ANT stresses networks as “alternate topological systems”.²⁴⁴ The focus is thus on “the elaboration of a topological spatial imagination concerned with tracing points of connection and lines of flow, as opposed to reiterating fixed surfaces and boundaries”.²⁴⁵ In networks, elements retain their spatial integrity by virtue of their position in a set of links or relations. Unlike the two dimensional regions nicely depicted on Cartesian maps, networks are topologies in movement, “performative orderings (always in the making), rather than as systemic entities (always already constituted)”.²⁴⁶

²⁴² and which we discussed in Chapter 2.

²⁴³ This approach is suggested by Macneil *The New Social Contract* *ibid.* at note 64, p. 144. He notes while individualist utilitarian models treat all exchange as good, strains of Marxism holds that “All trading in all commodities is negative and an evil, perhaps a necessary evil at some stages of social evolution, but nevertheless an evil”. For Macneil, in order to resolve the conflicts we must “examine the societal relation in which it is operating” and this will “provide us with a partial answer to the Marxist view”.

²⁴⁴ John Law “After ANT” *ibid.* at p. 4.

²⁴⁵ Whatmore and Thorne “Nourishing Networks: Alternative Geographies of Food” *ibid.* at p. 287

²⁴⁶ Whatmore and Thorne “Nourishing Networks: Alternative Geographies of Food” *ibid.* at p. 287

Seeing commodities as networks is a way of stressing the ways in which persons and objects exist in relationship, and in which agents are enrolled in the maintenance of commodity networks. The approach can envision the alternative topology of the network as constituting the common space of shared concerns that spill over and are not sufficiently contained in the consumer transaction process. The ethics of commodity networks concern how we co-exist in these constituted common spaces. Concerns range from the ways in which networks constitute consumers or workers as subjects to how they include or exclude the voice of the non-human. Commodity networks draw humans and non-humans from different countries, places, cultures, perspectives, and functional roles together into a “community”.²⁴⁷ Commodity communities are not seamless conflict free zones, as the usage of the term “community” has increasingly been fashioned. Rather these spaces are fraught with conflict and incommensurable understandings, situated allegiances, functional roles and misconceptions. Commodity network relations can be exploitative and dominating as much as exemplified by connectivity and mutual concern. As explored in the next section, these are communities deeply mediated by legal institutions, discourses and imaginaries. They also vary enormously in terms of their permanency, levels of commitment of members, and ability to withstand outside pressures and contingencies. Many rapidly change shape, while others operate through expansionist logic.

To sum up on commodity networks: Commodity network analysis accentuates the ways persons and things are intertwined in extensive and at times global systems. The approach emphasizes that commodities broadly construed as objects for sale (not just their raw ingredients) are what they are because of the way diverse actors use, distribute, design, manufacture, grow, mine or cultivate them. By focusing on particular goods such as coffee, running shoes or wooden furniture, researchers who use the approach accentuate the ways in which consumers are enrolled in networks through their purchase decisions, and that networks are constituted by cultural and symbolic

²⁴⁷ The Common Code for the Coffee Community uses this term. It is an initiative to “draw up social, ecological and economic dimensions of sustainability of the production, processing and marketing of green coffee through a participatory process that will serve as a code of conduct for the market for ‘mainstream coffee’”. At website, access May 12, 2006 www.sustainable-coffee.net/code_of_conduct/index.html Jeremiah’s Coffee, a San Francisco based roaster, provides links to the “coffee community” under which it includes the organizations it supports, different publications, websites devoted to coffee and links to trade organizations such as the Specialty Coffee Association of America. At www.jeremiahspick.com/coffee_community.php

aspects. The approach thus places emphasis on agents' subjectivity. The commodity networks approach helps scholars provide an account of the ways human discourses and self-understanding become translated into practical activities and relationships with distant ecosystems and human communities. Commodity networks are instances of the global economy and provide a smaller scale reference point for understanding the links between trade, the environment, and geo-political power. The approach can be expanded to include the way agents' subjectivity involves evaluative concerns, and how networks are contested spaces of conflicting values and interests.

PART THREE: LEGAL COMMODITY NETWORK ANALYSIS

3.9 Legalities of networks

Understanding commodities as networks also implies understanding the ways in which legal systems enable, facilitate, regulate and impact on commodity networks. Analyzing the role of laws in commodity networks provides for a description and explanation of the way laws variously enable, facilitate, regulate or impact on networks. We can call the analysis of law's role in commodities by the name "legal commodity network analysis". In what follows I show how such an approach provides for an account of the way that not only private law of contracts facilitates consumption and consumer transactions, but also how various public law measures work to regulate consumption. An analysis of legal regimes relating to networks helps tie together private and public law as working on, shaping and constituting commodity networks. Law is itself part of the assemblage of humans and non-humans that perform commodity networks.

One source of insight for legal commodity network analysis is the Marxist legal tradition. One of Marx's central ideas was that the commodity economy required persons to have a kind of description of, disposition to and self-understanding in relationship to commodities. Workers had to see themselves as selling their labour on the marketplace, irrespective of the goods they were making, and decision about what to produce and how to distribute it were determined "naturally" by the values of the commodities involved. Under such a system each party could be ignorant of other aspects of the network. In particular, he claimed that participants understood themselves as commodity holders who traded goods on the basis of exchange value, and in their own pecuniary interest, and acted in accordance with that self-understanding. He thus held

that under capitalism persons acted as possessive individuals, and commodities were the basic form of social interaction.

There was also a legal component to this analysis. Marx recognized law as representing people as formally equal, and so “the subject of equal rights” substitutes, in the legal imaginary, for the real flesh and blood person with substantive needs. Law sees individuals in this formal aspect, and so severs the person from the social ties and activities through which they are constituted. The formal individuality produced and guaranteed by law is based on the ideal of the self-interested commodity holder. Law thus enables and protects the system of commodity exchange through the private law of contracts and property, but also reinforces the self-understanding of persons as commodity holders. “The legal form both produces and reinforces the illusory, rather than genuine forms of equality, individuality, and community”.²⁴⁸ Consumers see their role in commodity networks as one of entering into exchange with formally equal (yet) abstract individuals—a process Evgnii Pashukanis came to refer to as a “legal fetishism”. Because of the dominance of the legal framework people did not see problems with commodity networks and so the law perpetuates commodity networks based on such interactions. Because “the most diverse relationships in commodity-producing societies are organized on the model of relationships of commercial circulation, and inscribed in the form of law”²⁴⁹ legal categories could only serve to reinforce and justify commodity networks.

It thus struck Marx as potentially revolutionary to proclaim that it was the people as a whole that makes production and distribution decisions, because this suggested that the people as a whole could then make decisions in any number of other ways than that

²⁴⁸ I. Balbus “Commodity Form and Legal Form: An Essay on the ‘Relative Autonomy’ of the Law” (1977) 11 *Law & Society Review* 3 at p. 57; M. Head “The Rise and Fall of a Soviet Jurist: Evgeny Pashukanis and Stalinism” (2004) 17 *Canadian Journal of Law and Jurisprudence* 2 A. Hunt “The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law” (1985) *Law and Society Review*, 11-38; R. Fletcher “Legal Forms and Reproductive Norms” (1985) 12 *Social & Legal Studies* 2 217-24; R. Hirst *On Law and Ideology*. (Atlantic Highlands, N.J. Humanities Press, 1979). R. Cotterell “Pashukanis: Selected Writings on Marxism and Law”(1980) 7 *British Journal of Law and Society* 2 at 317-321; N. Anderson and F. Greenberg “From Substance to Form: The Legal Theoreis of Pashukanis and Edelman” (1983) *Social Text* 7: 69-84

²⁴⁹ Pashukanis, “General Theory” *ibid.* at p. 60

presented by the then existing commodity systems.²⁵⁰ The discourse of commodity fetishism, then, was particularly designed to motivate person to redesign commodity networks. In Marx's mind this required, also, a critique of law as one element contributing to commodity networks gone bad. Pashukanis came to supply this critique, insisting that the forms of abstract individual, and the formal subject were derived from law and that law itself came to arise as a result of the commodity economy. It was through the development of capitalist markets that "the concept of the subject arose and developed from its contrast with an object or thing". As a result of the conceptual and practical results of the commodity economy, "a commodity is an object: a man is a subject who disposes of the commodity in acts of acquisition and alienation." This arises out of exchange relations: "It is in the exchange transaction that the subject first appears in the full totality of its definitions".²⁵¹

Pashukanis and Marx were attempting to show how the economy was made up largely of exchange transactions concerning commodities. They also were keen to show that the subject position of persons was influenced by different discourses and the reality of their social context. Moreover, law governed consumer transactions, and so both articulated and also reinforced a variety of values and ways of understanding networks and the role of individuals therein. Moreover, both the laws and the discourses surrounding networks were intimately linked to wider discourses and practices of capitalism. Commodity network analysis suggests we examine the way these different discourses and practices are linked and work together.

The Marxist tradition also resulted in serious flaws. Despite the at times brilliant insights, Pashukanis provides a frighteningly reductive analysis of subjectivity, law, commodities and how they interacted. In part this was a feature of the ways in which consumer markets were not as developed at that time as they are in current Western countries. Much of the problem was driven by an ideology intent on providing an analytic reduction of legal institutions to capitalist economic conditions. Moreover, Pashukanis saw commodity networks in terms only of contracts and property. He was either unaware of, or did not foresee the possibility of, more extensive regulatory systems. This

²⁵⁰ Kennedy, "The Role of Law in Economic Thought; Essays on the Fetishism of Commodities" *ibid.* at p. 969

²⁵¹ Pashukanis, "General Theory" *ibid.* at p. 79

foreshadowed the legal approaches of Communist regimes to appropriate property and to bring commodity networks under state controlled command systems. We can now see problems with this not only in terms of efficiencies (the 10,000 left boots problem) but in terms of hierarchical and totalizing state control over means of human self-organization. Alternatively, if we view Marx and his followers' reductions as instead a misplaced and rough attempt at drawing what Latour calls "lines of association" we can read Pashukanis as taking some first steps towards a legal commodity network analysis. We need not do so by reduction or causal determinacy, but merely by "tracing the associations". That is, we look at the ways these different discourses and practices work together, interrelate, and potentially become interdependent. To do so we need to examine the material workings of commodities, the subject position of persons, the role of discourses, and the functioning of law.

3.10 Commodity network analysis and law

Just as commodity networks can be analyzed from vertical and horizontal approaches, so to can we identify vertical and horizontal aspects of legal components of commodity networks.

Vertical analyses can include a study of the ways in which laws affect each link in the chain, from forestry law covering extraction of timber and waste management laws covering manufacturing to product safety requirements concerning consumption. By following the commodities we can show how laws at certain points will affect other points. Pollution control measures on factories, directed at sites of production, will make some goods hard to obtain or more expensive for consumers. Laws at the site of consumption can affect production—where, for instance, governments invoke "product related process and production method" type regulation and specify gas mileage requirements for cars, or use "non-product related process and product method" type regulation and ban the importing of goods made with prison labour. Such styles of analysis are not uncommon in existing studies of environmental and social regulation, especially where international aspects and differential standards are concerned.²⁵²

²⁵² See, for instance, OECD *Process and Production Methods*. *ibid.* See also Salzman "Sustainable Consumption and the Law" *ibid.* for vertical type analyses in considering law and sustainable consumption.

Laws will play a role in enabling, and facilitating commodity networks. Contracts and sales of goods are central here as they have been integral to the movement of commodities for much longer in our history than more recent labour or environmental regulation, and because they link so many different persons in the exchange of commodities. In Chapter Four these laws are more fully analyzed from an historical and network oriented perspective. As critical legal scholars point out, enabling laws can also play a broader role, more akin to regulation, by virtue of establishing the background conditions from which parties can negotiate. If the *Sales of Goods Act* were to be interpreted as providing an implied warranty that goods did not involve unfair labour practices or were not environmentally damaging, however specified, these would amount, if successfully implemented and enforced, to strong controls on commodity networks.

A detailed analysis of the background conditions of networks will help us understand the legal apparatus that structures the networks. Go to the store and pick up a kumquat. Ask about the legal structures that enabled it to end up in your hands. How is private property enforced in the region where it was grown? Where are the transport ships registered and what kinds of shareholder protection exist for investors in the shipping company? What remedies exist for commercial disputes? We can also identify laws of business associations, consumer protection laws that help protect consumers in the course of transactions, including labeling laws and consumer credit, the law of chattels and criminal law that allows for the protection of private property, systems for security for personal property (such as, in Canada, the *Personal Property Security Acts*) zoning that allows for shopping malls or even business licenses that allow for retail stores.

Where we find problematic commodity networks we might look to any one of these enabling conditions to see both how they contribute to the problem, and also how they might be transformed. For instance, critics of corporate behaviour cite legal rules in corporate law that require decisions to be made in the financial interest of shareholders and which conflict with values of social responsibility.

A second use for a vertical level analysis is to gain a handle on the actual systems of regulation that affect commodity networks. When considering any given good and asking questions as to its broader relational aspects, we will want to know the degree to

which it comes to us embedded within the values of various regulatory apparatuses, or rather, is the product of a relatively unregulated free market. This is not a simple question. Non-product related process and production methods regulation do represent a way in which governments invoke knowledge of commodity networks but their use is limited and internationally contentious. Networks are also governed by a now extensive framework of voluntary social and environmental standards which increasingly have a quasi-legal status. A particular consumer might have to spend some time in a legal library and exploring corporate codes of conduct to figure out if these rules applied to a particular good they might buy.²⁵³

Industrialized countries do have complex environmental, labour, health and safety laws that will affect the nature of products either produced or consumed in those countries. Consumer concerns about processes might not find expression in contract law or sale of goods, but where goods are made and transported in countries with strong labour laws, such worries may well be effectively addressed. Whether this is the case becomes a research task for a number of reasons; domestic legal systems largely avoid “cradle to grave” regulation of commodities, commodity networks are now extensive international processes involving countries with clearly different standards, and conscientious consumers are increasingly second judging both the standards and efficacy of even the most rigorous governmental regulation. Consider our kumquat again. Now ask where it came from and how it got here. What are the pesticide standards on the farm where it was grown? What were the legal remedies for the ship-hands who helped transport it?

Third, a variety of laws provide part of the social contexts which make networks possible. Back to the kumquat: What were the building codes in the offices of the managers of the importers? How did zoning in their city affect where they would live and why they took their jobs? Did big box suburban retailers provide new opportunities for people to drive out of town to buy kumquats at bulk discount rates? International trade agreements provide disciplines on individual countries import and export rules, which will indirectly enable (or disable) particular commodity networks. By tracing associations and exploring

²⁵³ Alex Hughes documents codes of conduct and certification systems in the Kenyan flower industry. While purportedly driven by consumer concern in the United Kingdom, in fact consumers receive no information about the applicability of the codes or the presence of quality assurance mechanisms. Hughes "Accounting for Ethical Trade: Global Commodity Networks, Virtualism and the Audit Economy." *ibid.*

the enabling conditions behind commodity networks we can begin to develop a rich picture of how law is linked to the economy. Global commodity networks depend, for instance, on citizenship and mobility rules that maintain international income differentials, and these depend on the whole nation state system.

Fourth, networks can come before laws: Networks not only depend on certain configurations in law, but are productive of law. Contract law presupposes commercial exchange and disputes. The ancient *lex mercatoria* arose in the medieval era, drawing on Roman tradition, to handle disputes at fairs, markets and ports. It later became incorporated into the state law system in England in the sixteenth century.²⁵⁴ It is not merely the case that the state precedes commodity networks. For most countries in our current “Westphalian system”, they were recognized as such much later than the commodity networks which helped form them. The situation is far more acute in the global South where most countries were not formalized as such until after the United Nations system was established in the 1940s. John Stuart Mill recognized this in the mid-nineteenth century describing England’s Caribbean colonies: “These are hardly to be looked upon as countries, carrying on an exchange of commodities with other countries, but more properly as outlying agricultural or manufacturing estates belonging to a larger community. Our West Indian colonies... [are] the place where England finds it convenient to carry on the production of sugar, coffee and a few other tropical commodities...”²⁵⁵ Corporate law is a device for structuring collectives of persons for business activities, but underlying almost all corporate ventures are trades in commodities and services. Business organizations for carrying out these trades existed before corporate law made the process easier.

The horizontal analysis will aid us in understanding the discourses and practices that persons engage in and which are informed by legal understandings. The normative assumptions of legal regimes will also enter the picture through their influence on the discursive understanding of humans in commodity networks, concerning themselves, other humans and also non-humans in the network. Legal concepts of persons, places and the non-human—as formally equal contractors, as “separate jurisdictions governed

²⁵⁴ Cutler *Private Power and Global Authority*, *ibid.* at p.115 and 144

²⁵⁵ John Stuart Mill, *Principles of Political Economy* (1876) at p. 685-86 Quoted in Sidney Mintz *Sweetness and Power* (New York: Elisabeth Sifton Books, Viking, 1985) at p. 42

by their own laws”, or as “sites for natural resources” or “private property” will form vital components of *legal* imaginaries. We can identify, for instance, the belief that workers in a supply chain have freely negotiated their wages as a result of “freedom of contract” as a kind of legal imaginary which helps justify to managers and consumers the network structure. While legal and ethical concepts are not always the same thing, they are closely connected. Laws are representations of “normative worlds” we inhabit.²⁵⁶ Law also leads us to take on its normative conceptions because of laws dominant place in the contestation of discourses that swirl around us, and because we follow the law in practice (by custom or coercion). Legal imaginaries will be central to understanding commodity networks.

Understanding the ways consumers are part of and participate in commodity networks will also require unpacking the ways their subjectivity is legally informed. Any number of legal doctrines and theories and practices will play a role in influencing, shaping and structuring the discourses and self-understanding of persons involved in the consumption, distribution, design, management, production, financing and regulation of networks. Law will also be under pressure to incorporate our “ethical imaginaries”, where, for instance, outrage over the uses to which small arms are used demands new controls over munitions networks and specifically production, or the use of coltan in cell phones is linked to civil war in the Congo. Ethics and values will press us to seek further regulation of commodity networks, such as where we are aghast that diamonds foster civil war, or that soccer balls are made by children so underpaid they cannot attend school.

At times reference to our normative conceptions will be a way of understanding the way normativity is channeled by law. Most well known is the way that social relations are construed in terms of rights, so potential harm to workers by way of exploitation is responded to in terms of workers rights, for instance. The analysis of different regulatory processes will provide key indicia of potentially problematic aspects of particular commodities: Concerns about distant sweatshops, for instance, can be voiced in terms of the efficacy and standards of local laws. Conflicts between different legal regimes

²⁵⁶ R. Cover “The Supreme Court, 1982 Term—Forward: Nomos and Narrative” (1983) 97 *Harv. L. Rev.* 4 at 30-33, quoted in Giagnocavo and Goldstein “Law Reform or World Re-Form” *ibid.* at p. 363

become the basis for identifying the salient problematics of commodity networks. Rights based conceptual frameworks, for instance, especially as developed by the International Labour Organization concerning workers rights, are a key driver behind particular codifications of appropriate labour practices in value-based labels²⁵⁷ and codes of conduct.²⁵⁸ These serve as one potential way of recognizing and protecting personhood. These rights based systems also represent one way of structuring relationships between persons in commodity networks.²⁵⁹

Commodity network analysis should also seek to move beyond a mere acceptance of legal rights based systems to also ask how they function to structure relationships and contribute to different regimes of power in networks. These can have new network effects, such as shifting power to certifying bodies²⁶⁰ or decreasing workplace democracy.²⁶¹ A core concern of many developing countries is that supply chain governance principles structured around First World consumer concern ignore the complexities of local concerns as to how to balance economic development and environmental protection.²⁶² Network analysis should not merely accept claims to jurisdictional sovereignty in the regulation of production processes, but neither should it disregard the ways in which local concerns are ignored, channeled, reflected or expressed in different systems of supply chain governance and regulation. The network approach also involves taking up a critical attitude towards the procedures, methods by which governments make laws, or by which non-governmental organizations and standardization bodies set certification standards or codes of conduct.²⁶³ The often raised worry that process and production method based regulation amounts to tacit trade discrimination reflects an awareness that methods of commodity network regulation and governance can serve tactical and competitive purposes. We should not leave out the effects of legal normativity on creating and maintaining illegal and underground

²⁵⁷ The Fairtrade Label Organization (FLO) standards –governing the Transfair label—specify ILO standards for labour rights.

²⁵⁸ Blackett "Global Governance, Legal Pluralism and the Decentered State" *ibid.*

²⁵⁹ Jennifer Nedelsky "Reconceiving Rights as Relationship" (1993) *1Review of Constitutional Studies* 1, 1-26.

²⁶⁰ See, for example, Hughes "Accounting for Ethical Trade: Global Commodity Networks, Virtualism and the Audit Economy." *Ibid.*

²⁶¹ Blackett "Global Governance, Legal Pluralism and the Decentered State" *ibid.*

²⁶² Hoffman and Tom Rotherham, "Environmental Requirements and market access for developing countries" *ibid.*

²⁶³ For a critique of Forest Stewardship Council governance systems see Walter "From Civil Disobedience to Obedient Consumerism?" *ibid.*

networks—tea smuggling into eighteenth century England, whisky into Prohibition America, or modern day illegal immigrants hidden in shipping containers.

Problematizing commodity networks can also serve as a source for critiquing not only existing laws and the institutions that law makes possible, but the ways in which law serves to channel our evaluative orientations. This will be especially so where legal frameworks operate to continue commodity networks we have found to be problematic. This is especially so in the case of ecological issues, where many ways of caring about our “non-human fellows” fail to be captured in existing legal regimes. Often ecological concerns are systemically defeated by legal regimes that maintain and perpetuate ecosystem destruction. The normative basis for the laws of consumer transactions and other laws that work to constitute networks will be cast into question as we begin to analyze the problematic aspects of commodity networks. Core concepts of persons, exchange, rights, obligations, property and objects can all be unpacked in terms of their relations to commodity networks. Commodity network analysis will look to analyze the way these concepts work to enable, perpetuate, facilitate or block off alternative forms of networks.

As an example, commodity networks are built on and embody a series of concepts of responsibility that are becoming increasingly problematic. The revised United Nations Consumer Protection Guidelines, for instance, provide that “responsibility for sustainable consumption is shared by all members and organizations of society... Informed consumers have an essential role in promoting consumption that is environmentally, economically and socially sustainable, including through the effects of their choices on producers.”²⁶⁴ Christopher Kutz describes a similar concept of commodity network dispersed obligations. He analyzes how our ordinary language practices embody a concept of “complicity” in distant harms by virtue of our participation in commodity networks.²⁶⁵ Traditional tort-based concepts of responsibility focus on individual responsibility (such as in the “but-for test”), but in participating in commodity networks we can play a very small role as members of a very large group of people whose cumulative action has harmful repercussions.

²⁶⁴ 1999 United Nations Revised Consumer Protection Guidelines s. 43

²⁶⁵ Christopher Kutz *Complicity: Ethics and law for a collective age*. (Cambridge University Press, 2000)

In network terms we can talk about how responsibility circulates and becomes distributed within the network, by virtue of the network working as a whole in the production of certain effects. Various technologies such as legal concepts work to articulate and divide responsibility amongst network participants. In traditional concepts of regulation, the state is seen as having the responsibility for governing the network, and in so doing ascribes roles to particular persons through legal categorization. Networks are also made up of bureaucracies and individuals, and division of labour serves to articulate differences in networks. A self-subsistent family, for instance, features a very compacted and internalized network consisting of the land and resources it uses and its own family members. Alternatively, automobile commodity networks employs hundreds of thousands of people with highly segregated functional roles. Current legal configurations both articulate networks and assign responsibility. There are now no mechanisms for holding consumers accountable for most ecological problems associated with the production and use of consumer goods, just as there are no mechanisms for shareholders in corporations to be held accountable for corporate crimes. The principle that individual countries are solely responsible for environmental or labour regulation in their own territory divides regulation of commodity networks where they extend globally. This dissociates regulation from applying to various network drivers. Alternatively, efforts to individualize responsibility and to cast it entirely on consumers redistribute responsibility to the individual consumer level. It also misses the degree to which companies, rather than consumers are situated to manage, control and design these networks. Corporate codes of conduct which seek to create voluntary codes for companies miss the ways in which companies are themselves beholden to consumers, stockholders, and competition. Systems of assigning responsibility seem to require a total network approach but law makes that impossible.

3.11 Commodity network analysis as framework

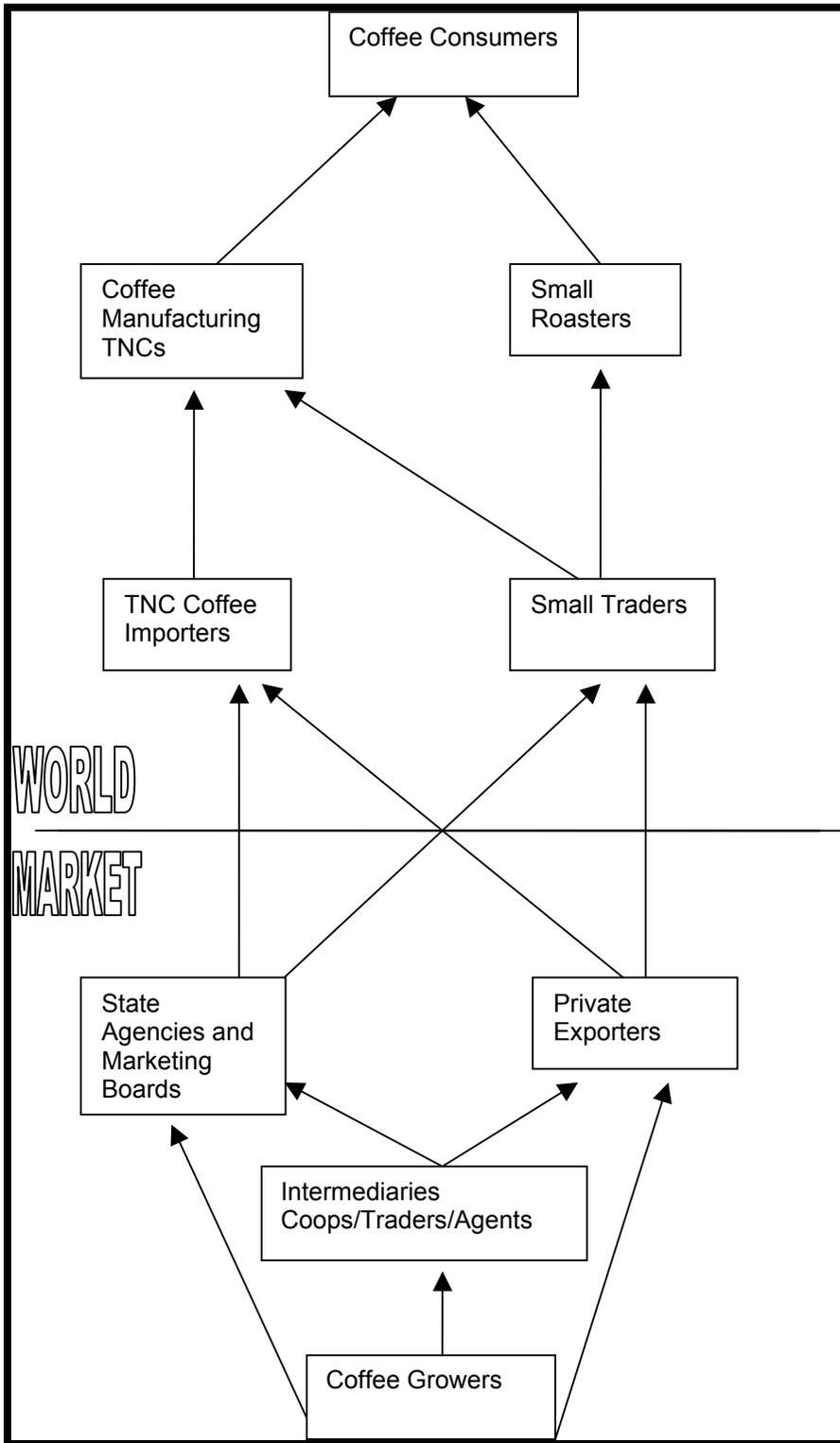
While legal analysis is important it is only one part of the larger analysis of commodity networks. In this section, I elaborate an idea of “commodity network analysis” as a way of mapping elements, associations and links that make up networks, together with different understandings and normative conceptions that participants and stakeholders have of networks. Such a “framework” is not meant to set out the confines of the study

ab initio, but rather indicate, on the basis of extrapolating from previous studies, what is likely to arise. As such it is a rough heuristic that allows us to make some generalities, but which will only be meaningful when specified for particular networks. Particular detailed studies will be very complex: For our purposes here it is enough to illustrate what is at stake in a consumption decision and what we take on when we decide to view transactions in terms of their wider relations. Consumers, network managers or government decision-makers should not take the infinite complexity of networks as a basis for acquiescence or resignation. We do not need to archive a photograph and narrative history of each of the millions of coffee workers to recognize that low farm gate prices is causing unnecessary misery. Likewise, the fact that there are many ways to evaluate the meaning, significance and morals of coffee growers' poverty does not mean there is no possibility of reaching widespread agreement that measures should be taken to help them. Further, recognition of the complexity and our relative ignorance in relation to commodity networks might play role in our adopting a more cautious attitude towards expanding trade and consumer society. Network analysis rests on the faith that many of our problems with networks, and difficulty in reaching decisions stems from the ways in which we have not considered so many aspects of how they work. As such it seeks simply to widen our understanding of what is at stake.

By way of summarizing the ideas of the network analysis I have drawn up two figures and a Table. In Figure 1 I have reproduced a copy of the coffee commodity chain as an example of a vertical chain analysis, and to provide a real life example of how this is done. In Figure 2 I have made a rough schemata of a life cycle analysis, which shows the greater complexity involved when industrial products or resource flows are considered. In including such a life cycle analysis I also mean to suggest that recent environmentalists' efforts towards tracing life cycles and green product design represent moves in the direction of a network perspective. In Table 1 I have attempted to outline the basics of a commodity network analysis, indicating the different empirical, evaluative and legal issues potentially at stake in considering commodities. This is meant as a general framework for which substantive considerations could be filled in for any particular commodity network: As such it remains somewhat vague and sketchy, and I have kept production values distinctly "low-fi" to reflect its status as a rough hypothesis for a framework. As we further review the commodity chain and network literature we can expand and revise the framework. As a rough approximate it helps to conceptualize

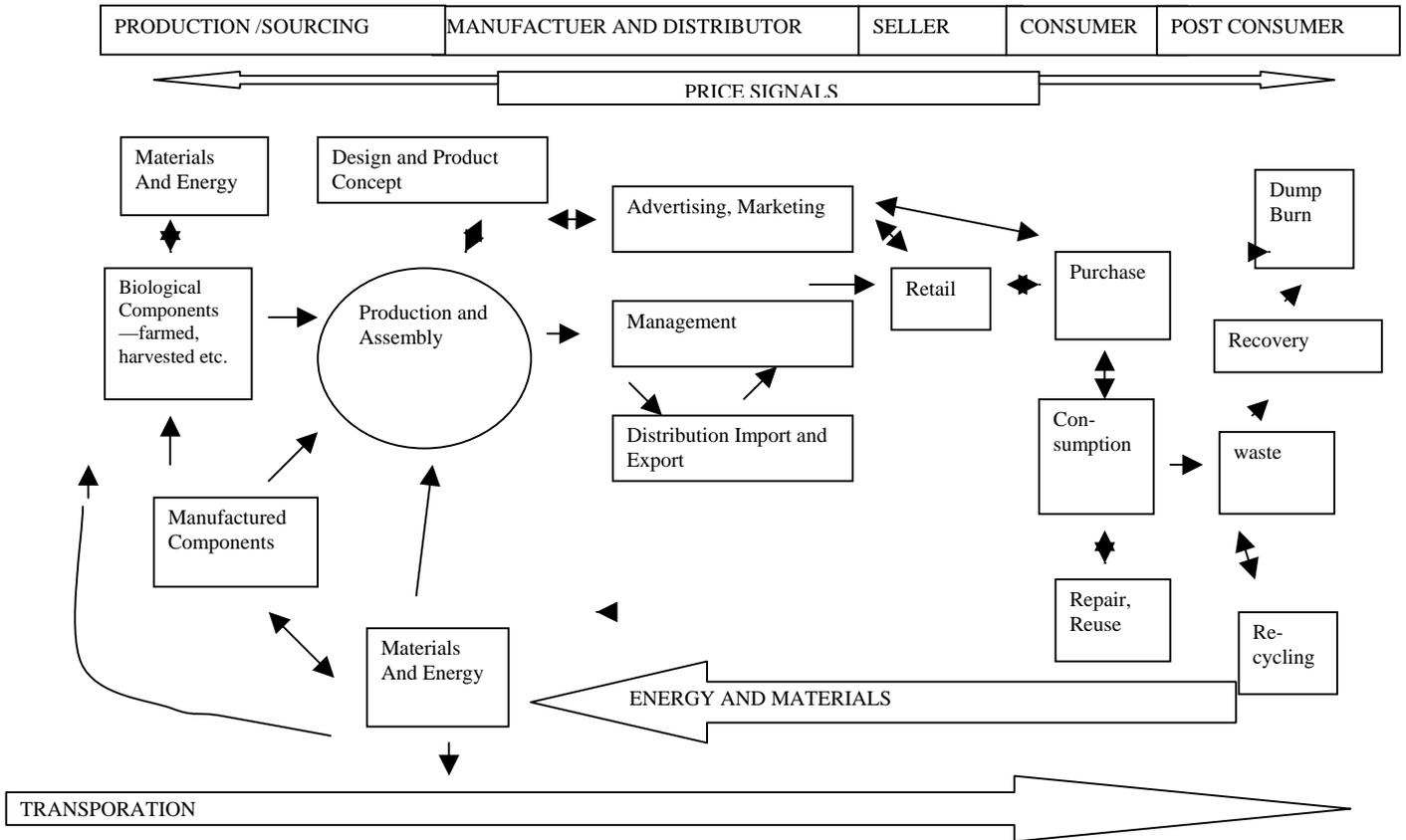
what is at stake in commodity networks. Each of the columns represents a “stage” in the vertical analysis starting with the consumer and leading through sellers, distributors, production and materials. These will of course necessarily vary depending on particular configurations—ranging from a family that grows its own food (the network relationships being all within the family) to large vertically structured

Figure 1: The Coffee Commodity Chain ²⁶⁶



²⁶⁶ Talbot, *Grounds for Agreement* *ibid.* at p. 32

Figure 2 : Life-Cycle Analysis



companies with international supply chains. I have left out post-consumer issues only for reasons of economy of space. The first row concerns “core elements” of the network, focusing on the main points that will require analysis for each “node” in the network. For instance, environmental analysis of “materials” will focus on the way methods of production require particular materials, but also on the effects of that material acquisition in terms of depletion of resources and harms to ecosystems. Understanding the network will require as well identifying the ways in which other elements—consumers, sellers, and others, understand and conceive of that resource depletion.

Following Micheletti’s use of consumer activism to indicate where consumption can be understood as politicized, I have placed in bold hot issues and associated consumer actions to help highlight where evaluative assessment might be relevant and where legal action could potential be relevant. For instance, I indicate “unfair labour practices protests” under “production” to indicate the ways in which labour and solidarity activists have been upset and engaged in political action concerning overseas sweatshops, and in turn instigated a range of legal, and extra legal responses, ranging from codes of conduct, bans on the importation of forced labour to calls for informational labeling. Understanding the range of aspects of networks which can potentially invoke evaluative response will require more than simply indicating “problematic” states of affairs. We will need to look at the composition of relationships between persons (which, in turn, may occur across the exchange barrier), as well as the way individuals’ virtues and vices are exercised in networks. Evaluative concerns are not limited to linking the way consumption contributes to problems created by production. Northern countries concerns over the small arms trade, for instance, is an example of the politics (and vices) of production given the harmful effects of the use (consumption) of arms. There is also a significant literature on the ways in which consumption is harmful to consumers themselves, if only because of the way it is linked to long working hours and lack of community.²⁶⁷

Row Two concerns the “horizontal” aspect. A consumer who wants to be understood as an environmentalist, for instance, will engage in the consumption of “sustainable goods”

²⁶⁷ See, for example, Juliet Schor *The Overspent American: Why We Want What we Don’t Need*. (New York: Basic Books/Perseus, 1998).

TABLE 1: Commodity Network Analysis					
Vertical Analysis	↔Consumer	↔Seller	↔Distributor, Business Structures, Import and Export	↔Production	↔Materials
ROW ONE: Core elements of Network Analysis	<p>Consumer identity as part of, related to, constituted by or caused by network (relational self, relational body)</p> <p>Consumers' causal role in network</p> <p>Consumer imaginary of other network elements (production, materials/nature, place (exoticism), seller, management, waste systems) (includes ideas of ethical/legal responsibilities, obligations, actual consumer information—eco-labels, advertisements, NGO and academic work, background knowledge)</p>	<p>Role in network (independent retailer, controller of supply chains)</p> <p>(If same as larger producer then see next column for all issues)</p> <p>Imaginaries of consumption, and consumers and other elements of the network</p> <p>Power relations over knowledge, marketing, financing with consumers</p> <p>Modes of advertising (boycotts due to advertising)</p> <p>(Boycotts on basis of methods of sale –eg. Discrimination)</p> <p>(Retail stores, franchises)</p>	<p>Network design and management (life-cycle process or linear model, externalizations)</p> <p>Commodity network structures (integrated firms, delinked trade chains, offshore contracting, North South cooperatives, government providers (such as utilities))</p> <p>Imaginaries of the network, including consumer, producers, materials, waste (as well as perceptions of legal and ethical obligations vis a vis these elements)</p> <p>Distribution needs and material requirements (e.g. transportation)</p> <p>Geography of network—national, international</p> <p>Corporate boycotts</p>	<p>Work-place and place of production (country boycott)</p> <p>Workplace management (union/non-union)</p> <p>Wages and working conditions (wage levels)</p> <p>(Unfair labour practices protests)</p> <p>Worker participation</p> <p>Production techniques (traditional knowledges, technical apparatus)</p> <p>Product standardization operations (quality control mechanisms, certifications)</p> <p>Production externalities—pollution</p> <p>Worker imaginaries of the network (consumers, managers, materials, shared responsibilities)</p>	<p>Production externalities—resource depletion, ecosystem harms</p> <p>(consumer boycotts, individualized avoidance)</p>

Vertical Analysis	↔Consumer	↔Seller	↔Distributor, Business Structures, Import and Export	↔Production	↔Materials
ROW TWO: Horizontal Analysis	<p>Strategic situation in community</p> <p>Social life</p> <p>Social/ personal uses of consumer goods</p> <p>Consumption as symbolic, and as performance</p> <p>Place of consumption</p> <p>Basic needs/quality of life</p> <p>Autonomy, cultural space</p> <p>Social person, relative income equality</p>	<p>Strategic situations vis a vis competition</p> <p>Profit maximization</p> <p>Places of consumption (malls, high streets)</p> <p>(Boycott of malls)</p> <p>Links of advertising with social views (discourse in general)</p>	<p>Strategic situation vis a vis competing firms in same industry/markets</p> <p>Strategic situation vis a vis competing products</p> <p>Profit maximization</p> <p>Influence on legal regulatory apparatus</p> <p>Strategic action of firm members, management</p> <p>Corporate links (MNEs) and subsidiaries including other projects</p>	<p>Place of production (city, region, state)</p> <p>Local social (class, ethnicity, resource distribution) and employment structures and relations of production (e.g. factory effects on local wages)</p> <p>(apartheid, extreme class disparity)</p> <p>Local political structures (dictatorships)</p> <p>Local legal struggles (e.g. widespread human rights violations, capital punishment for political activists)</p>	<p>Ecology</p> <p>Ecosystem integrity</p> <p>Parallel resource impacts</p> <p>Relationships with other resource users/stakeholders (local issues of resource allocation, global issues of distribution, temporal issues of future generations)</p>
ROW THREE: Different Conceptualizations	<p>Identity: Citizen-consumer; Consumer/self-interested maximizer; community member; atomistic individual, Relational self, Global/local</p> <p>In relation to network: "externalizer"; Ethical—virtuous shopper; Activist-resister; as Network participant</p> <p>In terms of exchange: -self-interested, "clean break", complicit,</p>		<p>Different management theories</p> <p>Smart network design</p> <p>Corporate social responsibility</p> <p>Cooperative approaches</p> <p>Non-governmental organization trade projects</p> <p>Do it yourself (home gardening) and substitutive farming/resource collecting</p>	<p>"workers as free bargainers" (commodification of labour)</p> <p>Labour law conception - negotiations under relations of power)</p> <p>Civil and political rights/ citizenship model</p> <p>Social and economic rights model</p> <p>Basic needs approach</p> <p>Ethical relationships with other (dialogic)</p>	<p>"natural resources" model</p> <p>Ecosystem services model</p> <p>Ecosystem integrity (ecosystem based management)</p> <p>Intrinsic value</p> <p>Romantic relationship with nature</p> <p>Non-human others</p> <p>Pollution as externalization</p> <p>Cost-benefit analysis v. discursive account of pollution harms</p>

Vertical Analysis	↔Consumer	↔Seller	↔Distributor, Business Structures, Import and Export	↔Production	↔Materials
<p>ROW FOUR: Current Legal Approaches</p>	<p>Consumer as contractual agent (Contracts, Sales of Goods)</p> <p>Consumption externality laws—health and safety regulations</p> <p>Consumer information requirements (labeling)</p> <p>Consumer protection--</p> <p>Voluntary eco-labeling</p> <p>Procurement laws and codes (government and companies)</p>	<p>Seller as contractual agent (Contracts/ sales of goods)</p> <p>Corporate codes of conduct (procurement)</p>	<p>Laws of business associations and non-profits</p> <p>Laws of importing (tariffs, reporting, importer licenses)</p> <p>International trade laws</p> <p>Lex mercatoria (International Sales of Goods, conflicts of laws, contracts etc.)</p> <p>State sovereignty</p>	<p>Non-product related Process and Production Methods regulations (labour, environmental standards in jurisdiction of production, forced by country of consumption)</p> <p>Product related regulations-- Consumption laws in country of consumption (health and safety)</p> <p>Production related legislation (country of production)</p> <p>Product related regulation (country of production)</p> <p>Corporate codes of conduct (working conditions)</p> <p>International labour law (ILO)</p>	<p>Environmental laws (production methods) (country of production)(systems of ecosystem management however thin)</p> <p>Resource allocation laws</p> <p>Custom, tradition, ways of life regulating ecosystem-human interactions</p> <p>Corporate codes of conduct (environmental conditions)</p>

Vertical Analysis	↔Consumer	↔Seller	↔Distributor, Business Structures, Import and Export	↔Production	↔Materials
ROW FIVE General innovations affecting the whole network:	Ecological consumption taxes and tax shifting Integrated product policy Non-product related PPM regulation of goods in country of consumption Certification systems (ISO, EMS, value-labeling) Eco-labeling Multilateral commodity-related agreements Extended producer responsibility Extended corporate codes of conduct Increased consumer information as to PPMs Stakeholder negotiations and agreements Multi-lateral environmental agreements with production/consumption elements, Reforms to trade law Strengthening ILO conventions to have enforcement mechanisms Fair trade values in exchange				
ROW SIX: Specific innovations	Other consumption related law and policy (Smart Growth, demand management, markets in leisure, income taxes, luxury taxes) Infrastructure changes Recycling laws, deposit systems increased consumer information and education social and environmental procurement laws	Farmers markets Selective zoning for green businesses Infrastructure support, tax advantages for cooperatives	Corporate governance/business association law reforms Anti-trust/ competition laws Financing/investing laws (environmental assessments)	Strengthening of environmental and social PPM regulations country of origin Strengthening PPM regulations country of consumption	Ecosystem based management Integrated social, environmental and health assessments

as a performance to others of their concern, and in so doing will not only make use of an understanding (or imaginary) of the site of production, but turn that into a symbolic tool as part of their self-expression. This in turn can be understood, following Bourdieu's usage, as part of her own striving to build "social capital"—to impress others based on her apparent distinction as a person of knowledge, conscience and class. Analogously the horizontal analysis of material extraction will consider the role this plays in the larger ecosystem, as well as its impacts on other potential resource users. If ecologists can give us a clear sense of the limits beyond which a particular ecosystem cannot be exploited without its collapse or fundamental transformation, and we can trace the way one or a number of commodity networks threaten to exceed that limit we can then say that a network is unsustainable in the ecological sense.²⁶⁸ Empirical studies will help elucidate the idea that conflicts over resource management are also conflicts between different stakeholder groups and different evaluative understandings of how to live and to use ecosystems.²⁶⁹

Row three discusses different "conceptualizations" as a way of bringing out the different discursive understandings of elements of networks. Various understandings of persons as part of commodity networks can illustrate this point. Persons have various identities or roles that they exhibit in different contexts and due to different discursive self-understandings—that of consumer or citizen, as atomistic individual or as community member. How they understand themselves and also how other persons in the network understand those persons will make differences in how networks are composed. Ethical consumption, for instance, works with a concept of the ethical or conscientious consumer, requiring actual consumers who engage with ethical goods networks to see themselves as ethical, and to be in part understood as such by the network designers (such as alternative coffee roasters, or even non-governmental organizations with side projects in solidarity coffee). Alternatively, big box retail stores who target price-conscious consumers work with differently understood and self-described persons. At the distribution/management node there will be a rich manifold of different theories and practices of commodity network structuring, including not only the vertically integrated

²⁶⁸ This lies at the core of the ecological economics idea that the economy should be constrained by ecosystem limits. See, Michael Jacobs *The Green Economy*. (Vancouver, BC: UBC Press, 1993) Herman Daly and J. Cobb *For the Common Good*. (New York: Beacon Press, 1989).

²⁶⁹ See David Harvey "The Nature of the Environment: The Dialectics of Social and Environmental Change" (1993) *The Socialist Register*. 29, 1-51.

large firms, but also theories and practices of corporate social responsibility or even systems of co-operatives. At the materials column we can here introduce the various philosophical disagreements concerning the appropriate ways of understanding ecosystems, nature, or resources: Clearly networks designed to institute the ideal of the intrinsic value of nature will take on a different form than those that assume resources are there for plunder.

Row four provides an initial idea of what a vertical legal commodity network analysis might include. At times laws will overtly regulate networks—such as in the *Canadian Wheat Board Act* (R.S., 1985, c. C-24) which sets out a regime for managing wheat, the *Convention on the International Trade in Endangered Species* which bans trade in endangered plants and animals, or the International Coffee Agreement which regulated prices and supply from 1962 to 1972.²⁷⁰ For many commodities an individual legal analysis would be a complex and relatively unproductive task, involving as it were, a detailed analysis of any number of regulations. The legal analysis should also include enabling laws such as contracts, Sales of Goods, corporate law and property, as well as include—horizontally as it were—the ways laws indirectly affect networks through working on agents self-understanding, network understanding and general social practices. The legal analysis and evaluative analysis will be intertwined, such as where legal discourses of workers rights become a way of framing potential discontent about the treatment of workers. In the next chapter I will focus on one particular element of the legal enframing of networks—the role of contracts and Sales of Goods both as “glue” of the network, and also as playing a role in constituting and subjectivizing the subject. Rows five and six extend the legal analysis to cover first, general innovations that echo through entire networks—such as integrated product policy, or extended producer responsibility laws—and second, legal and non-legal specific innovations that directly and indirectly affect networks.

We cannot look to this analytical model as a basis for easy solutions to the many ethical dilemmas that networks will involve. Rather, the approach is meant to open up and reveal the multitude of potential disagreements, contentions, viewpoints and conceptions which various actors bring to networks and help make them a reality. Commodity network analysis will reveal a plurality of voices and evaluative positions amongst

²⁷⁰ Talbot, *Grounds for Agreement* *ibid.* at p. 58-66

various actors at every stage of the network—from consciousness or penny-wise consumers to ambitious advertisers, competitive corporate executives to entrepreneurial peasant groups. Each will have her own evaluative understandings of other aspects of the network, as variously “available as a natural resource”, “sacred”, “part of a valuable ecosystem” or as a source of much needed income. The network is thus understood as “a genuine polyphony of... voices”²⁷¹ rather than the smooth space of preference orderings and price signals. Commodity network analysis will thus need to incorporate, first, the ways in which legal and economic theoretic frameworks contribute to discourses, practices, self-understandings and imaginaries of how we relate to actually and also want to relate to ecosystems through commodities, and how alternative conceptualizations also work in resistance to and alongside these modern understandings. By putting these different conceptions into “perspicuous contrast” we can begin to gain a sense of how we might begin to think about commodities differently.

²⁷¹ Mikhail Bakhtin *Problems of Dostoevsky's Poetics* (ed. and trans. Caryl Emerson, Minneapolis, Minn: University of Minnesota Press, 1984) at p. 5

4. SUBJECTS, OBJECTS, AND MARKET EXCHANGE: THE EMERGENCE OF SALES OF GOODS AND THE LAW OF CONSUMPTION

4.1 Introduction

Commodity network analysis provides a unique description of the exchange process whereby goods are traded: “Such webs not only connect firms through vertical commodity exchange relationships, but also bind together additional agents through the multi-directional flows of information and materials that variously support these exchange relationships”.²⁷² Exchange is one of the central components of networks and agents’ subjectivity as part of networks. Actor Network Theory suggests a research approach of unpacking the concepts of subjects, objects and relationships in exchange. Exchange in western capitalist countries is mediated by legal constructions. To understand how exchange works in our societies we need to look at the laws of contract and sale of goods. These laws remain largely unchanged since the nineteenth century and are central to the functioning of commodity networks. They developed in concert with many of the central commodity networks of the modern world which we owe to English colonialism, such as tea, sugar, coffee and textiles. Through acting on person’s subjectivity and providing a legal picture of the exchange process these laws in part constitute commodity networks. In this chapter the theoretical developments explored in Chapter Three are applied to understanding contract law and practice in its historical development in the nineteenth century.

The network theorist’s understanding of exchange suggests that individual consumer transactions are part of larger networks by which commodities are produced, distributed and come to market. The approach sees exchange as part of a series of relationships that bind persons together and facilitate the flow of goods in commodity networks. The theory is a second order account, on the part of theorists, to explain the exchange phenomena. Actual agents may in fact not share this picture at all. Individual consumers may be totally unaware or unconcerned with the wider relationships to distant workers or ecosystems that are embodied in the simple decision to buy Nike

²⁷² Hughes and Reimer “Introduction” *ibid.* at p. 5

running shoes or Chilean wine. When we look at the history of contract law and Sale of Goods Acts we see that precisely this sort of unreflective understanding of exchange is both worked into and justified by the law. Not all consumption involves the purchase of goods, but when persons do buy consumer goods, they enter into consumer transactions. Understanding consumption requires understanding the way contract law and sale of goods works to structure our relationship to consumer transactions, the ways we think of ourselves, and the objects we buy.

Understanding consumption through consumer transactions requires investigating the contingent “architectonics” of exchange—the way subjects (persons), objects (consumer goods) and exchange are discursively presented and actually practiced in historically specific contexts, and how these change. To speak of contingent architectonics is to recognize that there are a multitude of different ways of understanding exchange and practicing exchange relationships. Network theorists have analyzed the ways fair trade goods such as coffee make for different commodity networks.²⁷³ If consumers, producers, and others engage in networks through calculated profit maximization alone, then different networks develop (with different effects for workers and ecosystems) than if consumers are to pay a “fair price” to guarantee farmers’ earn sufficient amounts to meet basic human needs. Different modes of exchange make the difference. This chapter considers the implied concepts of subject, object and mode of exchange in contract law, as developed in nineteenth century England. Analyzing the history of Anglo-American contracts and Sale of Goods law that grew out of contract law in the nineteenth century is a way of understanding markets and the ways persons and things are shaped by them: It is a way of uncovering the “historical ontology”²⁷⁴ of consumption and its practices.

The laws of contract and sale of goods plays a mediating role in bringing categories of subject, object, and exchange into play on a daily level; they are, “constitutive rather than declaratory of the ontology upon which they are based”.²⁷⁵ Semiotic and discourse analysis suggests that textual moves “constitute” the readers of such texts, that is,

²⁷³ Whatmore and Thorne “Nourishing Networks: Alternative Geographies of Food” *ibid.* at p.295

²⁷⁴ Foucault “What is Enlightenment?” *ibid.* See also Hacking, Ian (2002) *Historical Ontology*. Harvard University Press.

²⁷⁵ Pottage “Introduction: The Fabrication of Persons and Things” *ibid.* at p. 9

position them as having particular self-understandings and as acting in certain ways.²⁷⁶ Law, like any language, is a way of world-making, one discourse amongst many that potentially influences our self-understanding.²⁷⁷ We are not merely pushed and pulled by laws that exert power over us from the "outside". Instead "we come, in uncertain and contingent ways, to see ourselves as law sees us".²⁷⁸ Tracing the historical development of concepts of subjects, objects and exchange in contract law helps make this apparent. Law becomes in Bruno Latour's phrase a "plug-in" –a vehicle that provides us tools for becoming who we are, and which we can consciously choose or find ourselves already utilizing as we are "made to be an individual/subject", a "psychomorph" that "literally lend you the shape of a psyche".²⁷⁹ In the interlocking concepts of subject, object and exchange found in the Anglo-American tradition of contract and sale of goods, understandings of objects become ways of understanding the self. Over time, persons and things have come to be understood as distinct entities rather than as interrelated through processes with other humans and non-humans. By tracing the history of contract we can see how it is that subjects and objects have come to be understood as disentangled from social and ecosystem constraints.

This chapter provides an overview of the history and the central concepts of classical contract law and concentrates on a close reading of formative cases in the law of Sales. It focuses on England in the nineteenth century because this is when the basic changes in the law occurred which shape practice in the exchange of goods in the Anglo-American world. This law parallels the American case law which came to be codified in the *United States Uniform Commercial Code* and also the *United Nations Convention on Contracts for the International Sale of Goods*. The principles of contract developed at this time provided the "natural and organic conditions of the private sphere and the *grundnorms* for international commercial relations."²⁸⁰ A comprehensive history of these areas is well beyond the scope of this paper. Rather, the focus is on a historically informed overview of the concepts of subjects, objects and exchange in contract law and key points which illustrate the problematics of exchange for those interested in commodity networks and consumption.

²⁷⁶ Dugdale "Materiality" *ibid.* p. 125

²⁷⁷ Nelson Goodman *Ways of Worldmaking*. Indianapolis, In: Hackett, 1978)

²⁷⁸ Austin Sarat " Redirecting Legal Scholarship in the Law Schools" (2000) 12 *Yale J. L. & Human.* 129 at p. 136

²⁷⁹ Latour, *Reassembling the Social* *ibid.* at 204-213.

²⁸⁰ Cutler, *Private Power and Global Authority* *ibid.* at p. 161

4.2 Early modern markets

The story requires us to go back to the development of the common law in England. Taking a historical approach helps to see the shifting terrain on which laws have developed and employed changing values concerning market place conduct, the establishment of prices and the concepts and normative basis for the enforcement of agreements. Two early features are important for setting the stage for the development of modern contract law in the eighteenth and nineteenth century. One concerns the rephrasing and reconceptualizing of contract in law. The second concerns the regulation of consumer markets and its links to the wider social and economic transformations of England before and during the industrial revolution.

At least since the 1540s the Kings' Bench operated as a commercial court, and one could sue in *assumpsit* upon the occasion that money was owed for a trade in goods.²⁸¹ Confusion was well cleaned up by *Slade's Case* (1602) which established that an agreement to exchange in the future (an "executory contract") implied an undertaking or *assumpsit* to pay what was due under it and so provided for the right to recover debts. The case law also reveals that the law at the time was certainly sufficient to allow for a robust trading economy: *Bates' Case* (1606) is a famous pre-Civil War case concerning the rights of the monarchy to tax international trade, and concerns the import of currants from Venice. Basic frameworks in the common law were thus in place for the resolution of commercial disputes for centuries before the industrial revolution.

Critical legal scholars and historians in the 1970s made much of the transitions in contract law in the nineteenth century, hoping to link contract law to the development of the industrial revolution and what Karl Polanyi had thirty years earlier referred to as the "great transformation" in England. Horowitz argued that contract was created by capitalism and the need for future planning,²⁸² such as in futures markets on stock exchanges. Similarly, Atiyah argues that the new formulation of contract was tied to economic liberalism and laissez faire values.²⁸³ However, if one looks just at the common law cases the picture that emerges, in the movement from *assumpsit* to

²⁸¹ Baker, *Introduction to English Legal History*, *ibid.* at p. 283.

²⁸² Horowitz "Historical Foundations of Modern Contract Law" *ibid.*

²⁸³ Atiyah, *The Rise and Fall of Freedom of Contract*, *ibid.*

contract in the nineteenth century, is one largely of reconceptualization. Many older actions are given new names and new theoretical justifications. However, this reconceptualization of contract was tied to the rise of the new political economy and laissez faire markets and *did* give rise to changes in the way cases were decided. The nineteenth century features a subtle but important shift in the legal concept of exchange.

Plenty of cases in the seventeenth and eighteenth centuries demonstrate how one could sue if horses were not delivered, money was owed, or jewels were fakes. The difference under the new law of contract that was reformulated first by Judge Mansfield in the late eighteenth century and then by subsequent judges in the nineteenth, was two fold. First, under *assumpsit* the idea was that someone had voluntarily agreed to do an act, in exchange for a sufficient consideration (such as money). Having paid or agreed to pay money or some other personal sacrifice, one party then relied upon the other. In the case where the agreement fell apart, this was considered as a nonfeasance, a breach of obligations one was relied upon to perform. The party in the wrong had acted deceitfully.²⁸⁴ The relationship between the parties was cast as a series of interdependencies, foremost of which was reliance. These considered the nature of the relationship and practices the parties were involved in. One did not owe money on a transaction because of a mere promise, but because the relationship created a dependency on one person in relationship to the other. In the nineteenth century the concept of exchange would be recast—with considerable effects in the decision of particular cases—as contract in terms of the meeting of wills of two persons, in terms of mutual obligations created by bare promises.

When wider social events are factored in, it becomes apparent that the eighteenth century and early nineteenth century were times of a weakened government, a rapidly expanding and globalizing commodity economy, and social pressures brought by industrialization and urbanization.²⁸⁵ *Assumpsit* was merely one potential avenue of legal redress available that had been available in the early modern period. Just as contract and sales of goods are today only a small part of the elaborate framework of regulation of consumer goods, the Middle Ages and early modern periods in England

²⁸⁴ Baker, *Introduction to English Legal History*, *ibid.* at p. 281

²⁸⁵ Thompson, “The Moral Economy of the English Crown in the Eighteenth Century” *ibid.*; Walter H. Hamilton “The Ancient Maxim Caveat Emptor” (1931) XL *Yale L. J.* 8 at 1133

featured a complex arrangement of weights and measures, and controls of markets in the Assize of Bread and Assize of Beer. These provided for detailed regulation of local markets and embodied a variety of social values. A paternalistic model existed not only in law, but in the consciousness of the labouring poor who at times would riot in support of the system that protected them from at times exorbitant prices. There were specific directions for different classes of persons. The law specified when farmers could sell their grains (not in the fields, only to dealers in specific situations), to the poorer classes first, in small parcels, with duly-supervised weights and measures in specific markets. Dealers were regulated, with laws against forestalling, regrating and engrossing. They were not allowed, for instance, to buy standing crops, nor might they purchase to sell again (within three months) in the same market at a profit, or in neighboring markets. The Assize of Bread regulated the price of loafs by weight and in relation to the ruling price of wheat.²⁸⁶ “Law was conceived of as protective, regulative, paternalistic, and above all, a paramount expression of the moral sense of the community.”²⁸⁷

These regulations began to wither by the time of the industrial revolution. The history of markets in England in the modern period is not one of a slow progression towards government regulation of an otherwise natural and preexisting market. Rather, the eighteenth and early nineteenth centuries were periods of deregulation as traditional controls in the marketplace were gradually loosened or simply fell apart to meet the new demands of industrialization. The breakdown of the Assize system and the relevant impoverishment of protections for shoppers in the nineteenth century helped turn the new law of contracts into consumer law. The result of this transformation was that consumer transactions came to be seen as only a special case of the larger class of commercial transactions.

Shifts in social and economic conditions in the late eighteenth century also contributed to making contract central in the lives of the majority of people. Industrialization and urbanization meant that the majority of the population shifted from peasant farmers to wage labourers. This brought the reconfiguration of person from the status bound position of peasantry to that of free contractors for labour dependent on money

²⁸⁶ Thompson, “The Moral Economy of the English Crown in the Eighteenth Century”, *ibid.* at p. 85-7

²⁸⁷ Atiyah, *The Rise and Fall of Freedom of Contract*, *ibid.* at p. 167 citing W. Horwitz “the Rise of Legal Formalism” (1975) 19 *American Journal of Legal History* 251

transactions and contract concerning employment.²⁸⁸ Corresponding to urbanization was a shift towards purchased food as the basis of subsistence: An open marketplace came to dominate.²⁸⁹ In short, the masses became consumers and their consumer transactions legally enframed by contract law. The person as a contracting agent would come to serve as a key mode of legal subjectivity.

4.3 Will theories and classical contract

In late eighteenth and early nineteenth century England the common law went through a period of systematization. The idea of a separate and systematized “contract law” so named, as opposed to the older actions on the writ of *assumpsit*, was new to common law. In the European civil law tradition it had a longer history.²⁹⁰ Earlier continental jurists had invoked the concept of will as part of contract making, but this was laden with concepts of “equivalent value” and “just price” which worked to ensure a variety of protections. Natural lawyers such as Grotius and Pufendorf used concepts of “equality in exchange”. In an exchange, parties must receive equivalent because each wishes to exchange and not to enrich the other party at his own expense. They saw it as intrinsic to the contracting process and implying substantive terms, such as that a seller would warrant goods against defects.²⁹¹ Will theories began to emerge in the late eighteenth and nineteenth centuries, whereby jurists thought of a contract as merely an expression of the will of the parties who were creating the contract.

Increasingly legal scholars in England came to discuss contracts as a unique discipline, and do so by reference to the raw agreements of the parties. William Paley’s *Principles of Moral and Political Philosophy* (1785) stands out as one of the first texts to give a central place to contract. Paley argued that “exchange” was the one principle that could ever become universal with regard to the distribution of wealth.²⁹² Consequently a

²⁸⁸ J. Orth “Contract and the Common Law” *The State and Freedom of Contract*. (ed. H. N. Scheiber. Stanford, Cal:Stanford University Press, 1998) 44-65, at p. 55, detailing the relationship between the shifts in labour and contract

²⁸⁹ James Walvin. *Fruits of Empire: Exotic Produce and British Taste, 1660-1800*. (New York University Press, 1997) at p. 111

²⁹⁰ . Gordley “Contract, Property, and the Will” *ibid.* at p. 74

²⁹¹ Grotius *de iure bellis ac acis* II.xii.9.1; Pufendorf *de iurure naturae*. V.iii.I-3 cited by . Gordley “Contract, Property, and the Will” *ibid.* at p. 72

²⁹² *Principles of Moral and Political Philosophy* Book III, part 1. Chapter III cited by Atiyah, *The Rise and Fall of Freedom of Contract* *ibid.* at p. 403.

market price was always a fair price.²⁹³ Powell's *Essay Upon the Law of Contracts and Agreements* (1790) focused on a narrow set of principles for describing all contracts. He argued that the consent of the parties alone fixes the just price of any thing, without reference to the nature of things themselves, or to their intrinsic value.²⁹⁴ Pothier's *Law of Obligations* (1806), a French text, was welcomed by English judges and lawyers and gave expression to the notion that a contract is primarily an agreement based on the intention of the parties and it is their will which creates the legal obligation. These will theorists regarded the will as the source of all the terms of the contract. They no longer claimed that these terms rested on the principle of equality or the nature of the parties' agreement. This is "essentially the theory of contractual liability which passed into English law, and has remained there ever since".²⁹⁵ By mid-nineteenth century judges commonly referred to contract as based on the intention of the parties.

The will theory represented a significant reconfiguration of the exchange process. The older law of assumpsit configured a series of socially constituted or even "objective" evaluative considerations of appropriate action within relationships, but the new classical contract approach now said it was the bare agreement of the parties that provided any substance to their mutual obligations. Once contract was defined in terms of the will of the contracting parties, it was then used as first principle to explain as many legal rules as possible.²⁹⁶ So the change with will theories is that they introduce the will or agreement of parties without any attempt to delimit what could legitimately be willed. They regarded any attempt to interfere with the express terms of the contract in the interest of justice as paternalistic.²⁹⁷

Implicit in the will theory, and even the idea of contract as centered on choice was the "two-party model" of the contract. The contract terms are provided by the meeting of the minds—the mutual promises—of the two persons engaged in the contract. Of course multi-party contracts are possible—allowing for the meeting of many more minds—but the important point was that other potential stakeholders or affected parties were *not* conceived of as having a role in the contract formation, or in the "law" that the

²⁹³ Book III, Chapter VII, cited by Atiyah, *The Rise and Fall of Freedom of Contract*, *ibid.*, at p. 403)

²⁹⁴ Horowitz "Historical Foundations of Modern Contract Law" *ibid.* at p. 918

²⁹⁵ Atiyah, *The Rise and Fall of Freedom of Contract*, *ibid.* at p. 400

²⁹⁶ Gordley "Contract, Property, and the Will" *ibid.* at 67

²⁹⁷ Gordley "Contract, Property, and the Will" *ibid.* at p. 72

contracting parties created for themselves. The two party model portrays the contract in terms of the subjective position of the parties, ignoring both the effects on other stakeholders or ways they themselves might think the contract should be arranged. It thus works as a “frame”, focusing the significance of the contract away from further linkages and relationships between the ways the two parties might characterize it. Early nineteenth century commentators such as Verplank “saw that if value is solely determined by the clash of subjective desire, there can be no objective measure of the fairness of a bargain”.²⁹⁸ Because contract only concerned the interests of the parties involved, no other stakeholders could use the judicial system or otherwise interfere in contractual relations. Consumer transactions were made private.

Will theory was a jurists’ theory: it originated in Roman, Christian and natural law theories, and was modified by an Enlightenment led crisis of faith in Aristotelian based concepts of equality in exchange.²⁹⁹ This was a modernist response to the bogeyman of objective value. However, it was rapidly accepted into English law and formed the unifying conceptual basis for “classical contract theory”. Patrick Atiyah provides ample evidence of the way the nineteenth century saw a new breed of lawyers and judges comfortable with the free market ideals of David Ricardo and Adam Smith and sought to remold the law of contracts as part of the centerpiece of a legal system structured around contractual relationships. Will theory provided the tool to achieve these goals. Courts could concern themselves only with the formal aspects of the contract such as formation, and compliance with the contract terms. They would not need to enquire into whether the substantive terms were fair or not. The effect of will theory was that it became the natural ally of everyone with philosophical, political and economic theories that stressed freedom of choice. Contract law could enable commercial transactions without interfering in how parties might want to structure their own affairs.

Atiyah notes that the classical law of contract embodied “the model of the market”.³⁰⁰ The idea was to construct a formalized system, based on the ideals of bargaining between free individuals, and the contract reflecting their mutual intentions. The effect of acceptance of the will theory into classical contract law was the effective adoption of a

²⁹⁸ Horowitz “Historical Foundations of Modern Contract Law” *ibid.* at p. 225.

²⁹⁹ Gordley “Contract, Property, and the Will” *ibid.* at p. 82

³⁰⁰ Atiyah, at p. 403

model of exchange transactions which brought new concepts of subjects and exchange. For Atiyah, in such a model no man is his brother's keeper: The parties bargain or negotiate and neither party owes any duty to volunteer information to the other, nor is he entitled to rely on the other except within the narrowest possible limits. Each party must study the situation, examine the subject-matter of the contract, and the general market situation, assess the future probabilities, and rely on his own sources of information. The content of the contract--the terms, price and subject matter-- are entirely for the parties to settle. It is assumed that the parties know their own minds, that they are the best judges of their own needs and circumstances, that they will calculate the risks and future contingencies that are relevant, and that all these enter into the bargain and finally, this bindingness is, in principle, a matter of pecuniary calculation.³⁰¹

This provides in crystallized form an expression of the subject of exchange as autonomous and calculating. It provides a picture of the mode of exchange as a one off discrete transaction between autonomous individuals. The classical picture, although self-described as formal, neutral and resting on basic principles, in fact embodies particular concepts of the person and of exchange. Classical contract law sought to embody a complete explanation of law in terms of basic principles of individual freedom to bargain. This formalistic analysis, however, contains within it a misplaced self-understanding: It misses the degree to which it is in practice oriented towards specific concepts of human well-being and flourishing. The mere rigid application of formal principles became biased towards those who would best flourish under them, and this would often be those persons with relative bargaining power and strength, who were capable of excelling in the rough and tumble world of competitive markets. The classical picture was, in effect, more than just another name for a laissez-faire market; it provided the legal ground rules and sanction for such a market.

The concept of the person utilized in the theory is that of an "individual": "Classical contract law represented a world of totally autonomous individuals free to transact on any terms they wished and thereby to control their own destinies".³⁰² By construing a sharp distinction between the interests of different persons, classical contracts presented

³⁰¹ by Atiyah, *The Rise and Fall of Freedom of Contract*, *ibid.* at p. 413

³⁰² J. Feinman "The Significance of Contract Theory." (1989) *Cincinnati Law Review* 58: 1283 at p. 1310

a normative world of individual self-reliance, and entitlement to enjoy benefits without an obligation to share or sacrifice them to the interests of others.

In this conception, freedom of choice is central to the concept of the person. Classical contract law created a world of private ordering where parties created their own laws by agreement. Liability was imposed through consent, and this was grounded in the conception of a social world as composed of independent freedom-seeking individuals. “Freedom of contract is grounded in the concept of choice. People should be free to choose which contracts they will enter into, on what terms, and which contracts they will avoid”.³⁰³ In the case of a contract for employment there is no cause to second judge wage levels or working conditions because these are assumed to have been freely negotiated by free and equal individuals.

The will theory and classical contract created the exchange process as we are familiar with it today. Because the bargaining process occurs between autonomous individuals, it takes on a specific form, but also implies a certain conception of the persons involved. Emile Durkheim, for instance, noted that “In the fact of exchange, the various agents remain outside of each other, and when the business has been completed, each one retires and is left entirely on his own”.³⁰⁴ Ian Macneil calls this the “discrete transaction”.³⁰⁵ More recently Michel Callon refers to a system of the “clean break” whereby the parties momentarily meet and then are “quits”.³⁰⁶ In each case, the point is the same: the model transaction involves an isolated one off event, between two relatively equally situated arms-length bargainers, engaged with each other for the sole purpose of the contractual exchange, and expressing their complete contractual obligations in their mutual promises. “Contract” is defined through the offer and acceptance rubric, where all the parties’ obligations are objectified in the stated agreement. The result is that parties relate to one another as “calculative agencies”.³⁰⁷ While the concept “consumer” would not come into play until the twentieth century, we

³⁰³ J. Feinman "Critical Approaches to Contract Law." (1983) *UCLA Law Rev.* 30: 829. citing Oliver Wendel Holmes *The Common Law*, 1881 and W. Story (1844) *A Treatise on the Law of Contracts Not Under Seal*

³⁰⁴ Quoted in Macneil *The New Social Contract* *ibid.* at p. 95

³⁰⁵ Macneil *The New Social Contract*, *ibid.* at p. 2

³⁰⁶ Michel Callon "Introduction: The Embeddedness of Economic Markets in Economics." In *The Laws of the Markets* (ed. M. Callon, Basic Blackwell/The Sociological Review, 1998) 1-57 at p. 17

³⁰⁷ Callon, "Introduction: The Embeddedness of Economic Markets in Economics" *ibid.* p.19

have the clear outlines here of the basic model of the rational actor as found in micro-economics and which later becomes the consumer.

The classical contract picture provides concepts of subjects and exchange that embody a specific concept of commodity networks. The network is implicitly understood as composed of different people who enter into contracts with one another, as free and equal legal subjects, so the consumer engages with the network by way of contract, and is quits with the network after the contract is fulfilled. A particular person need only relate to the network in terms of pecuniary self-interest and need not have a particular idea of other aspects of the network. Self-interest is to be understood in terms of commodity ownership itself—albeit in forms such as money or real or personal property. Because relations are only with the next person over in the chain, there is no need for considerations about effects on further parties or ecologies in the network to be brought to bear on the exchange.

Thus far, I have been drawing on a series of works by twentieth century legal realist and critical legal studies scholars that have taken an interest in understanding the law of contracts as a social institution.³⁰⁸ Writers such as Atiyah, Horowitz, and Feinman were concerned with problems of wealth distribution and the role of contracts and the courts in supporting capitalist social relations in the nineteenth and twentieth century. For contemporary readers concerned about consumption and its social and environmental effects, it remains important to understand consumer transactions as one type of capitalist social relation. Consumption related concerns involve issues of how exchange is part of global commodity networks that link consumers to distant other persons and ecosystems. This brings additional concerns about the material flows and resources usages of the economy. Capitalist social relations depend on the transformation of ecosystems and the non-human parts of the planet into commodities. The issue of objects and their role in exchange is central to such an analysis.

In the classical contract law approach that developed in the nineteenth century trade relations are structured and understood as part of the will of the parties—that is of

³⁰⁸ Realists who have made these critiques include Roscoe Pound and Karl Lewellyn. The tradition is continued in the 1970s and 1980s by Patrick Atiyah, Morton Horowitz, Jay Feinman, Roberto Unger and Duncan Kennedy among others.

individuals—and this comes to bear upon the way objects are understood. The will theory carries with it a sharp distinction between persons (*persona*) and things (*res*). Alain Pottage, writing about property law, notes that “the distinction between persons and things is a foundational theme in Western society, and that legal institutions have played an essential role in constituting and maintaining that distinction.”³⁰⁹ The concept of will was historically linked in Roman, Christian and natural law to the *persona*, as “*subjectum juris*”, “according to which legal rights... are the legal clothing of natural individuals or a set of quasi-prosthetic forms that realize and articulate a subjective will.”³¹⁰ While initially a legal fiction the concept of *persona* hardened into a dead metaphor and became a principle mode of self-understanding. The person/thing distinction both exemplifies and is productive of the modernist ideal whereby objects are understood as dead or inert things, and subjects as exercising control and jurisdiction over them. The will theory, in rendering subjects’ intentions the sole ground of value, results in a situation where “objects and relations have value only as individuals choose to accord it to them in the marketplace.”³¹¹ By configuring objects as subject to the will of their owner as obtained in exchange, the theory works to eviscerate the social lives and prior history of goods.

The will theory was an academic theory found in new treatises, and it does not exactly match all of contract practice. English contract law has always included equitable concepts and the idiosyncratic views of particular judges that make it hard to match the theory with actual judicial decision-making. In what follows, the analysis shifts to case law and commentary to see how the will theory and commercial practice worked to forge legal concepts of objects and exchange. This is most striking in the decisions concerning the principle of “caveat emptor”. This principle holds that buyers must take precautions in the market place and have no rights to information or to guarantees concerning the goods they buy. The decisions concerning caveat emptor are one area where the judges were willing to constrain the plurality of judicial practice to ensure a new uniform approach to subjects, objects and exchange.

³⁰⁹ Pottage “Introduction: The Fabrication of Persons and Things” *ibid.* at p. 4.

³¹⁰ Pottage “Persons and things” *ibid.* at p. 119

³¹¹ Feinman, “Critical Approaches” *ibid.* at p. 839

4.4 Caveat emptor

Caveat emptor became in the nineteenth century, “the apotheosis of nineteenth century individualism”.³¹² It was linked to the principles of liberal political economy by writers in the early nineteenth century such as William Paley and J.R. McCulloch. They argued that free competition in the marketplace was the best way to secure quality goods and reasonable prices.³¹³ The linking of caveat emptor to free markets, and the deregulation of the English economy has led a number of writers to identify caveat emptor with, as Hamilton expresses it in his famous article, “the refusal of public authority, through legislature and judiciary, to accord effective protection to the purchaser”.³¹⁴ Horowitz notes, citing the early nineteenth century critic Verplank, that caveat emptor represents “the nineteenth century departure from the equitable conception of contract”.³¹⁵ This interpretation suggests that when the courts shifted away from caveat emptor in the 1850s and 1860s it represented the beginnings of intervention into the market.

An alternative view is that caveat emptor and laissez faire are not the same thing at all. As Lewellyn explains: “the level of dealing (for purposes of dealers, and of civil suits), can shift far toward caveat venditor, and has done so, without disturbing business, or disturbing the unregulated character of business competition.”³¹⁶ For Lewellyn, if the social context changes such that commercial men and consumers come to expect sellers to bear the risks for bad goods, then the courts can adopt these new customs without imposing new forms of control on the market. On this view, when the courts shifted to the view that sellers of goods implied that their wares were safe, this did not represent significant forms of market intervention.³¹⁷ This chapter suggests that the earlier academic writings from Lewellyn to Atiyah overlook the ways in which the judicial cases concerning caveat emptor embody perspectives and debates on the nature of persons, things, and exchange.

³¹² Atiyah, *The Rise and Fall of Freedom of Contract*, *ibid.* at p.464

³¹³ Paley, *Principles of Moral and Political Philosophy*, Book III, part 1 Chapter VII; J.R. McCulloch, *The Principles of Political Economy*. Cited by Atiyah, *The Rise and Fall of Freedom of Contract*, *ibid.* at p. 467

³¹⁴ Hamilton “The Ancient Maxim Caveat Emptor” *ibid.* at p. 1133

³¹⁵ Horowitz “Historical Foundations of Modern Contract Law” *ibid.* at p. 946

³¹⁶ Lewellyn, K. On Warranty of Quality and Society (1936) 36 *Columbia Law Review*. 699

³¹⁷ Lewellyn, *ibid.* at p. 718

The predominant debate in nineteenth century sales cases concerned the issue of how to account for important aspects of goods that could not be found by the buyers' inspection. The courts were confronted with the difficulty that the market model provided no direct means for buyers to know about important background conditions for goods, but at the same time the integrity of the market depended on this. The result was considerable instability and conflict in the law as different judges took different positions. If a person was buying a physical object then personal inspection would be paramount. However, if a person was buying what was agreed between the parties, then the courts could say the buyer relied on the words of the seller: Whatever was handed over would need to comply with the way the goods were described in the initial agreement, regardless of the buyers' inspection. A series of common law cases that underlie the shift from caveat emptor to the *Sales of Goods Act* encapsulate this debate. Both conceptions squarely construe transactions in the harsh commercial logic of self-interest and mutual promises.

A range of cases in the early nineteenth century involve the rigorous proclamation of "caveat emptor". In *Parkinson v Lee* (1802)³¹⁸ there was a sale of hops (as in beer) sold by "sample"—that is, the buyer could inspect some of the hops and then order more "of like goodness and quality". Six months after the initial inspection, the buyer received hops from the seller's warehouse. Unbeknownst to the seller, and unlike the sample, the hops came watered, and then rotted. The extent of the prevailing belief in caveat emptor can be gleaned from the plaintiff buyer's own argument (or his lawyers). He was willing to acknowledge that caveat emptor applied in the context "where a defect is apparent on the face of a commodity; there it may fairly be presumed that the buyer exercised his own judgment upon it; at least it was his own fault if he did not".³¹⁹ The plaintiff's lawyers were even willing to concede that "Whatever natural defects or infirmities are incidental to the subject matter, the buyer must take the risk of; such as those with which horses are afflicted," (referring to the common law tradition of caveat emptor in the sale of horses). Given the state of the law, the plaintiff argues the narrow point that the commodity should answer the sample. The plaintiff invoked the earlier fair price doctrine, arguing that as a fair price was paid, the commodity should be in a merchantable condition at the time of the sale. Otherwise the buyer might receive a

³¹⁸ 2 East 314, 102 E.R. 389

³¹⁹ 102 E.R. at 391

different thing from that which he stipulated for, and which it was the understanding of both parties that he should have. The defendant argued that every person entering into a contract in the course of trade is presumed to have a competent skill to enable him to judge of the commodity he bargains for. He knows the defects to which it is liable as well from fraud as from natural causes, and he speculates accordingly. The court accepted this argument. Judge Gross ruled that: “It is the fault of the buyer that he did not insist on a warranty”.³²⁰ Judge Lawrence: “I must suppose that each party was equally well acquainted with the commodity bargained for.... the plaintiff might, if he pleased, have provided against the risk”.³²¹

Parkinson v. Lee was just one of many cases that upheld caveat emptor in cases of inspection. In *Shepherd v Pybus* (1841)³²² a builder sold a new barge from his wharf. Relief was denied to the plaintiff who after taking possession found the barge to be leaky and in bad shape, on the basis that he had had opportunity to inspect the barge on his own. In *Emmerton v Mathews* (1862)³²³ the courts okayed the sale of meat found to be unfit for human food on the basis that the buyer had inspected. As late as *Smith v. Hughes* (1871) the courts upheld a contract for oats different from what the buyer said he wanted on the basis that he had inspected a sample of what was provided. Lord Blackburn commented that “there is no legal obligation on the vendor to inform the purchaser that he is under a mistake which has not been induced by the act of the vendor.”³²⁴

We see in *Parkinson v. Lee* and these further cases the idea that the objects of exchange begin as things for which a physical inspection could almost completely

³²⁰ at 2-East-322.

³²¹ At 2 East 323

³²² 3 Manning and Granger 868, 133 E.R. 1290

³²³ 7 Hurlstone and Norman 586, 158 ER 604

³²⁴[1861-73] ALL E.R. Rep. 632* Also reported L.R. 6 Q.B. 597;40 L.J.Q.B. 221; 25 L.T. 329; 19 W.R. 1059. At para. 10. see also *Burnby v Bollett* (1847)16 Meeson and Welsby 644, 153 ER 1348. Farmer buys dead pig from another farmer. Turns out putrid. Caveat emptor when the defendant is not in the business or trade. This same faith in judgment and first hand inspection also explains the “patent exclusion clause” in the *Sale of Goods Act* (1893). Chalmers, the author of the Act, directly references two cases: *Chanter v. Hopkins* (1838) 4 M and W. 399 and *Ollivant by Bayley* (1843). 4 M and W. 399. *Chanter* involved a patented apparatus for a “smoke-consuming furnace” to help in making beer. “The [seller] had performed his part of the contract by sending that machine; and it is the [buyers] concern whether it answers the purpose for which he wanted to use it, or not.” So the fact that the object is an “ascertained article” means that there is no particular fitness for purpose. This reasoning is extended in *Ollivant v. Bailey*: because something patented is an “ascertained article” then the issue of fitness of purpose does not arise.

provide an accurate analysis. The courts emphasize that the buyer can inspect the article and depend on his own judgment. This is the domain of what Llewellyn has coined “primitive-mercantile”—the domain of “on the spot horse trading” and country vegetable markets. We have, then, a reference to the ideal of the physical marketplace, where goods are handled and seen and the rational agent, self-sufficient in making judgments, and the things traded as mere objects. This reflects the idea we see in Blackstone who talks of property in chattels (personal property such as consumer goods) as over “things which could be detected by the senses”.³²⁵

The emphasis on visual inspection works to construe goods in terms of their physical and phenomenal features. The approach sees the objects of consumer transactions as “things”. There is no way that process features could ever form part of consumers’ decision unless these were independently stipulated by the parties. While a buyer can make inquiries, sellers may well not provide answers. The effect of the competitive market may be that sellers are not likely to provide answers and are likely to not have made any inquiries themselves. It could be expected that no answers would be forthcoming. We have here an historical instance of the process product distinction whereby things on the market are understood in terms of their physical features alone and buyers are given no rights to know about origins.³²⁶ In the case of latent defects, where inspection would not show the problem, consumers would have to take their chances. Any actual reliance that consumers vested in sellers that was not protected by an express warranty was not legally protected. This was such an obvious hole in the theory that it would have to give way to a different approach that could accommodate latent defects.

Caveat emptor helps ensure that goods become “disentangled”. As Michel Callon writes “To construct a market transaction, that is to say to transform something into a commodity, it is necessary to cut the ties between this thing and other objects or human beings one by one. It must be decontextualised, dissociated and detached.”³²⁷ The

³²⁵Blackstone Commentaries 2 at 17. See also, for the object view of property, R. Vandeveld, “The New Property of the 19th Century: The Development of the Modern Concept of Property” (1980) 29 *Buffalo L. Rev.* 325

³²⁶ For contemporary discussion of this distinction see Kysar “Preferences for Processes” *ibid.*

³²⁷ Callon “Introduction: The embeddedness of economic markets in economics” *ibid.* at 18 see also Callon “An Essay on Framing and Overflowing” *ibid.*; Callon “Actor-Network Theory--the Market Test” *ibid.*

concept of disentanglement helps show how subjects, objects and exchange become assembled together. For Callon, disentanglement follows from the “clean break and then quits” idea of the discrete transaction. What makes the transaction discrete is that each party gets a bundled-thing, and does not become enmeshed in further series of social relations. In gift exchanges when one gives another person a gift, the recipient becomes obligated in some ways to return the gift. There is a kind of debt to be repaid: “If the thing remains entangled, the one who receive it is never quits”.

The constitution of exchange relationships in terms of the disentangled conception requires removing the various bonds of social relationship and interdependencies which usually accompany human association. In order to allow market relationships to be discrete, the persons must be disentangled and this requires that the things be removed from their background. All this is implicit in the idea of the exchange of property as “free alienation”. One severs the thing from its past and delivers a new object, without legal (or evaluative, moral, emotional, or other) bonds to the buyer: “The alienation of a thing is its dissociation from producers, former users, or prior context”.³²⁸ There is a two way relationship between the concept of discrete exchange and the concept of disentangled objects. The fact that things are seen as objects allows for disentanglement, and the fact that discrete contracting requires disentanglement works to turn things into objects.³²⁹

³²⁸ N. Thomas *Entangled Objects. Exchange, Material Culture and Colonialism in the Pacific*. (Cambridge, Mass: Harvard University Press, 1991) Cited in Callon, “Introduction: The embeddedness of economic markets in economics” *ibid.* at p.20

³²⁹ The thing theory has more recently been advocated as “*in rem* theory”. The initial formulation is in W. H. Hohfeld “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning ‘ (1913) 26 *Yale Law Journal* 16, and “Some Fundamental Conceptions as Applied in Judicial Reasoning ‘ (1917) 26 *Yale Law Journal* 710. “Hofeldian In Rem Theory” has been recently developed in Merrill, T. and Smith, H. “What Happened to Property in Law and Economics? (2001) *Yale L. J.* 357; Merrill, T. and Smith, H. (2001) “the Property-Contract Interface, 101 *Colum. L. Rev.* 773; Merrill, T. and Smith, H. (2000), Optimal Standardization in the Law of Property: the Numerus Clausus principle 110 *Yale L. J.* 1 9. Merrill and Smith distinguish property from contract (and feel that law and economics misses this). Contracts involve only a small number of persons who can actually work out the terms of the deal, and for that reason contracts can be quite complicated. And the contract is all over when the immediate participants finish with it. Property, on the other hand, can easily survive its current owners. A given piece of property may be bought and sold over and over, and the more durable the goods, the more times those goods will show up in the market. So property’s legal consequences attach to the thing (*in rem*) as opposed to the persons involved. The theory notes that property has to be kept simple, so that new generations of owners have a good idea about what they are getting, and so that current buyers and sellers do not need to search out extensive relationships that might affect their purchase—exactly Callon’s point.

Likewise, the autonomous individual is *made* autonomous through the configuration of exchange relationships as discrete; simultaneously relations are only discrete because individuals are always operating at arm's length from one another. For persons who already see themselves as autonomous individuals, disentanglement enables the perpetuation of that self-understanding and way of being.

The more traditional reading of *caveat emptor* is that the concern for individualized judgment had to do with the need for an easy resolution to problems of consumer protection in a deregulated market. What the courts were doing was providing a system for private vigilance, alerting potential victims to danger. *Caveat emptor*, on this reading is a kind of utterance that hails the consumer with its literal meaning—Buyer, Beware!—and so stimulate buyers to take all kinds of precautions against uncommunicative sellers. A sufficiently vigilant public could then ensure that shoddy goods would disappear from the market, without the need for legislation or litigation.³³⁰ If buyers knew there was a possibility of a legal remedy to save them, they might become sloppy in inspecting goods. The result would be more frauds than under *caveat emptor*.³³¹ This reading reinforces rather than undermines the idea of the new contract law as designing an individualized practice of exchange. Here the courts are using their power to emphasize the importance of individual judgment, to insist that consumers become accustomed to act in just the ways that the market ideal insists. The use of this warning presupposes the “thing” idea of the market and the self-interest model of the consumer. Here we have clear commands from the judiciary that the person should take on the market ideal of subjectivity, and become the legal subject of commercial exchange. “Not until the nineteenth century did judges discover that *caveat emptor* sharpened wits, taught self-reliance, made a man-- an economic man—out of the buyer, and served well its two masters, business and justice”.³³²

³³⁰ Atiyah, *The Rise and Fall of Freedom of Contract*, *ibid.* at page 465, citing the Second Report of the Mercantile Law Commission (1854-55). The technique proved to be failure: Reports of the conditions in which most English people lived in the early nineteenth century show remarkable levels of impoverishment and lack of protection in the marketplace. Bread adulterated with chalk was widely prevalent. Marx *Capital. Volume 1.* *ibid.* at p. 278, n 14. citing *Report of the Select Committee on the Adulteration of Food 1855*, and *Dr. Hassal's Adulterations Detected*, 2nd ed.. London 1861. also Thompson, *History of the English Working Class*, *ibid.* at p. 874.

³³¹ Mentioned in Kennedy, Duncan. "Form and Substance in Private Law Adjudication." (1975-76) 89 *Harv. L. Rev.* 1695 citing Kessler (1964) "The protection of the consumer under Modern sales law, part 1" *Yale Law Journal.* 74: 262

³³² Hamilton, *ibid.* at p. 1186

Arjun Appadurai has noted that objects are not always commodities, in the sense that they can pass into different uses at different times: We relate to a purchased product very differently than to something we find in forest. A person may also find something in a forest, cherish it as such, and later put it on the market as circumstances and feelings change. Hence, we should speak of a “commodity situation” in the social life of an object as “the situation in which its exchangeability (past, present, or future) for some other thing is its socially relevant feature”.³³³ It would follow that the conceptual framework surrounding exchange works to reinscribe the thing as a commodity. Caveat emptor works to *perform* things as things as people are enjoined by judges to take caution when they shop in the marketplace.

There is an ideological aspect to this: The “thing” concept reinforces the notion of the autonomous individual by disentangling the consumption of objects from social bonds. It can be understood as part of complex discourses that emerge to help normalize and justify the existing social order and ease the consumers’ soul. In the early nineteenth century most consumers would have had little knowledge of the working conditions in distant tea plantations but they certainly experienced first hand local factory conditions, which included fourteen to sixteen hour days for pre-adolescent children.³³⁴ Prominent social movements sought to change those conditions. This included popular agitation for labour legislation such as in the “Ten Hours” or “Factory Movement” which pressed for the labour rights of working children and adults.³³⁵ It also included later efforts such as William Morris’ arts and crafts movement, which attempted integrated reform of the design of products as well as humanizing the ways in which they were made.³³⁶ There were strong motivations for the consuming classes to deny their daily complicity in such hardship and seeing consumer goods as products rather than processes helps in this regard. Laissez-faire, caveat emptor and disentangled subjects and objects co-existed in an assemblage formation.

³³³ Arjun Appadurai “Commodities and the Politics of Value” *Rethinking Commodification*. (Ed. Martha Ertman and Joan Williams. New York University Press, 2005) at p. 37

³³⁴ E.P Thompson *The History of the English Working Class*. (London: Penguin, [1963] 1980) at p. 373

³³⁵ Thompson, *History of the English Working Class* *ibid.* at p. 371-84

³³⁶ Foster, John Bellamy Foster *The Vulnerable Planet: A Short Economic History of the Environment* (Monthly Review Press, 1994). at p. 67, Michael S. Kimmel “The Arts and Crafts Movement: Handmade Socialism or Elite Consumerism? (1987) 16 *Contemporary Sociology* 3 388-390.

4.5 Legislation

Laissez-faire values were prominent in England's Parliament in the first half of the nineteenth century. Nevertheless, Parliament did continue some legislative provisions relating to consumer issues. The new construal of contracts implied a particular understanding of the relationship of exchange to government regulation which continues to have force to the present.

The English state was increasingly under pressure to respond to specific problems such as the mistreatment of emigrants (hence the *Passenger Acts*), cholera epidemics (hence the *Nuisance Removal Act* (1848)) or food adulteration. In many cases the "legislation was largely dictated by the sheer force of events" rather than philosophical principles.³³⁷ In England and its colonies there was no explicit constitutional right to freedom of contract, and the liberal politics of Jeremy Bentham and John Stuart Mill acknowledged a role for government involvement in the economy. Contractual freedoms fell out of the property and contract system, and the absence of laws restricting commerce. There were laws concerning adulteration of food, including those to prevent adulteration of tea (1730, 1777), to prevent burnt vegetable matter from being mixed with coffee beans (statutes of 1718, 1724 and 1803) to prevent the suppression of alum in bread (1758, 1822, and 1836) and for beer (1761, 1816, and 1819). Once techniques of microscopic analysis became available in the 1850s, more aggressive and effective legislation for adulteration of food could be passed.³³⁸ Weights and measures legislation was passed from 1795 through to 1859, providing for inspectors to enter shops, examine weights and certify them as accurate, and to create standardization across the country. In possible response to the caveat emptor principles of *Parkinson v. Lee* Parliament passed the *Hop Trade Acts*, in 1808, and 1814, designed to identify the names and addresses of hop growers on bags, with the hope of avoiding fraud in the sale of hops. The 1866 *Hop Trade Act* noted that the previous ones had been ineffectual, and sought to specifically prohibit the mixing of different qualities so that a sample might not truly match the bulk. Parliament was more willing than the courts to acknowledge the deficiencies of caveat emptor.

³³⁷ Atiyah, *The Rise and Fall of Freedom of Contract*, *ibid.* at p. 555

³³⁸ Atiyah, *The Rise and Fall of Freedom of Contract*, *ibid.* at p. 546-7

Other legislative provisions impacted more seriously on traditional realms of contract. The mid nineteenth century saw the emergence of laws limiting first the hours of child labourers (The *Factories Act* 1833) and then restrictions on the hours of work of all workers (*Factories Act* 1853).³³⁹ The first *Alkali Act* in 1863 paved the way for a modest environmental and administrative system for dealing with industrial pollution. It acted as a template for central state regulation of pollution "that continues to the present."³⁴⁰ We can trace the ways employment laws might change the way commodities are produced, or how food adulteration laws might improve the quality of food, and these do represent changes to commodity networks and the objects of exchange. The limited powers of the administrative state did provide for minor processes of re-entanglement of goods although initially in terms of relationships between producers, vendors and the state, rather than any thickening of ties between persons.

The effect of the will theory was that once the bureaucratic state began to introduce legislation in the nineteenth and early twentieth century reformers saw this not as cohering with, but as a justifiable interference with the autonomous and coherent body of private law.³⁴¹ When the state came to impose workplace laws—governing maximum hours and minimum pay—these ceased to be conceived of as contract laws, but rather a *removal* of an arena from the realm of contract into a realm of legislative control. Commercial activity, including consumer transactions, were insulated in a zone of privacy and construed as free from the substantive constraints on contract activity found in public regimes such as employment law. The result was a conceptual separation of economics and politics, of private and public activities.³⁴² Where no public laws interfered, parties were free to engage in contract without concern as to substantive requirements.

Critical legal scholars have made much of the ways in which the division of public and private has contributed to a naturalization of modes of economic ordering. This contributes to a refusal of the liberal state or courts to challenge such modes, both in failing to recognize the political dimensions of contract activity, including consumption,

³³⁹ Atiyah, *The Rise and Fall of Freedom of Contract*, *ibid.* at p. 539-40

³⁴⁰ Coyle and Morrow *The Philosophical Foundations of Environmental Law* *ibid.* at p. 136

³⁴¹ Gordley "Contract, Property, and the Will" at p. 85

³⁴² Cutler, *Private Power and Global Authority*, *ibid.* at p. 161

and in shifting political discourse away from regulation of the economy.³⁴³ However, the administrative state even in the mid nineteenth century did feature regulations, laws, and policies that changed the face of contracting behaviour: The public-private distinction then, as it is now, was more a feature of liberal politics and economic theorizing than a reflection of any sharp rules undergirding actual government practice concerning consumption. The market ideal operated as a guiding force in Parliament, and when it was used, as it often was, it was to leave issues of governance to contract and private ordering.

4.6 Caveat emptor and title

The thing theory was never a very good theory, but rather the effect of the judges' attempts to maintain individualism, faith in individual choice and disentanglement. The theory was unstable because it meant blocking out obvious aspects of goods not discernible by inspection. The case of title to goods has always illustrated the limits to which courts are willing to accept visual inspection alone. Title concerns aspects of the "world behind the product". It is a central part of the business of courts to maintain the system of private property, and preserving property potentially comes into conflict with the free circulation of goods. If caveat emptor were truly the rule, individual buyers would have no basis to know whether, when paying for a good, they were also obtaining the right to have the good. In traditional law of personal property the rule in the common law has always been that a seller can only sell as good title as he has, so if a buyer pays for stolen goods he or she risks those goods being reclaimed by the original owners. No amount of inspection can help the buyer in this regard. So if the system is to be designed to protect property rights of both sellers and buyers, some provision is needed beyond simple declarations that buyer beware unless purchasers are to seek out the histories of each thing they buy. The entire framework of markets in England made such an approach impossible. Middle men, shippers and merchants would sell wares on the streets with potentially mysterious originations. Whereas trade wants disentanglement, property seeks reentanglement.³⁴⁴ Concerns about property foreshadow many future concerns about the hidden life of goods such as ecological concerns about process.

³⁴³ Cutler, *Private Power and Global Authority* *ibid.* at p. 178 Petter, A. and A. Hutchinson "Private Rights and Public Wrongs" (1988) 33 *U. of Toronto L. J.* 3; M. Horowitz "The History of the Public/Private Distinction" (1982) 130 *U. Pa. L.R.* 1423 at 1426

³⁴⁴ *Holman v. Johnson* [1775-1802] ALL E.R. Rep. 98; 1 Cowp. 341; 98 E.R. 1120 represents an extreme case of Judge Mansfield's attempt to disentangle the tea trade. The British government

The tradition in London of market overt represents probably the most pro-market solution available. Market overt was a particular kind of market whereby so long as goods were openly displayed, buyers for fair market value could always take good title. The market overt represents a kind of victory for the forces of free circulation. Buyers are freed of the need to inquire as to the origin of the goods, and sellers need not ask too many questions of their suppliers, nor worry as to what to say to customers. So it created a climate of unconcern over the history of products. The problem is that the system runs roughshod over the property rights of those who have been robbed or defrauded of their goods—they are asked to patrol markets themselves as their only security. Efforts in the twentieth century in England have been to limit the institution.³⁴⁵ In British Columbia which by historical contingency adopted the market overt rules, the courts have ruled that there are no such markets in the province.³⁴⁶

Outside of London, where property rules would still matter to the buyer, buyers could always make a point of asking the seller whether the goods came with good title, and a positive response would then take the form of a warranty concerning the goods that would bind the seller. In *Crosse. v. Gardner* (1688) the Chief Justice Sir John Holtd acknowledges that the mere affirmation that oxen properly belonged to the seller gave the buyer a right of action. At common law, if the vendor knew that he had no title and concealed that fact, he was held responsible to the purchaser for a fraud or deceit.³⁴⁷ If

in the eighteenth century retained large custom tariffs on tea, with the result that most tea in England was smuggled (Fruits of Empire, *ibid.*) In *Holman* Mansfield upholds a contract, made in France, in which both parties knew the purpose was to smuggle tea. His reasoning is that there was nothing illegal in the contract. Unfortunately for tea smugglers legality also breeds entanglement, hence the case remains an anomaly. See, *Gedge and others v. Royal Exchange Assurance Corporation* [1900-03] ALL E.R. Rep. 179; *Foster v. Driscoll, Lindsay v. Atfield, Lindsay v. Driscoll*, [1928] All E.R. Rep. 130.

³⁴⁵ Attempts at judicial limitation gain speed in the early 20th C: see *Clayton v. Le Roy* [1911-1913] ALL E.R. Rep. 284, [1911] 2 K.B. 1031—In the court of appeal Moulton notes that market overt is “unique custom and one which does not seem to me to be very much in keeping with modern ideas, and it certainly is not a custom which is likely to receive any further judicial extension” See also *Secretary of State for War v. Wynne and others* [1904] All ER Rep. 352, [1905] 2 KB 545 (Market overt protection to bona fide purchasers does not apply to Crown Property).

³⁴⁶ British Columbia is the only Canadian province to have rules concerning market overt. G. H.L. Fridman *Sales of Goods in Canada*, (4th Edition. Scarbrough, Ont: Carswell, 1995) at 146-7. The courts have ruled that there are no market overt in the province. *Westcoast Leasing Ltd. v. Westcoast Communications Ltd.* (1980) 22 B.C.L.R. 285 (B.C.S.C.) at 291.

³⁴⁷ See Coke .Ltt. 102, a, ad 3 Co. rep. 22a ; *Sprigwell v. Allen* (1) Early v. Garet and *Williamson v. Allison*.

the vendor was mistaken the risk fell on the buyer rather than on the seller. However, in the title case, silence was tantamount to an affirmation by the seller that she has title. Caveat emptor only applied, then, concerning the possibility that the seller is innocently (or perhaps negligently) mistaken.

The courts did at times apply caveat emptor in matters of title.³⁴⁸ The limited application of caveat emptor in title cases can be seen in the case of *Morley v. Attenborough* (1849).³⁴⁹ In this case there was a harp that kept changing hands. First a lease, then a lessee that leaves it at a pawnbroker, a pawnbroker who sells it at auction and a new buyer who loses it to the original owner for want of title. The new buyer sues the pawnbroker. The problem is, he never got a warranty of title. Parke, the presiding judge, argues that there is “by the law of England no warranty of title in the actual contract of sale any more than there is of quality. The rule of caveat emptor applies to both.”³⁵⁰ The strange thing about the case is that the judge declares caveat emptor, but only after listing all the cases it does not apply to regarding title. Not where there is an executory contract-- no court or reasonable person would see a purchaser as bound by a contract if he were to discover defects as to title before receipt of the goods, or if, after receipt the goods were recovered from him. Not if bought in a shop: A shopkeeper impliedly warrants good title. Parke insists that caveat emptor applies but in the very narrow case of a sale by auction by a pawnbroker. All that is implied is that there is a pledge and that the pawnbroker is not aware of any defects. Caveat emptor continued to hold great ideological weight, but by the 1860s the common law courts came to adopt the idea already found in Roman and civil law, that the vendor implies a warranty that he has the right to dispose of the objects which he sells.³⁵¹

4.7 From caveat emptor to implied terms

Throughout most of the nineteenth century there is no clear differentiation of Sale of Goods from contract law in general. The appeal of caveat emptor at the Court of Exchequer and King’s Bench may well have been attributable to the desire to maintain a consistent body of contract law through all areas. It was becoming increasingly questioned by political economists such as John Stuart Mill, and later even Herbert

³⁴⁸ *Allen v. Hopkins*. (1844) 13 M. & W. 94, 153 E.R. 39

³⁴⁹ [1843-60] All E.R. Rep. 1045 3 Exch. 500, 154 E.R. 942

³⁵⁰ At paragraph 3

³⁵¹ *Eicholz v. Bannister* (1864) 17 C.B.N.S. 708, 144 E.R. 284

Spencer whether consumers should be left entirely to their own devices concerning potentially dangerous goods.³⁵² In effect, this was a crisis in the “thing theory”. The courts did change the law on a case by case basis and by 1893 Judge Chalmers was able to codify a distinct realm of common law cases into the *Sale of Goods Act*. This new area would still rest on contracts law concerning the formation of agreements and issues concerning damages but embody new ideas of exchange and its objects.

In the first transformation courts retain an insistence on individual judgment but also allow, in some limited contexts, that contracts come with implied terms. In *Gardiner v Gray* (1815)³⁵³ the defendant sold twelve bags of waste silk which on its arrival was found to be of a quality not saleable “under the denomination of ‘waste silk’”. Lord Ellenborough: “The purchaser has a right to expect a saleable article, answering the description in the contract”. For Ellenborough this follows, not from any explicit reference to concepts of fairness, but from the way he read the terms of the contract. He says “the intention of both parties must be taken to be, that it shall be saleable in the market under the denomination mentioned in the contract between them.” So here we have the first introduction of the concept that the description of goods in the contract can help resolve contract disputes. The contract was read to include an implied term. It was implied that the contract in performance should accord with the promises given. A contract made amongst commercial men presupposes that the goods can be further sold down the line. In *Jones v Bright* (1829)³⁵⁴ there was an “executory” contract; a written agreement for a shipper to purchase, directly from the manufacturer, copper sheathing for commercial navigation ships. The buyer received bad goods (the sheathing quickly corroded) and sued in court for the money spent. The court held that the buyer relied on the word of the seller and manufacturer. According to the court, it was impossible that the buyer should be able to ascertain beforehand whether the article will answer the purpose for which it is destined. In *Brown v. Edington* (1841)³⁵⁵ a manufacturer who sold a special rope for a warehouse was found liable after it proved too weak to lift and move crates. The court held that if the buyer relies on the seller and states the purpose for a good then the transaction implies that the good will be fit and proper for that purpose. In each of these cases the court is careful to insist that “if a party purchases an article upon

³⁵² Atiyah, *The Rise and Fall of Freedom of Contract*, *ibid.* at p. 470

³⁵³ 4 Campb. 144,

³⁵⁴ 5 Bingham 533, 130 ER 1167

³⁵⁵ 2 Manning and Granger 279, 133 E.R. 751.

his own judgment, he cannot afterward hold the vendor responsible”.³⁵⁶ On the one hand the courts are beginning to accept implied terms, but they are also refusing to budge from the idea that individual judgment is paramount.

In the second transformation we witness in sales law is towards description. *Mody v. Gregson* (1868) provides the key transformation.³⁵⁷ The Plaintiff bought 2500 pieces of grey shirting. When the goods arrived they were no good. He sued, alleging a breach of contract on the basis that the goods were not of merchantable quality. In *Mody* the plaintiff argued that the contract carried an implied warranty as to merchantability: Because the defect was latent, it could not be ascertained. *Mody* featured the distance shipping of textiles-- shirting sent to Calcutta and orders taken and communicated at long distances. When the plaintiff received the goods in Calcutta he discovered that the defendant had put clay into the manufacturing process. The agreed upon weight had been met, but only by destroying the shirts.

In the earlier line of cases, when a buyer of goods could not make a direct inspection of goods, the courts were ready to acknowledge that a bargain was made on the basis of descriptions of the goods. This still gave primacy to direct inspection. Here we have a reversal: For goods bought under a specified commercial description “it is an implied term, *notwithstanding the sample or inspection*, that the goods shall reasonably answer the special description in its commercial sense.” (Italics added). The sample no longer serves as the basis for judgment. Rather, it is the “mere expression of the quality of the article, not of its essential character”. The description is first, and the sample is only to help realize that description. What mattered was simply whether the bulk matched the description. “The parties are dealing, not for the mere semblance or shadow of the thing designated, but for the thing itself as commonly understood in commerce, with the essential qualities which make it worth buying, to a person who wants an article of that designation”.³⁵⁸

This was an immense improvement, allowing the courts to consider the role of latent defects. It also led to the new technique of ascription of purposes. In *Randall v. Newson*

³⁵⁶ 133. E.R. at p. 763

³⁵⁷ 19 L.T. 459 (Exch. Chamber),

³⁵⁸ At p. 460

(1877)³⁵⁹ the new doctrine was used in a case involving personal injury. A faulty pole (axle) on a carriage gave rise to legal action in contract. It was “a pole to be purchased for a specific purpose”. The court ruled that the issue was whether the commodity answers the description of it in the contract, and “it does not do so more or less, because the defect in it is patent or latent or discoverable”.³⁶⁰ In that same year the case of *Beer v. Walker*³⁶¹ found an implied warranty as to merchantability on food (specifically rabbit meat). The House of Lords solidified the cause in *Drummond v. Van Ingen* (1887).³⁶² Cloth manufacturers and merchants, dealing across the North Atlantic from Bradford to New York ran into problems with latent defects in corkscrew twill for coats. Lord Herschel acknowledged “it is true that the purpose for which the goods were required was not... stated in express terms, but was indicated by the very designation of the goods, ‘coatings’” The sample, therefore, could achieve no more than express words. Chalmers then simply included this principle into the 1893 *Sale of Goods Act*. He took himself to be codifying existing case law, and not making new law. As a codification of pre-existing contract law, the Act includes the developments concerning implied terms, and also restates that the exchange of goods is by contract. The *Sale of Goods Act* still provided that in the circumstance of an actual inspection, where defects were patent, the fact of inspection would mean that there was no implied term. But this was now a rare exception, a hold over from previous cases. Chalmers included these out of deference to the common law tradition of accepting older cases if not explicitly overruled.³⁶³ In such cases the buyer’s having inspected and then bought the goods could be understood as an acceptance of their condition.

After the passage of the Act and its spread through the colonies, the courts become increasingly willing to ascribe a purpose to objects, in cases where this had not been discussed or otherwise made known by the parties. For instance in *Frost v. Aylesbury Dairy Co.* (1905)³⁶⁴ we have a case of the delivery of bad milk. In ruling that there was

³⁵⁹ 36 L.T. 162, 2 QBD 102 (C.A.)

³⁶⁰ 36 L.T. at p.166

³⁶¹ [1874-80] ALL E.R. Rep. 1139, 37 L.T. 278

³⁶² CC 284, 57 L.T. 1 (H.L.)

³⁶³ To date cases hold that even where goods are seen by the buyer they may be the subject of a contract of sale by description. See e.g. *Wren v. Holt* [1903] 1 K.B. 610 (C.A.); *Morelli v. Fitch* [1928] 2 K.B. 636, *Grant v. Australian Knitting Mills* [1936] A.C. 85 at 100 (P.C.). *Daniels & Daniels v. White & Sons Ltd.* [1938] 4 All E.R. 258. Other cases hold that even where specific goods are being sold, the sale may be one by description. *Verly v. Whipp* [1900] Q.B. 513.

³⁶⁴ [1904-07] All E.R. Rep. 132, 92 L.T. 527 (C.A.)

an implied warranty because the company issued pamphlets saying their milk was healthy, the Court of Appeal notes that "I do not suppose that anybody in his senses would question for a moment that the purpose for which the milk was bought by the family was for consumption as an article of food". The court now bypasses any reference to the intentions of the parties and infers a purpose to goods from the context alone. The result is that goods are interpreted by courts as coming with purposes. Subsequently, courts rule that Coca-Cola is for drinking,³⁶⁵ and that mobile homes are for travel from place to place.³⁶⁶ While technically the law requires that the seller rely on the buyer as to the quality of the goods, the courts increasingly adopt a liberal interpretation of when reliance can be inferred from the circumstances.³⁶⁷

Objects of exchange are now objects of utility—merchantable or filled with purposes, not because of any inherent attributes, but because they match their description. The courts would freely imply terms, but this depended on the consumer transaction being conceived as a language based agreement. The conceptual structure of an agreement planned for the future (an executory contract) whereby the buyer trusts that the goods will match the description, became the model for even simultaneous transactions. This parallels the general developments in property in the nineteenth century. Rather than physical stuff, increasingly personal property came to include various more abstract things which had value, such as financial instruments or intellectual property. The result was a process of "dephysicalization".³⁶⁸ The thing becomes transformed—not as a mere object available for inspection—but as whatever is specified by the parties, meaning, for the most part, the object of a description in an order form or bureaucratic arrangement. The commodity is no longer the thing as it appears for sale in the public square, but "the thing itself as commonly understood in commerce". The ways in which sophisticated businessmen carried on their work became the model for consumer transactions.

³⁶⁵ *Yelland v. National Café* [1955] 5 DLR 560 (Sask. C.A.)

³⁶⁶ *Marshall v. Ryan Ltd.* [1922]____.

³⁶⁷ see, for example, *Manchester Liners, Ltd. v. Rea, Ltd.* [1922] ALL E.R. Rep. 605*Also reported [1922] 2 A.C. 74 (H.L.) where Lord Sumner explains that "reliance is a matter of reasonable inference to the seller and to the court".

³⁶⁸ *Vandevelde*, *ibid.*

4.8 Conclusion

Nineteenth century contract and Sale of Goods provided a way of thinking about persons, exchange and commodities which helped to facilitate commodity networks. Key to this process was a set of interlocking concepts of subjects, objects, and exchange which the law attempted to stabilize. The circulation of commodities was enabled through concepts of exchange which hid the realities of networks from the persons who participated in and so perpetrated them. In order to achieve this, the courts had to conceive of objects in ways that kept them disentangled from historical and social relations. The result was at first a concept of these objects as things, and then a concept of these objects that was mediated by the concept of description. This maintained a set of exchange relationships structured around autonomous individuals, profit maximization, and lack of concern for the effects of contracting and its links to other persons and ecosystems. The re-ordering of contract effaced the prior history of consumption as embedded in social contexts and moral relations.

While a number of cases in sales of goods emphasize the role of trust, the adoption of the functional analysis does not represent the re-entanglement of goods. In so far as a person relies on the abilities or word of another, that other begins to be understood as having duties towards those with whom they deal.³⁶⁹ This suggests a reading of Sale of Goods as incorporating an underlying view of exchange relations in terms of social embeddedness, of recognizing the way a range of social values, including trust, underpin exchange relations as social phenomena.³⁷⁰ Atiyah argues that implied terms reinstates an effective acknowledgment that there are elements of reliance in contracts for goods.³⁷¹ We need to be cautious about overstating the degree to which the functional analysis re-embeds exchange into an ethical context. The whole idea of

³⁶⁹ *Drummond v. Van Ingen* *ibid.* per Herschel: “the merchant trusts to the skill of the manufacturer, and is entitled to trust to it...” *Hyman .v Nye* (1881) [1881-85] All ER. Rep. 183, 44 LT 919. Where a hired carriage breaks, spills and harms the plaintiff, an action in personal injury and negligence is available on the basis that “there is no distinction in this respect between contracts for sale and for the hire of an article for a specific purpose, where trust is reposed in the person who, in the ordinary course of business, sells or lets to hire”. *John MacDonald & Co. v. Princess Manufacturing Co.* [1925] O.J. No. 148 (C.A.) at para. 37 “ These particular classes are held to give an implied warranty against latent defects, notwithstanding opportunity of inspection of bulk or sample, because the purchaser trusts to their information, skill, and judgment, and is entitled so to trust.”

³⁷⁰ This would then mirror an analogous move in economic sociology see, for instance, M. S. Granovetter “Economic Action and Social Structure: the Problem of Embeddedness” (1985) 81 *American Journal of Sociology* 3, 481-50

³⁷¹ Atiyah, *The Rise and Fall of Freedom of Contract*, *ibid.* at p. 475

caveat emptor can be understood as an extreme swing towards one side of a pendulum oscillating between relationally conceived, or alternatively discrete and, individualistic notions of exchange. Caveat emptor represented a reconstitution of exchange relations in terms of a sparsely framed conception: Over time we see the courts and legislatures slowly adding connections one by one. The description account and the functional account thus represent minor re-entanglements, but only as explicitly provided in terms of implied warranties as to purpose and merchantability. Later in the twentieth century we would see relations of duties of care concerning health and safety features of products as between manufacturers and consumers, and a strengthening of health and safety features of products. Here again, the range of trust, reliance or dependency only concerns a limited domain.

The narrow range of “trust” in these cases-- concerned as it were with the gap between description and the goods received-- hardly reconstitutes an embedding of consumer goods within social, ecological and moral constraints. Disentangled goods are part of a distinct morality of self-determination, individual responsibility and competitive striving in the marketplace. The addition of concepts of trust for latent defects does not swing the pendulum very far towards the opposite pole. Sale of Goods law clearly fits into the contract law tradition. In terms of the possible ways in which goods can be re-entangled, even twentieth century consumer protection legislation, and negligence law simply represented adding a limited number of new ties, restricted to the axes of health, safety and financial protections for consumers. The limited environmental and workplace regulations which applied to some goods, depended in large part on where they were made, and so increasingly came to apply to only a subset of available goods on the market. Courts and legislators came to see that the myth of formal equality of contracting parties hid problems of bargaining power and imbalances of information. The analysis never extended to the problem of disentangled goods and the wider problems of how consumers are linked through commodities to wider human and non-human relationships.

The history of the treatment of objects in contract and Sale of Goods is a story of the conflicts between free alienation of goods and the reality of their social histories. The thing theory allowed for individual judgment and free alienation. The transformation to the “descriptions” theory worked to plug one hole in the thing theory’s emphasis on the

phenomenal aspects of goods. Simultaneously it re-instates the process-product distinction where objects of exchange are understood as detached from their background histories and linkages. Terms like “coffee” do not invoke the complexities behind particular products, but rather single out the common physical features of anything that falls under the description. Linguistic terms abstract from the contingent and particular trajectories of goods as elements of commodity networks. The functional analysis that courts developed in the nineteenth century also continues to contribute to the same malaise; understanding objects in terms of end use purposes runs counter to tracing their origins and transformations from natural resource inputs and human labour.

Insofar as the law influences our self-understanding, it comes to shape how we think of the world and our place in it. Even legal fictions, developed to serve idiosyncratic needs of the legal system, can become widely used metaphors and even solidified so we miss their metaphoric qualities. Once commodity networks develop with human subjectivity at their core, the concepts of objects from legal doctrine contribute to the shape of those networks. Commodity networks work to provide humans particular goods for particular purposes. Consumer goods are increasingly understood as constituted artifacts for human purposes—devices that matter in terms of utility. The result is the “device paradigm” where objects, and the commodity networks of which they are a part, come to be seen instrumentally, as something for us and our consumption. Increased complexification and technological sophistication work to create a world of products to which consumers can relate only in terms of utility. Someone who grows their own food or bakes their own bread can derive aesthetic and evaluative rewards from the interactions and process behind the goods they use, but the design of a computer works to shield the consumer from (either desirable or undesirable) aspects of its production.³⁷² Ecological economics must then return to remind us of the glaringly obvious: “Products and services are not only economic goods (measured in monetary term) with a social meaning, but physical objects as well, tangible or-like many services—otherwise physically enjoyed. No economic good exists without a physical footprint”.³⁷³ The functional approach was a measure to reconcile the needs of exchange with the ways

³⁷² Borgmann "The Moral Complexion of Consumption." *Ibid.* at p. 419

³⁷³ Spangenberg "The society, its products and the environmental role of consumption" *ibid.* at p.

objects are also processes, histories and material flows but it cannot control the instability.

Commodity networks are a way of conceptualizing the trade in goods. In many ways they depend on particular ways of thinking about exchange. Nineteenth century contract and Sale of Goods provided a way of thinking about persons, exchange and commodities which helped to facilitate commodity networks through the concept of objects at play. The circulation of commodities was enabled through concepts of exchange which hid the realities of networks from the persons who participated in and so perpetrated them.

By construing contract as open to the design of the individual parties, contract law also provides the space for alternative conceptions of exchange. Workers co-operatives, fair trade goods, or the planning of social movements can all make use of contracts. Contract theory and doctrine is one discourse amongst many and exists in spaces of contention with other concepts of subjects, objects and exchange. Fair trade goods represent one way in which consumers can begin to think differently about their engagement in exchange transactions. As will be discussed in the next chapter, discourses of sustainable consumption suggest new ways that law is seeking to grasp the interdependencies of economy, society and ecology that imply new concepts of subjects, objects and exchange.

5. SUSTAINABLE CONSUMPTION AND THE POLITICS OF NETWORK DESIGN

5.1 Introduction

Commodity networks involve extensive relations between persons and ecosystems; networks analysis traces the linkages. Actors' imaginaries, laws and material practices work to assemble networks but they also work to impose modes of ordering on networks. Networks are at times *designed*. Mostly networks are designed by corporate managers or experts in supply chain governance-- a major focus of global commodity chain theorists is to study the mostly corporately controlled modes of governance of commodity systems.³⁷⁴ Consumers also contribute insofar as they decide what they buy. Networks involve links between disparate persons, but often there are high degrees of centralized authority determining the design of the goods, and of the way components are sourced.

However, increasingly sophisticated planners, managers, and industrial designers are envisioning and implementing new modes of ordering for bringing goods to market that meet a richer set of values than mere price and quality optimization. A new project of "commodity network design" emerges. Private law of contracts and sale of goods provides some structure to networks, and government regulation impacts on aspects of networks. Increasingly concerns about sustainability, human rights abuses and ecological values are giving rise to more comprehensive forms of network planning, implementation and organization. "Movement" farmers concerned with organics and sustainability,³⁷⁵ industrial designers creating electric cars, green entrepreneurs such as Ray Anderson---famous for transforming his carpet business,³⁷⁶ aquariums designing "sustainable seafood" labeling schemes for local restaurants,³⁷⁷ journalists

³⁷⁴ G. Gereffi "The Organization of buyer-driven global commodity chains; how US retailers shape overseas production networks" *Commodity Chains and Global Capitalism*. (G. Gereffi and M. Krozeniezci (eds.) Westport, Connecticut: Praeger, 1993) at p. 95-122

³⁷⁵ See Goodman and Goodman "Sustainable Foods: Organic Consumption and the Socio-Ecological Imaginary", *ibid*.

³⁷⁶ Documented in the film "The Corporation"

³⁷⁷ Such as the Vancouver Aquarium's Ocean Wise Program, at <http://www.vanaqua.org/conservation/oceanwise/sustainable-seafood.html>, or the Monterey Bay Aquarium's seafood watch program, at <http://www.montereybayaquarium.org/cr/seafoodwatch.asp>

experimenting with a “100 Mile Diet”³⁷⁸ and accounting firms concerned with “supply chain management and governance”³⁷⁹ are all examples of such efforts. Fair trade goods, as certified by the Fairtrade Label Organization (FLO) represent a sophisticated level of commodity network design, extending from sustainability characteristics, to coffee producer wages, to sites of consumption. FLO designs the certification system, which in turn, works to regulate the fair trade coffee network as a whole. These are merely newer and more public forms of network design that has been going on for years. Whereas the common law tradition has supported an ideal of goods as disentangled, these new movements provide for novel ways goods are understood as re-embedded in social and environmental contexts.

The metaphor of design provides a unique angle for thinking about the interlinkages between concerns about consumption, consumer transactions and more traditionally conceived production regulation. Design of networks often involves consideration of the ways in which consumers engage with networks, both through forming consumer subjectivity and also by engaging their ethical orientation. On one end, corporate managers may be concerned only that consumers buy as many of a company’s goods as possible, and that the consumers should know as little as possible about methods of production. Alternatively, on the other end of the spectrum, some retail cooperatives actively enlist consumers to join committees and boards of directors, seek out products that enhance social solidarity and press for transparency in the commodity chain. Part of designing networks is designing the ways in which consumers relate to other people and ecosystems through consumption. Network design thus serves as a way to provide solutions to problematic consumer transactions.

Discourses of sustainable consumption, in particular, in attempting to transform product markets (and the economy as a whole) in the name of removing environmental harms, suggest a new and growing form of network design. Since at least the Rio Summit in 1992 sustainable development has been conceived as having a consumption angle:

³⁷⁸ Alisa Smith and James MacKinnon ran this experiment in 2005 and 2006. See <http://theyee.ca/Series/2005/06/28/100Mile/> for the complete “100 Mile Diet” series. Also see 100milediet.org, a book is forthcoming in 2007 from Random House Books.

³⁷⁹ See Price Waterhouse Coopers *Sourcing Overseas for the Retail Sector: CRS and the Ethical Supply Chain*. 2005 Available at www.pwc.com. Also Jorgensen, H. Pruzan-Jorgensen, P, Junyk, M. and Ganer, A. *Strengthening Implementation of Corporate Social Responsibility in Global Supply Chains*. (World Bank Corporate Social Responsibility Practice, 2003).

Agenda 21 notes the need for consumption to be reconfigured to allow for sustainability, and in 1999 the United Nations Consumer Protection Guidelines were reconceived to include sustainable consumption. The United Nations Environment Programme maintains a bureaucracy concerned with sustainable consumption and most Western governments have some types of sustainable consumption programmes. Key initiatives in this emerging policy discourse, such as ecological products, “eco-efficiency” of manufacturing processes or ‘life-cycle analysis of products” involve aspects of network design.

This chapter argues that the concept of commodity networks and network design, in providing a unique concept of consumer transactions, also suggests a unique orientation towards sustainable consumption, one that can move beyond simple reliance on voluntarism or free market approaches, and that offers a novel basis for guiding governmental regulation. On such a relational concept, we need to take up a reflexive attitude towards our consumption and the broader networks of which “the product” is but a part, and also that we change our practices and our commodity systems to reflect our values. From the standpoint of a relational approach, sustainable consumption concerns not only a top-down managerial approach to reducing total resource flows or emissions, but attention to the ways that individual people, through daily practices of consumption, relate to other people and ecosystems and thereby constitute themselves. A network design approach can be applied narrowly to suggest ecologically fine-tuning industrial products but can also be radically extended to include wider features of social, economic and ecological relations of networks. New discourses in sustainable development law that focus on integrating social, economic, and environmental considerations suggesting new ways of conceptualizing product and network design. Understood in this way, sustainable consumption suggests an alternative concept of exchange and participation in the economy from that found in traditional contract law, Sale of Goods and liberal trade regimes. It poses the possibility for a move from an economy of disengagement and disentanglement to one of care and connection.

This chapter first sets out the normative basis for network design in general. Legal concepts of sustainable consumption are then introduced, with reference to the main international documents. Analysis of the logic and practices of sustainable consumption policy show a concentrated effort on consumer choice and product design. I argue that

these predominantly voluntary measures are insufficient to cope with the problems of sustainability. At the same time, the emphasis on consumer products points to a concern with (what we are here calling) commodity network design. Sustainable consumption initiatives require collective action and a broadened analysis of commodity networks. However, requirements for experimentation and public participation mean that there is no way of predicting, from the outset, how sustainable consumption initiative will go. Rather, this chapter takes the approach that a limited number of “design principles” can be used to guide the process. Design principles help conceptualize the direction that collective action can take. As such, the relevant principles are outlined. In the last sections, the commodity networks and relational contract approach are discussed as an approach to reconceptualizing contracts.

5.2 Why engage in network design

Network analysis both suggests global commodity chains or networks are already structured in complex, and evaluatively loaded ways, and that we have normative reasons to take up a critical attitude to, and work to reconfigure, these networks according to our values. A growing sense of the interdependencies engendered by global commodities suggests increasing awareness of how commodities forge new communities of interaction. We find ourselves already immersed in webs of connection that bring obligations and interdependencies. The example of the world coffee trade provides an example. Possibly we should never have gotten involved—do First World consumers need coffee? And how much of coffee production was based on the exploitation of (ex) slaves or oppressed Latin American indigenous communities? However, participants come to find themselves already joined by practices into which they have been inculcated by social conventions, workplace demands or an unreflective or naïve willingness to take on consumer ideals. In the case of networks for basic necessities such as wheat flour, or rice, we are much more intimately tied to continuing these networks. In such “network communitarianism” many evaluatively laden features join humans and non-humans together. Consumers, producers and others in the network are joined by a need for money or a desire to satisfy wants. Concerns for ecology or workers rights, directed at the processes behind products, are ways of forging common interests in the shared space of commodity networks. Network relations are one way in which our world is increasingly unified and interdependent. Even the decision to withdraw from networks (avoid mainstream coffee, or even do without, for

instance) requires thinking through network design and the ever fluctuating and dynamic nature of networks, their form and structure and the changing array of participants within them.

In the old picture of contract as enablement, exchange is seen as the choice of individuals over goods or money as they prefer, and the commodity chain or network an effect of multiple such interactions. The fact of free contract is meant to provide the justification for low wages or acceptance, by consumers, of the product and its history as a complete package. In the relational conception, the exchange is understood as always already part of the network. Acts of exchange are then internally related to ecosystems and other people. The choice as to whether to purchase a good becomes also a way of engaging in relations with other humans and non-humans. When persons take up a reflexive stance on these interactions, and attempt to take charge of how these relationship should go, they engage in transformations of networks. At one limit, the decision of a consumer to refuse a consumer product means that that consumer is no longer part of the network. Recognition of the ways we relate to others and to ourselves through participation in networks, coupled with acknowledgement of the ways networks are always already designed, suggests collective endeavours to intentionally reconstruct networks to accord with our values.

An analogy can be made with the links between private property and urban planning. While initially property law formed the basis for the division of land in cities, the need increasingly arose for separating industrial uses from residential areas. Common concerns that overlapped ownership came to be handled through urban planning and land use management. Reflection on the social, economic and ecological interdependencies helped to reveal how private property regimes are part of a larger community which embodies common interests. Environmentalists and urban planners in the 1990s working under the banner of Smart Growth came to see a variety of shared ecological and social issues arising in urban design and called for more sophisticated methods for planning cities. Common concerns included issues of transportation management, densification and reduction of sprawl, mixed types of housing to create more integrated neighbourhoods, and respect for ecosystem carrying capacity. By focusing at the ecosystem level and considering a city in terms of its position within a larger watershed and bioregion, all levels of government and private landholders

become involved in the implementation of a coordinated plan.³⁸⁰ Understanding cities now involves considering the role of planning instruments, which increasingly also include Smart Growth style initiatives. The reflective Smart Growth advocate needs to then roll their own prior actions and effects into their analysis as their initial ideas increasingly become implemented.

While urban planning and Smart Growth rests on Cartesian map-making and the two-dimensional division of property, commodity network design can draw on the new topology of network analyses. While initially constituted by contract and personal property, increasingly it has been found that networks have to be organized also around preserving workers well-being and the health and safety of consumers. As research on the politics of shopping and the problematizations of commodities show, a whole host of evaluative features now circulate in networks, concerning environmental issues, forms of corporate malfeasance, human rights or other issues that overlap ownership and exchange and call for collective organization. Like different forms of city planning, network design can range from totalizing (central planned economies with top-down orders for the shipping of potatoes, or modernist mega projects like Robert Moses' New York freeway projects³⁸¹) to the more subtle (organic labeling, or the creation of a new farmers' market).

Network design, like city planning, is contentious and involves multiple different actors with different values, cultures, politics and motivations. Motivations for network design can come from corporate managers with a stake in expanding profits, from governments protecting health and safety requirements while also drawing tax revenue, or from citizens with a diverse array of needs for daily living and evaluative concerns about the effects of their actions on distant people and places. Conceiving of commodity networks as sites of contention and potential design experiments suggests an analysis of discourses of sustainable consumption in these terms: Sustainable consumption provides a novel contender for motivating network design. The network conception can be a way of framing attempts at regulation in the name of sustainable consumption, but

³⁸⁰ Deborah Curran "Expropriation and takings In North America: Comparing Private Property Rights in Canada and the United States" LLM Thesis, 2003.. On file with the author. Debroah Curran M. Leung *Smart Growth: A Primer*. (Smart Growth BC, 2000) at p. 2

³⁸¹ Moses' projects included plans for a freeway through the SoHo neighbourhood of lower Manhattan. The opposition to it was central to the formation of contemporary North American new urbanism. See Marshall Berman *All That Is Solid Melts Into Air* *ibid.* at 287-348

also shows such attempts as a new form of network politics, one concept of design and exchange amongst others.

5.3 Sustainable Consumption as Network Design

International legal institutions have come to recognize consumption as problematic, which also means there is an effort to use law to influence commodity networks. Sustainable consumption policy at the state level in the Western industrialized countries has come to be largely focused on the ecological characteristics of consumer products and on consumer choice.

The environmental problematics of consumption emerge in the 1970s in international legal institutions and organizations. The International Organization of Consumer Unions told the 1972 United Nations Conference on the Human Environment that consumption was problematic from an environmental angle because “consumers [are] forced to use unsuitable products, or industrial or other organizations acting or claiming to act in the consumers’ interest”.³⁸² The Brundtland Commission in *Our Common Future* (1987) noted that “sustainable global development requires that those who are more affluent adopt lifestyles within the planet’s ecological means”.³⁸³ Agenda 21, the plan of action agreed upon at the “Earth Summit” in 1992 explicitly foregrounds the problematic, giving consumption a distinct chapter.³⁸⁴ Agenda 21 links general problems of sustainable development to consumption, identifies “sustainable consumption” as a distinct area in sustainable development policy, and declares that “the major cause of the continued deterioration of the global environment is the unsustainable pattern of consumption and production, particularly in industrialized countries”.³⁸⁵ Agenda 21 calls for adopting an international approach to achieving sustainable consumption patterns, and discusses the need for research, policy formation, and government action. Reference is made to “reducing the amount of energy and materials used per unit in the production of goods and services” and the uses of environmental technologies. This includes assessments of

³⁸² United Nations Commission on Sustainable Development. “Background Paper: Consumer Protection and Sustainable Consumption: New Guidelines for the Global Consumer” 1998.

³⁸³ World Commission on Environment and Development *Our Common Future*. (Oxford University Press, 1987) at p. 9

³⁸⁴ Agenda 21 Chapter 4.

³⁸⁵ Agenda 21, sec. 4.3

environmental impacts and resources through the full life-cycle of the product.³⁸⁶ At the legal level the range of proposals is limited by a “knobs and levers” conception of government’s role to ecological labels and “sound pricing”.³⁸⁷

The 1999 Revisions to the United Nations Guidelines for Consumer Protection is also soft law. The Guidelines clearly contain two different theories of grappling with consumption. Most emphasis is placed on voluntary standards such as ecological labeling of goods, and consumer access to information. (This appears the rationale for considering this area as a form of consumer protection.) The Guidelines also make reference to the need for governments to implement a mix of policies. Some of this is educative: The Guidelines calls on governments to help promote sustainable consumption patterns,³⁸⁸ as well as work towards consumer education on the environmental, social and economic impacts of consumer choice.³⁸⁹ The Guidelines integrate social, economic, ecological and distributive justice concerns: “Policies for promoting sustainable consumption should take into account the goals of eradicating poverty, satisfying the basic human needs of all members of society, and reducing the inequality within and between countries”.³⁹⁰ These can include regulations, economic and social instruments, sectoral policies in areas such as such as land use, transport, energy and housing, tax shifting and promotion of environmental management best practices.³⁹¹

The Agenda 21 goals were reconfirmed at the Johannesburg Summit in 2002, the 10 year follow up to the Rio Summit. The Johannesburg Plan of Implementation again features a distinct chapter on consumption, and here the shift leans further away from viewing consumption in terms of consumer choice and information. The Plan stresses that “fundamental changes in the way societies produce and consume are indispensable for achieving global sustainable development”.³⁹² Significantly, consumption is not treated distinctly from production and the phrase “sustainable consumption and

³⁸⁶ Agenda 21, sec. 4.20

³⁸⁷ Agenda 21, sec. 4.23

³⁸⁸ UN Revised Consumer Protection Guidelines sec. 3 (g)

³⁸⁹ UN Revised Consumer Protection Guidelines sec. 3(g)

³⁹⁰ UN Revised Consumer Protection Guidelines sec. 5

³⁹¹ UN Revised Consumer Protection Guidelines, sec. 44, and detailed provisions from 45 to 55.

³⁹² Johannesburg Plan of Implementation at III: 15.

production” is repeatedly used.³⁹³ While specific proposals such as eco-labels are again mentioned, the approach, like the Consumer Protection Guidelines and Agenda 21, sticks to very loosely drawn suggestions. However, the Johannesburg Summit recontextualizes sustainable consumption within “an integrated environmental, social and development agenda”.³⁹⁴ The focus on the three “mutually reinforcing pillars” of sustainable development—economic development, social development and environmental protection reflects a new norm of international sustainable development law, the principle of integration and interrelationship.³⁹⁵

There is now international and state level bureaucracies concerned with consumption. Agenda 21 was extensively followed up by work at the United Nations Commission on Sustainable Development, the United Nations Environment Programme (UNEP) especially through the Division of Technology, Industry and Economics (Sustainable Consumption Branch), and the Organization for Economic Co-Operation and Development (OECD). Many countries now have specific departments or offices devoted, in some way, to sustainable consumption. For the most part sustainable consumption is bifurcated from other sustainability initiatives. Efforts to comply with the Kyoto Protocol in fact largely concern oil consumption by both industry and consumers and include proposals related to consumption, such as funding public transport, or subsidizing home insulation upgrades. However, these rarely appear under the mandate of sustainable consumption. Alternatively, some countries such as Germany are undertaking comprehensive reviews of consumer policy and economic policy making on the basis of concerns for sustainable production and consumption.³⁹⁶

For the most part, governments’ initiatives under the sustainable consumption rubric are limited to ecological labeling programs, life-cycle analysis of products and extended

³⁹³ Johannesburg Plan of Implementation, at III:14, III:15

³⁹⁴ Johannesburg Plan of Implementation, at III: 2

³⁹⁵ Marie Claire Cordonier Segger and Ashfaq Khalfan “Principles of International Law relating to Sustainable Development” *Sustainable Development Law: Principles, Practices and Prospects*. (ed. Marie Claire Cordonier Segger and Ashfaq Khalfan, Oxford University Press, 2004) 95-171 at p. 97

³⁹⁶ Mathew Bentley *Tracking Progress: Implementing sustainable consumption policies—a global review of implementation of the UN Guidelines for Consumer Protection*. Consumer International and United Nations Environment Programme, 2002) at p. 50; Reisch, "Sustainable Consumption as a Consumer Policy Issue" *ibid.*

producer responsibility.³⁹⁷ Life cycle analysis concerns analysis of the material and energy flows through product networks from resources to waste. The underlying idea is that those in control of the network could redesign products, and their production, distribution and disposal, to minimize the use of materials, energy and waste. The models and examples presuppose a highly integrated industrial products manufacturer such as an automobile company, which can hire engineers trained in industrial ecology. The further presupposition is that the company effectively manages hierarchical and vertically integrated supply chains or that firms in more complex networks could share information and coordinate systems to achieve integrated product design. Extended producer responsibility involves a legal mechanism for shifting responsibility for industrial and packaging waste to producers or consumers.³⁹⁸ Of all sustainable consumption initiatives it is the most successfully implemented. One technique is to provide consumers with monetary incentive to return product waste (such as containers) to the stores where they were bought. This forces merchants, suppliers and producers to take control of the waste disposal process. From a commodity network perspective, these initiatives are forms of network design, and are obviously limited to small alterations to the energy, material and waste aspects of product chains.

5.3 Designing Sustainable Consumption Policy

While the relational conception of sustainable consumption is one interpretation, it is not the predominant one now guiding most sustainable consumption policies promoted by governments or international organizations. Rather, sustainable consumption “policy” is plagued by indeterminacy concerning how to understand consumption and how to single out consumption as an area for policy implementation. The result is that the international legal discourse on sustainable consumption gives voice to and helps to perpetrate a concept of sustainable consumption as concerned with issues of consumer choice over products. Alternatively, where governments, organizations or documents use the conjoined phrase “consumption and production” they are generally making reference to the need for more dramatic changes to the economy. This subtle shift in language,

³⁹⁷ *Tracking Progress*. Ibid.

³⁹⁸ Salzman "Sustainable Consumption and the Law" *ibid.*; Bill Sheehan and Helen Speigelman "Extended produce responsibility policies in the United States and Canada: history and status" in *ernance of Integrated Product Policy: In Search of Sustainable Production and Consumption*. (eds. D. Scheer, D. and F. Rubik. Greenleaf Publishing Ltd., 2006) Greenleaf Publishing Ltd.)at p. 219

evident, for instance, in the move from Agenda 21 to the Johannesburg Plan of Implementation, reveals an awareness of the ways that a conceptual division between consumption and production is both central to liberal economic theorizing and a potentially dangerous depoliticization of the market. Increasingly policy papers and innovative proposals for changes towards consumption envision the government has having an active role in setting production, consumption and income taxes, in planning and implementing infrastructure changes (such as public transit), and in setting product regulations for building materials, household appliances and other consumer products.³⁹⁹ But even in this realm, it makes all the difference how consumer practices and values are understood.

Broadly speaking, current frameworks for understanding sustainable consumption can be divided into two camps, a “materials, energy and land use approach” and a “consumer choice” approach. In the materials, energy and land use approach, common in ecological economics for instance, environmental issues relating to consumption necessarily involve attention to the ways in which commodity networks embody the flow of materials and energy. Once environmental issues are to be understood it becomes necessary to trace the life of goods in a vertical style analysis, from raw materials through to production, distribution, consumption and disposal of goods. More radically, some ecological economists adopt a “physical systems” approach that looks at the material throughput of a society as a whole, and entirely abstracts from individual consumers or any end users.⁴⁰⁰ In earlier ecological economic approaches materials and flows were treated as a homogenous interchangeable mass, but new approaches recognize the need to provide distinct accounts for uses of energy, land and different materials.⁴⁰¹ To the degree to which distinct “resources” are valued intrinsically (such as, tropical lumber which is linked to valued rainforests) this implies nonfungibility: Separate documentation is then needed for each such item. Even where household consumption is singled out as a particular end use, the concept of consumption concerns how much resources consumers use, and how much waste they produce. In

³⁹⁹ See, for example, Oxford Sustainable Consumption Report, *ibid.*

⁴⁰⁰ See Daly “On Economics as a Life Science” *ibid.* Spangenberg “The society, its products and the environmental role of consumption” *ibid.* Comparing with different concepts of consumption see M. Cohen, and J. Murphy, “Consumption, Environment and Public Policy” *Exploring Sustainable Consumption: Environmental Policy and the Social Sciences.* (ed J. Murphy and J. Cohen, Elsevier Science, 2001).

⁴⁰¹ Spangenberg “The society, its products and the environmental role of consumption” at p. 43.

such an approach consumer choice is important in terms of its effects on material and energy throughput and land use but there is no real significance to a consumption-production distinction. Concern with material throughputs alone is analytically distinct from issues concerning whether government, individuals, or corporations drive consumption and production decisions.

In the materials, energy and land use approach, consumption practices and levels can be changed through a variety of means, ranging from production oriented regulations such as controls on industrial pollution to design of cities and transportation infrastructures which provide the background conditions for consumer decision-making. The materials, energy and land use approach focused on what consumers are actually doing, and so consumption is viewed as a series of practices. It can thus make use of and be combined with sociological accounts of the social practices related to consumer goods and their use as found in social theorists such as Bourdieu or Douglas and Isherwood. For this approach, the changes that matter are ultimately linked to changes in material, energy and land use: Such shifts may occur through increased product efficiency or through changes to consumers' practices. This can include regulating choice through tax incentives or information, but it can also include removing consumer choice entirely (such as in the case of banning goods made with toxic chemicals) or shifting the contexts in which choices are made ranging from background infrastructure to modes of social interaction. (Such as in the case where householders choice as to where to live is conditioned by the zoning and geographic make-up of a city). From such a perspective, the narrow range of sustainable consumption policy as adopted by most international organizations and governments looks like a simple refusal to confront the issues surrounding consumption. On such a conception, consumption policy can be the most exciting areas for politics, planning and social transformation, involving deep seated public reflection and debate on the relationship between our lifestyles, our values, our identities, our practical activities and productive work lives, and our relationships to each other and the Earth.⁴⁰²

⁴⁰² For an example of such a thickened account of consumption as practice, see Shove, Elizabeth. "Changing Human Behaviour and Lifestyle: A Challenge for Sustainable Consumption?" In *Ecological Economics of Consumption*, (ed. Lucia A. Reisch and Inge Ropke. Cheltenham, UK; Northampton, MA, USA.: Edward Elgar, 2004)

Alternatively, economic models that have not traditionally paid attention to the throughput of materials and energy view consumption in terms of consumer choice itself, implicitly adopting a “consumer choice” model of sustainable consumption.⁴⁰³ In the traditional economic picture, the economy is divided into consumption and production: Consumer desires drive industrialists to produce goods. Micro-economics accounts of consumers’ preferences are a form of horizontal analysis which focuses on consumption in terms of consumer choice. In such accounts, goods are understood in terms of consumer preferences for products. Underlying the approach is a normative vision of the economy as justified in terms of maximizing consumer preferences as expressed in the market.

This “choices” approach can, and has been, modified to include attention to product lifecycles and distant effects in two ways. In one approach, efforts can be directed towards the promotion, design and marketing of alternative “eco-efficient” goods that meet consumers preferences for ecological products. For some market-based proponents of value-labeled goods, the criteria of success of value-label goods is not whether they will come to dominate the market or result in widespread change to production systems, but only that they fill a market niche as reflecting the values or aspirations of those consumers who do purchase them.⁴⁰⁴ Such an approach retains the conviction that the legitimacy of the market rests only on the criteria of maximizing preferences.

Alternatively, adherents to the choice model may seek to force consumers to “internalize” costs associated with their choices in a process of “getting the prices right”. Here, the historical and geographical, and material life of products is flattened into a symbolic representation such as a price signal that can be worked into consumer preference ordering through price adjustments.

It should also be noted that not all approaches to ecological taxes, or even mention of “the true cost of consumer goods” fits into the market or choice ideal. While ecological taxes are widely promoted, not all such taxes are envisioned as forms of price

⁴⁰³ For an example see OECD Environment Directorate 1999-2001 Programme on Sustainable Consumption. “Towards Sustainable Consumption: an Economic Conceptual Framework”. ENV/EPOC/WPNEP (2001) 12/FINAL

⁴⁰⁴ See, for example, Kysar (2005) “Preferences for Process”.

internalization. Rather, taxes may be applied simply to discourage consumers from buying certain products, or to decrease the amounts they buy, where an outright ban may be too harsh a response. For instance, if a country decides on an optimal total volume of oil to consume, oil prices can be artificially inflated to ensure consumption does not exceed that target. However, the basis for setting that target may be independent of any sort of “real price” of the oil, but merely reflect a social consensus on an evaluative judgment concerning appropriate levels of oil consumption.⁴⁰⁵ Likewise, the oft heard concern of environmentalists that consumers are not paying the full price of the goods they buy may simply reflect the sentiment that were goods designed to have no serious environmentally adverse impacts then they would cost more.

Discussion of price internalization presupposes that the basis for increasing taxes is to adjust the prices of goods to reflect their real price, or the price adjusted to reflect the harms the product creates. Getting the prices right is perhaps the central policy response of environmental economics, the sub-discipline of liberal economics concerned with natural resources. If the theorist takes markets of disentangled goods and discrete transactions as the ideal, then the solution, when faced with the obvious problem of harms to the environment, is to adjust the prices of goods as though once true costs were ascertained, the market ideal could be restored. In Chapter 2, section 5 and 6 there is an extensive discussion of the failures of ascertaining these true costs. The price internalization technique is part of the larger project of designing the market around individualized choice. Because its so obvious that price internalization is a flawed method, it is not unreasonable to assume that it is still used because of its putative ability to retain the choice model. The approach holds out the promise that individual choice, untainted by political manipulation, could still be the basis for how goods are allocated in the economy.

Official sustainable consumption discourses have largely adopted the choice model, guided by the initial division of sustainability into production and consumption and by the force of microeconomic theorizing.⁴⁰⁶ The international soft law instruments such as Agenda 21 and the Consumer Protection Guidelines, and especially the Johannesburg

⁴⁰⁵ Jacobs, Michael (2002) *The Green Economy*. Vancouver: UBC Press.

⁴⁰⁶ See, for example “Towards Sustainable Consumption: An Economic Conceptual Framework” *ibid.*

Plan of Implementation do clearly signal that consumption is a larger issue of resource use in the economy as a whole, but analysis of the actual policies and programs of industrialized countries suggest the choice model of consumption is predominant.

The further twist in the equation is the predominant political shift in Northern industrialized countries towards deregulation of markets and minimal role of the state. In such a space voluntary approaches to transforming markets towards sustainability seem one of the few possible policy options available. “Free market environmentalism” provides an ideal of how society can respond to pressures for environmental reform without interfering with market-place norms. The choice model is susceptible to free market environmentalism in two ways.

First, libertarians object to government tinkering with what they understand as a realm of freedom of contract, especially where government appears to be broadening its mandate. In such a conception, concerns about the ethics of environment and consumption can still be raised, but they are effectively removed from political debate and relegated to individual choice. Whether or not a particular consumer avoids the harmful effects of their consumption decisions is a question of their subjective preferences. This rigid adherence to concepts of individual autonomy and freedom of contract directly descends from nineteenth century political liberalism and the contract law tradition, especially as formulated in England and the United States, but continue to hold sway in conservative political movements. The choice model contributes to this by construing sustainable consumption as at root a matter of choice.

The second difficulty stems from the structure of the division of consumption and production. While economists may treat this as a heuristic conceptual division, it becomes something more when it becomes the basis for different government departments. The primary difficulty is that traditionally, in Western societies, environmental regulation is almost all production oriented. Choice is always understood against the backdrop of what the market provides, so state environmental regulation of production methods falls out of the picture of consumption policy. Within the choice model, the regulation of consumption is understood as ways in which the existing range of choice can be modified, which include consumer education, access to information or consumption taxes. According to this bifurcation, the vast range of concerns about

greenhouse gases and global warming, biodiversity and land usage can all be handled in terms of the production side. A centrally controlled economy could achieve all its sustainability objectives by focusing on the production side, because in such a system consumer choice is seldom a significant design factor for products. Sustainable consumption can then be configured as concerning a much narrower range of issues, limited to how governments of liberal industrialized democracies can institute policies that either facilitate or guide consumers to willfully change their practices. Government departments dedicated to sustainable consumption can then limit their concerns to improving labels as instruments of choice, help steer industry towards supplying goods that meet environmental choice, monitor private-public partnerships over extended producer responsibility and adjust the tax system to support consumers in making better choices. Production side change, such as through increased standards for regulating industrial pollution, or through more stringent land use policies may well impact on consumers, but they are not directed at consumer choice per se. Most liberally construed, even the background conditions which affect choice, such as how cities are designed to accommodate public transit or private automobile use could be placed in the production and infrastructure side. The action all shifts to the production side of the equation.

The approach is susceptible to collapsing into a free market approach when the production oriented side of the sustainability bureaucracy fails to do its work. In the division of labour model a careful balancing of production measures with consumer led changes to consumption patterns could allow for a careful balancing of approaches as the ship of state steers towards sustainable ports. If consumers willingly choose to avoid harmful products then the strong arm of the state need not interfere. If market-led environmentalism achieves limited results then production oriented regulation can be increased. However, if government and industry fails to initiate production side change, then efforts towards ecological taxes or eco-labels begin to bear the burden of being the sole basis of environmental change. Consumption led changes become viewed as the driver of production side changes.

There has so far been little concerted movement by national, state, or provincial governments, especially in North America, specifically towards issues of consumption, beyond the tinkering effects of life-cycle analysis, toxics regulation, eco-labeling and

extended producer responsibility. As the above discussion indicates, this has resulted from a mix of the influence of laissez-faire politics and free bureaucratic intransigence in part created by the consumption-production dichotomy. Alternatively, concern for the environmental life of goods, as exemplified in life-cycle analysis or “integrated product policy” can in fact be incorporated into the commodity network approach. The approach strongly supports the vertical analysis of consumer goods as involving materials, energy and land use: It also recognizes consumption as a social practice involving humans and non-humans. However, the network or relational approach goes beyond a simple material analysis to look at the evaluative and normative aspects of human and human-non-human relationships as they emerge in networks. By invoking a range of evaluative concerns that include environmental throughput but also wider social and economic factors, the commodity network approach seeks to include economic, and social factors alongside environmental ones. The network analysis also recognizes the plurality of different networks, ranging from non-market barter to do it yourself projects, as instances whereby the non-human is transformed in networks. The commodity network analysis can thus build on the more narrow focus of the consumer goods approach to show the interrelationships between consumption, production, legal regulation and system design.

5.4 Voluntary market approaches as design

A single consumer who chooses an alternative product is embarking on a form of network design—they are choosing to connect themselves to networks with different modes of ordering which reflect a range of evaluative concerns. The relational approach to consumer transactions and commodity networks suggests that such voluntary measures do potentially embody a reconceptualization of exchange and consumption. However, singularly voluntary approaches can dovetail with a larger societal vision of maintaining relatively unregulated consumer markets. Free market environmentalism continues to have tremendous influence, and suggests that governments need not adopt robust sustainable consumption policies. Under free market environmentalism there arise few state-initiated changes to contract activity, although consumers, companies and even government procurement may incorporate a broad range of values into contracts. Adherents to the free market approach might look to fair trade goods to show that our current contracts-based regime of the market can allow alternative goods to flourish. In this section, it is argued that voluntary approaches are not likely to be

sufficient to either ensure that individuals can systematically consume in a sustainable fashion, or that individual efforts can add up to structural change in the economy.

Green consumerism and free market environmentalism are very different movements, involving different actors with different situated knowledges and perspectives on the life of consumer goods and how they are regulated. Drivers behind green consumerism such as the framers of fair trade coffee have been motivated to find practical solutions from the situated perspective of social actors with little control over state law or economic policy. Solidarity organizations and non-governmental development organizations behind some alternative goods are not driven by the profit-motive, and often see the development of these alternative goods as a worthy object of their resources and for effective subsidization. Further green consumerism has generated a tremendous amount of “ecopreneurship” as small business, industrial design and conscious consumers are harnessed towards change.⁴⁰⁷ There are now a wide array of ecologically designed consumer products, industrial plant restructuring, and green energy systems which hold the promise for the mainstreaming of green infrastructure. The green consumer movement provides its own alternative design systems, from community assisted agriculture, consumer cooperatives, movement organic farmers, to voluntary simplicity: These are all methods of shaping commodity networks which only marginally touch on government involvement.

For proponents of market led environmentalism, value-labels and green products represent evidence that the means exist for current markets to come to satisfy consumers’ and citizens’ ecological concerns. This approach emphasizes the technology of individual choice in consumer goods, augmented by better awareness and eco-labels and is the central approach of “ecological modernists” who emphasize the development of new ecological products as part of the larger project of reforming Western societies around ecological transformation.⁴⁰⁸ Now legal discourses are

⁴⁰⁷ For a broad overview of the movement see, for example Abbey, *Global Profit and Global Justice* *ibid.*. For a legal academic version see Kysar “Preferences for Processes” *ibid.*

⁴⁰⁸ P. Christoff “Ecological Modernisation, Ecological Modernities” (1996) 5 *Envtl. Pol.* 476; Charles O. Holliday, Stephen Schmidheiny & Philip Watts, *Walking the Talk: The Business Case for Sustainable Development* (Sheffield, U.K.: Greenleaf Publishing, 2002). Gert Spaargaren “Sustainable Consumption: A Theoretical and Environmental Policy Perspective” (2003) *Society and Natural Resources*, 16 687-701. For a critical analysis see P. Rutherford “Ecological

positioning consumer choice for green products as a method of managing environmental harms. From the situated perspective of environmental activists, consumption can appear at the heart of the problem of a capitalist order organized around consumer choice: Sustainable consumption discourses surrounding eco-labels or even tax incentives for green purchases appear as one more way in which we are governed by a regime of choice that underlies neo-liberalism.⁴⁰⁹ Value labels, codes of conduct, corporate social responsibility and voluntary management systems are now the preferred mechanisms of “governmentality” through choice for handling problems of network configuration.⁴¹⁰ While free market environmentalism and the informational approach flourished in the in 1980s and 1990s, since the turn of the new century there has been a widespread acknowledgment that these initiatives are insufficient and that government must take a more active role.⁴¹¹

In its mildest form, this approach calls for only voluntary measures, and so requires minimal legal changes to the structures of the market. Law can have a role through mandating when particular labels may be adopted as part of packaging. Generally, manufacturers or distributors face few legal obstacles to using terms such as ‘ecological’ or ‘just’ as part of value-labeling. If the law specifies and enforces the usage of words like “organic”, it ensures consumers that they know that the good they are buying

Modernization and Environmental Risk”. *Discourses of the Environment*. (ed. É. Darier. Oxford, Blackwell, 1999).

⁴⁰⁹ Such an approach follows from the “governmentality” approach of Nicholas Rose *Powers of Freedom*. Cambridge University Press, 1999).

⁴¹⁰ For a governmentality analysis of environmental management systems see Stepan Wood “Green Revolution or Greenwash? Voluntary Environmental Standards, Public Law, and Private Authority in Canada” in *New Perspectives on the Public-Private Divide*. (The Law Commission of Canada. Vancouver, UBC Press, 2003).

⁴¹¹ See, for instance, the works in *Exploring Sustainable Consumption: Environmental Policy and the Social Sciences* (eds. J. Murphy M. Cohen. Elsevier Science Ltd, 2001) especially J. Paavola “Economics, Ethics and Green Consumerism” in *Exploring Sustainable Consumption: Environmental Policy and the Social Sciences*. (ed. J. Murphy and M. Cohen, Elsevier Science Ltd, 2001) 79-94; *Confronting Consumption*. (ed. K. Conca, M. Maniates, and T. Princen, Cambridge, Mass: MIT Press, 2002) especially M. Maniates “Individualization: Plant a Tree, Buy a Bike, Save the World?” *Confronting Consumption*. *ibid*; also see *Oxford Commission on Sustainable Consumption Report*. (Oxford, UK, Mansfield College, Oxford Centre for the Environment, Ethics and Society, 2004). OECD Environment Directorate 1999-2001 Programme on Sustainable Consumption. “Towards Sustainable Consumption an Economic Conceptual Framework. ENV/EPOC/WPNEP (2001) 12/FINAL; Green Paper on Integrated Product Policy Brussels, 07.02.2001. COM (2001) 68 Final. Note also that the UN Consumer Protection Guidelines also include a number of provisions calling for government regulation, through tax shifting, product and toxics bans and other measures, raising the interesting question what these have to do with traditional consumer protection.

conform to certain physical or process related characteristics, and protects producers who conform to standards from fraudsters.⁴¹² In the case of organic food, many provincial and state governments now provide criteria for when the words can be used. Because value-labeled goods are a growing segment of the market it is difficult to predict how successful they will be. In the case of fair trade or organic coffee, it still represents only a marginal fraction of the total market—less than 1 percent of the North American and global markets in the year 2000—and must be priced competitively with other premium coffees.⁴¹³

In more rigorous forms, the informational approach does call for changes to the marketplace in terms of demanding required product labels or informational disclosure through additional packaging requirements or disclosures on websites. Advocates have requested that genetically modified foods receive mandatory labels, or that textiles be labeled with the location of the factory of manufacture. If labels are made mandatory, this involves a change to the way transactions are viewed in the traditional common law, as requiring certain information. Such a response is also firmly rooted in what we can call the “self-critique” of the common law. Issues of purchaser’s information came to play a significant role in the development of sales of goods law, and then later, statutory changes to contract and consumer protection legislation.⁴¹⁴ Rather than singling out as problematic the idea of the market as organized around choice, informational analysis seeks to correct market imbalances by providing consumers’ more information. Labeling advocates have thus utilized concepts of the “consumers right to know”, especially concerning the widespread popular reaction to genetically modified soybeans and corn.⁴¹⁵ For over thirty years there have been ongoing debates as to whether consumers are responsive to mandatory labels and the limits to consumers’ ability to

⁴¹² See J. Akerloff “The Market for “Lemons” : Quality Uncertainty and the Market Mechanism” (1970) 84 *QJ of Econom* 488. This approach is widely advocated. See D. Cohen “The Regulation of Green Advertising: The State, The Market and the Environmental Good” (1991) 25 *U.B.C. Law Review* 225-275; United Nations Commission on Sustainable Development (1998) “Consumer Protection and Sustainable Consumption: New Guidelines for the Global Consumer” Division for Sustainable Development Department of Economic and Social Affairs.

⁴¹³ Talbot, *Grounds for Agreement*, *ibid.* at p.205

⁴¹⁴ For an “informational” analysis of the purposes of consumer protection law see G. Hadfield, R. Howse, and M. Trebilcock “Rethinking Consumer Protection Policy” (1996) *University of Toronto Faculty of law Centre for the Study of State & Market. Working Paper Series* 14.

⁴¹⁵ F. Degnan “The Food Label and the Right-to-Know” (1996) 52 *Food Drug L.J.* 49

handle potential informational overload.⁴¹⁶ Recent psychological research coupled with experience with cigarette labeling gives strong prima facie reason that appropriately designed labels can affect consumer behaviour. It may, for instance, force people to think about aspects or effects of what they buy that they might otherwise choose to ignore.⁴¹⁷ Moreover, consideration of labeling in terms of consumer information alone misses the degree to which civil society organizations, unions, solidarity groups, pension fund activists, and environmental NGOs can use product and process information as part of campaigns, stimulating political debate and popular education.⁴¹⁸ Governments in North America have not been sympathetic to consumer demands for mandatory labeling or disclosure of information, as the case of GMO foods and textile labeling shows. In some cases courts have even invoked corporate freedom not to speak to overturn government labeling requirements.⁴¹⁹

The politics of information labeling can only be understood against the backdrop of the common law concept of caveat emptor. The common law tradition in Anglo-American countries has held that buyers did not have rights to information concerning the products they bought, apart from what buyers could ascertain on their own or obtain from sellers by asking. Sale of goods and public measures such as corporate disclosure have made some inroads, but not concerning process information. It is standard for information as to product processes to be understood as the private realm of manufacturers and distributors. This represents yet another configuration of the private-public distinction that twentieth century realist legal scholars have struggled to overcome. Once proprietary information is understood against the backdrop of the role of the state in maintaining private law, questions of information labeling can be seen as political

⁴¹⁶ M. Trebilcock "Consumer Protection in the Affluent Society" (1973) 16 *McGill L.J.* 263; E. P. Belobaba "The Development of Consumer Protection Regulation: 1945 to 1984" in *Consumer Protection, Environmental Law and Corporate Power*. (ed. I. Bernier and A. Lajoie Toronto: University of Toronto Press, 1986) at p. 23. See also Kysar "Preferences for Processes" *ibid.* in the context of value-labels.

⁴¹⁷ Kysar "Preferences for Processes", *ibid.*

⁴¹⁸ This is clearly the motivation, for instance, behind The Ethical Trade Action Group's application to the Canadian government to require clothing companies to make public the location of factories. See Conference Board of Canada *Study of A Proposal (and its alternatives) to Amend the Textile labeling and Advertising Regulations*. (For the Competition Bureau of Canada, 2003). Policy paper advising government not to amend textile labeling to include address of production factories, as requested by trade unions and development NGOs.

⁴¹⁹ In *International Dairy Foods v. Amestoy* 92 F.3d 67 (2d Cir. 1996). the U.S. Second Circuit ruled that a Vermont law to require labeling of milk where recombinant Bovine Growth Hormone was used violated the freedom not to speak of producers.

questions, open to legislators to change. Current configurations are not natural facts, but rather the result of a range of instituted processes. Their continuation can be seen as reflective of the power balance behind legislatures' decisions rather than the clear articulation of a consistent doctrine. Appealing to economic principles of efficiency sidesteps the issue. Access to information is part of the system of background entitlements that determine consumer transactions and form the context in which preferences are shaped.⁴²⁰ There are good reasons for balancing business concerns about preserving its information and competitive position against public values that could be promoted through the sharing of such information. Choices as to how to allocate information, or access to information, in consumer transactions are political choices.

There is room for considerable skepticism as to whether redistributing access to information to consumers would achieve widespread change towards sustainability. Commodity network analysis suggest problems with the ability of the informational analysis to effect widespread change in consumption: It ignores key elements of human subjectivity and practices.⁴²¹ A number of more specific arguments apply as to practical limitations with adopting an information based analysis as a policy response to consumption problems.

One prominent argument suggesting that the individual model is unlikely to succeed rests on the very market logic the approach seeks to make use of. Jouni Paavola notes that the entire approach is victim to free rider problems: The costs are borne exclusively by those who care the most.⁴²² Moreover, the most concerned consumers are less likely to be the ones most responsible for environmental impacts. A person may choose to ride a bicycle rather than a car, but in so doing he may be penalized twice over. He gives up the various time-saving and other practical uses of car ownership and use provides. Further, he may fail to meet the norms of business practice or gender roles and so face considerable difficulties in realizing many of his life plans. Automobiles and many other consumer goods serves as what Thomas Veblen and his followers call a "positional good"—a consumer item which the possession and use of signifies and helps achieve social status. To be effective, green consumerism requires environmental concerns to

⁴²⁰ As was discussed in Chapter 2

⁴²¹ As discussed in Chapter 4

⁴²² J. Paavola "Economics, Ethics and Green Consumerism" *ibid.*

be widely held. At the same time, relying exclusively on green consumerism to reduce the environmental impact of consumption does not provide agents with the opportunity to agree collectively. The result is what Daphne Lewinson Zamir, calls “hopelessness”: “Both the knowledge that one’s own contribution will have a minuscule effect on the desired outcome and the fear that not enough others will contribute may create a feeling hopelessness: People reason that, regardless of what they choose to do, the collective goal will not be achieved. Therefore, they despair and do nothing”.⁴²³ There are communities and movements of people who choose to adopt lifestyles of voluntary simplicity or engage in practices of resistance to consumerist lifestyles. Often the motivation is to avoid stress associated with keeping up credit card payments or intensive workplace demands.⁴²⁴ These theories do not rule out the possibility that green consumerism could become a society wide endeavour. Quite possibly most people could switch to ecologically more benign products, or even come to live more simple, or less commodity intensive, lives. These theories in fact they suggest that with sufficient adherents the problems they identify could evaporate. However, they do suggest reasons why these movements are not more widespread or have not become mainstreamed.

The space of individualized choice also opens up opportunities for new forms of games of power. Distributors of goods such as brand name companies can produce putatively “alternative” or “ethical” goods that appear to correspond to widely held values, but on closer analysis offer no substantive changes to workplace or environmental practices. Codes of conduct may employ vague discretionary language, or weak monitoring systems or in fact work to shift attention from more central concerns. Some codes seek to re-legitimize multinational commodity networks (and deregulated systems of trade) through the privatization of the monitoring of what are often only minimal environmental and labour standards.⁴²⁵ The concept of sustainability is often used to underlie ecolabels or codes of conduct in ways that are meant to give the appearance of legitimacy. In

⁴²³ Daphna Lewinsohn-Zamir. “Consumer Preferences, Citizen Preferences, and the Provision of Public Goods” (1998) 108 *Yale L. J.* 108, no. 2: 377-406. (p. 392)

⁴²⁴ M. Maniates “In Search of Consumptive Resistance: The Voluntary Simplicity Movement” *Confronting Consumption*. (ed. K. Conca, M. Maniates, T. Princen Cambridge, Mass: MIT Press, 2002) at p. 212

⁴²⁵ Adelle Blackett “Global Governance, Legal Pluralism and the Decentered State”, *ibid*; Hughes “Accounting for Ethical Trade: Global Commodity Networks, Virtualism and the Audit Economy.” *ibid*.

cases where non-governmental organizations have created carefully crafted certification systems such as Forest Stewardship Council wood products, or Fairtrade certified coffee, industry led groups have created alternative labeling and certification schemes or codes of conduct with weaker standards.⁴²⁶

Many value-labels codify and reflect aspects of products many persons do care about -- such as whether food is organic or not -- but simultaneously fail to address many other concerns. In the case of organic food, for instance, conscientious consumers might reasonably ask about far more than the narrow range of concerns represented by state-sanctioned organic labeling. They may ask about treatment and social lives of immigrant workers, the distance food is traveled, greenhouse gas emissions caused by production and distribution, the amount of packaging and processing involved, or whether the commodity network is part of a large agro-industrial corporation or is run by “movement” farmers who see social justice and sustainability values as more important than profit.⁴²⁷ Even value-labels organized around North-South solidarity or forest ecology must negotiate relationships engendered by operating in competitive markets, such as political involvement of large corporations, or downward pressure on wages.⁴²⁸ The Fairtrade coffee label is susceptible to these problems now that multinationals such as Proctor and Gamble (under the Millstone label in the United States) and Nestle now run fair-trade labeled product lines.⁴²⁹ While consumer may be concerned about process issues they

⁴²⁶ Consider the use of sustainability by the Common Code for the Coffee Community (4C), an industry led coffee code that includes multinationals and other stakeholders. Started in 2002 by the German Coffee Organization and the Germany Agency for Technical Cooperation, 4C aims to “draw up social, ecological and economic dimensions of sustainability of the production, processing and marketing of green coffee through a participatory process that will serve as a code of conduct for the market for ‘mainstream coffee’”. The Codes’ use of “sustainability” is apparent from the website address: www.sustainable-coffee.net/ It has partnerships with some unions, Oxfam and with Southern country large coffee plantation organizations. It provides no mechanisms for support for small growers, and its proposed certification system requires production sizes that most small growers could not reach. Editorial. “Not Quite 4C” *The Economic Times (India)*. Monday 14 November 2005. It thus appears as a direct competitor with the fair-trade system. Also see the American Forest and Paper Associations’ Sustainable Forestry Initiative, or the Canadian Standards Association Sustainable Forest Management System as direct competitors with the Forest Stewardship Council system. Fred Gale F. (2002) “Caveat Certificatum: The Case of Forest Certification” *Confronting Consumption*. (eds. K. Conca, M. Maniates, T. Princen, MIT Press) at p. 283, 287

⁴²⁷ Goodman and Goodman “Sustainable Foods: Organic Consumption and the Socio-Ecological Imaginary” *ibid.* Reynolds “The Globalization of Organic Agro-Food Networks” *ibid.*

⁴²⁸ Taylor “In the Market But Not of It” *ibid.*

⁴²⁹ “Nestle’s Fairtrade coffee gets mixed reaction from critics”. *The Guardian*. Saturday, Oct 8, 2005, p. 12 see also Statement by WDM on Nestle Fairtrade partners’ Blend Coffee. Friday 07 October 2005, accessed at www.wdm.org.uk/news/presrel/current/nestle.htm

may be unaware of how that concern becomes a tool for shifting of power to certification bodies, for competitive advantage through the use of new methods of segregating supply chains. Very few labels provide means for agents to actively participate in commodity network design, outside of the traditional channels whereby managers learn of marketplace success: The private nature of most commodity networks makes full citizen participation impossible.

Problems of the competitive marketplace are part of a wider analysis of the ways in which consumption concerns a combination of agents' discourses, practices and social contexts (that is, as analyzed by the wider "horizontal analysis" of commodity networks). The competitive marketplace is one of a range of factors influencing agents' decision-making. Other factors include persons' self-understanding, the discursive and social space in which they are located—what Bourdieu calls the 'habitus'—their deliberative judgment as to reconciling their values, needs, wants, obligations, the institutional constraints and strategic possibilities open to them and the existing forms of conduct to which they are normalized. Persons are embedded within and interact with a variety of practical systems that form their subjective orientation and their practical activities. Transforming action requires providing spaces for deliberation and reflection to enable persons to take issue with the ways in which they have been subjectivized.⁴³⁰ Persons have varying opportunities and abilities to reflect on their values and action. In many contexts agents cannot change their consumption patterns due to lack of choice, or economic necessity. Further, lack of education, creativity or feeling pressure to adopt their employers or widely held ideologies can interfere with persons' capacity to think differently. In such a space, those who have more resources at their disposal can appropriate ethical consumption into a mode of class distinction that exhibits more sophisticated knowledge and consciousness, taking advantage of, for instance, the fact that local, organic produce at the farmer's markets is an exclusive product,⁴³¹ or that

⁴³⁰ This follows from the work of Michel Foucault. See "On the Genealogy of Ethics", "Technologies of the Self", "Ethics of Concern for the Self as a Practice of Freedom" *Ethics Subjectivity and Truth. Essential Works of Foucault 1954- 1984 Volume One*. (ed. P. Rabinow New York: The New Press, 1997) Also Michel Foucault *The Care of the Self: The History of Sexuality Volume 3*. (New York: Vintage Books/Random House, 1988).

⁴³¹ Based on personal observations at Capers Community Market, Vancouver, British Columbia Canada, August 2004 a high end supermarket specializing in organic foods, and the Saturday Moss Street Market, Victoria, British Columbia, Canada September 2004, an example of an organic farmers market in which the prices and clientele certainly look high end. Also see Heath, Potter *Rebel Sell* at p. 156 who cite a story from *Real Simple* magazine celebrating the

value-based labeling depends on the consumer having a previously given acquaintance with the ethical and political problems involved in mainstream commodity networks.⁴³²

This leads us to question consumption more widely and its relationship to structural features of our social and economic lives. An account of consumer behaviour should recognize the degree to which the economic and social nexus in which consumption is located results in some consumers being unable to change their practices. North American society is filled with ways that individuals are constrained in their choices; there are, of course, issues of poverty and lack of education, but for all classes social and professional or workplace expectations define self-presentation and lifestyle. Most people have no say in the structures of production and distribution and we inherit an unwieldy geography of suburbs and freeways. Recognition of the ways in which persons actions are controlled and influenced by other people, institutions or social contexts can be a drive to seek structural change that contributes to problems of consumption. Recognizing the collective nature of the problem helps show why individual consumers continue to have so much difficulty negotiating these problematics on their own. Relegating choice to the market is simply a public policy choice to remove many alternatives that rely on collective action. It ignores the ways background conditions of consumption are already mediated by law and the state, and so reinstates the private-public distinction. If the refusal of government to act amounts to *restricting* the options for self-governance available, then governance through individualized choice can be understood as a form of control. Here we do have an example of what Nicholas Rose calls “freedom as a mode of organizing and regulation”. Because a range of ideals cannot be achieved in the market, adherence to the market ideal turns consumer freedom into “a certain way of administering a population that depends upon the capacities of free individuals.”⁴³³

revitalization of one Michel Rose, a Vermont mother of three who is reported to have transcended materialist values and consumerism by learning to grow tea, sandalwood and bamboo. The only catch is that to do this she must commute several times a year from Vermont to her 10 acre garden in Kauai, Hawaii. Also see Deborah Leslie and Suzanne Reimer "Spatializing Commodity Chains" (1999) 23 *Progress in Human Geography* 3, 401.

⁴³² Phillip Crang "Displacement, consumption, and identity." (1996) 28 *Environment and Planning A* 47-67.

⁴³³ Rose *Powers of Freedom* ibid. at p. 64

People who are concerned about the ways their consumption decisions hook up to larger problems of social justice or ecology can use value-labeled goods as one mechanism for changing their own practices. The embodiment of these ideals in practices in the present can help make a reality of aspirations to living in reciprocity with other humans and non-humans in network communities. However, consumers who want to embody in their daily shopping and social lives their ecological and social justice concerns also need to look to collective measures. While consumer co-operatives, fair trade goods, solidarity organizations, ethical investing initiatives and community assisted agriculture are way of doing things differently, the arguments made here suggest that the facts of interconnection with the wider society force the need for consumption decisions to be made on a wider scale. Further, if consumers motivation is to actually contribute to changing the way society relates to ecosystems and effecting transformations towards sustainability then this requires far more than simply changing consumer habits. The energy and resource uses of government procurement, export led industries, workplace processes and the amassing of capital also have to be addressed, and these are areas where voluntary action seems even less likely than in domestic consumer goods markets.⁴³⁴

5.5 Government and network design

The commodity network approach suggests a framework for understanding government and non-governmental collective approaches as network design in a way that sees production and consumption as inseparable. However, there are innumerable possible governmental programs, policies and legal options for moving industrial societies towards sustainability. If policies, programs and laws are to be the result of public participation and dialogue as well as expert analysis, and new approaches viewed as ongoing processes of experimentation, the result is an open-ended realm of possibilities. However there are massive problems with scale and complexity and the entire world economy can be the object of concern.

⁴³⁴ Spangenberg “The society, its products and the environmental role of consumption” Spangenberg calculates domestic material input (DMI) a composite index of all energy and material flows, for Denmark in 1997 and then attributes to different final demand. 20% of DMI was in capital formation, 51% for export of goods and services, 6% for government consumption and 23% for private consumption at p. 41

The commodity network approach helps to show the interconnections, for an individual consumer good, of production, distribution, consumption and disposal. We can also understand much of the economy as made up of thousands of different such networks. I want here to suggest that attention to individual commodity networks may provide a conceptual basis for guiding action. One way of conceiving of these proposals in a holistic and integrated matter may be through considering particular commodities. By choosing specific goods such as oil, softwood lumber, coffee or shrimp or a range of consumer goods such as household appliances we can analyze the entire network holistically, and then find where consumption policy may be relevant. This approach builds on the life-cycle and integrated product policy approach but adds a broader range of social and economic values. A further reason for conceiving of government action as a way of guiding commodity networks is to provide a collective basis for realizing the normative vision of network design. Legal or policy interventions need not apply to simply one network, but may rather pick out a feature common to many. Traditional production oriented laws, applying for instance, to discharge of toxic chemicals into the environment, apply to a number of potential commodity networks.

If we follow the consumer product along the chain or network we find a number of points at which governmental regulation by one state can affect the network and the material flows which run through it. This includes the oft mentioned informational and tax incentive functions, but also government in a “gatekeeper” role. In this function government can mandate product performance (such as gas mileage), the content of goods (whether there are toxic chemicals), to the methods of production (such as in production oriented environmental laws), to banning goods from entering the country on the basis of how they are made (such as the United States ban on importing shrimp that is caught in ways that harm sea turtles).⁴³⁵ Conceiving of traditional laws such as minimum wages as network design also shows a cross network regulatory approach: A single feature is identified as in common across multiple networks and that feature comes under regulatory control. Once we acknowledge the indivisibility of consumption and production we can see how any changes in the network will have potential feedback effects on price, and so consumers ability to purchase the goods, as well the potential role conscientious consumers can exert on the production process. Just as the negative

⁴³⁵ Salzman "Sustainable Consumption and the Law" *ibid.*

effects of tobacco or the dangers of small arms suggest restricting production, the harmful environmental effects of old growth lumber suggests revisiting consumption.

The wider analysis of commodities in terms of networks suggests a manifold of different evaluative concerns that plague networks. Network design is a process of seeking to meet these concerns. Sustainable consumption suggests a number of guiding principles for network design. So far, the predominant thrust in the literature has been towards simply reducing resource and energy flows. Following the sustainable development law norm of integration and interrelationship, the analysis needs to be extended to include issues of social and economic development as part of three pillars of economy, society and environment. Conceiving of networks as sites for design suggests six central design principles: Ecosystem-based management, demand management, public participation, equity and the eradication of poverty, and consideration of alternatives. Other principles follow from these. These guiding principles reflect many of our normative concerns concerning commodities, as were outlined in Table 1 on page 108. As will become apparent, these principles are far more easily accounted for in smaller locally placed commodity networks, governed by single or co-ordinated governments. Global commodity networks thus pose special concerns given the difficulties we have in bringing them under regulatory control.

Ecosystem based management. Providing a clear normative basis for articulating what counts as environmental harm is central to analyzing networks. If particular commodity systems have too severe ecological impacts they will need to be changed, resulting in potentially significant changes to consumption. Dismantling of a network may be one “design” option. Life-cycle analysis and integrated product policy initiatives usually refer to the economics concept of externalities. The concept of “externalities” works in this context as an attempt to provide a value neutral articulation of a harm which justifies intervention into otherwise neutral market arrangements, nicely complying with liberal values. However, techniques such as cost-benefit analysis or shadow pricing are unsuccessful on the terms of being a neutral arbiter, and offend basic values concerning our relationship to the non-human world.⁴³⁶ Moreover, there are a variety of normative disagreements concerning the ethics of human-ecosystem relations.⁴³⁷

⁴³⁶ As discussed in Chapter 2

⁴³⁷ As discussed in Chapter 3

One recent approach has been the formulation and articulation of “sustainability characteristics” for a given product. If governments are to give preferential tax treatment to sustainable goods there needs to be a way of codifying characteristics of the good. Reliance is then placed on the codification schemes behind eco-labels.⁴³⁸ Transfair International now has detailed specifications for coffee certification concerning environmental practices such as use of fertilizers and chemical compounds. These approaches usually represent improvements over previous practices,⁴³⁹ but are hard to place in the wider context of how ecosystems function, the particular relationship between a particular practice on the wider system, and the appropriate role for human actants in the ecosystem-human assemblage. Moreover, they are divorced from a holistic land-use planning framework for the communities involved. Consumers may well question the standards associated with different ecological certification techniques. All such certification systems “require trade-offs to be made across many dimensions—social economic, cultural, class and environmental”.⁴⁴⁰ The need arises for a principled basis for judging when labels are appropriate, especially when consumer price can figure as a motivation for watering down environmental standards. So merely referring to sustainability characteristics simply shifts the question to the larger one of required design characteristics for the commodity network.

One prominent answer of ecologists has been to insist on a systemic approach to resource management that emphasizes complexity and interdependence. The focus shifts to ecosystem management, in which ecosystem science is used to consider how best to maintain ecosystem function, composition and process.⁴⁴¹ Reference to ecosystem based management principles are made in the case of Forest Stewardship Council wood certification.⁴⁴² This can be also applied in the context of a particular resource such as salmon stocks or a rainforest ecosystem, and provides a science

⁴³⁸ Green Paper on Integrated Product Policy Brussels, 07.02.2001. COM (2001) 68 Final.

⁴³⁹ D. Cohen “Regulation of Green Marketing” *ibid.*

⁴⁴⁰ Gale, “Caveat Certificatum” at p. 281

⁴⁴¹ Gale, “Caveat Certificatum” *ibid.* at p. 280, citing R. Grumbine “What is Ecosystem Management?” (1994) 8 *Conservation Biology* 1, 27-38; Christensen, Norman, L. et al. “The Report of the Ecological Society of America Committee on the Scientific Basis for Ecosystem Management” (1996) 6 *Ecological Applications* 3, 665-691

⁴⁴² Gale, “Caveat Certificatum” *ibid.* at p.292, referencing FSC Principles and Criteria Principle 6, which states: “Forest management shall conserve biological diversity and its associated values, water resources, soils and unique and fragile ecosystems and landscapes, and by so doing, maintain the ecological functions and integrity of the forest.”

based criteria for limiting resource extraction. Ecological economics, with its stress on energy and material flows offers an analogous scientific limit for the economy as a whole: Material and energy throughputs need to be constrained by ecological carrying capacity. In “strong” interpretations of sustainability, natural capital is deemed “non-fungible”. It cannot be traded for capital in the form of equipment or cash. If ecosystems are viewed as natural capital and so non-fungible, then sustainability requires their preservation and maintenance.⁴⁴³

Tracing the interconnections between production and consumption signals that ecosystem management provides an outside constraint on the flows in the commodity network. This applies to materials at the production end, such as where ecological systems are degraded by resource extraction, in releases into the environment of pollution during manufacture or transport, such as with greenhouse gases, or in disposal where land is taken up, or pollutants released by non-biodegradable or toxic waste. A direct link can be made between consumption and environmental harms. If a particular product or flow of goods causes harm that are related to flow volume, then one can decrease flows to reduce harms. This means that ecosystem management may bring flow reductions, or, alternatively, increase the costs of obtaining resources. In the ecological and value label context this already appears as either a price premium in the fair trade coffee context, or as simply higher market prices, as in the Forest Stewardship Council case.⁴⁴⁴

In many cases, decisions to protect, preserve and respect ecosystems through ecosystem-based management principles will issue as a result of ethically based decision-making. In the context of smaller ecosystems or issues concerning preservation of individual species it will be often very difficult to establish how they relate to the larger biosphere: The loss will be unlikely to be more than only a very small contribution to an overall problem and so not clearly justified by reference to concerns for maintaining global life-support systems, or the needs of future generations.. Moreover, for such small scale losses it is simply impossible to determine what future generations will think, especially when their values and interests will be formed in the

⁴⁴³ This definition of strong sustainability is provided in OECD Environment Directorate 1999-2001 Programme on Sustainable Consumption. “Towards Sustainable Consumption an Economic Conceptual Framework. ENV/EPOC/WPNEP (2001) 12/FINAL at p. 9

⁴⁴⁴ Taylor “In the Market But Not of It” *ibid.*.

context of conditions created by present decision-making. Ecosystem-based management also implies use of the precautionary principle. If maintaining integrity of ecosystems is taken as central, then risks cannot be all externalized onto ecosystems. The precautionary principle is also accepted as a principle of sustainable development law and should be worked into commodity network design.⁴⁴⁵

Demand management. Conceiving of sustainability in terms of commodity networks spanning production and consumption can still give sustainable consumption a meaningful role in terms of "demand-management" and related techniques. Demand management emerges from natural resource management concepts and concerns ways in which engineers, policy makers, and systems planners for systems such as city water infrastructure, can use demand side measures. Standard techniques include water metering, increased prices and other tools to avoid building more infrastructure or sourcing new supplies.⁴⁴⁶ Arguably, water utilities that provided inexpensive and unmetered water are already involved in forms of managing demand. They contribute to, and manage, systems of provisioning and consuming that give consumers the appearance of endless plenty.

In the context of many commodity networks, reducing supply of some goods (such as, for instance, reducing fish catch allowances) can have the effect, if other features are left to the market, of simply increasing prices for the consumer. Economic principles of supply and demand suggest this. In the extreme case, if ecosystem maintenance and sustainability becomes an absolute constraint on consumption, harsh effects might reverberate through the commodity network to impact on consumers. For instance, if proper management of marine ecosystems means ending bottom trawling, but no adjustments are made at the demand side, the result will be that consumers either do without, or face sharply increased prices for certain fish.

⁴⁴⁵ International Law Association Committee on the Legal Aspects of Sustainable Development. 2002 New Delhi Declaration on the Principles of International Law Related to Sustainable Development. Cited in Cordonier-Segger and Khalfan "Principles of International Law relating to Sustainable Development" *ibid.* at p. 95 to 171

⁴⁴⁶ Oliver Brandies, O. M. Ferguson, M. M'Gonigle and G. Salter *At a Watershed: Ecological Governance and Sustainable Water Management in Canada*. (Victoria, BC: POLIS Project on Ecological Governance, 2005).

One simple response of environmentalists have been to acknowledge that we should simply do without many goods, choosing to live more simply and avoiding harmful goods such as beef or disposable cameras. The response of more sophisticated “soft path” approaches is to propose a variety of techniques for adjusting the demand side to facilitate transitions which provide a soft landing or minimize hardship in the transition to sustainability.⁴⁴⁷ The use of public participation and negotiated political agreements promises a wider consideration of a range of human values, including issues of income inequality, or the protection of diverse cultural values. Soft path approaches seek to supplant the narrow economism and time lines of traditional demand management. A key concept is “backcasting” where long term sustainable conditions of use are envisioned. Planners and communities work backwards to find techniques that “connect the future to the present”. Planners and stakeholders need to consider how to transform present systems to ones which can be sustainable.

The soft path approach to water demand management provides an example of how sophisticated techniques might be employed to move beyond the traditional demand management tool box. Water is envisioned as a service rather than an end, and soft path advocates examine alternative ways of providing the services, such as through more efficient toilets or even non-water intensive alternatives. Cities might phase in permanent rules about when people can water their gardens or encourage bioregionally appropriate vegetation. Farmer might be urged to return to rain-fed agriculture and urban planning adjusted to reduce run-off. As such, potential avenues for transformation include instilling changes in individuals’ habits, community growth rates and economic structure. Applying such measures in the present may also ease the process of reducing demand and forestall the introduction of more restrictive measures.

Such measures may not be sufficient in cases of commodities that are scarce and which face population pressures. Demand management techniques must pay careful attention to variety of values such as equity, autonomy, and cultural diversity. In the context of upward population pressures stretching Earth’s ecological services, ecological economic

⁴⁴⁷ Oliver Brandeis and D. Brooks, *The Soft Path for Water in a Nutshell*. (Friends of the Earth Canada and the POLIS Project for Ecological Governance, 2005) at p. 12; D Brooks “Beyond Greater Efficiency: The Concept of Soft Paths” (2005) 30 *Canadian Water Resources Journal* 1 83-92

models stress the resort to concepts of basic human needs.⁴⁴⁸ These suggest ways of establishing base-lines in deciding the context of Earth's carrying capacity for human populations in future planning. Sophisticated models of human needs reject the idea of needs as pertaining only to the individual biological aspects of a persons' existence. They also reject hierarchies of needs which suggest culture is a higher achievement or less fundamental than food or water. Writers such as Manfred Max-Neef,⁴⁴⁹ Carlos Mallman⁴⁵⁰ and Martha Nussbaum and Amartya Sen⁴⁵¹ have developed different frameworks. In each case the idea is to create a complex typification of the ways in which many human drives, desires and emotional longings can be realized, while separating out culturally specific modes of realizing these things. By distinguishing between needs and the ways these needs are satisfied in particular social contexts these theories supply "the critical recognition that not all the ways in which a particular culture or social group attempts to satisfy the spectrum of needs are equally successful".⁴⁵² In the case of Max-Neef's framework, the value of car ownership, for instance, can be analyzed in terms of enabling social interaction, affection, identity and leisure, suggesting that these needs can be reached in alternative ways that would leave persons not significantly worse off, and would also avoid the obvious long-term environmental pitfalls of the current system. If happiness (or at least needs satisfaction) can be delinked from the continual increase in consumer goods, the resulting changes to consumption patterns from environmental stewardship need not result in worsening quality of life.

In a commodity network conception, design of the network includes not just regulating the volume of flows through the network, but also paying attention to the social

⁴⁴⁸ Inge R pke "Consumption in ecological economics" *Internet Encyclopedia of Ecological Economics*: (International Society for Ecological Economics. April 2005)

⁴⁴⁹ Manfred Max-Neef *Human-Scale Development—Conception, Application and Further Reflection*. London: Apex Press (1990) Manfred Max-Neef "Development and human needs', *Real-Life Economics: Understanding Wealth Creation*, (eds. Paul Ekins and Manfred Max-Neef London and New York: Routledge, 1992) at pp. 197-213

⁴⁵⁰ Carol Mallmans "Society, needs and rights" in *Human Needs—A Contribution to the Current Debate* (Katrina Elderer Cambridge, MA : Oelgeschlager, Gunn and Hain, 1980) at pp. 37-54, cited in T. Jackson, W. Jaeger and S. Stagl "Beyond insatiability—needs theory, consumption and sustainability" *The Ecological Economics of Consumption*. (Ed. Lucia Resich, and Inge Ropke. Edward Elgar, 2004).

⁴⁵¹ Martha Nussbaum "The good as discipline, the good as freedom', in *Ethics of Consumption*. (eds. David A. Cocker and Toby Linden New York: Rowman and Littlefield, 1998) pp. 312-41; Martha Nussbaum "Capabilities as fundamental entitlements: Sen and social justice', (2003) 9 *Feminist Economics* 2-3, 33-59; Radin *Contested Commodities* *ibid*.

⁴⁵² Jackson et al. "Beyond Insatiability" *ibid*. at p. 90

conditions and values that contribute to those flows. This provides for a significant broadening of the range of concerns of network design, either by individuals, groups, civil society or the state apparatus. Demand is linked to social contexts, and the regulatory state plays a role in enabling such contexts, in providing regulations, tax and industrial policy that fosters demand, and in its potential role in demand management. Sustainable consumption can look to the particular symbolic fields in which demand is promoted, in particular instances and media, such as through advertising, as well as in wider social discourses. Critics of consumption such as Bradley Harsch thus cite various ways in which the state works to support consumer culture and the advertising industry such as through tax deductions for business advertising spending.⁴⁵³

More important still are the complex background conditions that facilitate cultures of consumption. These include the way disposable income is made available to consumers through the mix of working hours, wages, vacations and taxes that are highly state regulated. Working hours, wages and vacation times affect individuals decisions to opt for high income- high consumption lifestyles, or, alternatively, to work less and live lighter. Absence of job security or pension may pressure persons to seek higher wages or alternatively, to invest on the sole basis of wealth maximization (as opposed to investing with ethical constraints). The tax system also shifts consumption from the private to the public realm, where it can be spent on a variety of services rather than consumer goods, or organized around collective consumption decisions which can be designed to be more resource efficient (such as public transit). The income tax system is central to controlling the ability of some classes to enjoy (and use for maintaining their status) luxury and resource intensive goods to the disadvantage of others. Following the “neo-Veblenian” tradition, shifting consumption to the private realm will result in an increase in disposable income which in turn will be used on positional goods. Housing, clothes, transportation (such as by private cars), food (in fancy restaurants) all then become competitive and status oriented modes of consumption.⁴⁵⁴ This both exacerbates problems of economic disparity, but also orients consumption to modes that are at root wasteful.

⁴⁵³Harsch “Consumerism and Environmental Policy” *ibid.*

⁴⁵⁴ See Heath and Potter *Rebel Sell* for a recent statement of this dilemma.

Demand management can extend to the wider economy as a whole. The post-war “Consumers’ Republic” utilizes a complex of land use planning, tax law, subsidies, and industrial policy to facilitate housing booms, freeway expansions and car dependent suburban living based on individualized consumption choices.⁴⁵⁵ Attention to demand management involves a recognition of the complex relationships between consumption, commodity networks and state structuring of the economy. Rephrasing sustainable consumption in terms of commodity network demand management is a way of stressing its role in a holistic understanding of the consumption-production nexus. Understanding consumer demand is key also to whether particular alternative schemes are successful.⁴⁵⁶

Public Participation. Conceiving of networks as communal projects also suggests models of democratic participation in design. Understanding the politics of shopping reinforces lack of such control in most networks. As Micheletti notes, “Our vulnerability is underscored when scandals force us to question the quality of goods. Foods scares, concern about genetically manipulated organisms, and reports on sweatshop conditions and ecological disasters caused by manufacturing processes make it clear to us that we lack control over production processes upon which we depend for our daily existence”.⁴⁵⁷ The idea that persons exist in relationships to others through networks brings the idea that the self is at stake in networks: They are part of how we become who we are. This is true of consumers who relate to what they are eating as much as to workers who see their subsistence and identity as intertwined with their productive capacity in networks. Adopting the principle that those deeply affected should have a say entails levels of democratic participation. Public participation has also been recognized as a principle of international sustainable development law.⁴⁵⁸

⁴⁵⁵ Lizabeth Cohen, *A Consumers’ Republic* *ibid.* documents the development of post-war suburbia. See especially “Reconversion: The Emergence of the Consumers’ Republic” at p. 111-165

⁴⁵⁶ Paul Taylor argues that the effects on consumer awareness and understanding of FLO coffee, brought through the label and price-premium system, explains its relative success compared to FSC wood. Taylor “In the Market But Not of It” *ibid.*

⁴⁵⁷ Micheletti, *Political Virtue and Shopping*, *ibid.* at p. 74

⁴⁵⁸ International Law Association Committee on the Legal Aspects of Sustainable Development. 2002 New Delhi Declaration on the Principles of International Law Related to Sustainable Development. Cited in Cordonier-Segger and Khalfan “Principles of International Law” *ibid.*

Conceiving of networks as shared spaces for democratic deliberation potentially engages debate concerning the ways different actors understand themselves and their mutual relationships. In its most idealized form the model of interaction through dialogue forces agents to confront their own assumptions and presuppositions concerning the roles others play in networks, and the position they ought to play vis a vis each other and to ecosystems and non-humans in the network. Public consultation and deliberation can also potentially humanize the science of ecosystem management and even improve the quality of scientific analysis.⁴⁵⁹ Recognizing the voice of distant workers in commodity networks is a way of re-examining a variety of legal concepts. These include concepts of citizenship and legal subjectivity that work to render workers as mute labour inputs, or negate the ways commodity systems are modes of international social interaction. Networks also involve non-humans who can be styled as given a voice in the network, and deliberations should include persons appointed to translate these voices into human led debates. Commodity network analysis provides a tool for helping to map the field of possibilities in discursive network spaces. Ideally, public participation could be the only principle of network design. Given the millions of people involved in systems such as coffee, a second best approach may be to fall back on design principles and stakeholder consultation. Second, reference may be made to already widely agreed upon standards such as the International Labour Organization standards for employment conditions, and international human rights norms for issues of basic treatment and social and economic rights. These are almost universally referenced in fair trade labels, ethical investing and codes of conduct and represent compromise positions arrived at through previous deliberations.

Principles of participation imply also transparency, accountability and equality in commodity networks. Effective participation is impossible without the network being transparent. This is also key for consumers for which participation is often through choosing to use products. Transparency can include reporting on environmental activities, such as carbon dioxide emissions, locations of factories or subsidiaries in tax havens. Accountability ensures that network actors and managers act in accordance with negotiated plans and facilitates participation on an ongoing basis. Equality of

⁴⁵⁹ J. Gutrich et al “Science in the public process of ecosystem management: lessons from Hawaii, Southeast Asia, Africa and the US Mainland” (2005) 76 *Journal of Environmental Management* 197-209

representation provides that in participating persons are treated as equals, that their voice counts equally among others at the table. Meaningful participation implies this level of equality.⁴⁶⁰

In fact, a number of existing systems and proposals include extensive stakeholder negotiations. They invoke many of the values of network design listed here. The European Commission Green Paper on Product Policy, a foremost European Union policy document on sustainable consumption, calls for “product panels”. These are stakeholder groups that can work on how environmental goals can be achieved in relation to particular products. “The driving idea is that integration of environmental impacts at each stage of the life cycle of the product is essential and should be reflected in decisions of stakeholders”.⁴⁶¹ The German Federal Environment Agency, in implementing sustainable consumption proposals calls on “initiating multi-stakeholder dialogue and strategic alliances... in order to bring the issue of sustainable production and consumption forward”. The formation of the Common Strategic Framework for sustainable consumption in Germany was forged through dialogue with over twenty major stakeholder groups, including industry, retail, trade unions, churches, consumer protection, environmental groups and development groups.⁴⁶² Principles of public participation are starting to emerge in sustainable development law generally.⁴⁶³

Integrating governance with multi-stakeholder participation has become the norm of alternative trade systems such as Forest Stewardship Council wood or Fairtrade Label Organization certified coffee.⁴⁶⁴ FLO, for instance, holds a Fairtrade Forum every two years in which diverse stakeholders meet to discuss issues. Regional producer assemblies are held regularly between these forums to strengthen the involvement of

⁴⁶⁰ Gale, “Caveat Certificatum” *ibid* lists five principles for the legitimacy of ecological certification and labeling schemes, being (i) scientificity (based on ecosystem based management), (ii) representivity (here we have used public participation), (iii) accountability, (iv) transparency, (v) equality. At p. 281 Demand management is not applicable in the case of his case study (wood products certification) because its provided by the price mechanism. But in the commodity network analysis price mechanisms just are one form of demand management.

⁴⁶¹ Green Paper on Product Policy, p. 3.

⁴⁶² Bentley, *Tracking Progress*, *ibid.* at p. 51

⁴⁶³ International Law Committee on the Legal Aspects of Sustainable Development. *The 2002 New Delhi Declaration on the Principles of International Law Related to Sustainable Development* cited in Cordonier-Segger and Khalfan “Principles of International Law” *ibid.* at p. 97

⁴⁶⁴ N. Valleo and P. Hasuelmann “Governance and Multi-stakeholder Process” *Sustainable Commodity Initiative* (United Nations Conference on Trade and Development and the International Institute for Sustainable Development, 2004).

the small scale coffee producers⁴⁶⁵ Alternative trade activists have criticized the organization for too heavy reliance on a “pyramid decision-making structure”. In response, FLO has restructured to enhance the participation of producer groups, industry and other stakeholders. The Board of Directors includes democratically elected representatives from coffee producer organizations, national labeling organization representatives and fair-trade coffee traders. A Standards and Policy Working Group and a Certification Committee regularly hears from stakeholders. A new Producer Support Network has been established to address the needs of small-scale farmers and workers. Producers are also encouraged to establish their own collaborative organizations, such as the Latin American Association of Small Coffee Farmers.⁴⁶⁶

Equity and the eradication of poverty. This is at the core of the relational conception, as it configures exchange and participation in networks as fundamentally about ways of living in relation to others. Configuring relationships of exchange as relationship of just social relations and, as Ian Macneil says “not hogging the exchange-surplus”, requires attention to the living conditions of others in the network. This principle underscores Fairtrade goods and its certification scheme, and is also recognized as part of sustainable development law.⁴⁶⁷ The continued reliance in Western industrialized countries on farm support and subsidizations for farmers reflect on acknowledgment that for important and central commodity networks long term economic security of producers is vital.

Consideration of alternatives. A key question concerning any design element is always whether there are better ways of doing things. Once people identify the purpose underlying a part in a machine they can often see that its role could be fulfilled in other ways. In this way the engine in a car can go in the front and not just the back, or public transport can fulfill the needs for mobility rather than private cars. A particular network may be best simply dismantled: Northern coffee drinkers might decide they would be better without the caffeine, while Southern farmers decide they could have better uses for their land and labour. Movements towards restricting consumer goods or food supply to the bioregional level, or widespread “decommodification” of the economy

⁴⁶⁵ Taylor “In the Market But Not of It” *ibid.* at p. 140

⁴⁶⁶ Taylor “In the Market But Not of It”, *ibid.* at p. 141

⁴⁶⁷ International Law Association, *ibid.*

reflect a widespread skepticism that networks can be restructured to meet our fundamental values. The network design approach is more optimistic, suggesting that by articulating what we want in networks, we can seek to have them correspond with our values. At the same time, we do need to acknowledge that if a network could not be transformed to come even close to satisfying any of the design principles, the appropriate response would be to end the network entirely. Decisions to forego networks entirely need to be balanced with the values of relationship, interdependence and stakeholder participation less it collapse into abandonment. Coffee may be bad for Northern consumers' health, but an abrupt end to the coffee commodity system would be far worse for Southern farmers if not accompanied by alternate plans, compensation and retraining. In some contexts unilateral action by consumers may be the best way of forging change, such as is advocated by the principle of the Four Rs "Reduce, Reuse, Recycle and *Refuse*". Harsch gives as an example of aluminum cans for soft drinks as a possible contender of a network suitable for dismantling.

In conclusion, a number of principles for network design follow from the core concepts of sustainability and from the relational concept of exchange. ***Ecosystem-based management*** articulates a strong concept of sustainability coupled with requirements for scientific assessment. Recognition of the complexity of ecosystems and our continuing lack of knowledge supports application of the ***precautionary principle***. Linking production and consumption shows that ecosystem-based management brings restricts on resource and material flows, which may translate into reduced supply. Alternatively, ***demand management*** at the consumption end can reduce pressures for supply. This requires balancing concerns for ***autonomy, distributive equality, and basic needs*** with environmental values. Principles of stakeholder involvement suggest ***public participation***, which, in turn, brings concepts of ***transparency, accountability and equality of representation***. The ***principle of equity and the eradication of poverty*** flow from the need for a dignified involvement in networks. ***Consideration of alternatives*** stems from the need for creativity and insight in the design of a process. This is not a closed list, and parties to dialogue may want to include others. In many contexts it will not be possible to consider all these factors at the same time.

Conceiving of government regulation, certification systems, codes of conduct and value labels as forms of network design help show the way the issue can be considered from

multiple perspectives and networks reconfigured at multiple access points. Network design can be done by individuals, corporations, civil society or the state apparatus and in various collaborations between these groups. Value-labels configure consumer transactions as a potential, although individualized, mode of network design. The network design concept of the transaction gives a new level of articulacy to the relational concept of consumer transactions, and suggests an idealized form for its realization. A relational perspective does not strictly imply that one take action to ensure one's consumption accords with one's values. However, the fact humans have values concerning the relationships they enter into suggests we have reasons to improve those relationships. These design principles provide guidance for how to do so. The challenges and legitimacy of the global marketplace rest in large part on the ability of these design principles to be met. If international networks are too complex to be designed, we have good reason to shorten, simplify and transform them.

In an attempt at an international and integrated network design experiment, the International Institute for Sustainable Development and the United Nations Conference on Trade and Development has initiated dialogue towards new methods of governance in the global coffee commodity network, loosely modeled on the FLO certification process. The objective is to "identify novel ways for addressing supply chain and market issue in a coordinated way that is suitable for sustainable application in the coffee sector".⁴⁶⁸ It thus suggests new modes of governance meant to fill the vacuum created by the collapse of the International Coffee Agreement in 1989, and which has resulted in massive hardships to growers through over supply problems and a market crash in 2001-3.⁴⁶⁹ Here the hope is that the certification standards will simultaneously protect workers well-being, achieve sustainability results and also help to manage problems of oversupply and over production endemic in the coffee system. Initial discussions have begun through stakeholder meetings, including most of the players in the coffee commodity network, including producer organizations, transnational corporations such as Nestle, Altria (Phillip Morris and Kraft), Procter & Gamble and Starbucks, international development agencies such as the World Bank, United Nations agencies, the

⁴⁶⁸"Sustainable Commodity Initiative-Coffee" Website at www.iisd.org/trade/commodities/sci_coffee.asp

⁴⁶⁹ The International Coffee Organization Composite Indicator Price for 2001 ranged from 41.17 (Jan.) to 49.13 (Cents per pound, composite of all types of green beans), compared to a range of 99.57 (Dec) to 152.08 (Jan.) in 1995.

International Coffee Organization, the European Commission, the Common Fund for Commodities, regional coffee distribution and roasting companies and others.⁴⁷⁰ A Sustainable Coffee Partnership Initiative has been set up, with representatives on the steering committee from many of these groups and others. The organization and facilitation of this endeavour involves a complex lattice work of non-governmental organizations, international organizations, trade groups, and governments. Commodity network design suggests a new role for collective self-governance.

5.6 Trouble for Freedom of Contract

As described here sustainable consumption is at root a demand management scheme for commodity networks. There is almost total consensus among reports on sustainable consumption that “consumption itself can no longer be neglected if unacceptable environmental degradation is to be contained and reduced”.⁴⁷¹ “Contraction and convergence” advocates suggest that insofar as producing greenhouse gases provides wealth, then principles of global equality require First World and developing world countries to converge on levels of greenhouse gas emissions. If that is to happen while simultaneously avoiding dangerous levels of global warming and working within global ecosystem carry capacity, Northern industrialized countries will be required to reduce fossil fuel use by at least sixty percent by 2050.⁴⁷² Advocates of technological solutions talk bravely of needing to meet energy efficiency goals of one tenth current products’ usage.⁴⁷³ These suggest considerable changes to consumer transactions and contract activity.

A strong current in environmental thought seeks to minimize the degree to which disruptions to consumer lifestyles are entailed by ecological transformation. David Boyd, writing a comprehensive overview of problems with environmental law in Canada, seeks to reduce consumption, but he also wants to do this without reducing Canadians’ quality

⁴⁷⁰ IISD and UNCTAD (2003) “Preliminary List of Participants: Sustainability in the Coffee Sector Exploring Opportunities for International Cooperation Towards an Integrated Approach. (Available at www.issid.org/trade/comodmties/sci_coffee/workshop.asp)

⁴⁷¹ *Oxford Commission on Sustainable Development Report* *ibid.* at p. 11

⁴⁷² A Meyer *Contraction and Convergence: The Global Solution to Climate Change*. Green Books, 2000). See also United Kingdom Royal Commission on Environmental Pollution (2000) *Energy—The Changing Climate*. Referenced in Press release, Firday 16 June 2000 “Royal Commission Calls for Transformation in the UK’s use of energy to Counter Climate Change” .

⁴⁷³ *Oxford Commission on Sustainable Consumption Report*. *Ibid.* at at p. 18.

of life.⁴⁷⁴ The emphasis is thus placed on dematerialization—reducing total resource use, and substitution—changing the types of resources used to those that are sustainable. We need to focus on increased efficiency and resource productivity, decreasing waste, and on changing the types of energy and resources we use. In this way his project seeks to either side step or leave to a future time the more contentious issue, which concerns what counts as quality of life, and the importance of consumption in people’s lives. In this way it caters to traditional laissez-faire ideas of quality of life being tied to consumer sovereignty. What if efficiency gains are not going to make all the necessary reductions? What if sustainability requires the end of private cars and home air conditioning? Boyd acknowledges that “in the world’s wealthiest nations, consumption of some resources has leveled off but total resource consumption is still growing”.⁴⁷⁵ Environmentalists would be unhappy with goals of sustainability being put off until we have invented more efficient machinery.

Other environmentalists are more direct, and implore us to consume less, supposing a direct correlation between the quantity of consumption and environmental impact. Sustainable consumption proposals may well involve considerable changes in of how we consume, such as whether we use private cars or have large suburban houses. Jacobs calls reduced consumption a “Green ideal” and suggests this involves a trade off requiring reduced material possessions.⁴⁷⁶ Jacobs is careful to note that environmentalists need not be committed to a “return to a regulated caveman culture”.⁴⁷⁷ Rather, we can change the way we live to reduce stress on the environment without having a subjective sense of being worse off. The standard example given here is of the bicyclist who learns to love the wind in her hair and would not trade it for the cramped confines of the automobile.

In “achieving sustainability” we should be open to radical forms of network regulation, especially if we use the design principles outlined above. It hardly needs mentioning that almost none of our systems of provisioning in capitalist societies conform to these standards. Commodity network design implies systems of regulations of employment conditions, prices, production quotas, process methods or emissions targets, and

⁴⁷⁴ David Boyd *Unnatural Law*. (Vancouver, BC: UBC Press, 2003) at p. 307-308

⁴⁷⁵ Boyd, *Unnatural Law* ibid p. 308

⁴⁷⁶ Jacobs, *The Green Economy* ibid. at p. 252

⁴⁷⁷ Jacobs, *The Green Economy* ibid. at p. 242

environmental management plans that remove systems of ordering from the negotiated terms that parties to contracts might provide for themselves. Alternatively, government action towards sustainable production and consumption may have the effect of removing large parts of the economy from contract relations (widely construed) entirely. If “decommodification strategies” are pursued people may simply be buying less and so reducing their roles in many networks. A free bus system replacing private automobiles would have this result. These suggest significant changes to contracting practice.

In the old will theory of contract in the nineteenth century, exchange was configured in terms of agreed terms of the contracting parties, and government regulation an interference. In the United States in the “Lochner era” this became hardened into a constitutionally protected freedom of contract. In *Lochner v. New York* the United States Supreme Court struck down legislation prescribing the terms on which parties must contract unless it could be justified by the promotion of health and safety.⁴⁷⁸ By the 1930s the United States caught up to the position long held in Canada and England that government could regulate contract in principle, but in Parliament, Congress, legislatures and city halls the principles of individual autonomy and the “wealth creation function” of the private market reconstituted an ancient constitutional principle of liberal economies. The idea of contract as promises continued, and continues, to serve to uphold an ideal of exchange as discrete and removed from its wider social and ecosystem linkages. On this account state led changes towards sustainability look like yet more incursions and interventions into an autonomous private realm. Insofar as the old story of freedom of contract continues, it supports resistance to collective organization towards ecological transformation. Insofar as contracts are understood to be about “promises”, contractual freedom is disaggregated from the ways persons relate to ecosystems, economies and societies. The result is that these relations are ignored, and take on an instrumental and exploitative aspect under market conditions and so require outside intervention. The pressing concerns of ecological change and new international principles of sustainability suggest a rethinking of the relationships between contracting activity and legal conceptualization.

A number of thinkers have already considered ways of rethinking private law in the face of new concepts of our relationship to ecosystems. The relationship between property

⁴⁷⁸ . Gordley “Contract, Property, and the Will” *ibid.* at p. 85.

and environment is well-examined in the context of ownership of land. A number of theorists have suggested that we need to rethink what it means to own land, that rather than be understood simply as the right to control particular parcels, that involves relationships to the wider environment, and so carries with it environmental obligations such as stewardship and concerns for sustainability.⁴⁷⁹ While historically English legal writers such as Blackstone talked about “despotic dominion” an analysis of contemporary zoning laws, land use planning, and environmental law show ownership of property is more akin to a bundle of rights. Property theorists came to recognize that “property does not exist in isolation. Particular parcels are tied to one another in complex ways, and property is more accurately described as being inextricably part of a network of relationships that is neither limited to, nor usefully defined by, the property boundaries with which the legal system is accustomed to dealing”.⁴⁸⁰ Land use planning and zoning seeks to separate incompatible uses such as heavy industrial and residential, but in their most sophisticated form, they are used to craft aesthetically, socially, environmentally, and economically vibrant communities.⁴⁸¹ These laws thus embody a mix of social, economic and ecological concerns. New international legal discourses suggest environmental sustainability be seen as an underlying driver of legislative purpose, thereby strengthening the internal ties between the ownership of property and human-environment relations.⁴⁸²

This thinking concerning property can be extended to contracts, as they both involve many similar conceptions of private ordering. The shared space of the commodity network is composed out of property and contractual relationships, but the overflowing evaluative concerns of workers treatment, social power of network players such as corporations or environmental harms suggest network wide collective concerns, and needs for co-ordinated action. Realist and critical legal studies scholars point out that contract is best understood as an amalgam of individual agreement, principles of reliance, interpersonal duties and state imposed obligations and standards. The relational concept of exchange provides a way of construing exchange as internally related to ecosystems and distant persons: Exchange is part of commodity networks.

⁴⁷⁹ Coyle and Karen Morrow *The Philosophical Foundations of Environmental Law* *ibid.*.

⁴⁸⁰ Joseph Sax “Takings, Private Property and Public Rights” (1971) 81 *Yale L. J.* 152

⁴⁸¹ Deborah Curran “Expropriation and takings In North America: Comparing Private Property Rights in Canada and the United States” (LLM Thesis. 2003) On file with the author.

⁴⁸² Coyle and Morrow *The Philosophical Foundations of Environmental Law* at p. 208.

The need for ecological based regulation stems from the network itself and so is internally related to the exchange processes which *perform* the network ordering. Persons and the goods they exchange are not autonomous and discrete entities that are quits after exchange but exist in mutual interdependencies and relationships through networks. Network design is a way of forging better relationships in networks.

5.7 Politics of Design

Approaches to networks and exchange that reflexively seek to embody evaluative orientations to others compete in the space of ideas and in actual markets with other conceptions. When it comes down to who thinks what, the relational conception is just one approach amongst others. When it comes down to analysis of actual commodity networks, imaginaries of sustainability are but one design scheme in competition with others. New principles of sustainable development law may suggest sophisticated and well-crafted design experiments for commodity networks. Any serious observation of actual market conditions and existing commodity networks makes painfully obvious how far the ideal is from actualization.

The configuration and design of networks is obviously political: Different participants in networks will have personal financial stakes and complex evaluative orientations towards different ways the network could be structured. Likewise, principles of how networks might be structured will be highly contentious, in just the way we are familiar with fights over minimum wage laws or changes to competition law. The World Trade Organization in the 1990s blocked efforts by the United States to ban shrimp that was caught in ways that harmed endangered turtles, suggesting a strict adherence to a discrete notion of trade and a concept of objects as physical goods, detached from their histories.⁴⁸³ While that ruling has been overturned on the basis of an environmental exception⁴⁸⁴ many scholars still think correct the underlying idea that countries cannot normally pass non-product related process and production method regulations.⁴⁸⁵

⁴⁸³ See *United States—Restrictions on Imports of tuna, Report of the Panel.*(1991) Geneva: GATT, DS21/R; *United States—Restrictions on Imports of Tuna, Report of the Panel.* (1994) Geneva: GATT, DS29/R.; *United States—Import Prohibition of Certain Shrimp & Certain Shrimp Products, Final Report.* Geneva: WTO, WT/DS58/R.

⁴⁸⁴ Robert Howse. "The Appellate Body Ruling in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate." (2002) 27 *Columbia Journal of Environmental Law* 491

⁴⁸⁵ Samuel Gaines "Process and Production Methods: How to Produce Sound Policy for Environmental PPM-Based Trade Measures?" (2002) 28 *Columbia Journal of Environmental Law*

Approaches to exchange and to networks remains contentious. This should not lead to the conclusion that network concerns are just a matter of the politics of who profits from or has power to shape commodity networks. Rather, network design considerations are prior to these fights and underlie the values behind different legal orderings and political visions. Differences over how we think of exchange are central to the differences between different economic and political visions.

While recent innovations from civil society, international law of sustainable development and even domestic legal approaches are moving towards the relational conception, the weight of the common law legal tradition still has tremendous force. It remains in terms of concrete practices of the market, but also through a range of popular and academic discourses, values and traditions that also shape markets. These include among others: the continued adherence of many persons to libertarian concepts of freedom of contract; the ideals of consumer sovereignty and strict justification requirements on “intervention” into such sovereignty, and models of individual well-being and national wealth that fail to count non-market values (including living in a sustainable fashion). The disentangled, detached and discrete view we see in contract law and sales of goods also is central to traditional welfare economics and free trade theory. Rational choice models of utility work off of this market ideal, and by failing to specify the terms of trade or the nature of objects generally presupposes the regimes of contract and property supplied by law. This, in turn, helps maintain individualized contract making as the central policy objective of governments’ explicit or implicit consumption policy.

Thinking about contracts will not resolve all our problems with sustainability, but it can help as to begin to build what Bruno Latour has called “a new common world”, that is, one in which recognition is afforded to humans and non-humans to have an equal voice in a shared reality, one which we must struggle to create and assemble given our new found recognition of everything that is at stake.⁴⁸⁶ If we reconfigure consumption as part of what Mick Smith calls “our ethical relation to natural others” then sustainable

383; Reinhard Quick. "Environmentally motivated tax distinctions and WTO law: The European commission's green paper on integrated product policy in light of the 'like product' and PPM debates." (2003) 6 *Journal of International Economic Law* 2, 419.

⁴⁸⁶ Latour *The Politics of Nature*. Ibid.

consumption laws become one possible practical application of “that which is fitting with respect to natural places and our nonhuman fellows”.⁴⁸⁷

⁴⁸⁷ Smith, Mick. *An Ethics of Place. Radical Ecology, Postmodernity, and Social Theory*. (New York: State University of New York Press, 2001) at p. 216.

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