UNIVERSITY OF DERBY

The ‘Duality’ of Fraud in English Law and Practice

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Glossary of Acronyms and Nomenclature

ACFE	Association of Certified Fraud Examiners
CFE	Certified Fraud Examiner
CIPFA	Chartered Institute of Public Finance and Accountancy
CoLP	City of London Police
CLRC	Criminal Law Revision Committee
CPS	Crown Prosecution Service
CSEW	Crime Survey England and Wales
FATF	Financial Action Task Force
FBI	Federal Bureau of Investigation
FCA	Financial Conduct Authority
FRC	Financial Reporting Council
GAAP	Generally Accepted Accounting Practices
HMIC	Her Majesty's Inspectorate of Constabulary
ICAEW	Institute of Chartered Accountants in England and Wales
ICO	Information Commissioner's Office
IDF	Israeli Defence Force
ICT	Information and Communication Technology
LIBOR	London Interbank Offered Rate
FTSE	Financial Times Stock Exchange
LSE	London Stock Exchange
MFF	Midlands Fraud Forum
NCA	National Crime Agency
NPCC	National Police Chiefs' Council
NFIB	National Fraud Intelligence Bureau
NHS	National Health Service

ONS	Office of National Statistics
PACE	Police and Criminal Evidence Act
RAT	Routine Activity Theory
SFO	Serious Fraud Office
SPSS	Statistical Package for the Social Sciences
VAT	Value Added Tax
UK	United Kingdom
US	United States

Preface

DECLARATION

This work has not previously been accepted in substance for any degree and is not concurrently submitted in candidature for any degree.

STATEMENT 1

This dissertation is being submitted in fulfilment of the requirements for the degree of Doctor of Philosophy (PhD).

STATEMENT 2

This dissertation is the result of my own independent work/investigation, except where otherwise stated. Other sources are acknowledged by explicit references.

STATEMENT 3

I hereby give consent for my dissertation, if accepted, to be available for photocopying and for inter-library loan, and for the title and summary to be made available to outside organisations.

Signed Nir Tolkovsky……. (candidate) Date 05 September 2018

Abstract

This thesis critically assesses the scope and method of criminalisation of the concept of fraud under the Fraud Act 2006 through the discussion of an apparent 'duality' between (co-existing) criminal and non-criminal resolution mechanisms. The reader will find social sciences theory and mixed-methods research techniques being used to identify and characterise a dysfunction between legislation and the social function of fraud control and its resolution. The 2006 Act appears to present a categorical and monolithic headline offence of fraud qualified by *dishonesty*, yet it is not clear that the Act clearly identifies the scope of *effective* criminalisation with respect to fraud. The *dishonesty*-based conduct offence provided in the Fraud Act 2006 is examined in the context of contemporary theory and practical considerations that relate to the discipline of law-enforcement. This work investigates pre-industrial modes of fraud resolution and identifies industrial-era points of divergence between the concepts of fraud and theft (a similar headline offence defined and criminalised under the Theft Act 1968). The work also offers an empirical study of survey-based data collection involving one-hundred-and-forty participants (N=140). It measured the practical extent of criminalisation of fraud in terms of participant indications of the (typically) most likely official outcome in response to sixteen hypothetical examples of fraud offences. The survey results appear to support practical, contextual, and theoretical considerations from the literature on the inhibitors to the consistent application of a conduct-based general fraud offence. The data and findings highlight the advantages of detailed *actus reus*-based criminalisation of types of fraud that require additional control through *effective* criminalisation.

In Memory of Richard Maurice Leary MBE PhD

(1956 – 2015)

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Chapter One: Introduction

1.1 Introduction

Fraud appears to be a gestalt concept that requires no explanation or description. It would seem that everyone has a clear sense of its meaning. It becomes less clear as a unified concept when the term is unpacked as a criminal offence, despite its categorical criminalisation as a manner of conduct under the Fraud Act 2006. In the fields of legislation, regulation, policymaking, enforcement, application, and perception the concept of fraud is contested and its (alleged) association with law-enforcement activities appears inconsistent and obscure. Stakeholders perceive and address fraud in different ways as they function in particular domains and situations, and its resolution may be facilitated by the criminal justice system, the civil courts, or (privately) without judicial intervention or oversight. This adds further complexities to achieving clarity around how we know what we know (epistemology) about fraud, and the parallel challenge of the application of the concept of fraud in English law and practice.

Historically, fraud has been an elusive concept in English law. In 1795, the Lord Chancellor observed in correspondence with a colleague that:

> *Fraud is infinite, and were a court once to ... define strictly the species of evidences of it, the jurisdiction would be cramped, and perpetually eluded by new schemes which the fertility of man's invention would contrive.* (Holdsworth, 1909, p. 262 citing Lord Hardwicke, 1759; The

Law Commission, 2002 citing The Criminal Law Revision Committee, 1966)

A form of ‘duality’ with respect to the concept of fraud is implicit in the above quote. Regardless of which definition may be applied, some aspects of fraud will be addressed by the court and others will not. This ‘duality’ appears to be an intrinsic property of the legal encapsulation of the concept of fraud as a headline offence in English law. Scholars, jurists, policy-makers and others are in no position to deny the documented fore-warning that simplifying the meaning of fraud by the courts (through particularisation of circumstances or conduct) is not a solution to understanding and addressing the meaning of fraud. Understanding and addressing the inherent characteristics (ontology) of fraud continues to be impeded by an (alleged) conceptual clarity in English law and implementation confusion in practice. In this thesis, the author examines fraud as a monolithic offence in English law, and the variety of resolution mechanisms the concept of fraud may be subject to internally and externally to the criminal justice system. The emerging central theme is that of an apparent ‘duality’ between: (i) a narrow category of incidents that are processed via the criminal justice system, and (ii) the broader category of incidents that are either addressed through other mechanisms or remain unresolved.

The Fraud Act 2006 introduced a legal definition of fraud with the intent to create a comprehensive general offence in the form of three proscribed forms of conduct: false representation, failure to disclose information, or abuse of position (Law Commission, 2002). Fraud is defined above in a (deceptively) simple manner by conduct only, and regardless of outcomes. Gains, losses, or risk of a loss need

not occur to fulfil the requirements of the offence. The completion of the transaction intended by the perpetrator, in whole or in part, is also not required to meet the above definition, thus it encapsulates the concept of fraud and imposes a categorical criminalisation of 'all frauds' (Law Commission, 2002, p.3).

1.2 On the 'Duality' of Fraud and the Research Questions

Three main observations appear to underpin the characterisation of fraud as a 'dual' concept in English law. First, the concept of fraud may be addressed under parallel provisions such as insolvency, civil (torts) and extra-judicial resolution mechanisms (Fisher, 2015; Smith & Shepherd, 2017). Second, fraud presents itself as a disparate category of offending and victimisation from other common-law and statutory offences. This appears to be embedded in its 'specialised' status and side-lining across the procedures, work and information flows in United Kingdom (UK) law-enforcement and parallel agencies at the local, regional and national level. Operated by the City of London Police (CoLP) since 2013, Action Fraud provides a central service for the receiving and processing of reports of fraud (Button, et al., 2013). The centre collects victimisation accounts and feeds this into a national database, and it provides generic victim advice and publishes counter fraud advice and alerts. The main fraud reporting interface functions at arm's length to law-enforcement agencies. It generates reports for a national intelligence database (the National Fraud Intelligence Bureau, NFIB), which are not necessarily coupled with mainstream investigatory and victim engagement resources. There does not appear to be available data on the numbers of reports that are referred to law-enforcement for possible investigation, and anecdotal evidence suggests such referral numbers and investigatory uptake rates are low.

Apart from the volume aspects of the fraud problem, an alleged ‘upper-scale’ of complexity and large sums (£1 million or greater) is subject to the purview of the Serious Fraud Office (SFO). Readers should note that the SFO investigates only a handful of cases at any given time, and its case selection processes have not been made clear beyond the scope of harm criteria (Button, et al., 2013; Doig & Levi, 2013).

The third observation is the retention and subsequent introduction of statutes that include specific fraud offences which appear to overlap with the general conduct offences in the Fraud Act 2006. Examples for these provisions are discussed in the literature review chapter below. The Fraud Act 2006 represents a paradigm shift in legislation and the criminalisation of fraud (as a manner of conduct) and does not distinguish between a wide variety of typological and situational manifestations (Doig, 2006; Sharpe, 2013; Taylor, 2013). The wide definition and absolutist approach to criminalisation, in the creation of a general *dishonesty* offence, co-exists with other specific legislative measures of fraud particularisation. It should be noted that the only provisions that were repealed by the Fraud Act 2006 were the fraud and *dishonesty* related offences in the Theft Act 1968 (as amended) (Home Office, 2006).

This context appears to present two offences that are criminalised in a similar fashion (a legal definition subject to categorical criminalisation). The first (theft) is a common ground for law-enforcement activities and subject to ‘mainstream’ police activity, victim engagement and Crown prosecution. Theft is not a common subject of resolution through the civil court jurisdiction, and thieves are not

commonly subject to torts and damages-related prosecution (although stolen property may be returned by the police). Instances where theft is resolved by mutual or community-based resolution without the involvement of the police are possible. Nonetheless, these are grounded in victim choice not to direct a highly likely police attention to the matter and the individuals involved. The second (fraud) is subject to multiple resolution mechanisms other than the criminal justice system, a principle noted in this context with the civil court jurisdiction and state agencies who exercise regulatory powers. These represent an awareness by the state that a crime may have occurred (or that it has indeed), yet it is not subject to adjudication by the criminal justice system. Furthermore, fraud is not a subject for 'mainstream' victim engagement and investigation structures within the police, nor is its processing by criminal justice system agencies as 'streamlined' as in relation to the concept of theft (Button, et al., 2013).

As a result of the above context, the author sought to develop a means of systematising knowledge on this seemingly unique attribute of fraud as a concept in English law and practice. The following research questions (RQs) stem from the above discussion of the 'duality' of fraud:

1. How do we differentiate the concepts of 'commercial' and 'criminal' fraud in English law and practice, both historically and in contemporary society? (**RQ1** – 'duality')
2. How can fraud legislation be adapted to enhance conceptual and implementation clarity towards 'mainstreaming' and 'streamlining' enforcement by the criminal justice system? (**RQ2** – 'streamlining' and 'mainstreaming')

A fundamental element of the investigation of the 'duality' of fraud (RQ1) is rooted in the question of whether the dynamic variability of possible resolution mechanisms for fraud is either a consequence of current policy, or an intrinsic property of fraud. The approach favoured by the author would view legal interactions as a range of possible behaviours whose selection can be studied using the same methodologies as other social mechanisms (Black, 1972). This study, therefore, does not focus on (alleged) means of 'bridging the gap' between the legislative intent as expressed in the Fraud Act 2006, and the extent of practical association of fraud with law-enforcement activities. The concept of theft was selected as a point of comparison due to its similar statutory criminalisation through a legal definition of the terms as a monolithic category of offending, and one that is subject to effective criminalisation via mainstream policing. In other words, there appears to be a lesser gap between 'law-in-theory' and 'law-in-action' across the concept of theft than there is in relation to the concept of fraud. The gap in the context of fraud appears to be grounded in both perceptions (Levi & Burrows, 2008; Button, et al., 2009; 2013), and the availability of non-criminal resolution mechanisms that remain relevant despite the expansion of statutory law to criminalise 'all fraud' (Taylor, 2013; Fisher, 2015; Smith & Shepherd, 2017). The second central research question (RQ2), stems from the discussion and analysis of RQ1, and asks not how professional practice may be enhanced to better realise the current extent of criminalisation. Instead, RQ2 asks how criminalisation may be better framed and articulated in light of the practical and social limitations for the criminalisation of *dishonesty*, so as to expand the scope of effective criminalisation.

This approach is grounded in a functionalist assumption as to the nature of the 'duality' of fraud as a 'social reality' (Burrell & Morgan, 1979; Durkheim, 1982). Based on this assumption, a historical perspective was adopted in order to observe the 'invisible hand' (Smith 1776) that governs the selection of a given fraud resolution mechanism in English law and practice. The verification of these assumptions formed a part of a set of five intermediate research objectives that are presented in chapter three of this thesis. One of the research objectives was to determine whether the gestalt of fraud can be used as an ontological 'anchor' in a historical observation of the 'duality' of fraud. The first intermediate research objective asks whether the defining characteristics of fraud are sufficiently similar to be used as an analogue to the contemporary gestalt of fraud. The second intermediate research objective asks whether the 'duality' of fraud is indeed a social phenomenon that can be observed independently of trends in legislation and social progress (namely industrialisation).

The above (primary) research questions and intermediate research objectives emerged (in large part) at the beginning of this doctoral research programme (with some development tweaks discussed further below). This initial perspective reflected a sense of an absence of defining characteristics of *prima facia* fraud offences that are resolved (or at least investigated) by law-enforcement agencies in the UK. This initial focus of investigation sought to identify a set of (generally) applicable indicators of a (likely) criminal investigation from properties such as typology, circumstances, or one that relates to either victim or offender. This reflected a desire to identify a set of defining characteristics of criminal fraud under a system of law where a monolithic concept of fraud appears to fall under

the purview of both the criminal and civil jurisdictions (Fisher, 2015; Smith & Shepherd, 2017).

The Fraud Act 2006 provides apparent (and perhaps deceptive) simplicity that masks the continuing context of the practical difficulties of managing the problem. In simple terms, there remains an unresolved paradox: (alleged) definitional clarity does not appear to have resulted in the 'streamlining' and 'mainstreaming' of fraud enforcement. In part, this would appear to be grounded in the challenges presented by the Fraud Act 2006 conduct offences that do not conform to the standard 'who's done it' investigative framework, but rather asks whether 'it' was *dishonest*. In most investigations, this reasonable and proportionate 'entry barrier' to investigatory powers is justified with respect to evidence and deduction ('follow the evidence'). In fraud investigations, inductive reasoning is used to impute an assumption of *dishonest*y where evidence may only be suggestive ('follow one's nose'). The assumption-based investigatory approach appears to be contrary to the training, incremental, and evidence-based organisational culture in law-enforcement agencies. This burden is subsequently eclipsed by the need to substantiate *dishonest*y to the threshold required for public prosecution according to the standards set by the Crown Prosecution Service (CPS, 2013).

The literature accessed by the author did not appear to substantially address the essential characteristics of the 'duality' of fraud or contain means of addressing the challenges it imposes on legislation and law-enforcement. The discussion of the co-existence of criminal and non-criminal resolution mechanisms to the concept of fraud, as defined in the Fraud Act 2006, appears to be an axiom in the

literature. The 'duality' is embedded in discussion of law-enforcement structures and fraud victim support (Button, 2011; Button et al., 2013), methodological discussion (Levi & Burrows, 2008; National Fraud Authority, 2011; 2012; 2013; Button et al., 2016), legal practice (Fisher, 2015; Smith & Shepherd, 2017), and by the Law Commission (2014). Consequently, the author was not aware of (and was unable to locate) any existing data, validated tools, or analytical approaches used to study or systematise knowledge pertaining to the use of different fraud resolution mechanisms (RQ1).

1.3 Thesis Structure

This thesis will aim to provide an original contribution to knowledge through systematic inquiry of key components and provide critical analysis and discussion relative to the main research questions. Chapter two will provide a critical assessment of the Fraud Act 2006 as a guide for comprehensive criminalisation of all forms of offending under the concept of fraud as it is defined in the Act. The literature review will discuss the contemporary 'duality' of fraud (RQ1) and apparent challenges to the categorical criminalisation of fraud subject to its definition into criminal law (RQ2). The Fraud Act 2006 will be presented through a critical discussion of the recommendations by the Law Commission (2002), which were later adopted to form the Act. Under the 2006 Act, fraud is a conduct offence qualified by the concept of *dishonesty*. This approach to criminalisation was recommended due to its (*prima facia*) clarity and applied simplicity for offenders, victims, and criminal justice system stakeholders. This claim is subject to critical discussion in the context of non-fraud sociology (Black, 1976) and

criminology (Naylor, 2003) theoretical frameworks that offer theoretical suggestion as to the association of known examples of crime with law-enforcement activities. The reader will be exposed to available evidence that the monolithic (categorical) criminalisation of fraud transcends theoretical typological and socio-economic 'fault lines' in terms of the likelihood of law-enforcement response.

The author will compare and contrast a body of laws that exists in tandem with the Fraud Act 2006 and provides overlapping, yet narrow, criminal definitions for actions (as opposed to conduct) that amount to fraud (as opposed to meeting the categorical definition for fraud). This body of narrowly defined offences, which would otherwise be (theoretically) subject to criminalisation under the Fraud Act 2006, is referred to as 'particularised' criminalisation in this thesis, and examples for such provisions are provided in section 2.5. It would appear that particularised provisions offer an objective test as to whether an offence might have occurred with respect to specific activities that amount to fraud, and the evidence generated by the offence. The *dishonesty*-based offence seems to require an assessment of whether an activity was underpinned by this manner of conduct. The opposite of activities subject to particularised fraud criminalisation is legitimate conduct; the same manner of conduct could (theoretically and in practice) equate to a Fraud Act 2006 offence as the dividing line between fraud and legitimate conduct is dissolved.

These barriers to clarity and mainstream enforcement appear to underpin a dysfunction between 'law-in-theory' and 'law-in-action' (Black, 1972) in the context of the Fraud Act 2006. The similarly scoped criminalisation of the concept of theft

as a categorical headline offence (‘all theft’) through its legal definition into criminal law in the Theft Act 1968 (as amended) provides a reference point for the correlation between legislation and *effective* criminalisation (Hester & Eglin, 1992). The reader will find further context and justification for the framing of the ‘duality’ of fraud (RQ1) and challenges to conceptual clarity (RQ2) as subjects for social science theory in further discussion provided in chapters two and three (Black, 1972).

In the methodology chapter, the author will discuss the development of a research strategy relevant to the central research questions. A justification for a mixed-methods approach (Teddlie & Tashakkori, 2009) is developed from a discussion of the ‘duality’ of fraud as a social dynamic that is not subject to direct observation (Weber, 1978; Durkheim, 1982). The author will demonstrate a ‘misalignment’ in focus between existing empirical research tools from the literature and the study of the ‘duality’ of fraud as a social function. Whilst some quantitative tools refer to concepts of ‘severity’ (Wolfgang, et al., 1985) or ‘seriousness’ (Levi & Jones, 1985; Green & Kugler, 2010), they appear to refer to perceptions of ‘what ought to be’ as opposed to ‘what is’. Other qualitative tools (Button, et al., 2009; 2013) examine perceptions and experiences of victims of fraud and provide evidence of a dysfunction between ‘law-in-theory’ and ‘law-in-action’ (Black, 1972), but do not refer to its characteristics and functionality. This category of tool does not aim to describe the essential characteristics and functionality of such dysfunction (RQ1), or the role of legislation in clarifying and obscuring perceptions towards, and the relative function of, the criminal justice system (RQ2). None of the approaches examined by the author (see section 3.2) appear to address the social

phenomenon of variability in resolution mechanisms applicable to fraud (Fisher, 2015).

In chapter four, the researcher will present an original interpretivist analysis of the social function of the criminalisation of fraud, and its historical divergence from the criminalisation of the concept of theft and the protection of the right to property. The reader will find a historical narrative through which the researcher presents the results of a socio-legal historical analysis of secondary data and historical literature. The social function of fraud criminalisation is critically analysed as a social 'reality' that exists independently and externally of individualistic perceptions and specific cases (Weber, 1978; Durkheim, 1982). Whilst it is not subject to direct measurement (Bollen, 2002; Merton, 2016 [1968]) (see section 3.3), the transition from agrarian (Laslett, 2005; Anderson, 2013) to an industrialised social structure offers insight to the function of law relative to the concepts of fraud and theft (Emsley, 2010; Taylor, 2013; Schubert, 2015). Prior to the industrial revolution, prosecution of disputes in the context of (*inter alia*) frauds and thefts were self-funded, and compensation-seeking in focus, similar to legal action in the context of torts and personal insolvency (Cohen, 1982; Klerman, 2001). Punitive sanctions appear to have functioned as a means of coercing compliance to settle a court-recognised debt (from theft, fraud, commerce or tort), and served the additional functions of deterrence against offending and as a catalyst to promote bilateral settlement in lieu of formal responses. Crown prosecution was reserved for limited circumstances, narrowly particularised in legislation and proclamations, and was conducted in response to transgressions in the search for punitive sanctions as opposed to compensation. These areas of

particularisation functionally relate to narrow contemporary enforcement purviews of non-police agencies, such as in the context of tax collection, state-imposed regulation regimes, and company and insolvency law.

The industrialisation and urbanisation of England and Wales seems to have led to an increase in demand for law so to substantiate the right to property through state investigation and prosecution in response to transgressions (Emsley, 2010; Schubert, 2015). By contrast, responses to social change in the context of fraud and in the wake of public examples of harm and victimisation did not result with the inclusion of fraud under the purview of the institutions of public prosecution (Taylor, 2013). Instead, regulatory regimes, market self-regulation and the expansion of company law requirements throughout the nineteenth century were aimed at adapting market self-regulation support mechanisms to emerging financial vehicles and wider distribution of wealth. The chapter concludes with the functional analysis of the *effective* criminalisation of fraud as relating to a 'sovereign guarantee of trust' in commercial and official conduct, and its divergence from the context of theft in criminal law. It appears that whilst the protection of the right to property and the categorical association of transgressions against it with the function of criminal law, the concept of *dishonesty* was not protected against through a parallel 'sovereign guarantee' of trust. From this historical context emerges a contemporary question of how individuals perceive the 'sovereign guarantee' of trust as a 'social reality' (Durkheim, 1982) (RQ1), and how this 'social reality' correlates with legislation (RQ2)?

In chapter five, the author will present and critically analyse the results of an empirical study conducted through a single measurement of the most likely resolution mechanism across sixteen examples of fraud presented in a survey to one-hundred-and-forty (N=140) participants. The results from the survey demonstrate the contemporary manifestation of the 'duality' of fraud, and the variability of dysfunction between 'law-in-theory' and 'law-in-action' in the context of fraud. It appears that the study of the *effective* criminalisation of fraud as a social phenomenon subject to social science theory and methods produced results that agree with Naylor's (2003) typology of profit-driven crime and Black's (1976) theory of law. The particularisation of fraud was demonstrated to flow from the above frameworks and be either subject to strong or weak association with law-enforcement activities subject to criminological and sociological theoretical estimations. This discussion demonstrates the context from the literature review, where the dysfunction between legislation and *effective* criminalisation in the context of fraud is attributed to the conduct-based mode of criminalisation.

In chapter six, the author will provide a conclusion of this thesis and recommendations relative to the main research questions. Additional reflection on the limitations of this contribution to the literature may be found in section 6.2 of the conclusion chapter. The discussion in chapter six summarises the analytical contributions in this thesis towards a deepened understanding of the apparent lack of parity between the protection of the right to property (criminalisation of theft) to the 'sovereign guarantee' of trust (criminalisation of fraud). The historical and contemporary 'duality' of fraud appears to relate to a 'social reality' (Weber, 1978; Durkheim, 1982) to which legislation could appear secondary, and is a

utilitarian and victim-enabling function (Smith, 1776; Levi, 1987; Fisher, 2015; Rawlings & Lowry, 2017; Smith & Shepherd, 2017). The concept of fraud (or *dishonesty*) does not seem to form a categorical challenge to the existing social order in the same way that the protection of the right to property does (Black, 1976). Furthermore, it would appear that the monolithic criminalisation of 'all frauds' in its transcendence of typologies and socio-economic circumstances obscures conceptual clarity and stands in the way of mainstream interfaces with victims. This observation extends in particular to 'simple' frauds in circumstances where an association with law-enforcement responses is socially and typologically plausible (Black, 1976; Naylor, 2003). Thus, this thesis offers historical and contemporary evidence to support an approach to develop a body of particularised fraud provisions where Parliament sees fit to extend a narrow 'sovereign guarantee' of trust in responses to known offending patterns. The Fraud Act 2006 may still be needed to address unforeseen frauds as they emerge to present a challenge to the existing social order, notwithstanding the limitations of the Act to serve as a means of criminalising the entire concept of fraud.

Chapter Two: Literature Review

2.1 Introduction

This chapter offers a systematic examination of sources with respect to the phenomenon of the 'duality' of fraud, which refers to a variability of outcomes with respect to offences under the Fraud Act 2006. Under the 2006 Act all instances of fraud, which are qualified by *dishonesty*, are subject to criminalisation and up to ten years imprisonment (Law Commission, 2002; Farrell, et al., 2007). Some frauds are indeed resolved in a manner consistent with this statutory measure as they are being resolved by the criminal justice system and its institutions of investigative law-enforcement agencies and public prosecution bodies. Nevertheless, other frauds appear to be subject to non-criminal resolution mechanisms such as civil litigation, regulatory measures, bilateral agreements, or no resolution (Smith & Shepherd, 2017). Non-criminal justice system resolution of fraud does not appear to relate to a lesser (theoretical) applicability of the definition of criminal fraud in the 2006 Act, yet their resolution through the criminal courts appears dissonant. In the context of civil litigation, it would appear that the State through the judiciary branch of government, establishes at the very least a reasonable suspicion that a fraud offence has been committed, yet allows the use of civil remedies (Levi & Burrows, 2008; Law Commission, 2014; Rawlings & Lowry, 2017; Smith & Shepherd, 2017). Furthermore, interactions with law-enforcement and criminal justice system agencies in the context of fraud appears irregular in process and in substance (Button et al., 2009; 2013; Doing & Levi, 2013).

Whilst the literature addresses considerations of law-enforcement practice with respect to fraud (Fraud Trials Committee, 1986; Doig & Levi, 2008; Button et al., 2013), there appears to be a need to evaluate the Fraud Act 2006 as a means of identifying what types of fraud are subject to *effective* criminalisation. This substantiates an imperative to study the underlying mechanism behind the determination of frauds that fall under the purview of the criminal justice system, and those that are subject to other resolution mechanisms (RQ1). This imperative stems from the tentative rejection of the Fraud Act 2006 as a means of functionally distinguishing between criminal and manifestly 'civil' frauds (Fisher, 2015; Smith & Shepherd, 2017). This is notwithstanding the value of the definition in the Act as a guide to the unpacking of the gestalt of fraud. This discussion appears to capture both a need to understand the social context in which the blanket criminalisation of fraud is applied, and how it differs from the context to which the categorical criminalisation of theft is applied.

The 'duality' between criminal and non-criminal outcomes with respect to the concept of fraud (RQ1) is recorded and acknowledged as a limitation to the study of fraud in the literature (Levi & Burrows, 2008; National Fraud Authority, 2013). Nevertheless, whilst this phenomenon is well-recorded and generally understood, the author was not aware of a substantive analysis to identify the essential characteristics of 'criminal' and otherwise 'civil' fraud. Furthermore, the literature accessed by the author does not provide substantive discussion on why this phenomenon occurs specifically in the context of fraud, and not in relation to other headline acquisitive crime offences. In the context of policing practice, there appears to be significant variability between interfaces and processes with respect

to the concept of fraud and mainstream police practice, core skills, and structures (Fraud Trials Committee, 1986; House of Commons Library, 2006; Levi & Burrows, 2008; Button et al., 2013). Nevertheless, the literature accessed by the author does not discuss the apparent difficulties and unique processes and structures in the context of the practical implementation of the (alleged) simplicity of the statutory offence of fraud (RQ2).

2.2 Origins of the Fraud Act 2006

The following section expands on the dysfunction between the apparent focus on trial-stage issues or legal lacunae, and the practice of law-enforcement as integral to the process of (fraud) criminalisation. It critically analyses the emergent propensity of the Fraud Act 2006 to further augment unique criminology and victimology traits that independently challenge 'policing' in the context of fraud. The section highlights the ontological difficulties in past and present attempts to encapsulate the critical meaning of fraud and codifying it into law. These efforts are seen as a contributing factor to the difficulties and inconsistencies in learning about and responding to crime and victimisation. In the context of RQ1 ('duality'), the use of such a litigious concept as *dishonesty* to qualify an offence appears to augment victim engagement difficulties, and particularly those that relate to the understanding of what is criminal fraud (Levi & Burrows, 2008; Button, et al., 2009; 2013). The existence of parallel fraud offences, with simpler and narrower points of proof than *dishonesty,* contributes to the further exclusion of the concept of fraud from 'mainstream' policing (RQ2).

Prior to 2006, the concept of fraud in England and Wales was criminalised through a body of statutory provisions and common-law offences. In this body of laws were various offences in sections of, amongst others, the Theft Act 1968, the Theft Act 1978, the Finance Act 1982, the Criminal Justice Act 1993, the Terrorism Act 2000, the Licensing Act 2003, the Asylum and Immigration Act 2004, the Serious and Organised Crime and Police Act 2005, and the Gambling Act 2005. Furthermore, fraud has also been prosecuted under the common-law offences of 'Conspiracy to Defraud', 'Conspiracy', and '*Dishonest* Intent to Defraud'.

With respect to fraud, the current governing law in England and Wales is the Fraud Act 2006. Under this Act, fraud is an offence qualified by *dishonesty* with respect to false representation (section 2), failing to disclose information (section 3) or abuse of position (section 4) with intent to cause gain or loss, and regardless of outcomes. Unlike the specific and narrow scope in each of the above statutory provisions, the Act offers a wide approach to criminalisation, which essentially covers 'all fraud' (Farrell, et al., 2007). The 2006 Act strictly follows the recommendations of the Law Commission (2002) to create a general *dishonesty* offence to supplement and replace previous provisions scattered across various acts (Home Office, 2006). The Law Commission (2002) opened with a summary from its 1998 instruction from the Home Secretary:

> *… To examine the law on fraud, and in particular to consider whether it: is readily comprehensible to juries; is adequate for effective prosecution; is fair to potential defendants; meets the need of developing technology including electronic means of transfer; and to make recommendations to*

> *improve the law in these respects with all due expedition. In making these recommendations to consider whether a general offence of fraud would improve the criminal law.* (Law Commission, 2002, p. 1)

The Law Commission (2002) concluded in favour of a general offence, citing the following advantages:

1. It will introduce an offence more understandable to juries in "*serious*" (p.2) fraud trials by being clearer with the definitions of fraud as a criminal offence;
2. It will be easier to prosecute, particularly in complex cases, using one 'all encompassing' provision rather than having to select the most appropriate specific provision;
3. It will simplify the legal definition of fraud and make it easier for the public as well as law-enforcement to construct what fraud is and is not; and
4. It will not attempt to define the actual practice of fraud and thus be impervious to future technological developments. (Law Commission, 2002 pp. 2-3)

The 'formula' adopted by the Law Commission (2002, p.59) for the new fraud offence was defined in such way that it had to include *dishonest* deceit, intention to deceive or secrecy as well as the potential for actual injury or risk of injury. Consequences (or potential consequences) did not have to be intended by the offender, as the focus was on the *dishonest* conduct. This structure was implemented by the Law Commission (2002) as the basis for the definition and scope for subsequent criminalisation of fraud post-2006.

Part of the rationale for the new offence was to ‘future proof’ against technological advancement (Law Commission, 2002). The challenge of ‘capturing’ the essence of the concept of fraud so it could be applied independently to means potentially unforeseen by legislators. This was intended as a means of eliminating the need for (with a view to potentially abolishing) the conspiracy to defraud common-law offence, which is qualified by an agreement to carry out a scheme that amounts to the gestalt of fraud. The aim of abolishing conspiracy to defraud as a common-law offence and subjecting it to the statutory conspiracy offence that refers to other legal sources to qualify the object of the conspiracy as criminal (see Criminal Law Act 1977). The introduction of a legal definition for fraud as a statutory offence could theoretically offer the conditions for the abolition of the conspiracy to defraud common-law offence in favour of a ‘conspiracy to commit fraud’ as qualified by the Fraud Act 2006. Despite the advocacy to abolish the gestalt-qualified conspiracy to defraud common-law offence (Law Commission, 1976; 1980; 1985; 1994; 1999; 2002), the Home Office has yet to annul the conspiracy to defraud common-law offence due to its continuing utility, which is further discussed in section 2.7 (CPS, 2012).

As a form of acquisitive crime, fraud under the Theft Act 1968 was made subordinate to the definition of theft. A person is guilty of theft if he/she *dishonest*ly appropriates property belonging to another with an intention to permanently deprive its rightful owner. The 1968 Act offence makes use of *dishonest*y as a qualifier, but the substantial *actus reus* component of the act addresses tangible gains and losses, and lack of mutuality between the victim and offender. Theft Act fraud (sections 15-20), is defined as obtaining property or

funds by deception, false accounting, obtaining a money transfer, and false financial statements as particular circumstances to which the prohibition of *dishonesty* applies. Later amendments to the Theft Act 1968, in 1978 and 1996, introduced more specific provisions such as obtaining services, fraud against creditors, and obtaining credit by deceit (Griew, 1995; Law Commission, 2002).

Citing Griew (1995, p. 141), the Law Commission (2002) argues that the state of the criminal law on fraud suffered from "over particularisation" and "untidiness". A different approach to the challenge of fraud in criminal law was advocated by the House of Lords (as an appeals jurisdiction), which called for the examination of the merits of a general *dishonest*y offence (Law Commission, 2002, pp.16-18). This view was later cited by the Home Secretary, Lord Chancellor and the Solicitor-General in framing the terms of reference for the Law Commission paper on fraud (Law Commission, 2002, p.1).

The Law Commission (2002) lists a number of limitations to fraud prosecution. Aside from general observations of "untidiness" (p.15), more specific limitations have been highlighted from case law on the application of the Theft Act 1968 (as amended) to fraud cases brought before the courts. The Law Commission (2002) noted cases where convictions were reversed on appeal due to the wrong charges being brought, or the juries being inaccurately instructed by the judge in explaining the offence. Specific lacunae were also highlighted, such as a failure to prosecute an individual who obtained a loan under a false representation. This was underlined to substantiate the need for a conduct focus in order to articulate an offence without the need to identify and prove losses and gains. A precedent

was set in R. v. Preddy [1996] when a mortgage which was obtained by false representation, but the charge of obtaining property by deception for which the defendants were found guilty was deemed inapplicable by the House of Lords. The difficulty was that whilst the offence was widely applicable in similar cases, since the funds were transferred from one account to another, they were never outside of the controls of the lender, and therefore no gains or losses could be demonstrated as required to establish a Theft Act 1978 offence (R. v. Preddy, [1996]; Law Commission, 2002, pp. 16-17).

The above example (*inter* alia) brought attention to prior debate by the Criminal Law Revision Committee (1966), where a minority opinion advocated the introduction of a *deception* offence. This opinion was also cited in R. v. Preddy [1996] as a possible solution for the prosecutorial challenges in the case, which resulted with the guilty verdict being overturned by the House of Lords. The Law Commission (2002) cites further cases that have either been overturned by the House of Lords due to charging the inappropriate offence as well as other difficulties with the application of Theft Act definitions to the concept of fraud. For example, the House of Lords was not unanimous in upholding a conviction against an employee in a shop who knowingly accepted a stolen cheque and was convicted of theft. Prosecution under the Theft Act 1968 raised difficulties with interpreting how the defendant had appropriated gains since he never had possession over the merchandise he sold (DPP v Gomez [1993]). This critique and examples of ‘over particularisation’ and ‘untidiness’ were pivotal in the discussion of the expected benefits of introducing a conduct offence. The resulting use of *dishonesty* to qualify fraud under the Fraud Act 2006 was

intended to circumvent typological intricacies, particularly as it relates to identifying losses or gains in complex cases.

Nevertheless, the author points to legal source and deliberation by jurists on the applied meaning of *dishonesty*. The common-law definition of *dishonesty* is literal rather than legal, meaning that it should be uniformly understood and applied. The common test for *dishonest*y under the Theft Act 1968 (as amended) was established in *R v Ghosh* [1982] as a two-stage process, the conduct stage, and the state of mind stage. To qualify, an action must be proven as inherently *dishonest* and, if so, the state of mind of the accused had to be *dishonest* as well (see Law Commission, 1999, pp. 13-14 citing R. v. Ghosh [1982] QB 1053, 1059). The reader will note that the test does not establish a legal meaning to *dishonesty*, but rather specifies that the application of the term, in the context of the Theft Act 1968, requires both the action (*actus reus*) and the state of mind (*mens rea*) of the accused to constitute *dishonesty*.

The use of *dishonesty* to qualify an offence was deemed to require no interpretation or special instruction to a jury panel as the definition was not legal in nature (Regina v Feely [1973]; Law Commission No. 155, 1999). For this reason, *dishonest*y was preferred over 'fraudulently' as a qualifier for the concept of fraud by the Criminal Law Revision Committee in their drafting of the Theft Bill (later, 1968 Act):

> *'Dishonestly' seems to us a better word than 'fraudulently'. The question 'Was this dishonest?' is easier for a jury to answer than the question 'Was this fraudulent?'. 'Dishonesty' is something which laymen can*

> *easily recognise when they see it, whereas 'fraud' may seem to involve technicalities which have to be explained by a lawyer. The word 'dishonestly' could probably stand without a definition…* (The Criminal Law Revision Committee, 1966, para. 39)

This discussion was a feature of later deliberation on means by which to represent the concept of fraud in criminal law. Whilst the Criminal Law Revision Committee (CLRC, 1966) did not go as far as to criminalise *dishonesty per se,* it did use it to describe the manner of conduct relating to the concept of fraud under the definition of theft. In so doing, it limited the application of *dishonesty*, which was not itself the subject of criminalisation, to qualify activities that have resulted in losses or ill-gains (Griew, 1995).

To illustrate this point, under the Larceny Act 1916 and the Theft Act 1968 'intention to defraud' or '*dishonesty*' can be deduced from two points of proof: the first is making an untruthful statement and the second is an appropriation of goods or funds as a result. In R. v. Ghosh (1982) the Court of Appeals explained the test of the *dishonesty* offence in the following way:

> *In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails.* (Regina v Ghosh, 1982 case cited by Law Commission, 2002)

The use of *dishonest* conduct as a qualifier of criminality under the Fraud Act 2006 appears to sustain a lack of an objective test for fraud due to unclarity of the applied meaning of *dishonesty* relative to fraud, or evidence of such conduct. In Rose v. Matt (1951), the words 'fraudulently' and '*dishonest*ly' are used interchangeably to debate the Larceny Act 1916 offence of larceny by a trick under section 1.2(a): "*There is no question here that the defendant was acting fraudulently; he was acting dishonestly*". Further affinity between fraud and *dishonesty* or *deceit* is demonstrated in the interpretation of the term fraud under the Larceny Act 1861, the offence of making or publishing false statement of accounts 'to defraud':

> *To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit…* (Re London and Globe Finance Corp, 1903)

The above examples demonstrate an apparent lack of conceptual clarity with regard to *dishonest*y and deceit, particularly as a means of substantially qualifying the concept of fraud and distinguishing it from legitimate conduct. The difficulty in 'unpacking' the gestalt of fraud, or to interpret it by qualifying the manner of the offender's conduct in terms of *dishonesty* persists. This is also evident in the retention (and use) of the conspiracy to defraud common-law offence as a standalone offence (CPS, 2012). Section one of the Act determines that the criminal component of a conspiracy can only be determined subject to the partial fulfilment of a primary offence. This offence has remained unchanged by the

2006 Act, and individuals may still be prosecuted under the common-law provision, independently of a need to substantiate the fraud.

Several reasons have led the Law Commission (1974) to recommend the preservation of the provision, including the two following themes. The first relates to the limitations of prosecuting fraud under the Theft Act 1968. These limitations were concerned with the need to prosecute under the legal definition of theft under the Act ("*dishonest*ly appropriates property belonging to another with the intention of permanently depriving the other of it", section 1(1). This requirement subjected prosecutors to the need to identify and articulate tangible gains or losses in order to fulfil the offence, which at times amounted to "*a judicial nightmare*" (R. v. Royle, [1971]). The second reason was that the Theft Act 1968 and other statutory offences appeared inadequate for other types of fraud that were not foreseen by legislators or could not be readily understood by key stakeholders. The Law Commission (2002) discusses the limitations in law and practice of attempting to prosecute land misuse and land grabbing, misuse of machines (computers), swindling, licencing memberships and other regulatory and compliance matters. Despite pressure and unrest with the continuing existence of the conspiracy to defraud provision (Law Commission, 1994; 1999; 2002), investigations and prosecutions may still address the concept of fraud without being required to qualify its meaning. In other words, conspiracy to defraud continues to allow parties to circumvent the ontological quest for means of 'unpacking' the gestalt of fraud where multiple offenders are concerned.

The use of *dishonesty* as a criminal qualifier was promoted by some jurists and politicians who sought to simplify the trial stage (The Criminal Law Revision Committee, 1966; 1977; The Law Commission, 2002). During the same period, a recommendation for the creation of special tribunals where 'complicated' fraud cases would be decided by a judge and two laypersons was made (Fraud Trials Committee, 1986). The Fraud Trials Without a Jury Bill 2006, was debated in Parliament alongside the Fraud Bill (which later became the 2006 Act), until the former was rejected by the House of Lords. In the accompanying research paper prepared by the Library of the House of Commons, Lord Donaldson, a former presiding judge at the Court of Appeals, is cited on this topic:

> *It is then said that one can simplify a fraud case. To some extent one can, no doubt, but to some extent one risks arriving at a situation where one is trying something different from the real offence. As a follow-up to that, it is said that every fraud case comes down in the last resort to a question of honesty or dishonesty, and that the man in the street is a wonderful judge of what is honest or dishonest. I could not disagree more.* (House of Commons Library, 2006, p. 19)

Lord Donaldson, and others, reject *dishonesty* as offering a simple and objective test to denote an offence and underpin proof of *mens rea* beyond reasonable doubt (House of Commons Library, 2006).

The absence of an objective test for *dishonesty* raises doubts about the theoretical ability of victims to engage with law-enforcement or otherwise articulate their victimisation in reference to criminal statute. By extension, the absence of an objective tests raises questions as to the ability of investigators to establish

reasonable suspicions that an offence has taken place without engaging in a subjective assessment of a manner of conduct in which one party accuses the other. Investigators may find themselves challenged to 'follow their nose' in order to substantiate such reasonable suspicions and access investigatory powers under Police and Criminal Evidence Act (PACE) 1984 and in compliance with the Human Rights Act 1998. This requirement is somewhat unusual in the context of core police training and doctrine indicated by the Association of Chief Police Officers (ACPO, 2005). ACPO was dissolved in 2015 and replaced by the National Police Chiefs Council (NPCC).

This leads the discussion towards the need for a narrow and objective test, which is developed further below in this chapter (cf Sutherland, 1944;1949; Tappan, 1947). In short, if the average juror was not trusted to consistently and competently apply a standard of dishonesty to evidence presented in court, how can a constable do so? In other words, *dishonesty* is a complicated and litigious evaluation of a manner of conduct, and not an objective test. The Oxford Dictionary of Law defines *dishonesty* as an "element of liability" (2009, p. 175), which derived from the context of commercial litigation. Therefore, the question is how does fraud as a *dishonesty* offence fare against other profit-driven crimes, particularly in terms of deducing points of proof for law-enforcement to investigate?

2.3 Theoretical Frameworks

The above context serves to contextualise the notion of ‘law’ as a social phenomenon, and to qualify how it relates to other social controls that are used to normalise behaviours and to provide conflict resolution. In the context of RQ1 (‘duality’), a theoretical framework onto which both aspects of the ‘duality’ of fraud can be applied (resolution via the criminal justice system and otherwise) appears to be useful for further analysis. This framing of the ‘duality’ of fraud also promotes the understanding of non-criminal justice system related responses (civil litigation, negotiation, or bilateral resolution) which further promotes the analysis of the phenomenon as a social dynamic. The wide applicability of Black’s (1976) theory of law promotes a non-binary examination of the application of law in fraud-related dispute resolution. This does not change the dichotomic nature of the parameters set in RQ1, which relate to the contemporary ‘duality’ between fraud resolution using the criminal justice system, and independently of it (inclusive of the civil court jurisdiction). Instead, Black’s (1976) theory of law provides a continuum of social controls and formalised social controls (‘law’), through which to analyse observations of variable ‘amounts’ of law in fraud resolution. The ‘duality’ of fraud in this context appears to relate to a particular distinction within this broad framework. This was seen as advantageous by the researcher, as it enables a systematic functionalist examination of a wider social dynamic, from which to understand the particular distinction of the ‘duality’ referred to in RQ1 (Black, 1972; 1976; Berger & Luckmann, 1967; Durkheim, 1982).

2.3.1 Black's (1976) Theory of Law

In this sub-section, the author introduces the fundamentals of Black's (1976) theory of law and includes further discussion in the context of other contributions to the literature. Black's (1976) discussion on the 'behaviour' of law positions the different state-authority backed responses to disputes on a relative scale of resolution mechanisms that spans from no use of state powers, to civil jurisdiction and criminal justice system outcomes. 'Law' as a sovereign function is applied in response to disputes that could not be resolved using social controls, and thus present a challenge to the existing social order (Black, 1976). Resolution mechanism are evaluated and positioned relative to one another according to the 'amount of law' embodied in them. For example, incarceration embodies more law relative to a fine, and the latter indicate the use of 'more' law than a compensation order in civil proceedings (Black, 1976). The use of 'law' according to Black (1976) is subject to a general 'prediction' according to which law would tend to be applied 'downwards' on four social scales:

1. Stratification: denotes the material disposition of individuals – 'more' law is applied from high stratification to lower levels of wealth, the more stratification the more law.
2. Morphology: denotes the relative social positioning of as individual relative to others in the division of labour – 'more' law is applied from higher to lower positions in the division of labour.
3. Culture: denotes the relative symbolic positioning of an individual, such as in education and relative levels of conventionality – 'more' law is applied downwards on this scale.

4. Organisation: denotes the size, robustness, and social status of groups relative to one another – law is applied in the direction leaning towards the party who belongs to a smaller or less significant group or has a lesser position therein. The same can be observed between organisations of varying sizes who act collectively, and not on the behalf of individual members.

Black (1976) does not examine legislation or enforcement priorities, but rather focuses on the 'amount' and direction in which they are situationally applied. Any system of government or regulatory regime is grounded in both 'law' and social controls, to which the theory can be applied. It was said that "*the law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread*" (France, 1894, chapter seven). Whilst the above is evident in contemporary life, personal experiences, and social critique of legal limitations imposed by 'the rich' on 'the poor', Black's (1976) theory of law does not regard *sources* for law, but the social dynamic of the *use* of law. This theoretical framework is as applicable to the analysis of the function of law against financial statement fraud, which is (equally) applicable to company directors and the destitute. Furthermore, the focus of this thesis is not in legislation or sources of definition for social order (Rousseau, 1762; Marx, 1867; Sellin, 1938; Chambliss & Seidman, 1971; Chambliss, 1973; Postner, 1975), but rather the function of law as a social dynamic (Black, 1972; Weber, 1978; Durkheim, 1982). Whether laws are enforced and to what degree of effectiveness ('law-in-action') is a different discussion to legislation and sources for law ('law-in-theory') (Merton,

1938; Tappan, 1947; Sutherland, 1949; Cressey, 1961; Black, 1972; Hester & Eglin, 1992; Tyler, 2006).

2.3.2 Third-Party Theory (Black & Baumgartner, 1983)

The following discussion of third-party theory (Black & Baumgartner, 1983) identifies the use of external parties to a dispute in order to facilitate its resolution. This theoretical framework accounts for both voluntary and compelled involvement of third-parties, or 'settlement agents' in dispute resolution. Use of this theoretical framework in concert with Black's (1976) theory of law offers another means of analysing the extent to which social controls or law are being used in conflict resolution. This framework is of secondary importance in its application in this chapter for the two following reasons: First, due to the focus on settlement agents, third-party theory does not 'capture' the contemporary dichotomy between fraud resolution using the criminal-justice system, and through the civil courts. Both modes of resolution appear to belong to a singular category of a judicial resolution. Second, the reader will note that contemporary criminal adjudication of fraud does not necessarily pertain to the resolution of the conflict, but rather the determination of whether an accused is guilty of a crime and subsequent sanctioning (Button, et al., 2013).

Whether the victim is 'made whole' does not appear to be imperative to criminal proceedings as crimes are construed as offences against the Crown through the identified means of victimisation against a person. The criminal adjudication of fraud is therefore different from its resolution as a dispute between two parties, as

it is process initiated by a prosecution by the Crown in the context of a criminal offence, and not a dispute between two parties. Furthermore, the role of the judge is different to that in civil litigation of fraud. Whereas the civil court judge seeks to resolve the dispute by determining if the defendant is liable for fraud and the extent of his/her liability, the judge in the criminal jurisdiction presides over a fact-finding mission to determine if an offence took place (Fisher, 2015). The criminal court judge should, therefore, not be confused with the civil court judge, as the former does not act as a 'settlement agent' with regards to a dispute, but rather to state enforcement of its laws (Black & Baumgartner, 1983).

Nevertheless, third-party theory offers an added depth to the wider examination and characterisation of the use of social controls and the extent to which social controls are organic ('less' law) or structured ('more' law). In particular, third-party theory (Black & Baumgartner, 1983) offers means for the relative positioning of social controls, marketplace and self-regulation grounded in extra-judicial resolution mechanisms in terms of 'ascending' amounts of law (Black, 1976). Third-party theory also provides a characterisation of diverse types of extra-judicial means of conflict resolution in terms that are later used as part of the functionalist socio-legal approach in chapter four below. This characterisation is used as a means of evaluating the underlying social function of various resolution mechanism that either apply in extra-judicial conflict resolution, or whose inadequacy appears to drive a demand for 'more' law (Black, 1976).

Third-party theory identifies different official roles held by independent actors that are necessary for the resolution of conflicts. The theory focuses on an

understanding of the relationship between two parties, and (particularly) the social, internal, and external controls they mutually recognise. Five types of 'settlement agents' are included in third-party theory: (i) 'friendly peacemakers'; (ii) 'mediators'; (iii) 'arbitrators'; (iv) 'judges'; and (v) 'repressive peacemakers'. The 'settlement agent' role is retrospectively determined by his or her ability to secure a resolution that is final. (Black & Baumgartner, 1983)

'Friendly peacemakers' use personal and 'soft' influence to settle disputes where they do not aspire to arrive at an equitable resolution, but merely to end the conflict at hand. Their authority is grounded in the respect they enjoy from parties, apparent impartially, and ability to define and augment social controls. For example, friendly peacemakers may motivate parties towards conflict resolution by citing 'public disgrace', risks to personal reputation, and exert direct influence by setting boundaries for any further escalation. In other cases, arbitrary resolution may be brokered by a religious leader, whose legitimacy and the resolution, are both enforced by a social sense of belonging to the applicable system of faith. "Friendly peacemakers" do not form an official part of the division of labour, and do not enjoy a symbolic status that underpins their function as a source of deference in dispute resolution. Instead, 'friendly peacemakers' emerge from situations where deference to a particular position holder is well-conditioned, such as in the case of a dispute in a public house or other well-managed environments. Conversely, the function of a 'friendly peacemaker' may appear to be 'randomly' assumed by individuals. Ad-hoc functionality is assumed by those who are subjectively seen by both parties to a dispute as possessing both sufficient relevant knowledge or moral authority, and (perceived) symbolic

positioning and impartiality. Successful and final resolution is based on both parties individually accepting the settlement agent and his/her decision, and the adequacy of social controls in enforcing the resolution as final. The 'strength' of social controls that underpin resolution by 'friendly peacemakers' is the weakest amongst other settlement agents discussed below. (Black & Baumgartner, 1983, pp. 101-103).

'Mediators' and 'arbitrators' rely more on their formal role and notion of impartiality to 'assist' two conflicting parties to arrive at an equitable solution and to bring a dispute to an end. Both represent types of 'settlement agents' whose relevance is grounded in socially recognised symbolic deference (mediators), or a formal source of deference grounded in the division of labour (arbitrators). Mediation is a more structured approach (than 'friendly peacemakers') with more negotiation and a notion of fairness playing a larger role than that of the motivation for resolution. For example, a mediator may be called upon to resolve a dispute because the parties mutually recognise them. Similarly, a mediator may enjoy a social standing or a formal role which designates him or her as respected by both parties. For example, a police officer may mediate between two parties in a common dispute, where the situation dictates that it is in the best interests of both parties to engage and they may be exposed to social pressures to do so. As mediators, police officers rely on their symbolic role as sources of moral authority, as well as the deference grounded in social controls that recognise policing by consent in general (Home Office, 2012). This more formal approach is perhaps indicative of a less cohesive community and more structured society. In the above example, symbolic authority and notion of impartiality are grounded in

social controls and not by commonly recognised and interchange functions in dispute resolution. Nevertheless, as long as inter-personal disputes do not amount to a criminal offence or exhibit disorderly behaviour, police officers may not enjoy immediate legal authority, and proposed solutions could be given with no formal legal backing to enforce them. (Black & Baumgartner, 1983, pp. 103-107)

'Arbitrators' differ from 'mediators' in the sense that the former aim to render a decision, rather than to strive to enable parties to arrive at a mutually agreed equitable resolution (grounded in and enforced by social controls). 'Arbitrators' are either formally recognised as such in the division of labour or are intermittently called upon to function as such due to other objective properties of their role in the division of labour. The finality of a decision is grounded in a pre-existing formal designation and consent of the parties to accept their role and decision as definitive. The final decision is either enforced by social controls or market rules or re-issued by the courts as a verdict or a court order, and there would be formal penalties or sanctions in place to assure compliance.

'Judges' are similar to 'arbitrators' in the sense that the former types of 'settlement agents' seek equitable solution and imposes a decision on the parties that does not require mutual adoption. Nevertheless, 'Judges' do not require parties to recognise their authority at the outset of their consideration and decision-making process, but instead enjoy a sovereign source of authority that is intrinsic to their role in the division of labour (Black & Baumgartner, 1983, pp. 107-109). 'Judges' are independent of popular acceptance or recognition, and judicial decisions are

enforced by state powers. While in some cases a party may choose to initiate litigation, the application is to appear before the court and state appointed judges. There is no reference at the commencement of proceedings to the person that might be assigned to preside over the case. 'Judges' may be called upon to render a decision in disputes between equal parties, or asymmetrical relationships such as the state and one of its citizens. The use of 'judges' for dispute resolution should be viewed as an indicator of a failure of more intimate resolution mechanisms, or the social controls that underpin them. Black and Baumgartner (1983, pp.109-110) discuss a fifth category of 'repressive peacemakers', which is less applicable to the UK and other common-law jurisdictions. This category is applied to 'settlement agents' who operate by exercising next to absolute authority to resolve conflicts, with equitable resolution being secondary to the ending of the conflict.

Third-party theory is a useful concept in the examination of the relationship between social controls and law, and the transition between the two when employing Black's (1976) theory of law. The conflicts that outweigh the strength of social controls and intimacy require a resolution mechanism with considerably more structured or state-backed sources of authority. Disputes which typically require judicial powers are those where bilateral resolution has been shown to be beyond the reach of the parties involved. Furthermore, arriving at a resolution must be perceived as important enough by at least one of the parties to break mutual relations and turn to a third-party (Shapiro, 1986).

2.3.3 Summary

In the above section, a theoretical framework for the analysis of the 'duality' of fraud (RQ1) and its characterisation as a social dynamic was presented. Black's (1976) theory of law and third-party theory (Black & Baumgartner, 1983) have been presented and elaborated upon in the context of their theoretical application to the investigation of the 'duality' of fraud as a manifestation of an underlying social dynamic (Durkheim, 1982). The contemporary identification of the 'duality' of fraud as a dysfunction between 'law-in-theory' and 'law-in-action' is discussed in the Methodology chapter below as relating to the function of an underlying social mechanism (Black, 1972; Weber, 1978; Durkheim, 1982).

The reader will have found a partial answer in the above section to RQ1 ('duality'), that is, what determines and differentiates the concepts of 'commercial' and 'criminal' fraud in theory and in practice? Black's (1976) theory of law introduces a scale of social controls on which resolution mechanisms applicable to the 'duality' of fraud can be organised, whereby the criminal justice system represents 'more' law than other means of resolution. Third-party theory (Black & Baumgartner, 1983) offers a means for thinking about the role of social controls and other mechanisms towards the resolution of fraud, and it theorises the process of 'escalation' or where 'more' law may be required. These theoretical frameworks do not address fraud *per se*, but rather offer a general framework through which to develop an understanding social function of criminal law relative to other resolution mechanisms in the context of RQ1. Furthermore, both theoretical constructs assist in the study of the social dynamic of fraud

criminalisation in chapter four, where pre-industrial circumstances do not include a direct comparison to contemporary policing and public prosecution (Ashworth, 2000).

2.4 Theoretical 'Fault Lines' and a 'Wide Blanket' Approach to Criminalisation

In the above section, the author discussed contextual difficulties with respect to the landmark change in the legislative approach to the concept of fraud, specifically, the criminalisation of 'all fraud' qualified by *dishonesty*. This new approach and consolidation of multiple fraud offences into one criminal definition of fraud (despite some provisions not being repealed and the introduction of new provisions) was seen as a way of addressing difficulties in fraud prosecution in commercial circumstances. As a qualifier, *dishonesty* appears odd as a criminal definition due to the lack of an objective test and its affinity to the gestalt of fraud, which it is used to define. In this section, the author contextualises the above discussion to selected general social theory frameworks and applies them in the context of the 'duality' of fraud.

In this section, the 'duality' of fraud (RQ1) flows from a framing of dysfunction between legislation (criminalisation) and its application as a subject for an investigation based in social science theory and methodology (Black, 1972). Statutory law is subject to application in circumstances studied by social science (inter-personal interactions) and can therefore be evaluated by social theory. The general fraud offence in the Fraud Act 2006 appears to 'cut across' distinctive

categories of crime that the literature identifies as resulting with varying degrees of association with law-enforcement activities. Two theoretical frameworks that represent two 'fault lines' with respect to theoretical suggestions of association between a fraud offence and the likelihood of association with law-enforcement activities are presented in the sub-section 2.4.1. The first is Naylor's (2003) typology of profit-driven crimes. This theoretical framework identifies a distinction between a category of offences that is readily associable with law-enforcement activities, and a separate of offences that is not commonly associable with such responses. Nonetheless, the general offence in the Fraud Act 2006 is applied equally to frauds from each category. The second theoretical framework is Black's (1976) theory of law. This uses variability in social indicators between offender and victims as a means of estimating the likelihood of law-enforcement responses in dispute resolution. Different to examples of particularised fraud criminalisation discussed in this chapter and in chapter four, the general fraud offence is applicable to all permutations in social indicators between offender and victim. Both theoretical frameworks are presented and applied independently and in conjunction to the discussion of the 'duality' of fraud as a dysfunction between law-in-theory and law-in-action in the context of the Fraud Act 2006 (Black, 1972).

Sub-section 2.4.2 further below in this section discusses the criminalisation of the concept of fraud through a monolithic *dishonesty*-based offence in the context of the theoretical frameworks presented in sub-section 2.4.1. The question of whether the simplification of the legal meaning of the concept of fraud offers a clear measure for criminality and a basis for an association of the concept of fraud with law-enforcement activities and effective criminalisation (Hester & Eglin,

1992). Furthermore, the inconsistencies in outcomes with respect to fraud provide a basis to critically examine the rationalisation of a conduct-based categorical criminalisation of fraud as it was proposed by the Law Commission (2002, p. 3).

2.4.1 Theoretical 'Fault Lines'

Naylor (2003) proposed a threefold typology for acquisitive or 'profit-driven' crime, which distinguishes between three typological categories of crime. The first category refers to 'predatory' offences that are primarily defined by their inherently immoral nature, which typically refers to bilateral transactions by force or threat (though guile or deceit may be used) and occur either in a non-business context or using a false business cover. The second category refers to 'market-based' offences, which describe voluntary trade of illicit goods and services. The third category refers to 'commercial' offences, which are defined by use of illegal methods in to facilitate otherwise voluntary transactions in a legitimate business context and with some disparity in terms of fair market value. (Naylor, 2003)

Of the above categories, this thesis discusses only 'predatory'-type and 'commercial'-type offences. 'Market-based' offences are excluded from this discussion going forward, as these offences do not feature the concept of fraud as a form of harm and victimisation directed at a transaction with a victim. Instead, fraud in the context of these offence is a possible technique to interact with proceeds of crime emanating from other offences or benefiting from illicit goods and services criminalised independently of the concept of fraud.

In the context of the 'duality' of fraud, this discussion highlights an apparent theoretical 'fault line' between two categories. 'Predatory'-type frauds feature clarity in respect to the desired form of resolution, and an integral role for law-enforcement activities. 'Commercial'-type frauds are not intrinsically associated with law-enforcement activities as they commonly refer to actions that are otherwise legitimate, and as compensatory remedies can be secured by other means. This 'fault line' with respect to the (perceived) role and strength of association between the two categories in the context the role of the criminal justice system in their resolution. In Naylor's (2003) discussion of typical outcomes of 'predatory' and 'commercial' offences, the former is characterised as intuitively understood to be synonymous with law-enforcement responses, whilst the latter is a category of offences to which such a generalisation cannot be applied. Both categories contain multiple offence-types to which the Fraud Act 2006 is equally applicable. This adds analytical value to the examination of the dysfunction between 'law-in-theory' and 'law-in-action' in the context of the Act, and the discussion of 'duality' of fraud (RQ1) (Black, 1972).

The above demonstrates two theoretical insights that appear to suggest a dysfunction between 'law-in-action' and 'law-in-theory' (Black, 1972) in the context of the general fraud offence in the Fraud Act 2006. This context highlights typological 'fault lines' in theoretically suggested outcomes based on typology (Naylor, 2003), and social circumstance (Black, 1976). In conjunction, both frameworks point towards the likely catalyst for a 'duality' between the criminal justice system and other outcomes with respect to a *dishonesty*-based conduct offence. This context suggests that irrespective of the study of law-enforcement

practice in the context of fraud, there are ample grounds for a social-science-based evaluation of the Fraud Act 2006 and its applicability. The first question is whether a monolithic headline fraud offence (akin to the concept of theft) is an enabler of clarity given the above theoretical context with respect to its typological and circumstantial span? The second question is whether the general fraud offence, which appears to have been designed with substantial emphasis on frauds that are related to more complex typologies and methods (Law Commission, 2002), effectively address both 'predatory' and 'commercial' offences (Naylor, 2003)?

2.4.2 'Eroded' Criminality Under a 'Wide Blanket' Approach to Fraud Criminalisation

In section 2.4.1 above, the author demonstrated a misalignment between the extent to which fraud is criminalised under the Fraud Act 2006, and social theory concerning the concept of fraud and criminal justice system outcomes. These frameworks include Naylor's discussion of the difference in association with criminal justice system outcomes between 'predatory'-type offences, and 'commercial'-type offences, and the fraud typologies that apply to these categories (Naylor, 2003). Black's (1976) theory of law suggests the relative 'amount' of law applicable in response to fraud according to four social indicators. The application of Black's (1976) theory of law to the range of circumstances in which fraud is committed (Levi & Burrows, 2008; Smith, et al., 2011) results with a suggested association of both use of 'higher' and 'lower' relative amounts of law (Black, 1976). Both theoretical frameworks independently and in conjunction

suggest a ‘duality’ in outcomes with respect to the *dishonesty* conduct offence introduced by the Fraud Act 2006.

In this sub-section 2.4.2, the author contextualises the key contribution to the literature to the two dysfunctions identified above. First was the discussion of difficulties in unpacking the concept of *dishonesty* in the context of mainstream policing and criminal proceedings discussed in section 2.2. above. Second was the discussion of theoretical suggestions that support the evidence of variability in the use of law across the concept of fraud discussed in sub-section 2.4.1 (Black, 1976; Naylor, 2003). The author submits that the criminal association of the concept of fraud with viable probability of criminal justice system outcomes creates an erosion in the common association of the concept of fraud with the social construct of ‘crime’ (Hester & Eglin, 1992). The change in legislation and the criminalisation of the concept of fraud through the introduction of a *dishonesty*-based conduct offence was meant to overcome difficulties in addressing mainly ‘commercial’-type offences (Law Commission, 2002; Naylor, 2003). Nevertheless, the literature points towards difficulties with the application of the term *fraud* in the criminal justice system in England and Wales.

According to Naylor (2003), ‘predatory’-type frauds are those that do not occur in a legitimate business context and are characterised by readily understood features in terms of harm, victims, morality and unfairness (or *dishonesty*). One would expect such frauds, where *dishonesty* is intrinsic to the entire scheme, and it does not occur in the course of other legitimate activities (Sutherland, 1944), to be commonly associated with law-enforcement activities, as a ‘predatory’ offence

(Naylor, 2003). This flows from the generalisation made with respect to this category of offences, which assumes a historical and contemporary association of these types of profit-driven crimes ('predatory') (Naylor, 2003) with law-enforcement and legal responses. Nevertheless, this generalisation does not seem to necessarily apply with respect to frauds of such essential characteristics, despite the concepts of fraud and theft being subject to categorical criminalisation but differ in association with law-enforcement activities. The literature attributes some of the variability in outcomes between the two concepts in grounded in the unique victimology of fraud and inhibitors to victim engagement with law-enforcement (Levi, 1987; 2001; Titus & Gover, 2001; Doig, 2006; Levi & Burrows, 2008; Smith, et al., 2011).

Crime occurs in the context of ordinary ('routine') social life, and under circumstances where motivated offenders identify a potential victim they can interact with in the absence of capable guardians (Cohen & Felson, 1979). Routine activity theory (Cohen & Felson, 1979) contextualises the social function or ability to affect capable guardianship through effective interaction between victims and law-enforcement agencies in the context of fraud. In the discussion of RQ2 ('mainstreaming' and 'streamlining') in chapter one (introduction), the author refers to the unique response to fraud in law-enforcement structures and processes (Levi & Burrows, 2008; Button et al., 2011; 2013). The interface between reporting victims and law-enforcement agencies is a critical component of capable guardianship (Cohen & Felson, 1979); in the context of fraud, reduced likelihood for law-enforcement responses compounds the perception of an opportunity to commit fraud (Cressey, 1973). Furthermore, the above context

may support further rationalisation for offending (Cressey, 1973; Hester & Eglin, 1992).

In the context of RQ2, the demonstrable difference in law-enforcement responses and likely outcomes between the concepts of fraud and theft is arguably an 'eroding' factor for *effective* criminalisation of fraud (Hester & Eglin, 1992). Furthermore, approaches for fraud prevention also appear to place less of an emphasis on law-enforcement engagement as a means of establishing capable guardianship (Felson & Boba, 2009) or addressing known inhibitions on victim reporting. Instead, responses to some examples of 'predatory'-type fraud (Naylor, 2003) do not demonstrate a clear association between the offence and law-enforcement activities (Smith, et al., 2011; Button, et al., 2013; Levi, et al., 2015).

A study of victims of fraud who reported their victimisation to a law-enforcement agency highlights several reasons as to why they initially considered not reporting (Button et al., 2009). Among such reasons was confusion as to whom to report fraud, embarrassment in relation to speaking to a stranger about their victimisation, formalising their status as a victim in the eyes of their family, and the perceived low prospect of a police response or financial recovery. The dysfunction between 'law-in-theory' and 'law-in-action' is even apparent in narrative provided by victims who have reported fraud harm and victimisation to law-enforcement agencies. For instance, the victim of a pyramid scam (who did eventually report the crime) articulated to researchers the following insights:

> *Yeah, that's all really, I don't like prison, because they're not really criminals, isn't it? [Laughs] Sorry, that's what I think, my own opinion,*

> *they're not criminals, they haven't committed very deep crime…* (Button, et al., 2009, p. 28)

As discussed in the introduction to this chapter, there may be merit to the argument that criminality under the Fraud Act 2006 is not specific enough (or practically divisible from legitimate practice) to identify or assume 'intrinsic criminality' (cf Tappan, 1947; Cressey, 1961). The difficulty with a general *dishonesty* offence is that it seems grounded in a Victorian dogma of the "*untarnished character of the English merchant*" (Taylor, 2013, pp.26-27) that assumes prevailing and unqualified honesty of conduct as the rule. Deviations from this rule, under this somewhat naïve perspective, is in the public interest to address in severe terms in order to maintain overall confidence in participation and investment in trade. Furthermore, the above quote (Button, et al., 2009, p. 28) from the pyramid scam victim reflects an 'erosion' of the concept of fraud as it relates to conduct that mimics 'market-rules' and is therefore seen as having less intrinsic criminal properties.

The same confusion appears to have some presence within law-enforcement when approached by reporting victims and even in the criminal courts (Button et al., 2013). It would also appear that despite typological features consistent with the 'predatory'-type category, perceived (yet not existent) features of 'commercial'-type offences underline confusion and 'erode' the association of criminal justice system responses to 'predatory'-type fraud (Naylor, 2003; Button, et al., 2009;2013). Nevertheless, it would appear that practical association of 'predatory'-type frauds with criminal justice responses do not meet the theoretical

suggestion by Naylor (2003), or the scope of fraud criminalisation in the UK, and its alleged clarity (Law Commission, 2002).

Criminalising *dishonesty* does not recuse investors (or would-be victims) from exercising judgement and conducting due-diligence on potential investment opportunities as well as the individuals involved. Similarly, not installing an alarm system or failing to secure a dwelling does not diminish from the criminal liability of a burglar, or the status of victims (Griew, 1995). Despite introducing wide-reaching conduct offences, the Fraud Act 2006 has not supplanted deference to market-rules and regulation by reputation as the dominant crime control approach to some frauds (Action Fraud. n.d.; Financial Conduct Authority FCA, 2016). Furthermore, the notion of an investor engaging in a voluntary transaction being a valid reason for diminished expectations for law-enforcement action was largely dismissed by the Fraud Trials Committee (1986). Instead, recommendations emphasised the public interest in effective responses so to encourage the general public to participant in business investment (Fraud Trials Committee, 1986). Nevertheless, the 'blanket' criminalisation of the concept of fraud and the *dishonesty*-based qualification (as opposed to a range of narrowly defined objective tests), appears to greatly contribute to the apparent lack of effective criminalisation. For instance, in one case victims persisted in seeking a criminal justice outcome only to meet the following critique in court:

> *The worst thing for us was when they did the actual court case, the judge said that we were all wealthy arrogant people that wanted to get on the bandwagon of hedge fund investment ... He did. He just said that we were wealthy arrogant people that had erm ... which was annoying*

> *'cause we weren't. We were just normal people, obviously if my husband hadn't been involved we would never have got involved in it. We probably would've gone straight to the building society, paid off the mortgage and said, end of. Instead, we thought well could invest it, make a bit more from it, do something more for the children, that type of thing.* (Button, et al., 2013, p. 54)

The above example demonstrates a feature of 'commercial'-type frauds (moral ambiguity) that appears to overshadow the 'predatory' typological features of an offence in criminal justice system settings (Naylor, 2003). Another example of a feature of 'commercial'-type offences obscuring criminal justice system interactions with 'predatory'-type frauds is the notion of a particular skill requirement that extends beyond the ability of most law-enforcement agencies. This topic is developed in Roskill (Fraud Trials Committee, 1986), by Levi (1987), and others (Button, 2011; 2013; 2015; Smith, et al., 2011), but often in relation to so called 'serious' frauds, which the author (loosely) attributes to the category of 'commercial'-type crimes (Naylor, 2003). For 'predatory'-types frauds, the author submits that investigatory skills cannot be genuinely identified as a 'bottleneck', particularly due to the simplicity of the transaction and financial instruments, and readily understood *dishonesty* in a non-corporate context (Naylor, 2003).

In the context of RQ2 and the role of law-enforcement as the point of entry to the criminal justice system, the 'bundling' of 'predatory' and 'commercial' type frauds (Naylor, 2003) into a singular offence and enforcement structures should (theoretically) add value. Whilst there may have been some difficulties with the

prosecution of frauds that have taken place in the workplace environment, or related to more complex exchange mechanisms, these would not apply to 'predatory' frauds. Whilst this is not a fundamental cause for the somewhat unique victimology of fraud, it would have added value to the deliberations of a new approach to fraud victimisation (Law Commission, 2002).

The question with respect to the approach to criminalisation recommended by the Law Commission (2002), and enacted in the Fraud Act 2006, is not one of extent of criminalisation, but rather its substantiation as a headline offence. In chapter three (methodology), the author separates the Fraud Act 2006 as a means of unpacking the gestalt of fraud from a 'guide' to behaviour that are synonymous with law-enforcement responses. In this section, the author focused on the Fraud Act 2006 as a source of a criminal definition, and the resulting dysfunction between 'law-in-theory' and 'law-in-action' in the context of the Act, and by comparison to the general offence of theft. There appears to be a considerable challenge with the use of *dishonesty* as a qualifier for fraud by misrepresentation, failure to disclose, and abuse of position. Whilst the new fraud offence offers a significant contribution to the unpacking and the gestalt of fraud, it is doubtful whether the monolithic approach to the criminalisation of fraud is attainable. Different to the concept of theft, the concept of fraud manifests itself in a far wider range of means, typologies, and social circumstances. Theft is also defined in criminal law by an objective test with respect to gains and losses as a result of the offence, as opposed to a *dishonest* manner of conduct in making a representation to another.

A further contributor to the 'erosion' of criminality in relation to the concept of fraud and 'predatory'-type examples of it rests with the absence of lower thresholds and degrees of offending in the Fraud Act 2006. This discussion is separate from the discussion of the particularised mode of legislation due to the 2006 Act being the effective means of criminalisation (see section 2.5). There seems to be no 'lower-end' for the application of the Fraud Act 2006, or what misrepresentations, omissions or abuses of position can be brought before a jury to pass judgement on the *honesty* of the (alleged) perpetrator. Whilst there are apparent degrees for brackets of sentencing by financial harm, these only provide recommendations to an independent judiciary, and relate only to the post-conviction stage (Sentencing Council, 2014). This supports a notion that the terms of harm for which the Fraud Act 2006 is intended to address are not necessarily on the lower end of the scale. Such examples could be seen by multiple stakeholders as not amounting to 'criminal fraud' serve to further confuse the concept of 'criminal' fraud (Levi, 1987; 2001; Titus & Gover, 2001; Doig, 2006; Levi & Burrows, 2008; Smith, et al., 2011).

The above discussion demonstrates difficulties that do not result from a complicated law, but rather from the dysfunction between the scope of means of the criminalisation of the concept of fraud through a monolithic conduct offence. In this sub-section 2.4.2, the theoretical dysfunction between typological features (Naylor, 2003) and social circumstances (Black, 1976) were demonstrated as an inhibitor for contextualising fraud as an offence. The author suggested that perceived features and limitations of 'commercial'-type offences are also present in examples that appear to disassociate (or decouple) 'predatory'-type frauds from criminal justice system resolution (Naylor, 2003; Button et al., 2009; 2013).

2.4.3 Summary

The dysfunction between ‘law-in-theory’ and ‘law-in-practice’, with respect to the concept of fraud, is critically discussed in this chapter in terms of an inherent misalignment between the Fraud Act 2006 as contrasted with sociological and criminological theory (Black, 1976; Naylor, 2003). The discussion in this section is considered in conjunction with the discussion of the absence of an objective test for fraud as a driver for the instigation of a criminal investigation and further discovery in the section above. The absence of an objective test appears to relate to a focus on some legal lacunae and difficulties with the pre-existing scope of available provisions for the prosecution of fraud, particularly of the ‘commercial’-type (Law Commission, 2002; Naylor, 2003). In sub-section 2.4.1, the wide span of monolithic criminalisation in critically analysed through the prism of Black’s (1976) theory of law and Naylor’s typology of profit-driven crimes (Naylor, 2003). Both frameworks provide theoretical suggestions of variability in outcomes across an axis of relative social rankings between offender and victim (Black, 1976), and the typological and contextual settings of the offence (Naylor, 2003). Both frameworks converge on a suggestion of lesser association of ‘commercial’-type frauds with law-enforcement activities (Black, 1976; Naylor, 2003). This appears to be the reverse of the typological circumstances from which prosecutorial and trial-phase challenges had originally created the drive for a revision of the law with respect to fraud (cf. Law Commission, 2002; Naylor, 2003).

In theory, whilst the context from sub-section 2.4.1 should have resulted with demonstrably clearer association of ‘predatory’-type frauds and law-enforcement activities, observations do not confirm this suggestion (Button et al., 2009; 2013). In sub-section 2.4.2, the challenges for enforcement of ‘commercial’-type offences and misalignment of the fraud offence and ‘mainstream’ law-enforcement practice is identified as a contributor to the ‘erosion’ of *effective* criminalisation of fraud. This ‘erosion’ is evident from findings that demonstrate some of the limitations of ‘commercial’-type offences, which appear to extend into the legal and personal application of the offence of fraud with respect to ‘predatory’-type offences (Naylor, 2003; Button et al., 2009).

A final contributor to the apparent ‘erosion’ of the association of law-enforcement activities with ‘predatory’-type frauds is the difficulty of engaging with such agencies in the context of alleged *dishonest* conduct. Whilst other offences are typically investigated and prosecuted using points of proof that connect an accused offender to material evidence of criminality, the Fraud Act 2006 offences are qualified by *dishonesty*. With respect to an examination of conduct, fraud trials have the potential of being conducted in full agreement of the facts, but not their interpretation in terms of the state of mind of the accused (as discussed above). By contrast, the ‘predatory’-type offence (Naylor, 2003) of theft defines criminality through activities and their outcomes, not the state of mind of the offender qualified by a binary determination of *honesty* versus *dishonesty*. An understanding of the offence emerges directly, and 'traditionally’ (Stuart, 1967, p. 610), from section one of the Theft Act 1968. Whilst section one of the Theft Act 1968 qualifies offences through *dishonesty*, it offers clarity and simplicity through

which to understand the offence and related harm and victimisation: "…*dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and "thief" and "steal" shall be construed accordingly*". Furthermore, such activities are 'confined' within the definition of 'predatory' offences and cannot be *honestly* carried out in the course of legitimate activities (Naylor, 2003).

Both the Theft Act 1968 (as amended) and the Fraud Act 2006 define an activity into criminal law (the concepts of theft and fraud respectively). However, the former is an example of a correlation between a clear and simple offence and its effective criminalisation, whilst the latter does not describe a behaviour that is synonymous with law-enforcement activities. This difference in *effective* criminalisation (Hester & Eglin, 1992) appears unrelated to the internal 'simplicity' (Law Commission, 2002) of the two criminal statutes. The general *dishonesty* offence in the Fraud Act 2006, despite its simplicity, does not align with social science theories on the association between criminal behaviour and criminal justice system resolution. Social science theoretical constructs appear to provide considerable insight to this dysfunction between 'law-in-theory' and 'law-in-action' that underpins the 'duality' of fraud in English law (RQ1). In cutting across typological and socio-economical categories that suggest the involvement of law-enforcement agencies, the scope of monolithic criminalisation in the Fraud Act 2006 appears to further 'erode' the *effective* criminalisation of 'simple' frauds.

2.5 Parallel and Competing Provisions

In the above sections, the author discussed the origins of a monolithic approach towards the comprehensive criminalisation of the concept of fraud using a seemingly 'simple' criminal definition (Law Commission, 2002, p.3). In this section, the author examines parallel criminal fraud and non-criminal justice system resolution mechanisms facilitated by the state. Provisions that appear to criminalise specific behaviours otherwise subject to general criminalisation using the Fraud Act 2006. This mode of fraud criminalisation through the specification of actions and/or outcomes limited to narrow circumstances is referred to in this thesis as *particularisation*. Particularised provisions that exist concurrently with the Fraud Act 2006 have either pre-dated it, were not repealed, or were introduced after 2007. These offences do not employ a *dishonesty* test in the qualification of the offence, but instead *dishonesty* is implied in the description of these offences. Further included in this section is a discussion of other fraud resolution mechanisms facilitated by the judiciary that are external to the criminal justice system.

Particularised offences are mutually exclusive to legitimate conduct in two ways: (a) if the *actus reus* had not occurred, there is a clear distinction between the offence and legitimate conduct; and (b) if the same manner of conduct (*dishonesty*) is applied in a circumstance that is not specified by particularised fraud provisions, it amounts to a Fraud Act 2006 offence. Despite the enactment of a general offence by the Fraud Act 2006, fraud is also specifically criminalised under the following provisions *inter alia*:

1. Taxes Management Act 1970,
2. Customs and Excise Management Act 1979,
3. Weights and Measurements Act 1985,
4. Insolvency Act 1986,
5. Social Security Administration Act 1992,
6. Value Added Tax (VAT) Act 1994,
7. Social Security Fraud Act 2001,
8. Land Registration Act 2002,
9. Companies Act 2006,
10. The Welfare Reform Act 2012,
11. Prevention of Social Housing Fraud Act 2013, and
12. Immigration Act 2014.

Additional particularisation of fraud beyond the general offence (in sections one through four) under the Fraud Act 2006 are included in later sections of the Act itself. These provisions further criminalise offences in the Companies Act 1985 that relate to the concept of fraudulent trading and fraud against company creditors, as well as including supplementary liabilities on company directors in the same context. An offence under the Social Security Fraud Act 2001, such as 'failing to disclose' a change in circumstances that may remove a previous benefit entitlement (Section 16/2), amounts to a criminal offence. In addition to the specified imprisonment and financial penalties, a conviction also limits the offender with respect to future entitlements under the Welfare Reform Act 2012. Disclosing such changes in circumstances is therefore the legal avenue citizens are required to follow, and the law specifies narrowly and specifically the

criminalisation of the opposite proscribed behaviour. Nevertheless, the same manner of conduct (*dishonest* failure to disclose) under circumstances that are not subject to narrow definitions in law, would appear to (nevertheless) fall under the purview of the Fraud Act 2006.

Similarly, (some) contractual misrepresentation, fraudulent trading, and frauds relating to insurance policies, may be made known to the state through the civil courts or insolvency proceedings. For instance, in Agapitos and Another V Agnew and Others (2002) the civil jurisdiction analysed the liability of an insurer when fraudulent documents are produced by the beneficiary. It emerged that a deliberate misrepresentation was made as it was demonstrated that there was no good faith or error exceptions, and a civil remedy was applied in favour of the insurer (Agapitos and Another V Agnew and Others [2002] EWCA Civ 247, 2002; Rawlings & Lowry, 2017). The deference to (insurance) market rules in the above examples serve to demonstrate the supportive role played by the judiciary in enabling markets to predominantly self-regulate, by upholding market standards in the adjudication of fraud.

The study of the 'duality' of fraud (RQ1) as a dysfunction between 'law-in-theory' and 'law-in-action' (Black, 1972) is made particularly insightful by the above examples of adjudication of a particularised offence and a Fraud Act offence. Particularised provisions are easily applicable in investigative and prosecutorial contexts, yet the underlying conduct that underpins them is in itself subject to criminalisation (see section 2.2). Nevertheless, the literature demonstrates that knowledge of *prima facia* Fraud Act 2006 offences is brought before the judiciary

as a matter of course, but often as a civil matter and not through Crown prosecution (Smith & Shepherd, 2017). The role of the civil judiciary in adjudicating potentially criminal offences further contributes to the factors discussed in sections two and three above. In addition to the concept of fraud not being commonly understood as a criminal offence (cf Law Commission, 2002; Button et al., 2013), it is demonstrably included in the purview of the civil courts (Law Commission, 2014; Smith & Shepherd, 2017).

The civil jurisdiction over some matters relating to fraud and the use of compensatory remedies is functional and not subject to criticism in this thesis (Smith & Shepherd, 2017). Instead, it is simply referred to as an additional inhibitor to examples of desired law-enforcement activities in response to fraud. The legislator appears to have sought to clarify the criminal properties of fraud in narrow sets of circumstances through particularised legislation, making such fraud inherently criminal, and readily investigated and prosecuted. Whilst the 'motives' behind the preservation of particularised offences, in concurrence with the Fraud Act 2006 and the introduction of new provisions post 2007, is not recorded in the literature the author would offer a functional observation. Despite the explicit intention for the criminalisation of 'all fraud' (Law Commission, 2002), the standard of effective criminalisation applied to the concept of theft has not been achieved in the case of fraud. Competing resolution mechanisms, theoretical (see above), and functional (see chapter four) misalignments between reasonable expectations from the criminal justice system appear to suggest a place for an additional tier of criminalisation. Therefore, the questions are what categories of fraud are made

explicitly and effectively criminal, whilst other are subject to a general offence and *ineffective* criminalisation?

Historically, the particularisation of fraud was made by proclamation (and later, legislation) of fraud in narrow circumstances that pertained to sovereign interest (see sections 4.5 and 4.6). In this section, two general types of sovereign interest are identified from examples of particularised fraud criminalisation. This topic is further analysed in chapter four in a broader socio-legal historical context. The first type of offences concerns specific sovereign vulnerabilities to fraud victimisation, for example:

1. Section 111A(a)(b) of the Social Security Administration Act 1992 reads: "*Dishonest*ly producing or furnishing false information of [*sic* or] documents to obtain benefit"
2. Similar wording exists in the Value Added Tax Act 1994 and the Customs and Excise Management Act 1979.

Both provisions are still in effect and, theoretically, also prosecutable under the Fraud Act 2006. In addition to particularisation in law, such offences are also 'particularised' in law-enforcement, with designated agencies and personnel that focus on these offences such as local authorities and Her Majesty's Revenue and Customs (HMRC). In these offences, the state is subject to harm and victimisation. The Crown is made to either accept less than its rightful dues or is made to provide funds beyond the just allocation determined by the scheme though which they are paid.

This type of criminalisation does not address the full extent of vulnerabilities and potential harm from fraud that the state experiences, which can extend to (*inter alia)* procurement fraud, or embezzlement by a civil servant (Levi, 2008). Nevertheless, the scope of particularised criminalisation refers to legislative provision, and not the potential vigilance and ability to engage with law-enforcement that the mechanism of the state possesses.

The second type of particularisation relates to cases of corporate insolvency, administration and winding-up proceedings, and the state-imposed rules and the desired 'balance of power' between debtor and creditor in a bankruptcy context. The most recent revision of insolvency law in England stems from the work of the Cork Commission (1982) and enacted in the Insolvency Act 1986. The recommended imperative of insolvency under English law was comprised of maximisation of asset recovery as well as taking appropriate actions against directors, and other stakeholders, should their past actions have contributed to the company becoming insolvent. Both the Insolvency Act 1986 and the Companies Act 2006 contain provisions to recover funds and/or assets from former directors should the liquidator of a company be able to demonstrate the relevant personal liabilities. Most of these provisions are subject to discovery and enforcement powers that reside in the civil jurisdiction.

Different to fraudulent trading (a criminal offense of knowingly trading whilst insolvent), wrongful trading is a civil wrong under which directors and other stakeholders may be liable. As a civil wrong, the liquidator is entitled to exercise judgment in deciding on such a course of action. For example, the liquidator may

consider the cost of an investigation, estimated litigation cost, and likelihood of recovering assets or cash, against the prime duty of optimising recovery for the creditors. For a director to be liable for 'wrongful trading', the presiding judge has to be convinced that a director: "*ought to know or ascertain conclusions which he[/she] ought to reach and the steps which he[/she] ought to take*" (Great Britain, 1986, section 214(4)). A judge would have to make a finding on a balance of probabilities, which can be seen as amounting to an offence, or at least sufficient suspicion to merit a criminal investigation where it had concerned other forms of acquisitive crime.

The role of the state is identified by the Cork Commission (1982, pp. 1-13) as maintaining an equilibrium between the legal remedies available for creditors and the protections afforded to borrowers. This discussion is viewed in the context of providing a ‘sovereign guarantee’ of trust to allow the market to sustainably self-regulate over-time in the face of growing intricacies and lower intimacy, which reduce the effectiveness of social controls (Black, 1976; Black & Baumgartner, 1983). The Insolvency Act 1986 (as amended) contains several fraud offences which were not repealed by the Fraud Act 2006. These include two categories of offences: particularised fraud offences that apply to company shareholders and officers, and offences that relate to matters of compliance with the winding-up process and cooperation with administrators. Of the first kind are such offences as detailed in sections 207, 358, and 359 of the Act, which criminalises making gifts, or transferring assets or receivables, from a company undergoing or about to undergo winding-up or liquidation. Whilst this offence can be charged as *dishonest* abuse of position (Fraud Act 2006 section four), it remains in effect and

was not repealed as part of the Act coming into force in 2007. Similar particularisation addresses the concept of misrepresentation or failure to disclose in section 356, to identify a further example. Conversely, the practice of fraudulent trading and fraud against creditors is further particularised in section nine of the Fraud Act 2006, which appears to represent a subset of the conduct detailed in sections one through four of the Act.

The Companies Act 2006 and the Company Directors Disqualification Act 1986, both contain definitions of duties and obligations of company directors. Actions can be taken against directors failing to meet these general requirements, and to recover losses using the civil courts under the balance of probabilities standard of proof. Compliance with these processes and specific duties to disclose information is underlined by criminal provisions within *inter alia* the Insolvency Act 1986. Amongst these sanctions are the possible disqualification of individuals from acting in the future as company directors. Under the Insolvency Act 1986 and the Companies Act 2006, an administrator can approach a former director suspected of fraud directly, access court powers to obtain documents and statements, pursue restitution in civil proceedings ('wrongful trading'), or refer the case to law-enforcement as a 'fraudulent trading' offence. Furthermore, should the suspected fraud involve a third-party or an employee of the company, the administrator can use a variety of torts on behalf of the creditors such as 'conspiracy to Injure', 'deceit', 'breach of trust', or the conspiracy to defraud offence. Failure to comply with these investigatory measures, and court mandated disclosures, are either particularised against in the Insolvency Act 1986 through the concept of contempt of court, or specific offences. (Goode, 2011)

The investigative burden rests with the administrator. It is subject to 'cost/benefit' considerations in relation to the liquidated assets as well as the recovery potential for any chosen course of legal action. In cases where the alleged perpetrator does not comply and appears to have means from which value can be recovered, it is likely that such courses of action will be taken on a commercial basis (Goode, 2011). This highlights the dysfunction in outcomes between criminal prosecution and civil litigation (inclusive of insolvency proceedings in the context of civil liabilities and civil wrongs). The former does not directly serve to remediate the victim, whilst the latter is prosecuted by the Crown through its resources and seeks to address harm and victimisation construed as a transgression against the Crown (Ashworth, 2000).

The above insolvency context provides insight into a functional division of circumstances and outcomes. The Insolvency Act 1986 (as amended) sets out a regime of civil powers and procedure in the administration and liquidation of a company, and potential recourses for creditors. Fraud aimed to undermine this regime is particularised as a narrowly applicable offence. *Dishonest* conduct that undermines the position of creditors or their potential recovery in the case of a liquidation might offer grounds for civil remedies that are similar to other particularised fraud offences (wrongful/fraudulent trading, for example). Whilst the preference of creditors might lean towards civil proceedings and remedies, in some cases the evidence could amount to a criminal standard of proof. The investigation is led by the court-appointed administrator and financed from the assets of the liquidated estate (meaning that resources are spent out of the recoverable amount). Similar to fraud disputes in commercial circumstances not

involving bankruptcy, civil litigation and criminal charges are options available to the alleged victim, and subject to cost-benefit considerations (alongside extra-judicial resolution mechanisms) (Smith & Shepherd, 2017).

An additional form of particularisation relates to state-imposed standards in certain markets, or in relation to specific goods and services. For these provisions, the state is not a direct victim of harm (as opposed to the first type), but instead its capacity to regulate trade is undermined. This type of particularisation, together with a further analysis of the role of criminal law and historical analogues served in substantiating a regime to regulate creditor-debtor relations, is discussed in chapter four of this thesis.

2.5.1 Summary

This section examined offences, torts and insolvency practices that are available to specific manifestations of *dishonest* conduct as it is criminalised under the Fraud Act 2006, but (seemingly) independent of it. These provisions are particularised offences that are simple and narrow enough to be readily understood, and easily deduced to evidential points of proof by investigators. Indeed, it could be said that particularised offences tend to meet the standard of clarity alleged in relation to the criminalisation of 'all fraud' as a *dishonesty* conduct offence:

> *Introducing a single crime of fraud would dramatically simplify the law of fraud. Clear, simple law is fairer than complicated, inaccessible law. If a citizen is contemplating activities which could amount to a crime, a clear,*

> *simple law gives better guidance on whether the conduct is criminal, and fairer warning of what could happen if it is… A general offence of fraud would be aimed at encompassing fraud in all its forms. It would not focus on particular ways or means of committing frauds…* (Law Commission, 2002, p.3)

In the context of research question one (RQ1 'duality'), fraud appears to be either a subject of specific guarantees of trust given to the state and selected victims, or a general offence. Whilst the particularised offences are narrow in scope and readily understood, the general fraud offence is grounded in the *dishonest* conduct implied by the former. This distinction appears to augment difficulties with victim engagement in the context of fraud, and the misalignment between the Fraud Act 2006 offence and other statutory offences discussed above. Particularised frauds may be investigated and prosecuted by specifically designated agencies and powers, and not necessarily local police forces as in the context of theft. Regardless of the identity of the investigating agency, Crown prosecution and a criminal justice system adjudication and sanctions, and known infractions are synonymous with such outcomes.

2.6 Theoretical Discussion of a *Dishonesty*-Based Conduct Offence (the Fraud Act 2006)

The above section examined various parallel legal applications to Fraud Act 2006 offences, and the role of the former in fostering ambiguity with regards to the general offence of fraud in the latter. The discussion highlighted the limitation of a conduct-based approach to the criminalisation adopted in responses to challenges to the successful prosecution of 'commercial'-type frauds (Law Commission, 2002; Naylor, 2003). This approach was thus far discussed primarily in the context of its apparent dysfunction between 'law-in-theory' and 'law-in-action' (Black, 1972) with respect to 'predatory'-type frauds (Naylor, 2003). In this section, the focus is shifted to the application of a wide scope of criminalisation ('all frauds') through the use of monolithic *dishonesty*-based offence of misrepresentation, failure to disclose or abuse of position. 'Commercial'-type offences are primarily identified through the business settings in which they are committed, which offers a parallel to the classic definition of 'white-collar crime' (Sutherland, 1940) and is a category exclusive to such settings.

This section examines the application of fraud (to the concept of white-collar crime) as it is defined under the Fraud Act 2006. White-collar crime refers to the relative absence of alleged offenders that come to the attention of the criminal justice system where the offences are committed by skilled workers and business owners (Sutherland, 1940). These offences, that on their own merits may have come to attention under the criminal justice system, are directed away from its

purview to be resolved using ‘less’ law (Sutherland, 1940;1949; Black, 1976). This discussion approaches the ‘duality’ of fraud as it relates to research question one (RQ1 ‘duality’) by critically examining the use of a general *dishonest*y offence (cf Tappan, 1947; Law Commission, 2002). It would appear that to study fraud as a ‘true’ white-collar crime (Sutherland, 1940; 1949; Cressey, 1961; Smith et al., 2011), there has to be a system of law which clearly and narrowly defines its scope (cf Tappan, 1947; Cressey, 1961).

This discussion advances the analysis of the ‘duality’ of fraud (RQ1) and current inhibitors to the ‘mainstreaming’ and ‘streamlining’ of its application (RQ2). The focus in the thesis is on an ‘invisible hand’ (Smith, 1776) that directs some frauds away from the criminal courts. In the UK, law-enforcement and public prosecution agencies are the main (and virtually exclusive) gateway to the criminal courts where culpability is determined. The scope of RQ1 (‘duality’) in this thesis is therefore delimited to the activities of the institutions of public prosecution, and the author does not extend this remit to the application of the Fraud Act 2006 by the judiciary.

A theme which emerges from the examination of the gestalt of fraud is that criminalisation acts as a ‘sovereign guarantee’ of trust in the relevant field of commercial or legal conduct. The state can be expected to provide a guarantee to the standards and regulations it imposes: coins are expected to be authentic, weights and measures must be consistent and accurate, and trade and safety standards require compliance. Key to this discussion is the (alleged) departure, embedded within the Fraud Act 2006, from the legal principle to not “*…indict one*

man for making a fool of another" (Domina Regina v Jones [1703]; The Law Commission, 1974, p. 4). Historically, the Crown did not provide broad and comprehensive guarantees against all manners of *dishonest* conduct; this is novel to the Fraud Act 2006.

In addition, the state assumed its role in regulating trade by imposing a rules-based system of state-backed procedural compliance such as in the legislation relating to companies and insolvency. These functions may be theoretically regulated through the criminalisation of *dishonesty* in these limited contexts. Such provisions address manifest state-interest and are discussed in a wider historical context in chapter four of this thesis as a category of frauds that are more credibly associated with Crown prosecution and related activities upon discovery. There appears to be a discrepancy between such particularised provisions, and the 'one size fits all' measure for white-collar crime (Sutherland, 1949), as an analogue of 'commercial'-type offences (Naylor, 2003). Furthermore, the category of 'commercial'-type offences is not intrinsically associated in the literature to law-enforcement and criminal justice system resolution (Naylor, 2003). Instead, this category of offences is often subject to outcomes which may not include a resolution, or bilateral negotiations, or civil litigation (Rawlings & Lowry, 2017; Smith & Shepherd, 2017).

2.6.1 On the Scope of (Effective) Criminalisation and Criminology in the Context of Fraud and White-Collar Crime

The original definition of white-collar crime is that of a "*crime committed by a person of respectability and high social status in the course of his occupation*" (Sutherland, 1949, p.9). This family of crimes to which some frauds belong (Levi, 2008a; Levi & Burrows, 2008) are not defined by the action taken by the criminal, but rather by the circumstances in which he or she offends. Criminality under such social and organisation circumstances offer more choice for victims in terms of official resolution mechanisms as well as presenting tangible disincentives for law-enforcement engagement. Such considerations include: control over the investigation process, access to information and the 'optics' of the investigation, and its effects on the workforce. Internal investigations offer an opportunity to address victimisation on a bilateral basis with the offender(s), which is typically done with the prospect of law-enforcement intervention as a lever to enhance the position of the victim. Bilateral negotiations may also result with meaningful insight for future prevention, and a non-disclosure agreement to prevent third-party knowledge of incidents, including creditors, investors, clients, and law-enforcement. (Green, 2004; Levi & Burrows, 2008; Hand & Blunt, 2009; Tunley, 2014; Button, et al., 2015; Gee & Button, 2015)

Not deferring to law-enforcement by default allows employers and companies in a commercial dispute (as well as customers), to only access the 'amount' of law and the type of settlement agent they require (Black, 1976; Black & Baumgartner, 1983). The mutual self-interest of offenders and victims may encourage them not

to interact with law-enforcement agencies. The avoidance of officially recognising that a fraud has occurred may lead both parties to arrive at a mutually-agreeable solution or to part ways without further action being taken. In other cases where directors and officers of a company are the perpetrators, the company and other involved parties may 'hijack' controls and skew internal or joint bilateral (or even multilateral) processes to conceal the scheme and protect participants. When relationships are undermined by *dishonest* business behaviour, the parties are incentivised to address the matter on a mutual basis via arbitration or an adversarial process of zero-sum resolution mechanisms. (Levi & Burrows, 2008; Smith, et al., 2011; Button, et al., 2015; Smith & Shepherd, 2017)

The application of routine activity theory (RAT) (Cohen & Felson, 1979) in the context of fraud in the literature is demonstrated by the "fraud triangle" (Cressey, 1973). This term is a commonly used theoretical framework to study and evaluate the rejection of marketplace rules by offenders. The fraud triangle includes three circumstantial variables that may increase the individual disposition to commit fraud: (i) a perceived financial need, (ii) a perceived opportunity, and (iii) rationalisation (Cressey, 1973). This is not limited to white-collar crime or 'commercial'-type offences (Naylor, 2003), and may be applied in frauds that do not necessarily involve individuals who are placed in positions of explicit trust or business settings. Nevertheless, the focus is this section is on the application of the general fraud offence in the Fraud Act 2006 to 'commercial'-type offences and supplements the focus on 'predatory'-type offences in the above sections.

If considered in the context of the 'fraud triangle' (Cressey, 1973), the role of criminal law in the context of fraud is to provide a simple guide and warning of the criminal nature of a perceived 'opportunity'. Nevertheless, the capacity of a general offence to offer clarity, particularly with respect to offending settings where outcomes grounded in law-enforcement activities are rare, is called into question (Hester & Eglin, 1992; Levi & Burrows, 2008; Button, et al., 2015). Whilst some frauds under the white-collar crime umbrella are particularised against (see above), others are not, yet *dishonesty* qualifies any misrepresentation, failure to disclose, or abuse of position as an offence. Even an expressed knowledge of such stranded may still not be stuffiest in deterring one from perceiving an opportunity to engage in *dishonesty* outside the scope of particularised offences. For example, one might perceive opportunities not to disclose material facts about a condition of an asset to an insurer as *different* to mis-stating the value of the same asset a financial statement of a public company (Ulph, 2006; Law Commission, 2014; Rawlings & Lowry, 2017). Seeing as the latter is a 'serious' ('particularised') offence, it may be better associated with law-enforcement activities, or the reasonable expectation of which (upon detection) (Hester & Eglin, 1992; Tyler, 2006). In the following subsection 2.6.2, the absence of a lower threshold to the general Fraud Act 2006 offence is discussed further in this context.

The absence of a valid claim of clearly manifest criminality, as opposed to critique of conduct, is at the heart of the criticism against the construct of white-collar crime in the literature (Cressey, 1961). Tappan (1947; 1960) argued against the Sutherland (1940;1949) definition of white-collar crime. The former maintained

that the scope of criminology had been exceeded, and that the definition had passed into the realm of the law. At the heart of Tappan's (1947) distaste for the inclusion of behaviours that are 'foreign' to the criminal justice system is that it is the very interaction with the criminal justice system, and court conviction, that imposes the social label of a criminal (Chambliss & Seidman, 1971). Tappan (1947) places emphasis upon the conferment of a criminal label as an entry barrier to the field of criminology, not typological agreement between other offences or social constructs. The distinction between what is 'right' or 'wrong', 'social', or 'anti-social' can be measured using the application of common standards such as legislation, ethics or systems of value, but these are 'regulated' (or not) by social controls (Black, 1976; 1998). The concept of criminality is detached from typological or abstract definitions and is exclusively within the purview of the criminal justice system to determine. Conviction by a criminal court is the sole determining factor of criminality in this perspective, not the interpretation and theoretical applications of law by sociologists or criminologists (Tappan, 1947).

The argument by Tappan (1947) in this context is an extension of this historical and jurisdictional logic within the United States of America. Nevertheless, the critique of the dysfunction between condemnable conduct and criminality appears to be applicable to the discussion of the 'duality' of fraud (RQ1) in this chapter. The reader is encouraged to consider a theoretical common-law jurisdiction with an elaborate body of particularised fraud offences, but not a conduct-based general offence. In such a jurisdiction, *dishonest* conduct *may* amount to an offence under the concept of fraud or it could be subject to other resolution

mechanisms such as a commercial dispute, a tort, or a civil wrong (Ulph, 2006; Smith & Shepherd, 2017). Should that jurisdiction replace its corpus of particularised fraud provisions with the equivalent of the Fraud Act 2006, the following gross simplification would potentially apply: some examples of *dishonesty* may be subject to prosecution by the state, whilst others will be subject to other resolution mechanisms. Such a dysfunction between 'law-in-theory' and 'law-in-action' (Black, 1972) will appear, in this context, to relate to Tappan's (1947) argument and will require an external observer to depend on the criminal justice system as a qualifier of criminal *dishonesty*. Over time, generalisations could be made about frauds that challenge the existing order to an extent which resulted with law-enforcement activities and criminal justice system resolution (Black, 1976; Black & Baumgartner, 1983). From these generalisations could emerge a discussion of the 'criminal properties' of frauds, with the means of resolution (the criminal courts) underpinning the understanding of 'criminal' fraud. This discussion is developed specific to English law in chapter three (methodology) and in section 4.2.

Tappan (1947) and Fisher (2015) do not address the 'duality' of fraud, rather they observe it in acknowledging that circumstantial variability may determine 'criminal fraud' from other resolution mechanisms. Some behaviours are subject to social controls except for specific provisions in law under which it is specified to fall under the purview of the criminal justice system. Conversely, other behaviours become a matter for law-enforcement and public prosecution (almost) with no exception, such as in cases of violent crime or 'predatory' profit-driven crime (Naylor, 2003). Deviant behaviours are made synonymous with criminal

prosecution and the subject for near-intuitive criminal labelling as a result of the demonstrable enforcement of criminal law (Sellin, 1938; Tappan, 1947; Erikson, 1962; Hester & Eglin, 1992; Tyler, 2006). Nevertheless, the *dishonest* manner of conduct itself (as a means of defining and criminalising 'all frauds') appears to over-extend the reach of criminal law (as discussed above and see sub-section 2.6.2 in this section). The question is whether this form and extent of criminalisation is conducive in the context of fraud and *dishonesty*. In this context, the general offence in the Fraud Act 2006 appears to offer some parallels to critique of the study of white-collar crime. Tappan (1947) argues against the expansion of criminology to the study of those behaviours that occur in the workplace, yet are under-represented in criminal justice system statistics, as it rests on an unadjudicated premise of criminality:

> *It has become a fashion to maintain that the convicted population is no proper category for empirical research for the criminologist. […] this position reflects in part at least the familiar suspicion and misunderstanding held by the layman sociologist toward the law. […] They unite only in their denial of the allegedly legalistic and arbitrary doctrine that those convicted under the criminal law are the criminals […] and promote confusion as to the proper province of criminology.*
> (Tappan, 1947, p. 96)

The reader may find some components of enticing logic in this argument. Tappan (1947) directly rejects the notion of intrinsic criminality that is inherent to 'an offence'. From an outcome perspective, the absence of a criminal conviction may appear as the opposite to fulfilment of the social role of those agencies and

institutions that are entrusted with the enforcement of the criminal law (Hester & Eglin, 1992). This could be a result of a myriad of reasons, all of which result with no legal finding as to the application of the law to its transgression by the only agent of the state who is charged with this task (the criminal courts). Tappan (1947) objects to the view that sets of offenders or offences can (generally) be defined independent of specific court rulings, and based on conduct, or a notion of something that 'ought to be' criminal as it undermines the public interest. Whilst there is logic in questioning the intrinsic criminality of some alleged offences that are under-represented in the criminal justice system, the notion could be controversial and perhaps offensive.

The adoption of the above analysis is therefore applied strictly in the context in which it was introduced (as a critique of the criminological definition of white-collar crime) (cf Sutherland, 1940; Tappan, 1947). If applied to a wider context, this analysis may offer less value. For example, domestic violence is an under-represented criminal phenomenon, which the literature attributes to particular victim vulnerabilities and law-enforcement engagement difficulties (Felson & Paré, 2005). It should be valid and reasonable to study incidents that are not reported to law-enforcement but may be brought to attention via victim outreach, analysis of data from related support mechanisms or other evidence of its occurrence. Fostering specific understanding of the reasons why the criminal-justice system seems to underperform in terms of fulfilling legislative intent should be a valid field for enquiry notwithstanding the absence of a legal 'seal of approval'. This approach to criminology is not grounded in 'wishful' or 'idyllic' pursuit after "conduct norms" (Tappan, 1947, p.97), but rather in an understanding that the

existence of law does not (necessarily) imply seamless and uniform enforcement. Given that law-enforcement activities represent the primary entry point to the criminal justice system, this appears to require that the study of law extends to other evidence of *prima facia* offences that are not being investigated.

The concept of white-collar crime was introduced as a theoretical framework to understand class-specific criminality, which was distinctively absent from law-enforcement statistics and public debate. In its current, somewhat more *actus reus* specific application, white-collar crime is defined by the US Federal Bureau of Investigation (FBI) as "*[crimes] characterised by deceit, concealment, or violation of trust, and are not dependent on the application of threat of physical force or violence*" (FBI, 2015). This definition is consistent with the UK Fraud Act 2006. Nevertheless, the FBI (2015) focuses on offences that are subject to other legal definitions and does not assign criminality to deceit, concealment or violation of trust *per se.*

The FBI (2015) definition of white-collar crime is contingent on the capability to identify an underlying offence and is defined by the subset of readily identifiable offences which feature deceit, concealment, or breach of trust with no physical force. The Fraud Act 2006 defines criminality using conduct-based and non-specific qualifiers. This distinction is important in examining the parameters for criminological examination of that which is not labelled as 'criminal' by the criminal justice system but is criminal by virtue of satisfying 'artificial' or 'arbitrary' definitions. Deviance, anti-social, and unethical behaviour are forms of conduct which undermine the public interest and may constitute 'criminality'. Criminology

theory has developed around concepts such as social deviance that may function independently of strict legal definitions of crime (example: Durkheim, 1893; Merton, 1934; 1964; Hester & Eglin, 1992), but this does not appear to be the case with white-collar crime (Sutherland, 1940; 1944; Cressey, 1961).

The literature on the construct of white-collar crime is grounded in the identification of underlying criminality, which is in the practical reach only of those socio-economic groups in positions of trust (Sutherland, 1944). As emphasised by Cressey (1961), in his dissent from Tappan (1947) narrowing the scope of criminology, the construct of white-collar crime is grounded in specific provisions in law rather than abstract 'norms' of conduct (cf Tappan, 1947; Cressey, 1961). Unlike the classic definition of white-collar crime (Sutherland, 1940;1944; 1949), the definition in the Fraud Act 2006 is subjectively construed and shaped by a value-system and manner of acceptable conduct (*honesty*). Some forms of deceit (not underpinned by criminality) are widely considered acceptable. These may even be considered desirable by wide segments of Western societies, which regulate forms of deceit using social controls and the advantages of having a decent reputation (Selling, 1938; King, 2000; Taylor, 2013).

The above discussion is somewhat absent from contemporary (or indeed, recent) contributions to the literature. The reader may wonder what contemporary value this (apparently) long-settled debate (Cressey, 1961) offers. The author submits that the current dysfunction between 'law-in-theory' and 'law-in-action' (Black, 1972) that underpins the discussion of the 'duality' of fraud (RQ1) appears to stem from the adoption of a conduct-based offence in the context of fraud. Unlike the

definition of white-collar crime (Sutherland, 1940; Cressey, 1961), the general offence in the Fraud Act 2006 does not specify particular ways of offending, but rather pre-judges 'all fraud' or *dishonesty* to be criminal. Subsequently, there emerges a dysfunction between fraud offences that are effectively dealt with by the criminal justice system, and those that are subject to other resolution mechanisms, which appears to defy the legislative intent (Law Commission, 2002). This dysfunction stems from the difference between the criminalisation of 'all theft' and 'all fraud'. The former is achieved by a definition and criminalisation of an *actus reus* and the general acceptance of the guarantee of the right to property (Griew, 1995), whilst the latter is grounded in the criminalisation of a *mens rea* definition (Law Commission, 2002; Farrell, et al., 2007). This theoretical expansion of criminalisation engulfs some frauds that are typically resolved using means other than the criminal justice system, and that may perhaps offer preferable outcomes for victims when construed as grounds for damages (Smith & Shepherd, 2017; Ulph, 2006).

2.6.2 The Absence of a Lower Threshold for Fraud in the Fraud Act 2006

In sub-section 2.6.1 above, the author revived the debate around the scope of criminological discussion based on a premise of criminality associated with *dishonest* conduct. The discussion demonstrated the applicability to Tappan's (1947) critique of conduct-based scoping of under-reported crime to the scope and means of the criminalisation of 'all fraud' under the Fraud Act 2006. In this sub-section 2.6.2, Tappan's (1947) critique is further discussed and applied to the general fraud offence in the Act, but in the context of the absence of a lower

threshold in the conduct-based offence of fraud. The discussion in the following paragraphs challenges the claim of simplicity, particularly in the context of the discipline of law-enforcement, which is the dominant gateway to the criminal courts in the UK.

The dysfunction between 'law-in-theory' and 'law-in-action' in the context of the general fraud offence appears, as previously discussed in this chapter, through a prism of misalignment with social science theory. In this section, the discussion turns to the *de facto* expansion of fraud criminalisation ('all fraud') and asks whether the absence of a lower threshold, as in the Theft Act 1968, contributes to the alleged clarity of the fraud offence. Unlike the concept of theft, the literature accessed by the author and discussed in this chapter points away from the general conduct offence in the Fraud Act 2006 being synonymous with law-enforcement actions. The only post-legislative evaluation the author was able to access demonstrates that despite the expansion of fraud criminalisation, no evidence of law-enforcement expansion was mentioned (Ministry of Justice, 2012). According to this evaluation, the advantages of the new Act appear to relate to the application of the general fraud offence in pre-existing enforcement contexts (Ministry of Justice, 2012).

The literature points to insular attempts to apply the offence in the Fraud Act 2006, outside what would previously been considered the remit of law-enforcement and criminal law, appears to have resulted with further confusion. For example, the offence of fraud (a monolithic provision carrying a sentence of up to ten years imprisonment) was applied in relation to representations made by

parents on a school form (Monaghan, 2010). Whilst the mother in this example might have known that her actions were morally questionable (Tappan, 1947), it is doubtful that the objective behind the statute under which she was prosecuted (before the charges were dropped) was achieved, namely:

> *If a citizen is contemplating activities which could amount to a crime, a clear, simple law gives better guidance on whether the conduct is criminal, and fairer warning of what could happen if it is*. (Law Commission, 2002, p.3)

The difficulty with the above example appears to relate to the absence of a lower threshold to the general offence of fraud. Whilst the definition of theft is itself functional for effective and readily understood criminalisation (Griew, 1995; Law Commission, 2002), it varies from the definition of fraud into criminal law in (*inter alia*) two different ways. First, different to fraud, it does appear to have a lower threshold; the Theft Act 1968 identifies losses and gains as a result of actions (not conduct) as part of the offence. Second, it relates to the social function of the protection of the right to property, and not the guarantee of *honesty* (see discussion in chapter four of this thesis). Finally, the criminalisation of 'all theft' did not appear to expand the scope of theft criminalisation, but merely followed a path of modernisation and clarification in order to maintain it as synonymous with law-enforcement activities (The Criminal Law Revision Committee, 1966). The literature points to an inherent difficulty with the expanded spectrum of fraud criminalisation: The Fraud Act 2006 scope of (theoretical) offences spans across questionable morality (Ormerod, 2007), otherwise civil or employment matters (Allgrove & Sallars, 2009), or entirely banal minutiae (Monaghan, 2010). These

did not form a part of the statutory scope of fraud criminalisation prior to the enactment of the Fraud Act 2006.

In the absence of a lower threshold or degrees or relationship to harm, the standard of criminalising *dishonesty* without meaningful qualification does not foster intrinsic understanding of conduct that is excluded from the 'sovereign guarantee' of trust. The criminalisation of *dishonest*y, and the dysfunction in the consistent application of law, may exhibit some unfortunate similarities to the pre-industrial offender-victim relationship dynamics. Both historically and in the modern era, engagement with the criminal justice system is: victim-driven and costly, the state offers little in terms of investigatory resources, and if the victim can identify the offender, both parties are incentivised to settle as the court process is skewed against the offender. Some offences of state-interest remained (or recently were) particularised, and these offences are prosecuted and investigated. The state seems indifferent to evidence of *dishonesty* offences, as represented in civil or insolvency litigation, as these processes allow victims to seek financial remedies using the civil courts. This dynamic has also been observed with respect to insurance contract law:

> *It is impossible for the law to set out clear sanction to deter policyholders from acting fraudulently. Although insurance fraud is a criminal offence, prosecutions are relatively rare, meaning that the civil law has an important part to play in deterring fraud.* (Law Commission, 2014 cited by Rawlings & Lowry, 2017, p. 537)

The above discussion demonstrates the difficulty was a conduct-based mode of criminalisation, particularly as a means of expanding the remit of criminal law. The absence of a lower threshold demonstrates the dysfunction between the definition of fraud by the Law Commission (2002), and its effectiveness in clearly communicating the extent to which fraud is criminalised (RQ2). This discussion should be considered in conjunction to the critique in section three above regarding the 'erosion' of the applied understanding of fraud as a criminal concept. Whilst difficulties with the lower end of theoretical application of general fraud offence in the Fraud Act 2006 is of little concern, some of its characteristics appear to inhibit the application of the offence in 'commercial'-type circumstances. This is the topic of the following sub-section 2.6.3.

2.6.3 White-Collar Crime

In sub-section 2.6.2 above, the absence of a lower threshold to the Fraud Act 2006 general offence was discussed in the context of the critique voiced by Tappan (1947) on conduct-based framing of a crime. The discussion related to the limitations discussed above with respect to lower-end theoretical applications of the 2006 Act and the absence of clarity and uniform unpacking of the gestalt of fraud in a criminal context. In this sub-section 2.6.3, the discussion above which may not necessarily be of great concern, is applied in the context of 'commercial'-type fraud and the concept of white-collar crime (Sutherland, 1949; Naylor, 2003). Workplace-based fraud offences offer at times complicated typologies and use of (allegedly) complicated financial vehicles (Naylor, 2003). As discussed in section two of this literature review chapter, the Fraud Act 2006 was intended to create clarity with respect to fraud offending in such settings. In section 2.4, the

limitations to the *effective* criminalisation of fraud in the context of 'predatory'-type offence were attributed (in part) to the focus of the Law Commission (2002) in addressing limitations to the prosecution of 'commercial'-type frauds (Naylor, 2003). The question is therefore what benefits does the Fraud Act 2006 offer to the clarification of the legislative intent of absolutist criminalisation and (alleged) clarity in the context of white-collar crime?

Societies harbour an embedded tension between how they codify and reward 'success' and the legitimate means for its achievement. Whilst most share 'goals' (social currencies) and the 'means' (the confines of the law), 'delinquents' are those who reject conventional 'means' and 'innovate' by finding other ways to satisfy common incentives (Merton, 1945; 1957; 1964). Merton codifies social adaptation by the acceptance of goals (or social currencies) and the acceptance of norms for achieving such goals. Notwithstanding a criminal definition, the rejection of norms is 'encouraged' by inadequate social controls to enforce norms and acceptable marketplace practices and regulations (Merton, 1938, p.676). In the context of white-collar crime, the literature on acquisitive crime generally converges on the notion of restitution as a main (if not primary) imperative for victims, even under the well-established norms of public prosecution (Bentham, 1789; 1843; Greenberg, 1990; Green, 2004; Levi & Burrows, 2008; Button, et al., 2015).

This imperative appears to have particular relevance in the context of two main observations on the official responses to fraud victimisation in professional or 'normal business settings' (Naylor, 2003). These observations appear to provide

insight into (some) of the underlying inhibitors for the referring of fraud in such environments to the criminal justice system, and the resulting under-representation of these frauds in crime statistics (Sutherland, 1940; Levi & Burrows, 2008; Tunley, 2014; Button, et al., 2015): First, the availability of other means of resolution that are more likely to result with a financial or procedural remedy (Smith & Shepherd, 2017). Second, the preference of taking no official action so as to 'not send good money after bad'; such an approach can result with no action against the perpetrator, or some bilateral agreement. The second category of outcomes can also be discussed in terms of cost effectiveness, either in real terms, or in conjunction with reputational considerations as well (Levi & Burrows, 2008; Smith & Shepherd, 2017). Such latitude in terms of outcomes and ability to apply cost effectiveness considerations in the pursuit of compensatory outcomes does not appear to be available for other forms of acquisitive crimes in English law, and particularly in the context of theft.

The criminalisation of fraud through a *dishonesty*-based conduct offence does not appear to have been accompanied by a parallel 'mainstreaming' and 'streamlining' of law-enforcement structures and policies, particularly as applied to commercial and professional settings. This is not to diminish enforcement activities in this field, but when compared to the criminalisation of 'all theft' by the Theft Act 1968, the concept of fraud is not policed in a manner that effectively regulates *honesty* in all settings. On the alleged 'upper-scale' of complexity and sum amounts, the Serious Fraud Office (SFO) would appear to be investigating only a handful of cases at any given time, and its case selection processes have not been made clear (SFO, 2017).

In the context of the challenges of ‘mainstreaming’ and ‘streamlining’ the investigation of Fraud Act 2006 offences (RQ2), the literature on the victimology of fraud needs to be considered in the context of the above paragraph. These unique characteristics result in serious limitations that undermine the construction of valid and reliable estimation of the cost of fraud to the British economy (Levi, 1987; Levi & Burrows, 2008; Button, Lewis, & Tapley, 2009; Tunley, 2014). Despite unclear estimation, the literature appears to be consistent in its analysis of the problem of fraud (under the current definition in law) to be extremely wide, particularly in the private sector (National Fraud Authority, 2010; 2011; 2012; 2013; Button & Gee, 2015; Button et al., 2016).

Estimation of the extent of fraud victimisation in the UK surveyed by the author did not include specific estimations on the extent through which victimisation to public and private bodies is caused through ‘predatory’- and ‘commercial’-type offending (Naylor, 2003). Both sectors are exposed to fraud from both internal and external parties, and of varying complexity (Levi, 2008a; ACFE, 2016). Whilst businesses and public bodies are exposed to ‘predatory’-type offences, the focus of this discussion is on ‘commercial’-type offending (Levi, 2008a; Naylor, 2003), particularly as it overlaps with the concept of white-collar crime (Sutherland, 1940; 1944; Naylor, 2003; Smith et al., 2011). These refer specifically to fraud offences commissioned by employees or company officers. These offences may be targeted against the firm (and its stakeholders) or perpetrated to the disadvantage of external stakeholders such as other companies, state agencies, creditors and consumers.

The simplistic view of the ‘duality’ of fraud is that fraud is ‘criminal’ if resolved (or thought of as typically being resolved) by the criminal justice system, or ‘civil’ fraud accounts for those frauds typically associated with the civil courts and other resolution mechanisms (Fisher, 2015). This outcomes-based approach to the identification of ‘criminal’ fraud points away fostering an understanding of the essential characteristics of ‘criminal’ fraud (or ‘civil’ fraud). See chapter Three for a more detailed epistemological discussion with respect to outcomes-based fraud categorisation in the context of the ‘duality’ of fraud (RQ1).

The concept of fraud under the Fraud Act 2006 appears to leave stakeholders with less confidence and reduced conceptual clarity (RQ2), especially if they are aware of other specific particularised offences that relate to their occupation. The questions raised by Tappan (1947) offer a valuable test for distinguishing between criminal conduct, behaviours that are against the public interest, and legitimate conduct. A specific question emerges from the above discussion: what is the extent of social interest in *dishonesty* so as “*to bear the odium of crime*” (Tappan, 1947, p.98)? Whether *dishonest* misrepresentation, failure to disclose or abuse of position ‘amount’ to an offence is an important and unresolved issue, and in practical terms that are mutually exclusive to other behaviours? How can one judge *dishonesty* as the qualifier of whether a violation has occurred or not? The ‘duality’ of fraud (RQ1) is a property that points to tensions between the criminal justice system, the perceived benefits of other resolution mechanisms, or the lack of efforts to officially address harm and victimisation. If viewed more narrowly, particularised offences such as insolvency or value added tax (VAT) frauds are

different to the general *dishonest*y offence in the Fraud Act 2006 with respect to levels of conceptual and practical clarity (Cressey, 1961).

It would appear that the definitive challenge for the definition of fraud in the context of white-collar crime and 'commercial-type offences (Sutherland, 1940; Naylor, 2003) is not an ontological one, but a practical one. In other words, the clarity with regards to the legal definition in the Fraud Act 2006 does not seem to translate to a clear association of *dishonest* conduct with law-enforcement actions outside the scope of particularised offences. This context demonstrates the limitations of the approach to fraud criminalisation employed by the Law Commission (2002) in order to create an offence that applies to 'all frauds'.

In a corporate environment there appears to be a distinct dysfunction between the anti-fraud regime that in imposed by particularised fraud criminalisation and regulations, and the abstract conduct-based offence as it exists in the Fraud Act 2006. For example, in relation to the concept of false accounting (Section 17 of the Theft Act 1968 (as amended). The Companies Act 2006 details duties for the production and submission of financial reports in parts 15 and 16 of the Act. It does not set specific standards for accounting or reporting practices, rather it defers to standards set by associations of the accounting profession to self-regulate the fashion in which their members operate. The Companies Act 2006 contains criminal offences that are clearly and narrowly defined. These offences do not state that a company or its directors should not engage in fraud. Instead, such offences ensure procedural compliance with ongoing company and company director registration requirements as well as compliance with audit and reporting

duties. That is, with the exception of the offence of trading whilst insolvent, otherwise known as fraudulent trading under section 993, which is a preserved measure in the 1985 Companies Act and section 213 of the Insolvency Act 1986. In England and Wales, the specific accounting, financial reporting, and audit standards are determined by the Financial Reporting Council (FRC). The Council establishes best practice audit standards known as the Generally Accepted Accounting Practices (the UK GAAP), and functions an independent regulator of company law (ICAEW, 2016).

A form of market-based private sector self-regulation, company law and the UK GAAP act as an assurance for investors and stakeholders against fraud and malpractice by codifying a standard for financial reporting and an audit regime. An (allegedly) independent review of public company financial statements and underlying methodology (external audit) is the mechanisms that ensures that the shareholders are provided a sufficiently accurate financial representation. Despite common misconceptions (see Levi, 1987; 1992), the standard of audit applied is not absolute, but rather focused on discrepancies and errors that are significant to the representation of company finances (Financial Reporting Council, 2004; Financial Reporting Council, 2014). The audit regime is not impenetrable, nor does it seek to detect such frauds that do not inflict a material impact on the finances of a firm, but it is instead concerned with the overall integrity and methodology of financial reporting (Rezaee & Riley, 2009).

Despite this assurance and standardisation of accounting method and presentation of the financial statements of a firm, non-GAAP accounting appears

to be endorsed by the marketplace as a basis for financial reporting and investments. Of the London Stock Exchange (LSE) top 100 companies in market capitalisation terms on the Financial Times Stock Exchange (FTSE), 95% of companies depart from the GAAP in accounting for profits in their financial reports (PWC, 2016). This is not to imply that criminality is associated with non-GAAP compliance, particularly when compliance is not alleged in the first place, and the departure for convention is rationalised and explained. Instead, the context is provided as an observation of the 'ease' with which investors agree to accept an additional (potential) fraud risk by investing in firms that do not follow a common methodology in representing their revenues, costs, profits or the value of their assets.

Levi (1987) analyses the propensity towards 'self-regulation' in the context of practicality and political reality. Actively 'policing' markets and imposing sufficient intervention to guarantee trust may be politically unpalatable. In a capitalist economy, it is seldom astute to be perceived as causing disruption to market trade and investment. Embedded in this approach is the capitalist romanticism of '*the firm*' and free economic trade systems, and the 'natural' capability to optimise returns on investment (Smith, 1776). Any government intervention is inevitably viewed to interfere with 'natural' market dynamics, and to generate sub-optimal micro- and macro-economic performance (Smith, 1776; Demsetz, 1988).

Without going into a detailed critique on the validity and degrees of confidence that are available to support the above ethos of '*the firm*', the notion appears persistent and resilient even when confronted by ample evidence of abuse

(Sutherland, 1940; Cressey, 1973; Demsetz, 1988; Levi 2008b; Platt, 2015; ACFE, 2016). Individual short-term decisions such as the bundling of re-financed housing debts into commodities seemed to do little to change the context of political debate on self-regulation (The New York Times, 2008; The Economist, 2014). The discussion on regulation and fraud is still rooted in this 'breed' of economic idealism rather than criminology or sociology research. Levi (1987) expands on the tenuous relationship between the political class and the business elite in their perceived roles as the employer of the masses and tax revenue generator, respectively. Deviation from the puritan and profitable behaviour of the capitalist firm are set aside as a rarity or the infiltration of *dishonest* 'bad apples' into the financial system (Levi, 1987).

For example, newspapers and other advertising outlets enforced through self-regulation anti-false advertising rules since at least the middle of the nineteenth century, and long before similar standards were put into law in the UK and the US (Jordan & Rubin, 1979; Miracle & Nevett, 1988; Burns, 1999;). In is another example of regulation by reputation, publishers sought to retain the long-term viability of the print advertisement business model by avoiding inherit consumer distrust as a result of a short-term exploitation by dubious businesses. *Dishonest* misrepresentation, failure to disclose or abuse of position appears not to be 'automatically' associated with the concept of 'criminality', but rather as *dishonesty*-related risk that can be mitigated by deference to reputation.

The question is therefore the extent to which conduct that may appear to be legitimate in a business context can itself qualify as white-collar criminality? In

other words, to what extent does the co-existence of a body of narrowly defined offences and a monolithic conduct-based offence serve the interest of clarity in the context of 'commercial'-type fraud criminalisation (Law Commission, 2002; Naylor, 2003)? Particularised anti-fraud provisions in UK company and insolvency laws, in conjunction with employment law, health and safety, information protection and other industry specific offences, form a body of narrowly defined offences. Such offences are readily understood offences that are both specific to professional settings and offer considerable clarity for stakeholders. Nevertheless, as discussed in section 2.5 above, these offences are only mutually exclusive in *actus reus* terms to otherwise legitimate conduct. *Dishonesty* that may be implicit is such provisions, is the qualifier for criminality for the general fraud offence in the context of any misrepresentation, failure to disclose, or abuse of position. The author submits in this context that the clarity offered by particularised provisions in the context of an anti-fraud and industry standards regimes provides a much "*better guidance on whether the conduct is criminal, and [a] fairer warning of what could happen"* (Law Commission, 2002, p.3).

The aforementioned standard for clarity, which was provided as a justification of the legislation of the Fraud Act 2006, is arguably further diminished by the coexistence of particularised offences alongside a general, monolithic offence, and the absence of entry barriers. *Dishonesty* itself does not appear to be objective, descriptive or grounded in specific and narrow definitions in law (Cressey, 1961). The lack of an objective test implies the use of subjective assumptions in discussing the 'duality' of fraud, as discussed in section 2.2 of this chapter. The relative positioning against 'proper' particularised offences, as well

as *the de facto* expansion of criminality to contexts that were not previously considered to be part of the remit of criminal justice system outcomes appear to lead toward less clarity. Other than the distinction between particularised offences and other behaviours, there does not appear to be any clear guide to determine what examples of *dishonest* conduct are *effectively* associated with potential law-enforcement responses. In light of such clarity, the context provided in this chapter concerning the lack of an objective test and a lower threshold to the monolithic conduct-based offence, there is doubt that the Fraud Act 2006 meets its stated objective of clarity and fairness (Law Commission, 2003). The above context is appositely problematised in the quote below:

> *We take it that anti-social conduct is essentially any sort of behaviour which violates some social interest. What are these social interests? Which are weighty enough to merit the concern of the sociologist, to bear the odium of crime? What shall constitute a violation of them?*
> (Tappan, 1947, p.98)

The critique of the Fraud Act 2006 in this chapter appears to lend contemporary relevance to Tappan's (1947) initial dissent from the definition and scoping of the concept of white-collar crime (Sutherland, 1940). Prosecutorial challenges in the context of 'commercial'-type frauds (Naylor, 2003) were integral to the frame of reference of the Law Commission on Fraud (2002), as discussed in section 2.2 of this chapter. It is therefore apposite to contextualise the structure of the offence and the means through which a (theoretical) criminalisation of 'all frauds' is achieved by the Fraud Act 2006 in the context of the literature on white-collar crime. The emerging observation from the literature and the historical white-collar

crime debate (Cressey, 1961) offers considerable insight into the underlying dysfunction between 'law-in-theory' and 'law-in-action' (Black, 1972).

In sub-section 2.4.1 above, the variability of outcomes in relation to 'predatory'-type frauds were discussed in terms of a theoretical 'misalignment' between criminology theory and the practical application of the Fraud Act 2006 (Naylor, 2003). Different to 'predatory'-type offences, 'commercial'-type frauds are pre-disposed to exhibit variable association with law-enforcement outcomes (Naylor, 2003; Sutherland, 1940; 1949). The theoretical misalignment discussed in section three does not apply as a valid theoretical critique in this context. Nonetheless, the legislative intent in the context of 'commercial'-type frauds is explicitly identified as the driver behind the recommendations of the Law Commission (2002). This focus has also been contextualised above in terms of a 'trade off' with respect to the emergence of perceived inhibitors to law-enforcement in the context of 'predatory'-type fraud that resemble those attributed to 'commercial'-type frauds (Button et al., 2009; 2013, Naylor, 2003). Therefore, the question is what benefits in terms of clarity and likelihood of the realisation of the legislative intent in the 2006 Act has been achieved in the context of 'commercial'-type offences (Law Commission, 2002; Naylor, 2003)?

In the context of a conduct-based criminalisation, it would appear that a two-tier system of offences is effectively in force. The first tier represents particularised and narrow offences which are circumstantially applicable to white-collar professionals. Some of these offences are subject to some degree of market-self

regulation through financial reporting standards and audit regimes in the context of company and insolvency laws. Other offences may be subject to enforcement by non-police bodies such as industry specific regulators, or other regulators such as the Information Commissioner's Office (ICO), environment regulations or health and safety (*inter alia*). Outcomes that relate to known examples of transgressions are consistent with both the typological and sociological theoretical suggestions of an association with resolution mechanisms requiring 'less' (Naylor, 2003; Black, 1976). The second tier relates to a general criminalisation of *dishonesty*, which in itself could encompass most (if not all) of the first tier of offences using sections one through four of the Fraud Act 2006. These offences are not circumstantially exclusive to professionals or to legitimate business environments, but instead are absolute by design (Law Commission, 2002). Unlike Sutherland's definition and scoping of white-collar crime (Cressey, 1961), the Fraud Act 2006 creates a criminal definition based on conduct without underpinning it using narrow criminal definitions of transgressions against the public interest. Similar to the theoretical misalignment discussed in section three, it is questionable to what degree clarity of association between behaviour (*dishonesty*) is achieved outside the scope of particularised offences (Tappan, 1947). The author would be remiss not to include a fundamental quote from the field of military strategy by Frederick the Great (1712-1786):

> *Little minds try to defend everything at once, but sensible people look at the main point only; they parry the worst blows and stand a little hurt if thereby they avoid a greater one. If you try to hold everything, you hold nothing*. (United States Army, 2001, Section 8-1, p.1)

2.6.4 Summary

In this section, the author critically analysed the limitation to the study of fraud that extends beyond the concept of white-collar crime or linked to its unique criminology or victimology. In the contemporary context, the 'duality' of fraud (RQ1) seems to relate principally to the dysfunction between 'law-in-theory' and 'law-in-action' (Black, 1972) in relation to the Fraud Act 2006. The scope of this conduct offence, combined with the pre-existing challenges of 'policing' white-collar crime (Sutherland, 1940; 1944; 1949), and the unique criminology and victimology of fraud (Titus & Gover, 2001; Ganzini, et al., 2001; Levi, 2001; Button, et al., 2009; Perri & Brody, 2012;) were not addressed by the Law Commission (2002). Indeed, the literature accessed by the author does not appear to present evidence to support a notion of increased association between law-enforcement actions and 'commercial'-type frauds (Levi & Burrows, 2008; Levi, 2012; Button, 2013; Ministry of Justice, 2014; Smith & Shepherd, 2017).

In the context of the 'duality' of fraud under the 'blanket' criminalisation of *dishonesty* in the Fraud Act 2006, the primary 'gateway' to the criminal justice system is via the institution of public prosecution (RQ1). The author identified the existence of particularised offences, which denote criminal conduct in a way that makes clear the extent to which it can be applied. However, the Fraud Act 2006 offers no such practical distinction, as it imposes no limitation or entry barriers to the criminalisation of *dishonesty* in the context of a misrepresentation, failure to disclose, or abuse of position. This creates a difficulty to meaningfully argue a material deficiency in law-enforcement with respect to frauds that do not result in a

criminal prosecution (cf Tappan, 1947; Cressey, 1961;). On the other hand, some frauds are sufficiently particularised to be understood and applied to Fraud Act 2006 offences where *dishonesty* is not directed towards a victim that enjoys a 'sovereign guarantee'. For example, a company that makes proper representations with respect to its VAT obligations, and does not trade whilst insolvent, may still act *dishonestly* in its interactions with clients and investors. Complying with the tax code is a narrow and mutually exclusive test for legal conduct; *dishonesty* towards others is (potentially) mutually exclusive to narrowly defined applications of a 'sovereign guarantee' of trust that can still generate an offence under the Fraud Act 2006.

The reader should question whether simplicity is grounded in the ease of offence selection (see Law Commission, 2002, p.3) as compared with a body of offences that may apply (narrowly) to clear and defined typologies or circumstances (Cressey, 1961). Such a diversity and specificity in legislation may better confront the citizen with a specific and proportionate "*odium of crime*" (Tappan, 1947, p.98), and associate these offences specifically with a demonstrable prospect of criminal conviction. The existing general (omnibus) offence encompasses the legal concept of fraud, but the (alleged) simplicity has resulted in complicated and inaccessible law. The Fraud Act 2006 has not fostered the 'streamlining' and 'mainstreaming' of fraud enforcement (RQ2), and the intended scope of application appears to remain stymied.

The discussion above illustrates a general lack of deference to the discipline of law-enforcement as well as the lack of consideration for the unique criminology

and victimology of fraud. It embeds a seemingly impossible property for the post-2006 omnibus offence, which makes the nebulous construct of *dishonesty* the only applicable means of articulating fraud as an offence. The new offence (allegedly) serves as the primary (simplifying) concept in law to deter and prosecute all frauds, regardless of means or circumstances. In the following section six, the alleged simplicity of use with respect to the Fraud Act 2006 is examined.

2.7 The Fraud Act 2006 in Practice

This section will apply the above discussion on the 'role' of the general *dishonesty* conduct offence to the challenge of 'policing' the concept of fraud and the current state of its 'duality' in English law and practice. Whilst previous sections focused on the interface between law-enforcement agencies and victims in the context of the general *dishonesty* offence in the Fraud Act 2006, this section focuses on the prosecution of fraud. The Tappan (1947) framing of criminality in relation to RQ1 will be applied to discussion of the Fraud Act 2006. As no other qualifiers or conditions are attached to the conduct offence of fraud (by *dishonest* misrepresentation, failure to disclose and abuse of position) the extent to which trust is guaranteed in commercial and legal conduct is (theoretically) absolute and uniform.

Whilst the Fraud Act 2006 appears to provide a more orderly approach to the criminalisation of fraud, the non-transactional nature of the Act is less compatible with simple 'predatory' offences (Naylor, 2003). On the other hand, its use of

dishonesty as a criminal qualifier creates its own investigatory and legal difficulties when tested in some 'commercial'-type frauds (Naylor, 2003). The route taken by the Law Commission (2002) pointed away from particularising specifically how financial vehicles are forbidden from being manipulated, or particularising fraud in relation to financial sector services. The idea was that a conduct offence would 'capture all frauds' to such an extent that the fall-back common-law offence of conspiracy to defraud could (finally) be abolished (Law Commission, 1974; 1999; 2002).

Nevertheless, the conspiracy to defraud offence is still available and used subsequent to 2007. It continues to be put to use by the CPS and SFO to prosecute fraud cases, most notably a Ponzi scheme valued at £45 million, and a solar power marketing scheme (SFO, 2016; SFO, 2017). More prominent examples in the media include the London Interbank Offered Rate (LIBOR) index of average interest relates by City of London banks, which is commonly used in international foreign exchange trade by global trade companies and financial institutions. In R v Hayes (2015), a group of traders were charged with manipulating the Yen (Japanese currency) LIBOR and convicted of conspiracy to defraud. The focus of the case for the prosecution was not an examination of single actions taken by the accused, nor proving fraud by establishing *dishonest* misrepresentation, failure to disclose or abuse of position. Whilst this was theoretically achievable, conspiracy to defraud allowed prosecutors and jurors to default to the gestalt meaning of fraud and establish whether two or more persons were conspiring to defraud in the manner above. In the case of the LIBOR rigging affair, the accused could have argued that they were acting in the best interest of

their employer, and that they were not individually benefiting, or standing to benefit, from any particular representation. Conspiracy to defraud allowed a 'looser' examination of specific actions, whilst focusing on the agreement between the accused to conspire in the overall scheme and towards its potential outcomes.

The CPS-issued guidelines direct prosecutors to favour the use of statutory Fraud Act 2006 offences over the common-law offence of conspiracy to defraud. The House of Lords in Scott Appellant v Metropolitan Police Commissioner Respondent [1975] found that "*the object of a conspiracy must not be confused with the means by which it is intended to be carried out*." The court ruled that despite the existence of a statutory offence (the Theft Act 1968 at the time), conspiracy to defraud forms a part of the general criminal law relating to "*fraud in its widest sense*" (gestalt), irrespective of statute. To defraud is held as:

> *to […] dishonestly […] cause unjustifiable prejudice to that other. The meaning is synonymous with the corresponding adverb "fraudulently" and is much older than the common law itself* (Scott Appellant v Metropolitan Police Commissioner [1975]).

From an investigative standpoint, such offences require an 'all-knowing' prosecutor, who is in possession of all the material facts to develop the narrative for the offence, and unique insight into the state of mind of the offender. The evidence in R v. Hayes (2015) came from a number of banks and their computer systems, and the investigation was triggered following the payment of fines regulators in the US and UK by implicated banks. Initial attention was brought to the practice of LIBOR-rigging by the Wall Street Journal in April of 2008

(Mollenkamp, 2008). In June 2012, the New York Times had published a chronology of the digital evidence to a conspiracy to manipulate the exchange rate by the perpetrators (The New York Times, 2012). In September of 2012, incriminating text messages between named traders were made public, and showed the wilfulness, and depth of knowledge of the fraudulent trade and cavalier attitudes towards it by the participants (The Guardian, 2012). This was in conjunction with regulators and law-enforcement agencies in the US, UK, and Singapore issuing summonses for information from banks that were suspected to be involved (The Guardian, 2012). It was in this context, and level of knowledge and depth of evidence that existed between regulators and law-enforcement agencies, that the SFO initiated its own investigation into the matter (Binham & Parker, 2012).

The primary source of evidence in the R v. Hayes (2015) investigation appeared to come from digital evidence controlled by, and provided by, cooperating financial institutions. This is different to the 'classic whodunit' (who-has-done-it) investigation and discovery model (Innes, 2012). In this type of investigative scenario, an investigation is instigated in response to a report of a crime being commissioned in the past, and the identity of the offender is deduced from gathering and analysing evidence generated by the offence. The hypotheses developed by the investigators are subject to test in the trial-phase: jurors are asked to determine whether the evidence generated by the offence indicating the identity of the offender to be the accused (beyond reasonable doubt)? The questions are not whether (for example) a house was burgled or not, but rather by whom (Innes, 2012).

Conversely, investigations into frauds carried out by employees in the course of their employment generate evidence that is mostly in the possession of the victim organisation (through computers, phones, and other records) (Comer, 2003; Wells, 2011; Bragg, 2016). By extension, a criminal investigation into the actions of an employee or a company officer could be thought of as an akin to a 'self-solving' investigation, whereby circumstances make the identity of the offender readily established (Innes, 2012). Knowledge of the identity of the offender often rests with victims of both 'predatory' and 'commercial' offences (Naylor, 2003), particularly when the fraud is conducted through representations made in person (Button, et al., 2009; 2013). In cases when there was no 'real world' communication between the offender and victim it can be said that a fraud (or so called 'cybercrime' or 'cyberfraud') investigation takes the shape of a 'whodunit' (Levi, et al., 2015).

Fraud investigations and prosecutions, particularly of the 'commercial'-type (Naylor, 2003) are considered 'difficult' (Fraud Trials Committee, 1986). Whilst some rely on narrow definition and scoping of an offence (false accounting, for example), others are conducted using either the Fraud Act 2006 or the common-law *conspiracy to defraud* provision (CPS, 2012). In order to establish the necessary evidential basis required to substantiate fraud based on a qualifier of *dishonesty*, there is a need to develop a state of knowledge that may be equated to the theological concept of an 'all-knowing god' (Kvanvig, 1986). Under the Code for Crown Prosecutors (CPS, 2013, p. 6), a pre-indictment determination is conducted as to the sufficiency of the evidence to provide a realistic prospect of

conviction in reference to itself and possible defences. Whilst particularised offences seem to be grounded in objective tests of material evidence (from which *dishonesty* can be inferred), a *dishonesty*-based offence requires a wide body of evidence to establish *mens rea* as a subjective test. From an investigatory perspective, this demand can be answered by a wide evidential basis which extends beyond the transaction of representation from which harm had been inflicted on the victim. This appears to be consistent with the special powers of investigation available to the director of the SFO under section two of the Criminal Justice Act 1987. The provision grants the Director of the SFO the power to compel persons of interest in relation to an ongoing investigation as well as third-parties individuals or firms to produce documentary evidence or testimony. This provision empowers the SFO to create the evidential basis required to the investigation of 'complex fraud' (Fraud Trials Committee, 1986; Savla, 1997). Victims that are not in legal possession of the relevant data to establish that an accused has been *dishonest* (or the identity of the offender) are therefore less likely to be able to offer substantial evidence to establish *dishonesty*.

The concept of *dishonesty*, together with the concepts of misrepresentation or failure to disclose, all stem from civil litigation (see Carter v. Boehm [1766]; Derry v Peek [1889]; Tackey v Mcbain [1912]), which seeks to achieve a balance of probabilities standard during adversarial litigation. 'Mainstream' law-enforcement are (typically) not available to accept reports of fraud harm and victimisation, nor is it likely that knowledge of alleged fraud would be investigated in a similar fashion to other offences (Button, 2011; Button et al., 2013). The shift in focus from particular incriminating material findings, such as a written falsehood about

an investment opportunity, or titles to property or land, to evidence 'predatory' offences would appear to undermine potential investigative successes. Under the Fraud Act 2006, a police officer would be required to make a determination of the likelihood of such documentation to evidence *dishonest* conduct. The traditional context in which law-enforcement operates will tend to favour an incremental process of deduction as opposed to the application of subjective judgement in attributing *dishonesty* to the actions of others.

In Carter v. Boehm [1774], failure to fully disclose facts and circumstances in the process of procuring an insurance policy is given as reason for its annulment. The policy in question related to a trading post that was known by the person seeking the policy to be inadequately defended whilst under threat of an attack by an enemy fleet. The annulment of the policy was made as the omission of that knowledge amounted to concealment and fraud:

> *Some circumstances... not having been mentioned... at the time the policy was underwritten, amount to a concealment… The underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwrite[r] into a belief that the circumstance does not exist, and to induce him to estimate the risk if it did not exist. Keeping back such circumstance is fraud... The question, therefore, must always be whether there was, under all the circumstances, at the time the policy was underwritten, a fair representation or a concealment, fraudulent if designed... and chaining the risk understood to be run.* (Carter v Boehm [1774]

Carter v Boehm [1774] continues to be a reference point as a qualifier of grounds for annulment on account of fraud, in contract and insurance related litigation, in the commercial ('civil') jurisdiction in England and Wales. The contemporary reader will not be surprised to find similar examples, resolved in a similar manner, despite the case belonging *prima facia* within the criminal justice system. In Involnert Management Inc v Aprilgrange Ltd & Ors. [2015], a depreciation in value demonstrably known to the owner of a luxury yacht was not disclosed to the insurer when a policy was signed for a higher than market value. The concealment of the new valuation and market value (the yacht was placed on sale at the time), was just over half of the amount for which the yacht was insured. Furthermore, the owner did not abide by all the terms of the policy and did not maintain the yacht to the required standard, which led to its eventual write-off and insurance claim. The definition in Carter v Boehm [1774] is that the concealment, or failure to disclose, as it is explained in the decision amounted to the court's understanding of the gestalt of fraud. This invoked the principle of not allowing a person to benefit from his own fraud or allow the disinheritance of another (see Bracton 1210-1268) but was not in itself criminal as per R. v. Jones [1703] ("[not to indict a] man for making a fool of another") (and see Law Commission, 1974; p.4; Law Commission, 2002; Sharpe, 2013).

Notwithstanding the above discussion, the Fraud Act 2006 has resulted in fraud charges. KPMG (2016), a multinational accountancy and consultancy firm, tracks high value-sum criminal fraud prosecutions across the UK and annually publishes regional figures and examples of cases litigated by the criminal jurisdiction in that area. The examples provided reflect frauds against employers or relate to

particularised offences such as tax and customs-related frauds. Occupational frauds are reported to the police typically in the form of a report of the findings of an internal investigation (Button, et al., 2015). Organisations are less likely to consider the criminal justice system as the most useful resolution mechanism as discussed in the previous section.

The KPMG (2016) report includes a number of examples of employees of public sector bodies, such as local councils, the National Health Service (NHS), and large sum embezzlement from within the private and financial sectors. Other examples include VAT-related frauds, benefits and customs-related offences, which are typically investigated by dedicated agencies, and using particularised legal provisions for fraud. Only two examples of 'predatory'-type fraud (Naylor, 2003) were included as examples. Of the large sum frauds that were litigated in the courts, the proportion of monies lost were respectively: financial services sector (38%), public sector (26%), investors (19%), commercial businesses (8%), and 'others' including individuals (9%). Originally developed for the Home Office, the now dissolved National Fraud Authority (2010; 2011; 2012; 2013) implemented a methodology for the assessment of the scope of fraud in the UK based on an extrapolation from a national victim survey. The indicator methodology was 'revived' by private-sector stakeholders (Gee & Button, 2015; Button, et al., 2016) following the discontinuation of the public-sector engagement. The last annual cost estimation of fraud under the Home Office instruction was £51.9 billion (National Fraud Authority, 2013) and £193.4 billion under private sector instruction and access to sources of knowledge (Button et al., 2016).

The absence of an objective test for the *dishonesty*-based offence in the Fraud Act 2006 discussed in section two of this chapter. An objective test is nonetheless available for particularised provisions as discussed in section four above. Such offences are often a form of 'self-solving' offences (Innes, 2012), as the objective test refers to evidence generated by the offence and often pertain to legal entity of the offender, particularly so in frauds directed against the state. Another class of victims who are potentially able to identify perpetrators are corporate victims who are in possession of (enough) evidence generated by the offence and are able to forensically attribute them to a known entity. This is often achieved through the findings of an audit or a self-resourced investigation (ACFE, 2016; Bragg, 2016). Victims who have ultimate control and ownership of evidence of their victimisation are better situated to 'take' law-enforcement agencies over the threshold needed to negate the default assumption of good faith in English law (Teubner, 1998). Negating this assumption may be equated to articulating a reasonable suspicion that may initiate the investigation of a criminal offence (Association of Chief Police Officers, 2005).

Law-enforcement agencies must grapple with the difficulties in overcoming the assumption of good faith to 'police' a social function that is traditionally (and to some extent, currently) external to their social function (the protection of property as opposed to the *dishonesty*). Particularised and narrowly prescribed offences can be readily deduced to points of proof and *prima facia* evidence of offences can be deemed sufficient to access investigatory powers. As discussed in the section above, the general concept of fraud requires an investigatory induction to infer *dishonesty* as opposed to 'legitimate' loss or honest misrepresentation.

Whilst this may be somewhat easier with respect to ‘predatory’-type frauds, ‘commercial’-type frauds represent professed ‘financial craftsmanship’ that is perceived to be beyond the capability of law-enforcement to investigate (Fraud Trial Committee, 1986).

There appears to be another difficulty, which is concerned with the challenge of ‘mainstreaming’ and ‘streamlining’ a uniform understanding and enforcement of the concept of fraud as defined in the Fraud Act 2006 (RQ2). The co-existence of resolution mechanisms operated and enforced by the state outside of the criminal jurisdiction is a (useful) fact, and not a subject of critical discussion in this thesis. What is a subject for critical analysis is the ‘erosion’ of the (alleged) intrinsic criminality of fraud (The Criminal Law Committee, 1966; Law Commission, 2002), as it is over-generalised and non-particular, and criminalised in a manner that is not generally divisible from legitimate conduct (even if it may be unethical). The general offence appears to be ‘eroded’ by particularised offences that relate to specific ‘sovereign guarantees’ of trust (and specific and specialised enforcement bodies in some cases). The offence is further ‘eroded’ by the deference to existing regulatory and common-law provisions, which are resolved under mediaeval principles of restorative justice and particular attention to addressing ill-gotten-gains (see discussion on Bracton (c. 1210 – c. 1268) in chapter four). This mechanism of legal custom presently relates to a system of precedents which creates specific tests for principles of reasonable conduct in common-law and means of articulating harm as torts and civil wrongs. In turn, these mechanisms help regulate the marketplace by establishing the principles according to which individuals foster a near uniform understanding of market-rules, and the principles

which define and test them. These rules may also be used in extra-judicial resolution, as they provide all parties involved an understanding of the tests that will be applied in hypothetical commercial litigation (Black, 1976; Black & Baumgartner, 1983; Ulph, 2006; Rawlings & Lowry, 2017). This is similar to the discussion on the merits of specificity and narrow descriptions of offences in criminal law (Tappan, 1947; Tyler, 2006).

In the above section, the author examined the extent to which the unpacking of the gestalt of fraud into criminal law serves an as *effective* means for the criminalisation of 'all frauds'. The literature identifies *effective* criminalisation by the association of known infractions with law-enforcement action and criminal justice system resolution (Hester & Eglin, 1992). A dysfunction in the relationship between the bounds of an offence and the extent to which known examples of it generate responses by law-enforcement agencies demonstrates a gap between 'law-in-theory' and 'law-in-action' (Black, 1972). Above in this chapter, the 'duality' of fraud is discussed in terms of outcomes of Fraud Act 2006 offences discussed in its legislative context, in terms of social theory and 'predatory'-type offence, and in the context of white-collar crime (Sutherland, 1940; Black, 1976; Law Commission, 2002; Naylor, 2003). This section focused on the expectation of effective prosecution set by the Law Commission (2002, p.3), and the expansion statutory fraud criminalisation.

It would appear that outside of the limited scope of offences previously subject to enforcement efforts, there has been no noticeable expansion of *effective* (Hester & Eglin, 1992) criminalisation (Ministry of Justice, 2012). The claim of

‘simplification’ with respect to the new offence appears to apply to pre-existing typologies and areas of enforcement (Ministry of Justice, 2012), much like in the case of the criminalisation of ‘all theft’ (Griew, 1995). There appears to be little evidence of typological or circumstantial expansion of the association of known examples of *dishonesty* with law-enforcement action. Furthermore, The Fraud Act 2006 reflects a conduct-based approach to criminalisation, which is meant to pre-empt technological or typological innovations or use of ‘loopholes’ (Law Commission, 2002). Nevertheless, it would appear that particularised statutory offences and the common-law offence of conspiracy to defraud are still in extensive use by law-enforcement bodies and (inclusive *inter alia* of HMRC and local authorities). Particularised statutory offences do not unpack the gestalt of fraud. Instead, they provide a narrow definition for fraud in the particular circumstance of criminalisation to which they apply. Furthermore, despite the apparent theoretical ability to prosecute agreements to engage in a Fraud Act 2006 offence under the general definition for conspiracy under the Criminal Law Act 1977, the gestalt-qualified conspiracy to defraud common-law offence is retained due to its prosecutorial advantages (CPS, 2012).

The question that arises from this discussion is the extent to which the absence of a definition in law for fraud was an obstacle to the criminalisation of fraud and criminal fraud trials? Where the difficulties with the law in 2002 (including case cited by the Law Commission) ontological, or practical? In other words, has the criminalisation of fraud suffered from an objective ambiguity in the past, or rather the extent to which criminal law applied to it? The Law Commission (2002) provide a partial answer. In its critique, the Law Commission (2002) cites

‘untidiness’ as a challenge contributed to insular examples of fraud being prosecuted using one provision, whereas another was indicated by the courts to be more applicable (see section two above). The focus placed on the prosecution of fraud and its ‘misalignment’ with the practice of law-enforcement and social theory discussed in this chapter does not appear from the discussion in this section to enable prosecutors as anticipated (Law Commission, 2002).

2.8 Conclusion

The above chapter provided a review of the literature pertaining to the ‘duality’ of fraud in English law (RQ1), and inhibitors to the ‘streamlining’ and ‘mainstreaming’ of the concept of fraud in law-enforcement actions (RQ2). The ‘duality’ of fraud refers to the variability of outcomes with respect to the general offence of fraud in sections 1-4 of the Fraud Act 2006. The ‘duality’ is studied as a dysfunction between ‘law-in-theory’ and ‘law-in-action’ (Black, 1972) and the inconsistent association of e*ffective* criminalisation across the span of fraud criminalisation under the 2006 Act (Hester & Eglin, 1992). It appears in the context of the general fraud offence, which was explicitly intended to criminalise ‘all frauds’ (Law Commission, 2002), that the scope of ‘theoretical’ offending is wide, and comparable in its absolutism to theft or other violent offences in law. In ‘action’, the concept of fraud is subject to a variety of resolution mechanisms outside of the criminal justice system (Levi & Burrows, 2008; Law Commission, 2014; Smith & Shepherd, 2017). Whilst there may be latitude to consider perceived and objective inhibitors to law-enforcement practices (Button et al., 2013), the focus of this thesis is the Fraud Act 2006 and its alignment with social theory and practice.

In its reasoning for recommending a conduct-based offence, the Law Commission (2002) explained that:

> *Introducing a single crime of fraud would dramatically simplify the law of fraud. Clear, simple law is fairer than complicated, inaccessible law. If a citizen in contemplating activities which could amount to a crime, a clear, simple law gives better guidance on whether the conduct is criminal, and fairer warning of what could happen if it is. [...] A general offence of fraud would be aimed at encompassing fraud in all its forms. It would not focus on particular ways or means of committing frauds*. (Law Commission, 2002, p.3)

Nevertheless, this literature review contested the existence of such applied clarity with respect to the *effective* criminalisation of fraud as it is defined by the Fraud Act 2006.

The offence in the Fraud Act 2006 transcends typological (Naylor, 2003) and sociological (Black, 1976) categories for association of known harm and victimisation with law-enforcement activities. Furthermore, many previously existing (and subsequently introduced) fraud provisions were not abolished by the act, creating together with the preserved common-law offence of *conspiracy to defraud*, a body of overlapping offences. Such offences rely on an implicit understanding of the gestalt of fraud (as in *conspiracy to defraud*) or specify unique circumstances where misrepresentations or omissions are construed as fraud (such as in the context of housing benefits or tax). The wide scope of the offence appears to create difficulties in its application, even in the context of theoretically suggested association with law-enforcement activities and

‘predatory’-type offence (Naylor, 2003). It would appear that the Fraud Act 2006 limits the ability of victims and law-enforcement to realise the theoretical potential for criminal justice system responses in the context of ‘predatory’-type offences (Levi & Burrows, 2008; Button et al., 2009; 2013; Naylor, 2003). Furthermore, the difficulties identified from the literature appear to mimic (mis)conceptions regarding ‘predatory’-type offences that are otherwise attributed to ‘commercial’-type offences, namely moral ambiguity and an allure of complexity (Naylor, 2003; Button et al., 2009; 2013). This theoretical ‘misalignment’ in not entirely a result of the legislative approach to fraud criminalisation since 2007 (Fraud Trials Committee, 1986). Nevertheless, stakeholder confusion and the resulting theoretical ‘misalignment’ appears to be somewhat augmented by its focus on conduct, the absence of an objective test, and typological and circumstantial span.

The criminalisation of ‘all frauds’ through its definition into criminal law does not seem to result with a similar outcome as the criminalisation of ‘all theft’ – retention of the degree of its *effective* criminalisation and a degree of legal modernisation. The concept of theft is different to the concept of fraud in that the former is axiomatically criminal (Naylor, 2003), whilst the latter is a manner of conduct (Law Commission, 2002) that the literature warns against a sole basis of criminalisation (Tappan, 1947; Cressey, 1961).

Chapter Three: Methodology

3.1 Introduction

In the above chapter, the author discusses critical gaps in the literature with respect to the 'duality' of fraud (RQ1), and the 'mainstreaming' and 'streamlining' of fraud enforcement (RQ2) in England and Wales. The context of the literature review supports the need for a study of the 'legal effectiveness' (Black, 1972) of the Fraud Act 2006, and the extent to which it may not represent the scope of *effective* fraud criminalisation in England and Wales. In this chapter, the author presents and explains the development of the research philosophy adopted in this thesis. The following section (3.2) includes a detailed discussion of the research philosophy. First, a reflexive discussion of the author as a decisionmaker and potential source of error in the development of an approach to research is developed. This is followed by discussion of four categories of approaches to research of the phenomenon of fraud that were identified from the literature, and a consideration of their applicability to the focus of the main research questions. From this problematised background, key philosophical assumptions are presented to support a justification for a mixed-methods (Bryman, 2004; Teddlie & Tashakkori, 2009) approach to research.

In section 3.3, the design for a historical socio-legal functionalist analysis (Weber, 1978) of secondary data and key literature resources is presented. The study provides an investigation of the essential characteristics of the association of fraud with Crown-led investigation and prosecution as part of the social function of

fraud resolution through the characterisation of the historical ‘duality’ of fraud. The investigation was guided by five intermediate research objectives that are presented further below in this chapter.

In section 3.4, the design for an empirical survey-based study is presented as a means of examining the contemporary characteristics of the ‘duality’ of fraud by applying the theoretical and historical contexts developed in chapters two and four. The research presents a bespoke measurement tool that was designed and used in a survey completed by one-hundred-and-forty (N=140) participants who were asked to indicate their perception of likely fraud resolution mechanisms in response to hypothetical examples of fraud offending. This presentation includes discussion of research philosophy, design, sample procedure, and analytical approach.

3.2 Research Philosophy

3.2.1 Reflexivity and Positionality

This sub-section discusses the role of the researcher and a potential source for error and tendency towards a normative preference in the development and design of the approach to methodology discussed further below in this chapter. In section 6.2, a critical reflection on the reliability and validity of the findings from this study is provided relative to the research questions and the methods that were implemented (see sections 3.3, and 3.4). The following is a discussion of the researcher as a source of error and subjective influence on the *design* of the

approach to the study of the ‘duality’ of fraud in this thesis. The role of the researcher as an observer and a decision-maker provided relative to consideration of methods from the literature, attempted approaches, ontology, epistemology, and the tools presented in sections 3.3, and 3.4 further below in this chapter.

The approach to the challenge of RQ1 in the context of the discussion of the association with law-enforcement activities is applicable to examples of *dishonest* conduct and observation of their course of resolution. In thinking about the ‘duality’ of fraud, the researcher perception of this phenomenon was that of one that cannot be directly observed from anecdotal evidence. Furthermore, the literature accessed by the author (academic or professional) did not result with the identification of a clear definition of the essential characteristics of fraud. The professional background of the researcher included training as a network-intelligence analyst and service as an intelligence analyst (later officer) in the Israeli Defence Force (IDF) mainly in counter-terrorism and counter-proliferation roles (2006-2011). Following this period, the researcher continued to analytical roles in the context of private-sector fraud examination, digital forensics and electronic-discovery in Israel and then in the UK. In 2015, the researcher earned the qualification of Certified Fraud Examiner (CFE) from the Association of Certified Fraud Examiners (ACFE).

This doctoral thesis forms a part of the continuing interest in deepening understanding of the concept of fraud in applied circumstances. This interest stems from earlier focus on indirect fraud victimisation (Levi & Burrows, 2008),

which was a key theme of dissertation work submitted by the researcher as part of a master's programme at the University of Derby (2012-2013). The dissertation research (Tolkovsky, 2013) focused critical attention on the gap in policy responses to indirect-fraud victimisation, and the absence of means to systematically characterise and quantify indirect-victimisation. The normative preferences of the researcher in his role as an intelligence officer gravitated towards evidence not grounded in qualitative interpretation and subjective assessments. Nevertheless, the nature of academic interests in the field of fraud does not appear to offer ample opportunities to engage in quantitative data collection and analysis. Instead, through research methods training and discussions with the director of studies, the researcher adapted to an apparent imperative to collect and critically analyse qualitative data (interviews with stakeholders). After receiving an award for 'best dissertation', the researcher was encouraged to continue to expand on study of fraud and address barriers to the applied understanding of fraud. The focus on the 'duality' of fraud emerged from 'unfinished business' from the master's dissertation project, as it had been referred to in the literature (Levi & Burrows, 2008; National Fraud Authority, 2013) and by the interviewees who participated in the study. The 'duality' between the criminal resolution of fraud and other resolution mechanisms may not be unique to the UK. Nevertheless, the categorical criminalisation of fraud as a conduct-offence appears to create an interesting relationship between statutory law and the applied understanding of fraud as a concept in criminal law. In this context, the Fraud Act 2006 appeared to the researcher as both anecdotally useful, and systematically confusing.

Following from Black's (1972) analysis, 'anecdotally useful' refers to considerations of whether theoretical scenarios could be qualified as fraud under the qualifications of what fraud *is* in sections one through four of the Fraud Act 2006 ('law-in-theory'). 'Systematically confusing' refers to the 2006 Act as a 'guide' to associate behaviour with law-enforcement responses to known incidents ('law-in-action'), and public perceptions (see sections 2.4, and 2.6). From the outset of this project, the researcher was philosophically pre-disposed to approach all manners of inquiry (literature review, data collection, and analysis) relating to the 'duality' of fraud as pertaining to a social phenomenon and not a legal or practice-related topic of investigation. Subject to this pre-conception, legislation, law-enforcement activities, and decisions by victims were all seen as relating to the workings of an 'invisible hand' (Smith, 1776) and a yet-to-be characterised social dynamic. One of the key references to a 'duality' of fraud in the literature is in context of a barrier to the measurement of fraud harm and victimisation (Levi & Burrows, 2008; National Fraud Authority, 2013). To the extent of the researcher's awareness, the literature tends to accept the 'duality' of fraud in near-axiomatic terms, and without sufficient fidelity in the characterisation of its essential properties and functionality (Levi & Burrows, 2008; Fisher, 2015; Smith & Shepherd, 2017). It was therefore not clear how this social phenomenon can be measured directly, what were the rules that shaped it, or how such rules could be understood from anecdotal observations (see further discussion in sub-section 3.2.3 below).

An abundance of anecdotal of evidence of the 'duality' of fraud appears to exist, particularly between criminal and civil case-law ('civil' including fraud-related

compensation-seeking insolvency proceedings in non-criminal courts). The prospect of secondary-data analysis was therefore integral to the approach taken towards research design, yet no method appeared to be available through which to aggregate anecdotal evidence into a means of systematic inquiry. This initial focus on insight from case-law correlated with the researcher's normative preference towards quantitative research and the creation and analysis of large datasets. Furthermore, the master's degree research methods training exposed the researcher to structured approaches to qualitative data analysis (Miles, et al., 2013), and a specific software application (NVIVO). The prospect of systematically analysing and developing theoretical synthesis from case-law was appealing in this context.

Parallel to the development of a literature review, research design focus shifted towards systematising case-law in order to investigate the essential characteristics of cases litigated in the criminal and civil jurisdictions in England and Wales. This was grounded in an earlier iteration of RQ1, which focused on the historical changes in the divide between criminal and other resolution mechanisms in the context of fraud. In retrospect, this approach was both simplistic and naïve. The author's assumption was that case-law analysis would yield sufficient reliability and fidelity so as to be able to describe the 'duality' of fraud, and the practical 'dividing line' both historical and contemporary. The epistemological assumption that underpins the current scope of RQ1 is discussed in sub-section 3.2.4 below.

The dysfunction between ‘law-in-theory’ and ‘law-in-action’ (Black, 1972) in the context of the Fraud Act 2006 as discussed in the literature review stems from the ‘duality’ of fraud relative to legislation and the categorical criminalisation of fraud. The approach to the study of the ‘duality’ of fraud was not limited to the enactment of the Fraud Act 2006 onwards, but rather in wider historical perspective of a social phenomenon to which legislation could apply. There was therefore an appeal in considering a pre-2006 perspectives, for its expected value-added in finding a lesser dysfunction between criminalisation and the prospect of law-enforcement responses.

This context provided an early indication of an interpretivist component that would subsequently inform possible approaches to primary data collection (which were not yet determined). As will be discussed in the following sub-section (3.2.2), this normative preference was not realised due to barriers to reliable analysis and synthesis that emerged from test experimentation with the data. Deeper and more systematic analysis and synthesis of case-law and archival materials was conducted so as to inform the design of a primary data collection tool. This was initially packaged as historical literature review, and later fully developed as part of a mixed-methods design towards historical secondary data analysis (see chapter four). Nevertheless, a case-law research project presented an underlying tension between ample *anecdotal* evidence of the ‘duality’ of fraud, and a need to synthesise *systematic* understanding of the relationship between different fraud resolution mechanisms.

The above approach seemed preferable, particularly given awareness of the limitations of the researcher as an 'outsider' in interpreting context and managing the collection of primary qualitative data or securing sufficient access to participants. The decision to include a substantive qualitative analysis of secondary-data (case-law) or archival data was to eliminate (to the extent possible) the unique background of the research as a source of error in the creation of a dataset (Bryman, 2004). The disadvantages of the researcher as a party to qualitative primary-data creation may be seen (in part) as advantageous in secondary-data analysis, the perspective as an 'outsider looking in' may result in fewer contextual pre-conceptions. The normative preference in terms of primary-data collection was to collect quantitative data (particularly using survey-based tools) so as to not interact with participants directly and thereby (hopefully) enhance the reliability and replicability of such a measurement (Bryman, 2004; De Vaus, 2013). In the following sub-section 3.2.2, a discussion is provided of approaches to the study of fraud from the literature, and those that were considered in the context of this project.

3.2.2 Approaches to the Study of Fraud

The 'duality' of fraud refers to the difference of outcomes in terms of the prospect of criminal justice system resolution in the context of Fraud Act 2006 offences. The apparent dysfunction between 'law-in-theory' and the criminalisation of 'all fraud' and 'law-in-action' (Black, 1972) was discussed in social science terms (Black, 1976; Naylor, 2003; Tappan, 1947). Despite claims of such insight being contained in the Fraud Act 2006 (Law Commission, 2002), there does not appear

to be a definitive guide in law to the association of *dishonesty* and law-enforcement activities. The discussion in this chapter reflects an awareness of objective difficulties with the investigation of some frauds on the grounds of financial complexity (Fraud Trials Committee, 1986) and in cases where the identity of the offender is obscured through the use of information and communication technology (ICT) (Levi et al., 2015). Nevertheless, the focus of this thesis is on the extent to which the 2006 Act can function as a reliable guide for 'law-in-action' (Black, 1972)

The set of frauds that are subject to statutory criminalisation under the Fraud Act 2006 was, to the author's perception, a category that is theoretically wider to that of frauds that are resolved by the criminal justice system. Nevertheless, the litigation of civil cases appears to represent a public-gallery substantiation of a reasonable suspicion that a statutory offence of fraud had occurred, and a determination of the facts on a basis of balance of probabilities by the state via the courts. There does not appear to be a theoretical legal basis through which to understand how frauds that are subject to resolution by the criminal justice system, as Fraud Act 2006 offences, are mutually exclusive to the conduct that underpins fraud resolved by the civil justice system. The initial approach was therefore to develop a typological and contextual means of identifying essential characteristics through an examination of case-law from criminal and civil jurisdiction.

The development of the case-law research project reflected an underlying tension between ample *anecdotal* evidence of the duality of fraud, and a need to deepen

the understanding of fraud resolution mechanisms through *systematic* analysis. In the following paragraphs a discussion of an approach that was developed alongside the literature review the second half of the first year of work in this thesis is presented, and the reasons for which it was not included in this submission are explained.

Fisher (2015) distinguishes between criminal fraud and civil fraud in England and Wales, strictly, according to the resolution mechanisms, remedies, and consequences that were applied in its resolution. Consequently, it appeared that the distinction between 'criminal' and 'civil' fraud was grounded in the circumstances under which an offender will only be liable for *dishonesty*, without being charged or convicted of a crime (Fisher, 2015; Hayton, 2015; Smith & Shepherd, 2017). Whilst this does not form part of the scope of this thesis, the literature offers potential frameworks to systematise knowledge of fraud stakeholders and circumstances. The literature offers means of distinguishing between victims of fraud and offenders in the context of smaller typological subsets of the wider concept of fraud.

A combined interpretivist and functionalist approach was developed as an exercise of applying concepts from the literature to secondary-data as a means of inductive theory generation in relation to RQ1 ('duality'). A dataset of criminal and civil case-law was to be used as a basis for evaluating the role of theoretical and circumstantial distinctions from the literature in determining the preference of one jurisdiction over the other. Two samples, one of cases from the criminal jurisdiction, and one from the civil jurisdiction (inclusive of insolvency

proceedings), were to be coded for typological features (i), and litigation imperative (ii). Typological features refer to categorical information about the victim, offender, and circumstances in which the fraud occurred. Circumstances were to be coded for type of fraud offence (as prosecuted, or as appropriate Fraud Act 2006 section in civil litigation), and circumstances of fraud discovery (routine, through audit, by a whistle-blower, through pro-active detection efforts, or by an official receiver or liquidator). The litigation imperative variable refers to sought remedies, sanctions, and eventual remedies ordered by the courts.

The case-law analysis would not have been 'legalistic' in nature, but instead identify typological and circumstantial features in an attempt to associate (some of) them with the preference of one resolution mechanism over the other. Accordingly, cases would have been coded according to the information (narrative) included in the reporting of the case into the case law database that were accessible to the researcher (The British and Irish Legal Information Institute, and Westlaw). The coding system would have included such victim attributes as sector (Levi, 2008a), degree of contributing or enabling behaviour (Titus & Gover, 2001; Button, et al., 2009; Smith, et al., 2011), stratification, and morphology (Black, 1976). Offenders would have been coded for imperative (distress, greed, opportunistic, or organised crime), relation to victim, stratification (through proceeds of crime or legitimate assets), stratification, and morphology (Sutherland, 1949; Black, 1976; Cressey, 1973; Naylor, 2003; Levi, 2008a). The envisioned matrix would have resembled the following:

Table 1 – Case-Law Analysis Matrix

		Sought sanctions or remedies	Imposed sanctions or remedies
Victim	Type		
	Enabling behaviour		
	Stratification		
	Morphology		
Offender	Imperative		
	Relation to victim		
	Stratification		
	Morphology		
Circumstances	Applicable Fraud Act 2006 section		
	Circumstances of fraud discovery		

Furthermore, in the context of RQ2 (‘mainstreaming’ and ‘streamlining’), the above matrix of post Fraud Act 2006 case law would have been compared to earlier periods in English history, namely the last decade of the sixteenth, seventeenth, eighteenth, and nineteenth centuries. This comparative analysis of the five datasets (four historical and one contemporary), would have provided a pre-industrial, industrial, post-industrial and modern era bases for comparing the scope of fraud association with the criminal justice system. Variations in the strength of association between a given indicator and one of the jurisdictions would have served to further examine specific inhibitors and catalysts for applied law-enforcement activities.

A further anticipated advantage influenced this design to include criminal and civil court samples representing earlier periods so as to add analytical depth to the investigation of the essential characteristics of the 'duality' of fraud. As discussed in the literature review (section 2.7), key definitions in the Fraud Act 2006 can be traced to compensation-seeking ('civil') case-law as components of liability and in relation to damages in commercial disputes. The inclusion of a historical perspective to case-law analysis was therefore anticipated to add further analytical value through being able to refer not only to the gestalt of fraud, but also some of its specific qualifiers under the 2006 Act.

There were a number of limitations that dissuaded the researcher from developing the above approach as secondary-data analysis tool as part of this thesis. First, the two samples would have accounted for a small portion of *prima facia* fraud offences which were resolved by the criminal justice system or using other dispute resolution mechanisms. Criminal jurisdiction cases would have been subjected to three non-probabilistic reductions that could not be accounted from the data. They will have included cases that were reported or otherwise became known to a law-enforcement agency, investigated as a result, and resulted with a prosecution (CPS, 2013) to which an early guilty plea was not entered (Ministry of Justice, 2012). Similar to the criminal jurisdiction, civil jurisdiction cases are representative of those incidents where a decision by the court was required. Civil litigation cases represents a smaller portion still, in the sense that they relate to only one non-criminal justice system resolution mechanism, and one to which there are high entry barriers, both financial (Smith & Shepherd, 2017), and in terms of underlying social dynamic (Black & Baumgartner, 1983). In other words, the civil

jurisdiction may only account for those frauds that were resolved externally to the criminal justice system, but nevertheless required legal adjudication in order to achieve final resolution (Black, 1976; Black & Baumgartner, 1983; Smith & Shepherd, 2017).

Another limitation to data analysis became apparent after testing some of the data. Criminal court decisions in England and Wales are decided by jury panels, and thus offer (far) less written discussion of the evidence and circumstances of the case in comparison to civil court decisions. This resulted with a (relative) abundance of information about parties to civil litigation, as well as narrative concerning the behaviour that underpinned the allegation of fraud, circumstances relating to its discovery, harm, as well as other relevant information. By contrast, the descriptions of offences on which a jury panel decides are shorter and contained fewer details. This was ever more pronounced in records of historical criminal cases, where the available information on record for a case could include only a handful of sentences. This limitation invalidated the utility of the above approach towards systematisation of case-law. The primary concern was that the prevalence of social indicators, financial instruments, evidence of financial harm, and other typological observations, would be more prevalent in the civil court sample due to overall comparative richness in detail.

Following on from the above exercise, the researcher's focus returned to the literature in search of an approach to the study of fraud that could be implemented. The adoption of social sciences theory and methods for the examination of the 'duality' of fraud (Black, 1972) drove the researcher to revisit

the question of how can the ‘duality’ of fraud be indirectly measured so as to generate analytical insight? The literature presents a number of approaches to collect and analyse data in the context of fraud. Four general categories of empirical data gathering tool designs emerged from the literature that was reviewed in this context. The first is victim survey-based primary data collection, which occurs in studies that measure the extent of the phenomenon of fraud (alone) or in the context of other categories of harm and victimisation (National Fraud Authority, 2013; Gee & Button, 2015; Office of National Statistics, 2017). The second category relates to perceptions of crime severity towards multiple criminal concepts which include fraud (Levi & Jones, 1985; Wolfgang, et al., 1985; Green & Kugler, 2010). The third category offers qualitative analysis and insight that is based on narratives that relate to a limited number of real-world cases and the perceptions of those that are directly involved in various capacities, but predominantly victims (Button, et al., 2009; Arvedlund & Roth, 2010 Button, et al, 2013; 2015). The fourth category relates to analysis of types of frauds that are litigated in the criminal courts as a means of estimating the scope of (‘criminal’) fraud, and categorisation of typologies and victims (KPMG, 2016).

Studies from the above four categories have been a source of considerable insight for discussing some of the essential characteristics of the dysfunction between ‘law-in-theory’ and ‘law-in-action’ in the context of the Fraud Act 2006 (Black, 1972). Nevertheless, the types of method considered did not appear to sufficiently align with the study of the ‘duality’ of fraud (RQ1), or the potential for legislation to enhance conceptual clarity in the context of fraud in mainstream criminal justice practice (RQ2). The first category of studies aims to generate an

extrapolation of the extent and cost of fraud (across the UK or limited to England and Wales) from self-reporting of harm and victimisation by victims. Such methodologies do not distinguish between frauds that involve criminal justice system resolution or law-enforcement activities. Nevertheless, responses are grounded in the state of knowledge of participants (who may themselves not be aware of all fraud experienced by their organisation) as well as individual perceptions and interpretation of the gestalt of fraud (Levi & Burrows, 2008; National Fraud Authority, 2013). In part, this contributes to the tendency of such methods to generate highly variable estimations of fraud, particularly in relation to the private sector (National Fraud Authority, 2010; 2011; 2012; 2013; Gee & Button, 2015; Button, et al., 2016).

The second category (perceptions of crime severity) also appeared as somewhat misaligned with the main research questions. The measurement designs appear to focus on perceptions towards examples of offending including fraud, and relative 'ranking' in terms of severity, or appropriate criminal sanction (Levi & Jones, 1985; Wolfgang, et al., 1985; Green & Kugler, 2010). These tools appear to focus on individualistic opinions as to 'what ought to be', as opposed to 'what is' which better relates to the parameters of RQ1 ('duality'). Furthermore, the author agrees that some categories of crime may be 'more severe' than fraud, yet that does not fall within the parameters of the main research questions, which frame the concept of fraud relative to itself. The dysfunction that unpins RQ1 ('duality') refers to the extent of *effective* criminalisation (Hester & Eglin, 1992) across the span of offending, that may be encompassed under the Fraud Act 2006, and not the perceived relativism against other offending categories.

The third category (qualitative analysis of narrative from stakeholders) provides ample examples for underlying perceptions that underpin elements of disassociation between the gestalt of fraud, and its unpacking in the context of 'mainstreamed' and 'streamlined' law-enforcement activities (RQ2). Studies from this category appear to provide examples for the workings of an 'invisible hand' (Smith, 1776), yet they provide limited insight to support inductive reasoning of its essential characteristics. Such studies are based on accounts of known victims, which appear to be identified primarily (if not exclusively) by their eventual interaction with law-enforcement agencies (Button, et al., 2009; 2013). There is little information gathered from stakeholders in circumstances where the criminal justice system route was not chosen by the victim, either through lack of knowledge and understanding, the preference of civil litigation or bilateral agreement, or a decision not to take any further steps following the discovery of fraud. This limitation extends to both individual, corporate and government sector victims. Given that the primary source of knowledge in such cases are victims, objective access difficulties, and the researcher's own evaluation of a low affinity between such an approach and the main research questions led to the dismissal of similar approaches to design. Furthermore, the researcher questioned whether the risk in direct conversational interaction with victims was proportionate to the expected contribution to knowledge in the context of the main research questions. These ethical limitations would not have been sufficiently mitigated for this thesis given the limited relevance of victims as exclusive sources of knowledge in the context of the main research questions.

The fourth category (categorisation of criminal litigation) provides a basis for generalisations of 'what is criminal' based upon cases that were adjudicated by the criminal justice system (Tappan, 1947; KPMG, 2016). A more elaborate approach which presents a similar means for the study of case-law as secondary data and the reasons for which it was ultimately not included in this thesis were presented above in this section. In the context of this discussion, an epistemology that is based on cases decided upon by the criminal courts is ultimately limited to a subset of examples of 'criminal' frauds. Such an approach does not account for frauds that were investigated but did not result with criminal charges, and frauds that were subject to early guilty pleas (Ministry of Justice, 2012). Furthermore, such a subset of fraud does not include information on frauds that were reported to a law-enforcement agency but not investigated further and relates to RQ2 ('streamlining' and 'mainstreaming').

Of the above four types of approaches from the literature, the second approach (perceptions of crime severity) appeared to be the most viable in terms potential for adaptation to the requirement of the main research questions. The below discussion provides a detailed explanation of key design features from a US and a UK example of such an approach. First is a methodology developed by the US Department of Justice in which 60,000 participants were asked to rate the *seriousness* of offences based on short descriptions of victimisation (Wolfgang, et al., 1985). The US study included one-hundred-and-ninety-eight offences, which contained examples of white-collar crime (including fraud) alongside 'mainstream' offending (including violent crime, sexual offences, and narcotic-related crime). Offences were presented using short sentences and represented various forms of

criminality and degrees of harm within them in a consistent and utilitarian manner, with no details on the offender or the victim beyond that which qualify the offence.

The above survey cannot be characterised as fraud-centric, nor does it describe or directly name fraud in any of the one-hundred-and-ninety-eight cases. The study does explore several elements of corporate criminal liability, indirect victimisation, white-collar crime and offences that relate to *dishonest* conduct but emphasises mainly financial and corporal forms of harm in a direct and readily understood fashion (Wolfgang et al., 1985 p. vi-x). The study does not measure the extent to which offences are enforced and made synonymous with a response by law-enforcement agencies. This feature of the above design appealed to the researcher as a style of measurement could be adapted to the parameters of the main research questions (see section 3.4).

Levi and Jones (1985) examined crime *severity* perceptions in England and Wales in a study was focused on fraud offence descriptions relative to other forms of 'predatory'-type offences (Naylor, 2003), and sampled the general public and law-enforcement personnel. The study measured an underlying sense of crime *severity* with respect to both 'volume' and violent crime, and with respect to fraud and related offences where harm and victimisation are not readily understood. The stated aim of the study was the examination of the differences and similarities in indications of crime seriousness among the general public and law-enforcement. The results suggested that fraud against individuals and companies is similarly integrated into the 'crime seriousness' matrix from both the public and the police but is secondary to 'volume' or violent crime (Levi & Jones, 1985 p.

240). In addition to the similar conceptual design of the measurement from the US study (Wolfgang, et al., 1985), the analytical value-added in including both members of the public and law-enforcement personnel as potentially applicable to the main research question was on note.

Despite their advantages, the above examples appear to focus on 'internal' perceptions of 'what ought to be' towards crime and are therefore conceptually 'misaligned' with the main research questions and analytical focus in this thesis. Nevertheless, the substantive measurement technique appeared to the researcher as potentially applicable subject an adaptation of the measurement to measure 'what is', as opposed to 'what ought to be'. The parameters of RQ1 ('duality') and RQ2 ('mainstreaming' and 'streamlining') relate to the concept of fraud relative to the scope of its categorical criminalisation under the Fraud Act 2006 and particularised provision. The main research questions are subject to examination as a dysfunction between 'law-in-theory' and 'law-in-action' in the context of the Fraud Act 2006, and not relative to other offence categories (Black, 1972). The reader will recall from the literature review that a comparative discussion is developed in the context of an apparent higher correlation between statutory criminalisation and law-enforcement activities across the concept of theft. This discussion is developed in principle due to the similarity in the manner of criminalisation between the Theft Act 1968 (as amended) and the Fraud Act 2006; both statutes provide a legal definition for their headline offence, which is subject to categorical criminalisation.

Given the above context, there appeared to have been a need to develop an approach to research that can realise the potential insight from historical socio-legal analysis as well as include a means of measuring contemporary perceptions. In the following paragraph a justification for the implementation of a mixed-methods (Bryman, 2004; Teddlie & Tashakkori, 2009) approach is presented. Notwithstanding further discussion of research philosophy in the ontology and epistemology sub-sections (3.2.3, and 3.2.4), the following refers to the two methods discussed in sections 3.3, and 3.4 in this chapter.

The decision to develop an interpretivist socio-legal historical analysis (originally in the context of the literature, and subsequently as an analytical chapter), results from the aforementioned consideration of a potential contextual contribution. The potential to develop contextual means of understanding the phenomenon of the 'duality' of fraud and what (potentially) measurable properties of it may be used as variable in quantitative research provided the justification for a qualitative study (Bryman, 2004). This form of reasoning towards the development of approaches for measurement and identification relates to the researcher's former role as a counter-proliferation and counter-terrorism analyst. It can also be compared to the tracing of *proceeds of crime* through a labyrinth of transactions and financial entities across criminal and legitimate contexts, whilst maintaining an awareness of such funds as ill-gotten gains (Financial Action Task Force, 2006). This normative preference is grounded in a need to replace contemporary and historical examples of the 'duality' of fraud (RQ1) with a functionalist understanding of its properties (Weber, 1978). An observation of the manifestations of variability in fraud resolution mechanism across social changes

in English history offers insight into the essential properties of fraud criminalisation as a social function. The historical research objective, and research philosophy are presented in section 3.3, and the findings and discussion are developed in chapter four.

The resulting inductive reasoning from the development of the historical context ('phase one', section 3.3) informed the epistemological development of the empirical deductive measurement tool ('phase two', section 3.4). In chapter four the reader will find an emerging characterisation of the criminalisation of fraud as underpinned by an imposition of a 'sovereign guarantee' of trust for commercial and official conduct. This guarantee appears to be sparingly applied by the Crown, and stems from its protection of its interests, and narrow particularisation of circumstances where a guarantee of trust is essential for commerce and private investment. This is contrasted with the divergence between the concepts of fraud and theft. Both concepts existed prior to the industrial revolution as categories of inter-personal disputes subject to bilateral resolution of private prosecution aimed at a compensatory form of justice (Klerman, 2001). The concept of theft became categorically associated with law-enforcement activities and punishment-seeking Crown prosecution (Emsley, 2010). Nevertheless, the concept of fraud retained its narrow scope of criminalisation and was not categorically criminalised prior to the enactment of the Fraud Act 2006 (Taylor, 2013).

I therefore sought to develop a measurement that would simply ask participants on the consistency of their experience of a 'sovereign guarantee' of trust across the span of offending under the Fraud Act 2006. Furthermore, the approach to

theory generation preferred in this thesis is not specific to fraud and is not grounded in fraud-specific theory. Instead, theory is generated relative to Black's (1976) theory of law, which is general to dispute resolution mechanisms including law and social controls, and the relationship between them in a non-offence specific context. This preference was grounded in the researcher's view of fraud as a standard category of crime, and one that should be explained through general social and criminological theory. The researcher was aware of Black's (1976) theory of law in general terms prior to starting this project but had not yet considered its meaning or application in full or as a tool for critical analysis in the context of fraud. The initial scoping of the investigation into the 'duality' of fraud led to a re-consideration this theoretical framework. On re-examination, Black's (1976) theory of law appeared to offer a framework to develop an understanding of the 'duality' of law in broader and functional terms than the categorical identification of observed resolution mechanisms (Weber, 1978). This capacity extends to both contemporary and historical resolution mechanisms, a topic which is discussed below and in the literature review in the context of RQ1. In addition, Black (1976) positions formal and informal resolution mechanisms on a continuum of social controls and law (to represent ordinal or rank order division), on which a binary definition (to represent nominal or categorical division) for the 'duality' of fraud (RQ1) can be established and tested historically and in the present. Furthermore, the application of 'more' law is tied by Black (1976) to socio-economic indicators, which are subject to historical change, particularly in the context of industrialisation.

As discussed above in this sub-section, the literature reviewed in this context did not appear to offer validated data collection tools through which to directly engage with RQ1 ('duality') or RQ2 ('streamlining' and 'mainstreaming'). The dysfunction between 'law-in-theory' and 'law-in-action' with respect to Fraud Act 2006 offences appears to require further methodological development aimed at assessing the social circumstances to which the Act applies (Black, 1972). A survey-based methodology offered a basis for quantitative analysis, and a platform for concise and narrow 'indirect' measurement of the 'invisible hand' (Smith, 1776) which determines the course of fraud resolution. The preference towards the inclusion of such a study was both in terms of design, ethics (see sub-section 3.4.3 below), as well as a normative preference towards positivism (Bryman, 2004, pp.14-18) and quantitative analysis. The latter is grounded in the perception of the 'duality' of fraud as an external social function (Weber, 1978; Durkheim, 1982), and the consequent imperative to develop means for its measurement. Nevertheless, available literature and methodology does not appear to directly characterise or measure this dynamic (as discussed above). In the absence of a readily apparent approach to be adopted and direct the design of a survey-based data collection tool, further development steps were deemed necessary.

3.2.3 Ontology

This sub-section examines the assumptions made with respect to the nature of key components that are core subjects for research in this project, and the reality in which they exist. Ontology is a branch of philosophy that studies the nature of and essence of being, which is fundamental to the conceptualisation of key

concepts in scientific inquiry (Martins, et al., 2013). In approaching social science methodology, the ontological basis must be established through a set of assumptions of the nature of the social phenomenon that is subject to investigation. In the context of this chapter, the challenge is to qualify what *is* the 'duality' of fraud. 'Duality' may (and does) exist as a property of socially constructed concepts of crime that are commonly associated with law-enforcement responses to know examples of the behaviour which their headline denotes (Hester & Eglin, 1992). This property is defined in chapter one (introduction) as the variability in outcomes of an offence, and particularly the dichotomy between by the use of the criminal justice system or other dispute resolution mechanisms.

The extent of this dichotomy is analogous to a degree of dysfunction between 'law-in-theory' and 'law-in-action' in the context of the headline offence to which it relates, or a specific legal definition of an offence (Black, 1972). The 'duality' refers to the extent to which external legal definitions apply to the use of law as a social force (Black, 1972; 1976). In this thesis, the view of the 'duality' of any offence category is grounded in the relationship and functional association between the use of criminal law and a category of offending as a 'social fact' (Durkheim, 1982). 'Social facts' are both external and independent from individuals, and their experience is common to all members of society, yet it may be subject to different individualistic interpretations and error in measurement (Durkheim, 1982). No particular individual possesses superior knowledge or influence over this reality although levels of insight may vary. Durkheim (1982) discusses 'social facts' in terms of a 'whole that is larger than the sum of its parts'

(p.127), or in distinguishing between the elements making up a biological cell, and the gestalt concept of 'life' (pp. 128-129). By similar analogy, 'social facts' can be considered in terms of an 'emergent property':

> *Systems at each hierarchical level have two characteristics. They act as wholes (as if they were a homogeneous entity), and their characteristics cannot (not even in theory) be deduced from the most complete knowledge of the components, taken separately or in other practical combination. In other words, when such systems are assembled from their components, new characteristics of the new whole emerge that could not have been predicted from knowledge of the components.*
> (Mayr, 1985, p.58)

This approach to the ontology of the concept of 'duality' provides a useful conceptualisation of the hierarchical relationship between the 'duality' as a 'social fact', and knowledge of it that can be derived from mere examples. Whilst the latter refers to the former, deepened understanding of the essential properties of the former ought to be characterised through observation of how it interacts with reality, as opposed to its components.

The second ontological component is that which defines what is the meaning of the gestalt term of fraud ('what is fraud'). The critical discussion in the literature review supports a conceptual separation between the definition for fraud in sections one through four of the Fraud Act 2006, and the practical scoping of 'criminal' fraud in the context of RQ1 ('duality'). The definition adopted for what fraud is, therefore, flows from the 2006 Act and the work of

the Law Commission (2002): Fraud is qualified by *dishonest* misrepresentation, failure to disclose, or abuse of position. This assumption is examined in an historical (pre-industrial) perspective in section 4.3.

3.2.4 Epistemology

This sub-section examines assumptions through which a researcher develops an understanding of the 'duality' of fraud as a 'social fact' (Durkheim, 1982). Epistemology is a branch of philosophy that studies means of knowledge generation, the derivation of meaning, and discusses logical frameworks (assumptions) through which reality could be understood and meaning conveyed (Burrell & Morgan, 1979, pp. 1-4). The above ontological assumption with regards to 'duality' being a 'social fact' is consistent with the positivist epistemological positioning, which is grounded in the application of natural sciences logic to the social sciences (Burrell & Morgan, 1979; Durkheim, 1982). The positivist assumptions (Bryman, 2004, pp. 13-18) is grounded in the derivation of knowledge form empirical observation of reality and the application of deductive reasoning towards the nature of the property that is being examined. It stems from the framing of subjects of social sciences research in terms of 'social facts' that exists independently, similarly to objects of research in the physical sciences (Durkheim, 1982; Bryman, 2004).

As discussed in sub-section 2.2.2 above, a validated means of empirical data collection and analysis was not directly available from the literature accessed by the author. The context of RQ1 requires a development of an understanding of

the ‘duality’ of fraud in historical and contemporary terms through a consistent frame of reference. The relevance of positivism is to the contemporary component, as it relates to empirical measurements that can be conduct in the timeframe in which this thesis is authored. The positivist component of the mixed-methods study in this thesis is presented in section 3.4 below, and in chapter five. Whilst the literature review provides relevant theoretical framework that discuss variability of resolution mechanism in the context of fraud (section 2.4), a context for the understanding of what is being measured was missing.

The framing of the ‘duality’ of fraud in RQ1 as a ‘social fact’ (Durkheim, 1982) implies that its contemporary existence and interactions with the social world are a continuation of its consistent historical existence and manifestations. The inclusion of an historical dimension to RQ1 (‘duality’) implies the preference of the functionalist approach to the nature of society as being of considerable consistency in structure and properties of its internal self-regulating functions (Weber, 1978; Burrell & Morgan, 1979). Deductions as to the essential characteristics of the ‘duality’ of fraud can be made through functionalist analysis (Weber, 1978) of its varying manifestations across socio-economic changes and developments (qualitative). Furthermore, the function of fraud criminalisation can be developed as a means for empirical (quantitative) research.

The general inference from historical socio-legal analysis to the understanding of the contemporary element of RQ1 and the development of recommendations in the context of RQ2 is grounded in functionalist discussed above. In the context of this implementation of a mixed-methods research strategy (Bryman, 2004; Teddlie

& Tashakkori, 2009), the interpretivist (‘anti-positivist’) approach to the implementation of the qualitative (secondary) of historical socio-legal analysis is adopted. The interpretivist paradigm adds a dimension of analysis through the latitude to foster of an understanding based on contextual analysis of a social phenomenon and is not necessarily based on primary data (Willis, et al., 2007). The ‘reconstruction’ of some properties of the ‘duality’ of fraud through its historical manifestation adds value to the development of a subsequent positivist study through the functionalist approach (Weber, 1978). The understanding that emerged from the development of the historical socio-legal analysis informed the development of the positivist single measurement presented in section 3.4.

On reflection, it is possible that the positivist component design may have been developed independently of this context as part of an inquiry of perceptions association of criminal law with the concept of fraud. Nevertheless, the historical functional component of RQ1 presented in section 3.3 informs the analysis of the findings from the positivist study. Chapter four serves to deepen the understanding of the relationship between the concept of fraud and criminal law. The reader will find functionalist analysis of drivers for particularisation, the role of law in inter-personal disputes, and the historical divergence between the concepts of theft and fraud and the role of Crown prosecution relative to the two. This analysis provides increased depth to the application of the positivist findings and the development of recommendations in the context of RQ2 (‘mainstreaming’ and ‘streamlining’) in chapter six (conclusion and recommendations). It allowed the researcher to refer to an apparent ‘social fact’ (‘law-in-action’) that underpins a

dysfunction in effective criminalisation relative to the scope of criminalisation in the Fraud Act 2006 ('law-in-theory') (Black, 1972).

3.2.5 Summary

The design of the approaches to data collection and analysis that are presented in sections 3.3, and 3.4 in this chapter and are grounded in a positivist (Bryman, 2004, pp.13-18) approach to social research. The research design is influenced by Black's (1972, p.1087) approach to 'legal sociology', which studies the law as subject to "*scientific analysis of legal life as a system of behaviour*". The application of the social sciences to the study of law is a process of "*[discovering] the principles and mechanisms that predict empirical patterns of law*" (Black, 1972, p. 1096). This approach relates to the discussion of the social and contextual circumstances onto which the categorical criminalisation of 'all fraud' was applied, as discussed in the literature review above. Consequently, a two-phased mixed-methods (Teddlie & Tashakkori, 2009) approach was adopted as discussed below.

'Phase one' critically analyses past illustrations of a disparity between criminal and other dispute resolution mechanisms in the context of the modern construct of profit-driven crime (Naylor, 2003). A discussion of the research philosophy and methodology with of this phase is provided in the proceeding section of this chapter, and the analysis and findings are provided in chapter four of this thesis. Chapter four provides an inductive functionalist (Weber, 1978) analysis of secondary data and sources on dispute resolution from history and sociology

literature. The findings of this investigation provide contextual and functionalist understanding of the apparent dysfunction between 'law-in-theory' and 'law-in-action' (Black, 1972, p.1087).

'Phase two' utilises a positivist (Bryman, 2004, pp.14-18) empirical study that features a single measurement to test whether the epistemology of the 'duality' of fraud (RQ1) enables insightful research and supports theoretical suggestions in empirical study. The critical contribution of 'phase one' was in developing an epistemological framework to the study of the 'duality' of fraud, primarily in the form of identifying the underlying social function of effective fraud criminalisation (Hester & Eglin, 1992). The conclusion of chapter four, submits that the effective criminalisation of fraud is a manifestation of a 'sovereign guarantee' of trust in commercial and official conduct. A single measurement questionnaire was developed to denote the extent to which typological features of fraud referred to in the literature, in the context of enforcement challenges are associated with a law-enforcement response (Black, 1976; Naylor, 2003; Button, et al., 2009).

The study of the 'duality' of fraud as a 'social fact' (Durkheim, 1982) requires an explanation of how its essential characteristics can be identified. Yet the literature reviewed by the researcher did not seem to point towards a means of understanding the social function of associating fraud with law-enforcement activities. In other words, what social structures and perceptions collectively shape the 'collective consciousness' to engage the senses to view fraud as a challenge to the existing social structure and a basis for law-enforcement response (Black, 1976; Durkheim, 1982)? Nevertheless, such an approach will

lack epistemological clarity; how can there be a measurement of ‘a thing’ that relates to an underlying social function (Smith, 1776; Weber, 1978) and is not itself subject to direct observation (Bollen, 2002; Merton, 2016 [1968])? In other words, what is it that underpins the perceptions and social structures (as they exist in contemporary society and historically) that prefer the criminal justice system over other resolution mechanisms across the concept of fraud?

The above questions compounded the mixed-methods approach taken in this thesis (Bryman, 2004; Teddlie & Tashakkori, 2009). RQ1 (‘duality’) was expanded to include both contemporary and historical qualitative dimensions in order to foster an understanding of the essential characteristics of the social function that is later subject to quantitative analysis. This application differs from mainstream triangulation of reality using mixed-methods in the sense that the interpretivist functionalist stage (‘phase one’) does not involve primary data collection (Bryman, 2004). Instead, the ‘qualitative’ discussion is developed from functionalist analysis of historical narrative and specific contributions to the literature on historical dispute resolution. This was preferred over the development of an interpretivist analysis of contemporary narrative in favour of an observation of the phenomenon of the ‘duality’ of fraud over time and through socio-economic changes as discussed above.

3.3 ‘Phase One’ – Secondary Data

3.3.1 Historical Socio-legal Interpretivist Approach

This sub-section provides methodology-oriented discussion of the first of two phases of data collection and analysis that were carried out as part of this thesis. The study introduced in this section is a secondary-data based interpretivist analysis into the essential characteristics of the criminalisation of fraud in English law, which is presented in chapter four of this thesis. The study provides functionalist analysis of the historical application of higher ‘amounts’ of law (Black, 1976) in response to incidents of fraud. The study reflects an attempt to develop a deepened understanding of the social function behind the association of different ‘amounts’ of law (Black, 1976) and settlement agents (Black & Baumgartner, 1983) with fraud. The reader will find in chapter four a systematic inquiry into the variability of fraud resolution mechanisms in a socio-legal historical analysis of the ‘duality’ of fraud as a ‘social fact’ (Durkheim, 1982). The study addresses RQ1 (‘duality’) through its historical perspective. Further analytical value to the contemporary analysis of the ‘duality’ of fraud (RQ1) is derived consistent with the functionalist assumption (Weber, 1978; Burrell & Morgan, 1979), as discussed in the above section. Similarly, the socio-legal historical analysis adds value through contextualising ‘mainstreaming’ and ‘streamlining’ law-enforcement in the context of fraud, and the function of legislation therein (RQ2).

Five intermediate research objectives (or research questions) were derived from RQ1 ('duality'), and RQ2 ('mainstreaming' and 'streamlining') and refer to the context provided in the literature review in chapter two. These research objectives are aimed to develop an understanding of the essential characteristics of *effective* fraud criminalisation in English law. These characteristics are discussed in terms of an 'invisible hand' (Smith, 1776) behind the resolution of fraud using varying 'amounts' of law (Black, 1976). The reader will note that the modern construct of 'criminal justice' grounded in readily identifiable processes, institutions and court jurisdictions, is a recent phenomenon that had begun to emerge in the 1880's (Ashworth, 2000; CPS, 2013). The research objectives are therefore articulated using the constant of 'use of more law' (Black, 1976) as a means of denoting the underlying social dynamic in use of the modern criminal justice system as a resolution mechanism. The following are the intermediate research objectives that were developed to address the historical component in RQ1 ('duality'):

1. Have the defining characteristics of the gestalt of fraud been a constant in English law, or a concept shaped by case law or legislation (or both)?
2. Is the 'duality' of fraud (in terms of use of varying 'amounts' of law for fraud resolution) a historical trend, or a more recent phenomenon?
3. Was the particularisation of fraud in law aimed at substantiating an overriding criminal definition of fraud, or has it specified historical states of 'duality'?
4. Can the social dynamic behind the historical relationship between use of 'higher' and 'lower' amounts of law ('criminal' and 'civil' or bilateral resolution) (Black, 1976) be characterised?

5. Given the criminalisation of ‘all thefts’ (Theft Act 1968 as amended) and ‘all frauds’ (Fraud Act 2006), how did the two concepts relate to the development and social functions of the institutions of public prosecution?

3.3.2 Method

As part of this study, a number of legal and historical databases, as well as key publications relating to despite resolution, the concept of fraud and the history of substantive and procedural law in England and Wales were accessed. The basic structure of the investigation tentatively identified three periods of history that were inferred as potentially capturing relevant circumstantial change that would offer an opportunity to learn about the ‘duality’ of fraud as a ‘social fact’ (Durkheim, 1982). The three periods were (i) time immemorial to early industrial times (1189 – circa 1750), (ii) circa 1750 – the introduction of public prosecution in England (1880), and (iii) 1880 onwards. The analysis of the first and second periods is provided in chapter four, whereas the analysis of the third period was amalgamated into the discussion and analysis provided in the literature review. Chapter five (‘phase two’ and see section 3.4) relates to the contemporary period in which this thesis was authored. The identification of the above time periods flows from the discussion in the above section, and particularly the structural-functionalist assumption towards the ‘duality’ of fraud (Burrell & Morgan, 1979, pp. 49-57).

The above periods of time, particularly the first and the second, were identified as representative of fundamental aspects of social change (industrialisation and shift

from agrarian to capitalist society). Whilst the social dynamic that determines the course of fraud resolution itself was assumed to be a lasting 'social fact', changes to its manifestation were expected to be insightful. As in the literature review in chapter two, the reader will find in chapter four a comparative discussion of the concept of fraud relative to the concept of theft. The introduction of public prosecution in the 1880's (period three above) may appear to drastically change the resolution dynamic relative to the concept of theft toward effective categorical criminalisation (see section 4.7). Nevertheless, the reader will find contextual analysis of social change as a driver to the re-shaping of the guarantee of the right to property in response to social change subject to the structural-functionalist assumption (Weber, 1978; Burrell & Morgan, 1979).

The types of sources used can be classed into two categories, literature, and secondary data (in the forms of case law, historical archives and legislation). In addition to the theoretical background presented in section two of the literature review, which features Black's (1976) theory of law and third-party theory (Black & Baumgartner, 1983), literary sources were used in the following way: a general frame of reference was developed from contributions pertaining to the legal history of English law and legal history, both in general, and in relation to acquisitive crime and fraud. This general framework was used to conceptualise a time-line of critical developments in procedural law, as well as hallmark changes in legislation and fraud-related challenges. Sources were identified through digital library searches of books and journals that provided a genera historical analysis of legal history, as well as search of reference to fraud in historical context. Sources used in publications were also accessed if they referred to a theme that appeared

to be relevant. Through Google Scholar (scholar.google.com) there is an option to search for publications that cite a particular source – this technique was also used alongside the keyword fraud to identify further sources of potential relevance. These searches have also contributed to the identification of secondary-data sources that were used in historical research, as discussed in the following paragraph.

Secondary-data sources were queried and 'sifted through' by the researcher in order to provide depth and examples that are insightful in the context of the main research questions, as well as address the intermediate research objectives. Intermediate research objectives one, three, and five in particular were investigated with extensive reliance on: Bracton (c. 1210 – c. 1268) in Harvard Law School Library, 2003), and "*British History Online*" (Institute of Historical Research, n.d.), the "*Parliamentary Rolls of Medieval England* (Ed. Given-Wilson, et al., 2005), and Westlaw. These databases were searched for the keywords of 'fraud' and 'defraud' to identify types of sources and periods of history from which relevant records were available for examination by the researcher. Result types included case law, mediaeval legislation, official records of transactions, claims of fraud in courts and in political discourse. Selective and unique examples were analysed as they added value in the context of the theoretical frameworks (Black, 1976; Klerman, 2001), or the intermediate research objectives.

The key analytical contributions from the historical socio-legal study provide further epistemological understanding of the social dynamic behind the 'duality' of fraud, and a basis and justification for empirical study in the following section

(Berger & Luckmann, 1967; Weber, 1978). This is achieved through the contextual analysis of fraud in historical records dating back to the thirteenth century that demonstrate the historical consistency and durability of the essential characteristics of the gestalt term of fraud. The 'duality' of fraud as it has been characterised in the discussion of ontology and epistemology in the above section is observable in historical records and appears to have been typical of other modern definitions of acquisitive crime, inclusive of the concept of theft. The social dynamic behind the 'duality' between the use of 'lesser' and 'higher' amounts of law in response to the same acquisitive crime typologies (including fraud) is identified in the literature, and further refined by the researcher (Klerman, 2001). The role of the concept of theft in the social circumstances from which the institutions of public prosecution emerged is contrasted with responses to 'moral panic' with respect to the concept of fraud (Ashworth, 2000; Taylor, 2013; Schubert, 2015). The historic mode of legislation with respect to fraud ('particularisation') is characterised as a means of postulating on its function as a means of effective criminalisation in the context of interpersonal litigation (Klerman, 2001).

3.4 'Phase Two' – Primary Data Collection and Analysis

In this section the reader will find a presentation of the second phase of research undertaken in the context of the overall research philosophy and objectives presented in section 3.2 above. The study is based on the epistemological expansion on the underlying social dynamic behind the 'duality' of fraud (RQ1), and the intermediate research objectives discussed in the previous section. The

relevance of the historical insight to the development of a primary-data collection tool is grounded in the functionalist (Burrell & Morgan, 1979) assumption. The ontological view of fraud as a 'social fact' that is experienced by members of society as an external 'thing' that is independent of internal interpretation supports the survey-based methodology presented below (Durkheim, 1982; Groves, et al., 2011). The study is based on the identification of a 'sovereign guarantee' of trust in commerce and official conduct as the social function fulfilled by *effective* criminalisation of fraud (elaborated upon in chapter four) and seeks to identify its present-day scope.

3.4.1 Contemporary Empirical Approach

The discussion in section two of this chapter qualifies the gestalt of fraud using sections one through four of the Fraud Act 2006 (*Dishonest* misrepresentation, failure to disclose, or abuse of position). As part of the overall ontological assumption, the definition in the Act is used to capture the essential characteristics of fraud as a literal term, and not a criminal offence. For the purposes of phase two and the research design below, the Act applies a categorical criminalisation of fraud. As discussed in chapter two, there appears to be a dysfunction between the scope of criminalisation in the Act ('law-in-theory'), and the scope of effective criminalisation ('law-in-action') (Black, 1972). In order to clarify this to participants in the study that is presented below, the briefing materials (see below and in Appendix A) clearly state that all case descriptions pertain to criminal offences.

3.4.2 Theoretical Background

The study outlined in this section refers to a second phase of theory generation in the context of the 'duality' of fraud (RQ1). Different to the above phase one, which described a study of secondary data and interpretive approach to analysis, this phase two is grounded in a positivist assumption of reality (Weber, 1978; Burrell & Morgan, 1979). The dysfunction between 'law-in-theory' and 'law-in-action' (Black, 1972) in the context of fraud is analysed (retrospectively of 'phase one') through a theoretical perspective, and a functionalist perspective deduced from historical interpretation (Durkheim, 1982).

Three assumptions were made with respect to possible theoretical suggestions of law-enforcement activities in response to known examples of fraud. The first assumption was that 'predatory'-type offences will generally be better associated with law-enforcement activities than offences of the 'commercial'-type (Naylor, 2003). In the literature review, Naylor's (2003) framework is used to identify a typological 'fault line' in terms of the likelihood of law-enforcement responses that the general fraud offence in Fraud Act 2006 spans across. The second assumption was that offences where harm was directed 'upwards' on three social scales will typically result with the application of a high 'amount' of law 'downwards' on the same social scales. These social scales are stratification, morphology (relative positioning in the division of labour) and organisation (in terms of rank and relative exclusive associations) (Black, 1976). The third assumption was that particularised offences will generally be better associated with law-enforcement activities than those subject to conduct-based

criminalisation. The third assumption also needed to be tested against the first two and include examples of 'predatory' and 'commercial' types of fraud, in order to examine the relationship between statutory legislation, and the social dynamic of fraud resolution and the role of law therein.

3.4.3 Design

The following section presents a cross-sectional study (Bryman, 2004, pp. 11-44) designed to measure the perception of the 'sovereign guarantee' of trust as a means of denoting the effective criminalisation of fraud (see chapter four). The selected means of primary data collection at this stage was conducting a survey-based study, featuring a single measurement (see below). An online survey-based tool was selected due to its advantages and correlation to the positivist paradigm on which the philosophical approach to data collection and analysis is based. An online survey provides a means to record observations made by multiple individuals who are independent of the researcher. The survey is provided in full in Appendix A. In Appendix A appears a section 2 of the questionnaire, which does not form a part of the methodology presented in this chapter or the scope of discussion in this thesis. Section 2 was included in the survey as an opportunity to collect data in relation to a separate research interest that relates to victim imperative and indirect-victimisation (Levi & Burrows, 2008), and will not be further discussed. Section 2 of the questionnaire in the appendix does not form a part of the scope of this thesis, and references to Appendix A are exclusive to section 1 of the questionnaire.

The measure is captured through an indication of the typically applicable 'amount' of law using a scale of possible responses to fraud. The survey questioned financial investigators and laypersons to indicate what they consider to be the most likely resolution mechanism in relation to sixteen (16) hypothetical fraud offences. Included in the briefing was an explicit qualification that all examples of fraud included in the study were criminal offences. The scale was developed specifically for this study so as to represent types of potential resolution mechanisms, and to measure 'how much law' participants would view as most probable (Black, 1976). It presents participants with a question of 'what typically happens' as opposed to asking participants to indicate their consideration of 'what ought to happen' as discussed in section 3.2 above.

The research design seeks to measure a social dynamic that exists independently of particular individuals and may be experienced with only slight variation (Durkheim, 1982) (the 'duality' of fraud, see 3.2.3). The ability of measuring the effects of a social self-regulation functions (Weber, 1978) in the context of RQ1 ('duality') and generating observations that correspond to analytical themes from the literature review were the main design imperatives. This measurement relative to the three theoretical assumption discussed in the previous sub-section was intended to test suggestion of association between different types and circumstances of fraud and law-enforcement activities (Black, 1976; Naylor, 2003). The use of a survey was preferred as a means of data collection for a number of practical and ethical reasons. From a practical standpoint, a survey-based design enables the application of a consistent measurement of a 'social fact' through the perceptions of a (potentially) large number of observers

(participants). Despite its advantages, using a survey-based tool generally limits the quality and depth of data collected from participants (Bryman, 2004; De Vaus, 2013).

The survey was designed to support quantitative analysis as part of an overall mixed-methods approach to research (Teddlie & Tashakkori, 2009; De Vaus, 2013). This survey design is a single measurement questionnaire based on a five-point ordinal scale (Stevens, 1946; 1951), and a general assumption is made is that the interpretation of the meaning of the measurement (hypothetical question and scale) is consistent (Groves, et al., 2011). One dimension of this assumption that was not part of the interaction with the questions and scale was the extent to which participants are aware of the scope of fraud criminalisation in English law. This study measures perceptions of 'law-in-action' as an experience of an external social fact (Durkheim, 1982) and participants are therefore not tested for their knowledge of 'law-in-theory' (the Fraud Act 2006). This was mitigated by the explicit identification of all hypothetical examples as criminal offences in the briefing and consent sheet so as to clarify the 'law-in-theory' to be that all examples in the measurement *could* be investigated by a law-enforcement agency. The 'duality' is therefore measured subject to this supposition as the extent to which participants apply their perceptions to what they understand to be an offence, yet its resolution is determined by another social function (Smith, 1776; Weber, 1978; Durkheim, 1982).

Whilst the above addresses the question of comprehension, the below discussion addresses the process of 'retrieval of impression' (perceptions) (Tourangeau, et

al., 2000). The survey design was careful not to sequence the case descriptions in a manner that may suggest a progressive hierarchy or relativity in 'severity' or harm or support assimilation or contrast effects (Schwarz, et al, 1991). Assimilation effects may affect responses when similar questions appear in close proximity and the judgement of the latter is influenced by relevant consideration given to the former. For example, chapter five includes a discussion of difference in responses between typologically similar survey questions (abbreviated as 'Q'), Q5 and Q10. The two questions represent a very similar predatory-type scenario that was worded in terms of 'predatory'- and 'commercial'-type offences interchangeably (Naylor, 2003). These offences were intentionally separated in sequence, so findings could best reflect independent consideration of each question. Contrast effects may influence results when a previous question appears to create a 'threshold' to the one that follows by creating a clear benchmark for comparison. To that end, the sequencing of hypothetical examples of fraud harm and victimisation in the questionnaire distances narratives that were similar or dissonant in terms of narrative, socio-economic circumstances, or typology. (Schwarz, et al, 1991; Tourangeau, et al., 2000)

The ethical considerations related in particular to participants who are employed in law-enforcement or financial investigation or intelligence functions (see sample below). Surveys can offer participants a high degree of anonymity, and the survey presented in this section was designed with this consideration in mind. The survey was administered either in paper format, or using an online platform configured not to record browser and Internet Protocol ("IP") data. This degree of anonymity meant that upon paper submission or online completion, there was no

potentially identifying information available for the researcher or through the author's online survey site account. Two items of nominal-categorical information were collected from participants. First, participants were asked to indicate whether they are professionally employed in a financial investigation or intelligence function (in law-enforcement or otherwise) in a form of a yes or no question. Second, participants were asked to indicate the geographical area in which they reside by their police constabulary. The details collected by the researcher did not fall under the definition of sections one and two of the Data Protection Act 1998, and therefore did not require further action to protect the identities of participants. Affording this level of anonymity alongside the generic nature of the questionnaire, and the non-sensitive nature of the questions using vignettes was a design parameter from the point of conception. The researcher sought to encourage participants, and particularly financial investigators working in the government and private sector, by not including any meaningful identifying details that may refer to known case law, and by designing a measurement that does not ask for opinion on matters of professional practice.

The analysis of the above survey was also intended to be supplemented by qualitative analysis of semi-structured interviews with practitioner stakeholders, based on the findings from the historical socio-legal study (phase one). The intended design for the interview-based study called for a non-probability stratified convenience sample and identified possible participants from organisations such as the CPS, SFO, CoLP, a regional force in the Midlands area, a local force in the Midlands area, private sector solicitors and barristers. A sample of up to five (N=5) was considered for this stage. The semi-structured interviews would have

expanded on themes from the literature, primarily victim imperatives and the use of alternative resolution mechanisms (Levi & Burrows, 2008; Smith, et al., 2011; Fisher, 2015; Smith & Shepherd, 2017) as well as the concept of fraud in the context of the criminal justice system (Button, 2011; Button, et al., 2013; 2015; Levi, et al., 2015). The provisional interview framework included specific questions to different stakeholder groups.

Ultimately, potential interview participants were difficult to reach given the (perceived) sensitivity of discussing the dysfunction between the extent of fraud criminalisation, and *effective* enforcement. Would-be participants that were approached through networking were generally unwilling to participate. A small number of practitioners were open to the idea of participation in the form of interviews; however, they requested considerable information about the analytical approach and emerging conclusions in advance. This respondent need for prior comprehensive knowledge of the study (beyond consent requirements) made the empirical value-added of these interviews doubtful.

The author's primary concern was the extent of conversation that (repeatedly with different individuals) had to happen with potential interviewee practitioners. Substantive conversations with would-be participants pertained specifically to elements of case-law, critique of legislation that is part of the literature review in chapter two, and discussion of the context that was developed from 'phase one' (see chapter four). Ultimately, the researcher grew concerned of these preliminary conversations possibly determining some aspects of the interviews and thereby undermine the quality of possible data collection. This barrier to the

requirement of practitioner interviewee participants without substantive pre-consent discussion caused this course of additional primary-data collection to be discontinued.

3.4.4 Sample

The sample for this survey-based study utilises a non-probability convenience sampling method (Bryman, 2012), which includes one-hundred-and-forty (N=140) participants. There are two groups in the sample. The first group includes fifty-one (N=51) individuals with a professional background in financial investigations whether law-enforcement or otherwise. The second group includes eighty-nine (N=89) laypersons who did not indicate a professional involvement in financial investigations. More information on participant outreach, interaction and response rate in provided in sub-section 3.4.6 further below.

The use of a non-probability sample was not the preferred approach to data collection, yet it emerged as the most applicable. The original intention was to collect responses from two separate samples, a stratified probability sample, and a non-probability convenience sample of laypersons. The stratified probability sample was intended to include National Crime Agency (NCA) accredited financial investigators across the UK who were potentially accessible as a group via an electronic portal with access provided by a practitioner-colleague-turned-academic. The request to distribute the survey in this manner was denied as use of the portal is restricted to law enforcement personnel. In addition to indicating whether they were professionally involved in financial investigations, participants

were asked to indicate their general area of residence based on police constabulary localities in the UK. Participants were asked to select one of forty-two local force areas in England and Wales (for example, Derbyshire or South Wales), or the regional force of Scotland (Police Scotland) or that of Northern Ireland (Police Service of Northern Ireland). This was included in the data collection in order to facilitate possible collaboration with a third-party that was conducting national-level data collection for Action Fraud. As this prospect was not realised, data pertaining to local police jurisdiction in which participants resided was not included in the analysis of findings or the aggregated dataset of responses (see Appendix B).

3.4.5 Measures

This section presents a single measurement that was developed from Black's (1976) theory of law for the purpose of measuring the 'duality' of fraud and tests potential theoretical indicators of its essential properties from the literature (3.4.3). The measurement asks participants to assign the most likely official responses to sixteen short hypothetical descriptions of harm and victimisation, which are identified for participants in advance as criminal offences. These are numbered as questions one through sixteen (Q1-Q16) in the thesis for ease of reference, though the questions began at number seven in the survey due to consent and related questions (see Appendix A). Each case description was followed by five possible resolution scenarios (consistent across the questionnaire), with each representing an increment in the 'amount' of law exercised in what he/she considered a typical resolution of a given form of victimisation. The increments

were in response to each case description using the following five-point ordinal scale (Stevens, 1946; 1951):

1. A criminal investigation potentially leading to an arrest.
2. The incident being reported to a law-enforcement agency but taken no further.
3. Regulatory sanctions / commercial litigation.
4. The victim takes other steps against the perpetrator or recovers some of the losses from the perpetrator.
5. No action is taken by law-enforcement or the victim.

Each increment represented a category of resolution mechanisms and expressed decreasing ‘amounts’ (Black, 1976) of law going from option one towards option five. The ‘duality’ of fraud (RQ1) is manifested through the ratio between option one (criminal investigation) and other resolution mechanism across the sixteen hypothetical examples. Option two indications manifest a barrier to successfully unpack the concept of fraud as a criminal offence in the interface between the victim and the criminal justice system (RQ2). The sixteen examples in this study span across the theoretical ‘fault lines’ identified in section 2.4 of the literature review (Black, 1976; Naylor, 2003), and include frauds that are subject to particularised criminalisation or criminalised only under the Fraud Act 2006.

In the context of RQ1 (‘duality’), section 3.2 discusses the researcher’s review of the literature and the apparent absence of a validated tool to measure a dysfunction between ‘law-in-theory’ and ‘law-in-action’ directly in the context of this study (Black, 1972). As discussed in chapter two, the literature qualifies

effective criminalisation with the association of known examples of a behaviour with responses by law-enforcement agencies. In terms of Black's (1976) theory of law, law-enforcement activities can represent the 'highest' amount of law when they are compared to other resolution mechanisms in the context of fraud, such as regulatory actions, civil litigation or bilateral resolution. Outcomes and relative 'amounts' of law within each category, particularly downstream implications of law-enforcement activities, do not provide additional qualification for the measurement of 'law-in-action' (Black, 1972; 1976; Hester & Eglin, 1992).

In the context of RQ2 ('mainstreaming' and 'streamlining'), there is further analytical value in identifying typically unfulfilled demand for law-enforcement activities. The literature indicates that victims of fraud have a lesser tendency to engage law-enforcement agencies in response to fraud harm and victimisation (Ganzini, et al., 2001; Green, 2004; Levi & Burrows, 2008; Smith, et al., 2011; National Fraud Authority, 2013; Smith & Shepherd, 2017). Other contributions shed light on challenges experienced by victims who do interact with law-enforcement agencies in response to fraud harm and victimisation (Button, et al., 2009; 2013). As discussed in section 2.4, the researcher recognises the role of unfulfilled demand for law-enforcement in contributing to lower reporting rates and further disassociation of known examples of fraud with a criminal justice system outcome. Thus, there was a need to include an expression of such unfulfilled demand to distinguish between typically otherwise resolved frauds (through civil litigation or bilateral agreement, for example) and unfulfilled demand for law-enforcement activities.

In response to this imperative and the lack of validated tools in the literature, a novel measurement was developed for implementation as phase two. The measure was the five-point ordinal scale (noted above and described below in this section) to represent differing 'amounts' of law (Black, 1976) to respond to the challenges posed by RQ1 and RQ2. The scale is directly related to social theory (Black, 1976; Black & Baumgartner, 1983) and existing resolution mechanisms that are commonly recognisable, and applicable to the context of fraud (Levi & Burrows, 2008; Fisher, 2015; Smith & Shepherd, 2017).

The single measurement is designed to provide an empirical basis through which to evaluate the extent to which a categorical criminalisation of fraud ('law-in-theory') is experienced ('law-in-action') as a social fact (Durkheim, 1982). The measurement includes hypothetical examples of fraud that were designed to represents different theoretical suggestions of association of fraud with law-enforcement activities discussed in section 2.4 (Black, 1976; Naylor, 2003). The hypothetical cases in the measurement also include three types of particularised offences identified from the functionalist analysis in 'phase one' (see section 4.6). The three hypotheticals subject to particularisation were included so provide and empirical basis for further analytical discussion to the critique of conduct-based criminalisation in section 2.6 (Tappan, 1947). Fourteen of the sixteen hypothetical offences relate to typologies where the identity of the offender is known, or it could potentially be readily discoverable. This was done so as to focus analytical attention on the application of legislation (RQ2) and not investigatory or evidential challenges. The two remaining hypotheticals relate to the concept of 'cybercrime', which suffers from objective investigatory difficulties and technological barriers to

attribution of offending to a legal entity, and the involvement of transnational offending groups (Levi, et al., 2015). The two offences were included so to contrast (if possible from the data) the application of legislation from the attribution and enforcement challenge. Alternatively, the data may suggest that perceptions towards the likelihood of law-enforcement activities in the context of fraud are similar regardless of the prospects of offender identification in some cases.

The measurement tool was designed to empirically assess the extent to which the legislative intent (a generalised 'sovereign guarantee' of trust) may be perceived by participants as the typical response to given forms of fraud offences. The null-hypothesis was that the assumptions and justifications for the Fraud Act 2006, in the creation of a *dishonesty* conduct offence, would have created a clear and consistent association between fraud offences and law-enforcement responses. In other words, the instigation of criminal investigations should be indicated at a high frequency across the sixteen hypothetical descriptions of fraud and representing a low standard deviation value (RQ1). In order to isolate a criminal investigation outcome from cases where fraud is being reported but not investigated further, an option to indicate that a fraud would have been reported to law-enforcement was included. The inclusion of option two was intended to distinguish between a resolution mechanism other than a criminal investigation through the preference of another settlement-agent (Black & Baumgartner, 1983), or through challenges in engaging law-enforcement (RQ2). The frequency of option two indications is intended to reflect a contribution of the contextual and practical dysfunctions between a *dishonesty-based* conduct offence and the discipline of law-enforcement (see 4.7, and 4.8).

In order to enhance the possible utility of this tool, which was bespoke to this study as there was no validated analogue in the literature, advice was sought from a retired UK financial investigator with respect to the design of this instrument. A version of the questionnaire was subsequently tested as a pilot study with ten (N=10) participants, including financial investigators in active service at a local midlands area police force. The pilot study participants provided oral comments to the contact, which were communicated along with completed test pilot paper copies (some of which contained written comments). The comments highlighted specific points where questions were not sufficiently clear to participants. No comments were made with respect to the scale developed for this study. The pilot study and resulting conversation with colleagues and the director of studies should lend a degree of face validity to the design of the tool. The study does repeat a manner of presentation of hypothetical description of harm and victimisation, which has been validated in the literature (Levi & Jones, 1985; Wolfgang et al., 1985).

3.4.6 Procedure

The survey was distributed as a link to an online platform (smartsurvey.co.uk) and in paper format based on a printout of the online survey (see appendix A). The questions were presented in the same sequence to all participants (see above on measures). Arrangements were made for the survey to be sent via the Midlands Fraud Forum (MFF) weekly email newsletter for a period of one month following the inclusion of the study in the chairman's opening remarks at the MFF annual

conference in February 2016. Several professional contacts were asked to email a link to the survey in a number of private sector bodies that are involved in financial investigations. Outreach efforts also benefited from opportunities to include an invitation to link to the survey in an internal email to criminology colleagues at the University of Derby.

Data collection was further supported by attending an MFF 'masterclass' in Birmingham with a substantial number of financial investigation professionals from law-enforcement, public bodies and the private sector. During that masterclass, a number of tablet devices were circulated to collect responses from attendees by accessing the survey on the website through a tablet computer. The number of responses collected on that day was significantly limited by the duration of time it took individuals to complete the survey using a web browser on a tablet device (approximately ten minutes per participants in a noisy environment). The researcher proceeded to use printouts of the survey (adapted for formatting) in future opportunities to collect data from financial investigators (FI) and laypersons. This avoided 'bottleneck' limitations on the number of participants that can be asked to complete the survey at any given time (up to three using the three tablet devices that were available with assistance from colleagues for such opportunities). The paper format questionnaires also seem to have been completed by participants quicker than the online version accessed through a tablet device, most likely since ticking a box with a pen was less time consuming than touching a tick-box on a screen. On reflection, more FI participants could have been included if the online version would have been reserved to email-based appeals only, and digital data gathering was not attempted in-person.

Opportunities where noteworthy amounts of data were collected included an outdoor charity event in the Derby area in the summer of 2016 as well as a professional conference hosted by the University of Birmingham (both with the consent of the organisers). Other events were attended and yielded few (or no) participants, namely a general-theme research conference hosted by the University of Derby, and a national level event hosted in a law-enforcement training facility. A final email appeal was sent to all undergraduate criminology students at the University of Derby in early 2017, which yielded very few participants. The response rate cannot be accurately determined due to the number of broad email appeals made on behalf of the author by third-parties (namely the MFF and the University of Derby), and in-person appeals. Furthermore, a handful of colleagues promised to disseminate a link to the online survey in internal law-enforcement and private sector distribution networks. The researcher cannot verify the extent to which such dissemination had occurred or quantify the scope of outreach achieved by such efforts. A reasonable assumption given the above context would place the response rate at about 3%, with about 20% of the estimated outreach being based on faith alone and not subject to verification.

Participants were asked to indicate if they had a professional background in financial investigation on the consent sheet. All participants had to indicate their consent to participate in the study and were given the author's email address, so they could make future contact if they were to have further questions. Participants with a professional background in financial investigation had to confirm that they

either had line manager approval to participate in the anonymous survey, or that they did not require such authorisation.

Upon the completion of the online survey or the handing in of a paper format, there were no parameters that could be used to identify an individual participant, and upon completion withdrawal was no longer possible. This is due to the original design decision made to appeal to law-enforcement practitioner by not including potentially identifying information in the data collection. A completed paper-format survey only identified whether the participants is professionally involved in financial investigations, and the area of police jurisdiction where he or she resides. Online survey responses included the same details, as the researcher ensured the disabling of features such as IP logging (which would have preserved time stamps of access to the survey, IP addresses, operating system and web-browser versions amongst other potentially identifying details). An inclusion of a withdrawal mechanism would therefore have had to include a unique reference number that participants would self-generate, and thereby introduce a theoretical means through which responses could be attributed to individual participants. In addition, as follows from the design decision, the survey asks for the participant's opinion of typical resolution of sixteen brief hypothetical descriptions of fraud harm and victimisation. This means that participants (practitioners in particular) do not express an opinion that is relevant to 'real-world' cases, areas of professional practice, or opinions as to 'what ought to be' in the responses to fraud harm and victimisation.

3.4.7 Analytical approach

There were no missing results due to online survey settings wherein participants would either answer each question in turn, and complete the whole survey, or elect to withdraw (from the survey as a whole) at any point by ending the session. This included the option to withdraw after the survey was completed as the debriefing provided the final opportunity to consent to participate in the survey. The author followed the same principles above used for the online survey to the paper-format survey returns. A small number of paper-format surveys were discarded (about ten), and these paper-format questionnaires included responses to two or three questions out of the sixteen. Since the design of the tool identifies responses to the sixteen hypotheticals as a single measurement, these partial responses were not included as response (meaning they do not form a part of the eventual sample of one-hundred-and-forty (N=140). This is consistent with the mandating of a box to be ticked for each of the sixteen hypotheticals in the online versions of the survey, meaning the survey could not have been completed and the response recorded had not all sixteen questions been answered. Insular responses do not represent the experience of a member of society who becomes aware of the different typological, contextual and situational attributes of fraud that are tested in the survey. Such incomplete single measurements do not properly capture the nature of the social phenomenon of the 'duality' of fraud, and do not contribute to meaningful analysis of the varying amounts of law applied in the context of fraud. No examples of 'nearly completed' paper-format questionnaires were submitted to the researcher (meaning ones with almost all sixteen questions answered, or beyond the first two or three). The final data set thus included only

(online and paper-based) fully completed questionnaires representing a single measurement.

The results were uploaded to the Statistical Package for the Social Sciences (SPSS) for descriptive analysis (Pallant, 2013). Given that each of the sixteen scenarios were measured on a five-point ordinal scale, the statistics that were included were mode, median, and frequency (N and percentage). Additional analysis was conducted on aggregated percentages of response selections relative to each of the sixteen hypotheticals in the measurement. To assess whether there was statistical significance to the variation in responses between the FI and laypersons subgroups the Mann Whitney U-test (Ruxton, 2006) was used on each of the sixteen questions in the measurement. The test assumes that variations in responses in a non-parametric (ordinal) measurement between the two sub-groups is equal. Observation of instances where the distribution of results is 0.05 consistent or less, are defined as negating the assumption of equal variability, which requires further analytical discussion of its possible origins (Ruxton, 2006). These results and discussion are included in chapter five.

In chapter five, the results are presented, and analytical discussion is provided in reference to the main research questions, Black's (1976) theory of law, Naylor's (2003) typology of profit-driven crime, and particularised legislation (see section 2.5). The percentages of option one indications are across the sixteen hypotheticals in the measurement. No pre-determination was made to create a 'threshold' for *effective* criminalisation, as it is qualitatively defined in the literature as an association with law-enforcement activities without a quantitative

qualification of which the researcher was aware (Hester & Eglin, 1992). Instead, the approach to analysis that was adopted sought to qualify *effective* criminalisation of fraud in this study relative to itself, and applicable to the concept of fraud alone. This effectiveness of the three assumptions that were made in the design is tested against the analysis of the variation of option one indications in the context of the operative properties of the hypotheticals and their correlation to the empirical findings (RQ1). The same procedure was repeated with respect to RQ2 in the examination of indication of a 'demand gap' for law-enforcement activities that is not fulfilled despite victim engagement. The discussion in the chapter includes further insight as to the validity of the theoretical and contextual variables through which the researcher critically discussed the dysfunction between 'law-in-action' and 'law-in-theory' in the context of fraud in chapters two and four. The chapter presented 'groups' of offences based on a descending order of option one indications by participants and examines potential generalisations that can be made in response to varying association of fraud with law-enforcement activities by participants.

3.5 Conclusion

In the above chapter, the author detailed the research philosophy and justification for a mixed-methods (Teddlie & Tashakkori, 2009) approach in the development of a means to study the main research questions. In section 3.2, the development of the research philosophy was presented through discussion of the role of the author as a decisionmaker and a source for error in developing a research strategy. This discussion was followed by an evaluation of research strategies

related to the study of fraud from the literature and a critical evaluation of their suitability as data collection and analysis tools relative to the main research questions. The normative preference of the author led to the development of an approach based on case-law analysis and the use of textual analysis software (NVIVO) to develop systematic understanding of the essential characteristics of the 'duality' of fraud. Whilst the development of this approach did not result with a tool that was judged to be potentially applicable to the topic of this thesis, it formed part of the author's process (and personal development vector) towards the research strategy in this thesis.

Section 2.3 concludes with a justification for mixed-methods approach that is justified by the ontological assumption towards the 'duality' of fraud as a 'social fact', and the development of an epistemological discussion. The initial attempts by the author to systematise historical case-law pointed towards the analytical value in observing manifestation of the 'invisible hand' (Smith, 1776) that determines the course of fraud resolution. This supported the inclusion of an historical component to the framing of RQ1 (see section 1.2), and the development of a socio-legal historical functionalist analysis (Weber, 1978) of the role of criminal law relative to the concept of fraud. This analysis informed the development of a positivist phase (Bryman, 2004, pp. 13-18) that features a bespoke single measurement. The analytical approach to the empirical positivist phase incorporated theoretical elements from the literature in the context of the contemporary 'duality' of fraud (RQ1). In addition, the analytical approach also incorporated parameters for further functionalist analysis toward the development of recommendation in the context of RQ2 ('mainstreaming' and 'streamlining').

In section 3.3, the first of the two phases of research was presented. Five intermediate research objectives were derived from RQ1 ('duality') in order to develop a depended understanding of essential characteristics of the historical 'duality' of fraud as a consistent normalising social function (Weber, 1978; Durkheim, 1982). The researcher explained the justification for a historical socio-legal investigation of the 'duality' of fraud as a means of fostering a critical understanding of the social function of effective criminalisation (as opposed to stated intention). Independent of the legislative means, the effective criminalisation of fraud is contrasted with the social function behind the effective criminalisation of theft – the protection of the right to property (Griew, 1995). The 'sovereign guarantee' of trust in commercial and official conduct is proposed as the social dynamic behind the effective criminalisation of fraud, and the characteristics of sovereign interest in substantiation the protection of trust.

In section 3.4, a positivist empirical research tool (Bryman, 2004, pp. 13-18) is presented as a second phase designed to test the hypothesis raised in phase one. This second phase of research presents a sample of one-hundred-and-forty (N=140) financial investigators and laypersons with a single measurement tool based upon Black's (1976) theory of law representation of possible resolution mechanisms. The survey measures the extent to which fraud is effectively criminalised, and three theoretical suggestions are included in the design and approach to analysis so to test their relevance to the development of an understanding of the role of criminal law relative to the concept of fraud. The study features a bespoke single measurement that is based on an adaptation of

seemingly related methodologies discussed in the conclusion of the literature review. The key difference between other perception-based surveys in the context of fraud policy is the focus on ‘what is’ in the context of the relationship between fraud and criminal law, as opposed to what ‘ought to be’ (see section 3.2).

Chapter Four: Historical Perspective

4.1 Introduction

This chapter provides a historical analysis of fraud resolution mechanisms through the use of social theory. The investigation into the 'invisible hand' (Smith, 1776) that determines the contemporary resolution of fraud using the criminal justice system from other resolution mechanisms ('duality', RQ1) is particularly important given the categorical criminalisation of fraud under the Fraud Act 2006. This dysfunction between 'law-in-theory' and 'law-in-action' (Black, 1972) with respect to the *effective* association of the 2006 Act offences with law-enforcement activities. Black (1972; 1976) includes the concept of law as being subject to direct observation using standard social science methods. In the context of the criminalisation of fraud, its association with law-enforcement activities can serve as common instrument to identify the extent to which the law *effectively* prohibits the phenomenon (Hester & Eglin, 1992). Nevertheless, this study does not examine the historical effectiveness of enforcement in the context of fraud, but rather examines historical mechanisms of resolution and their development in relation to the concepts of fraud and theft.

The concepts of fraud and theft were initially similar in terms of possible resolution mechanisms, their functionality, and in terms of the apparent dynamic which determined the course of resolution for such disputes. In contemporary English law, both concepts are subject to categorical criminalisation under the Fraud Act 2006 and the Theft Act 1968 (as amended). The researcher was interested in

investigating the root causes for the contemporary difference with respect to these previously similarly resolved phenomena. In the following section, the theoretical framework of Black's (1976) theory of law and third-party theory (Black & Baumgartner, 1983) are presented and applied as a means of studying the 'duality' of fraud as a social phenomenon (Black, 1976; Black & Baumgartner, 1983). This social framework is subsequently used to characterise the underlying social dynamic behind the resolution of fraud and theft, and their industrial-era divergence. This study was developed using the following five intermediate research objectives presented in section 3.3:

1. Are the defining characteristics of the gestalt of fraud a constant in English law, or a concept shaped by case law or legislation (or both)?
2. Is the 'duality' of fraud (in terms of use of varying 'amounts' of law for fraud resolution) a historical trend, or a more recent phenomenon?
3. Was the particularisation of fraud in law aimed at substantiating an overriding criminal definition of fraud, or has it specified historical states of 'duality'?
4. Can the social dynamic behind the historical relationship between use of 'higher' and 'lower' amounts of law ('criminal' and 'civil' or bilateral resolution) (Black, 1976) be characterised?
5. Given the criminalisation of 'all thefts' (Theft Act 1968 as amended) and 'all frauds' (Fraud Act 2006), how did the two concepts relate to the development and social functions of the institutions of public prosecution?

The study was conducted through the interrogation of secondary data sources and selected academic and classic English jurisprudence and legal history titles.

The following sources were used for targeted keyword searches (fraud, defraud) and for broader reference: The Institute of Historical Research at the University of London School of Advanced Study (Institute of Historical Research, n.d.), “Bracton on the Laws and Customs of England”, attributed to Henry of Bratton, c. 1210-1268” (Harvard Law School Library , 2003), and the Parliamentary Rolls of Medieval England (Ed. Given-Wilson, et al., 2005) and Westlaw. Other sources from the literature are referred to at the appropriate passages in this chapter, as well as references to specific records and statutes from the aforementioned sources when specific examples are provided.

In section 4.2, the social circumstances in pre-industrial England are presented, alongside the commonality in resolution dynamic between pre-industrial fraud and other contemporary criminal concepts. Prior to the emergence of public prosecution in England in the 1880’s, only in limited circumstances of direct harm against the state would a person be subject to prosecution by the Crown. Instead, many contemporary criminal concepts would have been addressed through compensatory justice, and the courts would preside over matters if a plaintiff would bring a petition and take on the financial cost of so doing. The functional role of this form of litigation is analysed as an ultimate means of coercion in securing just compensation, whether through adjudication of the premise of alleged liability (points of facts and of law) or by authority. The researcher refers to the punitive means (by authority) that underpinned compensation orders by the courts, which applied to those who did not satisfy court orders, or ‘legitimate’ debts recognised by the courts. (Cohen, 1982; Klerman, 2001).

Private prosecution is seen as inherently analogous to contemporary ‘civil’ litigation. It represents an escalation of a dispute and the use of the courts to secure a remedy to address an injustice and is driven by the allegedly aggrieved party. By contrast, prosecution by the Crown did not seek to amend a wrong through compensation, but rather to use punitive means to address a subversive act against royal authority and supremacy. This form of litigation is, therefore, similar to the contemporary use of the criminal courts. Nevertheless, in the absence of a concept of public prosecution, it is not to say that those actions that were not subject to Crown prosecution were ‘legitimate’, but rather they were civil wrongs and grounds for compensation. In that sense, both the concepts of theft and fraud appear to have been subject to the same resolution dynamic, and their ‘duality’ subject to a similar characterisation.

In section 4.3, the author uses historical records to unpack the pre-industrial defining characteristics of the gestalt of fraud in order to validate the ontological assumption made with regards to the definition of fraud in this thesis. In section 3.2.3 the researcher refers to the meaning of the term ‘fraud’ in sections one through four of the Fraud Act 2006. This definition is independent of the question of whether a particular fraud is subject to criminal law in the context in which the term is used. This discussion also addresses the argument by the Law Commission on Fraud (2002), which placed an emphasis on the absence of a definition for fraud in statute. It would appear that the use of the term fraud in legal records and in examples of its use by laypersons would be largely consistent with contemporary understanding, and the aforementioned legal definition.

In section 4.4, a focused discussion on the pre-industrial resolution dynamics of the concepts of theft and fraud is provided. The discussion examines the evolution of responses to victimisation by individuals, and legislative responses to the concept of fraud by the Crown. The section identifies the use of particularised fraud provisions (see discussion on particularised fraud offences in section two of the literature review above) as the primary means through which Crown prosecution was associated with the concept of fraud. The criminalisation of fraud through its association with Crown prosecution is the subject of section 4.5, where examples of particularisation are used to identify and categorise drivers for an imposition of a 'sovereign guarantee' of trust. The researcher identifies the protection of the Crown and its coffers as the first driver. The extension of this protection to regulation of certain trade functions is the second driver. The third driver is the enforcement of an imposed insolvency regime.

In section 4.6, the common resolution dynamics of the concepts of theft and fraud appear to diverge as a result of an increased demand for law in order to regulate the right to property. This increase in demand appears to result from socio-economic change in industrial-era England, which made the right to property more difficult to regulate using social controls. The researcher refers to the literature on local associations for the prosecution of felons as indicative of that change (Schubert, 2015). These local associations appear to have mimicked the punishment-oriented mode of litigation in response to victimisation against members of their group, or in an area they sought to regulate. The local associations used their resources to investigate and prosecute those they suspected of theft and (criminal) damage to property, but with no case-specific

cost-benefit consideration or focus on compensating the victim. Instead, the courts were used in order to access sanctions against those who did not comply with a court order, partly because the local association did not seek compensation, and would therefore not engage in attempts to compromise. Punitive measures served primarily for the purpose of deterrence through retaliation and were made synonymous with theft or damage to property in particular areas.

The discussion in section 4.7 represents the 'mould' for modern policing and public prosecution as well as the driving role of the protection of the right to property that underpinned their emergence and social function. This is compared and contrasted with industrial-era responses to the concept of fraud in response to market crashes and political pressure in the wake of frauds enabled by emerging forms of trade and social currency. Despite differences to pre-industrial responses, the researcher characterises industrial-era approaches as stemming from the three drivers identified in section 4.5 as categories of particularisation, and to examples of particularisation discussed in the Literature Review chapter. This point of divergence appears to be of substantial importance in the analysis of the gap between the *effectiveness* of the categorical criminalisation of theft and of fraud. The social dynamic that allows for a 'duality' between compensatory and punitive justice does not seem to be applied to the concept of theft as it does to fraud, despite the similarity in manner in which they are criminalised in contemporary statutory law.

4.2 Acquisitive Crime in the Age of Private Prosecution

In this section, the author further develops the epistemological synthesis required for the development of a positivist research approach to the study of the contemporary manifestations of the 'duality' of fraud (RQ1). In the previous section, the author presented a general social theory of the behaviour of law as a mechanism of social regulation (Black, 1976). Black's (1976) theory of law offers a means of positioning various resolution mechanisms on a continuous scale that represent a relative 'amount' of law that underpins each observation. This framework was developed in a contemporary context where relative 'amounts' of law can be categorically identified in observation as representing the 'use' of more law than others. In the context of the 'duality' of fraud (RQ1), the use of the criminal courts represents 'more' law than the use of the civil courts, and the use of investigatory powers represents 'more' law than disclosure under the Civil Procedure Rules (Ministry of Justice, 2016). Comparatively 'lower' amounts of law that are grounded in social controls (as opposed to state powers) may include resolution mechanism that are characterised by extra-judicial resolution agents (arbitrators, moderators and friendly peacemakers) (Black & Baumgartner, 1983).

The author opens with an implementation of Black's (1976) theory of law to pre-public prosecution social structures in England, and the absence of clear categorical distinctions between the criminal and civil courts (Pollock & Maitland, 1898; Ashworth, 2000;). The author examines the functionality of the courts in resolving 'interpersonal disputes' pertaining to fraud, but also to acquisitive and violent crime by contemporary standards (Burell & Morgan, 1979; Durkheim, 1982). The below discussion also traces principle concepts of judicial remedies to

fraud and other acquisitive crimes. This analysis is primarily based on Klerman's (2001) discussion of the role of the courts in enabling aggrieved parties ('victims') to negotiate out-of-court settlements with alleged offenders.

4.2.1 The Epistemology of 'Criminal' and 'Other Resolution Mechanisms' (RQ1) Prior to the Emergence of Public Prosecution in England

In the context of the 'duality' of fraud (RQ1), there is analytical value in examining how contemporary constructs of crime were resolved by the judiciary prior to the emergence of a distinction between the criminal and civil jurisdiction. This discussion relates to the epistemological challenge of studying the 'duality' of fraud as a manifestation of a social dynamic (Black, 1972; Durkheim, 1982), as opposed to an insular legislative lacuna in contemporary provision. The second of the intermediate research objective for this chapter asks whether indeed the 'duality' of fraud can be observed directly and in the context of a wider social function (an 'invisible hand', Smith, 1776). A preliminary assessment of punitive measures in a historical context suggested that a categorical outcomes-based approach to the epistemology of historical analogues to use of the criminal justice system was functionally inapplicable. Judicial (punitive) outcomes appear to have been dependent primarily on the circumstance of the party found liable, and his or her ability to comply with compensation or other remedies. When offenders could not abide restorative justice measures, they might have been subjected to imprisonment, or even the death penalty in some cases. Similar to the dynamics which govern contemporary civil proceedings, the historical process appears to have been designed to favour extra-judicial settlement between offender and

victim. Settlements could have been achieved during the proceedings, and the possibility of imprisonment was often used to promote the value of compliance with compensation orders (Pollock & Maitland, 1898; Klerman, 2001).

Below is a functional analysis of judicial outcomes that are representative for the use of the 'highest' relative amounts of law in the context of inter-personal disputes (Black, 1976; Klerman, 2001). It would appear that there has been a comparatively vast use of 'harsher' punitive measures to the style of law currently practiced in western countries (Cottu, 1820). In some cases, those accused and convicted of murder, or theft, in some cases, were put to death. This provision included the transfer of all their belongings and titles to the aggrieved or next of kin, or to the Church or the Crown (Pollock & Maitland, 1898; Klerman, 2001). Other sanctions, particularly in the context of petty 'crimes' included imprisonments or the use of the pillory. Nevertheless, these outcomes did not appear to be directly synonymous with a judicial finding of guilt in the same manner as imprisonment, fines or community service are currently predictable outcomes for guilty verdicts (Sentencing Council, 2014). Instead, it appears that compensatory measures were favoured for both acquisitive 'crimes', and for offences where harm is not readily quantifiable.

Furthermore, the same 'harsh' punitive measures observed in relation to contemporary constructs of crime appear equally applicable as outcomes of personal bankruptcy, which was by no means in itself 'forbidden'. It is important to highlight in this context that in 'applicable' the researcher does not mean to indicate prevalence, but instead a 'worst case scenario', or use of the highest

‘amount’ of law (Black, 1976). Nevertheless, the application of such outcomes appeared not to follow from the offence typology, but rather from individual case circumstances. In addition to the inconsistencies in sentencing outcomes, historical research further disassociates the practice of hanging (or other means of executing a court issued death warrant) from the imposition of death sentences. Even at the height of use of the death penalty in English history (under the so-called ‘bloody code’ in the early nineteenth century), only about one in five of those so sentenced to death were actually put to death by the state (Gatrell, 1996; King & Ward, 2015).

Seemingly ‘punitive’ measures by contemporary standards appear to have also been applicable as possible outcomes for debtors in the course of personal bankruptcy (Levinthal, 1919; Cohen, 1982). The imprisonment of debtors was practiced in English law through the middle-ages and industrial era, until its abandonment in the latter half of the nineteenth century (Cohen, 1982). As early as the thirteenth century, historical legal research points to provisions to arrest a merchant debtor for the purposes of formally adjudicating his debts. Should the court or local administrative official recognise the debt, the merchant may be imprisoned until such time as the debt is settled or restructured to the satisfaction of the creditor (Cohen, 1982, pp. 154-155).

Case law or legislative measures did not appear to assign any consideration to the circumstances by which a debt was incurred, through honest trade, negligence, or fraud. Outcomes indicative of the use of ‘more’ law (such as imprisonment) were applicable, but not prevalent. Under 1% of debtors involved

in bankruptcy litigation were committed to imprisonment, and only due to their inability to satisfy the process by payment or compliance (Rubin, 1984). Until the gradual abolition of debtor imprisonment towards the end of the nineteenth-century, it 'supplemented' the remedies available to victims of fraud, yet without the need to argue fraud (Innes, 1980; Cohen, 1982). Creditors would enjoy principally similar protection against insolvency whether a default was triggered by fraud as well as other objective and subjective reasons. Nevertheless, the application of 'more' law (imprisonment) did not follow from a default, but rather from a lack of compliance with the insolvency regime by the debtor, and cost-benefit and other considerations by the creditors (The Cork Commission, 1982; Taylor, 2013).

Despite the absence of an allegation of wrongdoing that underpins court petition pertaining to interpersonal disputes, outcomes with respect to debts that have been recognised by the Crown are similar. Imprisonment was not associated with bankruptcy, much like it appears not to have been associated with inter-personal disputes analogous to modern concepts of acquisitive and violent crime in mediaeval England (Klerman, 2001). The epistemology of historical analogues to inter-personal dispute resolution (inclusive of the gestalt of fraud and other contemporary concepts of acquisitive crime) appears therefore not to be a categorical outcomes-based observation. Instead, the variability of 'amounts' of law used in dispute resolution, as well as the question of use of the judiciary as a 'settlement agent', seems to relate to the function of social controls in the context of compensatory justice (Black, 1976; Black & Baumgartner, 1983). With no direct sovereign interest in the dispute itself, the essence of the function of the courts

could be summarised as the adjudication and enforcement of debts incurred through social interactions. These interactions extend to behaviours that are currently synonymous with Crown prosecution (such as violent crime and the concept of theft), the concept of fraud, and debts incurred thought trade (by fraud or the realisation of risk).

The function of imprisonment was used in a similar fashion by the mediaeval courts in relation to compliance with compensation orders issued in relation to inter-personal disputes, and through the adjudication of bankruptcy (Cohen, 1982; Klerman, 2001). Pre-industrial imprisonment in this context does not appear formally or functionally related to later industrial and contemporary notions of 'correction', retribution, or the imperative of protecting the public. The industrial and contemporary imprisonment system stems from a pre-existing institution, but one of a different function to its current role as the primary punitive means of responding to crime, and of corrective and preventative utility (Bentham, 1843; Foucault, 1977). The function of imprisonment in the context of personal bankruptcy was primarily 'coercive' in nature, creditor satisfaction with respect to the recognised debts or its restructure would result with the release of the debtor (Cohen, 1982, p. 155). Therefore, imprisonment was not a judicial response in isolation, but a means of substantiating compensation orders and other debts recognised by the court. Imprisonment served as deterrence for debtors and those with compensation orders issued against them so as to ensure their compliance, and as a means of pressuring their relatives to contribute towards satisfying their debts (Cohen,1982; Klerman, 2001).

Interpersonal disputes that feature readily quantifiable harm, particularly those that relate to contemporary 'predatory'-type profit-driven offences (Naylor, 2003) favour compensatory remedies (Bentham, 1789; Crabb, 1831). The categorical association of punitive outcomes (imprisonment, corporal punishment, death *inter alia*) with relatively 'higher' amounts of law (Black, 1976) does not appear to correctly underpin the measure of law used to resolve allegations of this nature. This dysfunction is present in observation, where the aforementioned outcomes appear arbitrary, and do not closely associate with typological features of interpersonal disputes (exceptions are discussed further below in this chapter). Instead, such outcomes appear to be indicative of the 'amount' of law required to enforce the order of the court, and not to resolve the underlying dispute. Furthermore, the dysfunction between the contemporary association of such outcomes and higher 'amounts' of law applied in relation to harm and victimisation appears to also be contextually misleading. Instead, the use of law appears to enable victims (and creditors) to achieve their compensatory requirements. Should social controls and regulation by reputation not apply or suffice, compensation is made possible through the use of ascending 'amounts' of law: the context of criminal proceedings may 'encourage' an offender (or debtor) to arrive at a resolution, a judicial outcome may enforce compliance, or imprisonment may be required in order for a payment to be made.

The above discussion relates to the epistemological challenge of denoting the dichotomy in the 'duality' of fraud (RQ1) in historical terms, particularly in circumstances that preceded the introduction of public prosecution in the 1880's (Ashworth, 2000). The contemporary categorical distinction between the criminal

justice system and other resolution mechanisms (inclusive of civil litigation) appears to be without a direct (categorical) historical analogue. Instead, the 'amount' of law applied in relation to a wide category of disputes (of which fraud is a part) does not appear to be subject to typological theoretical suggestions, but rather social and other circumstantial considerations. These considerations relate to a commonly understood concept of compensatory justice, and a utilitarian undertone in victim-offender interactions. The use of law appears to function as an upper stratum on a scale of means of coercion against defendants (Black, 1976; Black & Baumgartner, 1983; Klerman, 2001).

4.2.2 The Functionality of the Courts in Resolving 'Inter-Personal Disputes'

In the above sub-section, the researcher framed the discussion of the study of variable 'amounts' of law used in a wide category of social interactions and refuted the possibility of studying the historical 'duality' of fraud through outcomes. In this part, the researcher provides additional analysis for the social function of the judiciary, and its emergence as a means of resolution for 'inter-personal disputes'. In this role, the Crown adjudicates in disputes to which it is not a party. This capacity is of similar function to civil litigation of fraud and appears to exhibit similar plaintiff-defendant dynamics in the social characterisation of the requirement for judicial resolution (Black & Baumgartner, 1983). Furthermore, the dynamic between parties in a compensatory-based judicial process appears similar to characterisations of contemporary processes in the context of fraud (Levi & Burrows, 2008; Law Commission, 2014; Button, et al., 2015; Hayton, 2015; Smith & Shepherd, 2017). This is a different capacity to the Crown as a

prosecutor, which is discussed further below in this chapter in the context of an epistemology of ‘criminal’ analogues in legislation and practice. Nevertheless, the study of the historical use of the judiciary is relevant to the investigation of the historical ‘duality’ of fraud. This use of the court for ‘inter-personal disputes’ represents the ‘highest’ available amount of law, which is similar to the contemporary use of the criminal justice system, as well as the dynamics of ‘civil’ judicial adjudication (Black & Baumgartner, 1983; Klerman, 2001).

Historically, the Crown was not a party for many dispute-types that are understood as ‘criminal’ in contemporary society, nor were they necessarily resolved by the courts in the past (Pollock & Maitland, 1898; Turner, 1962). The extent to which a lack of sovereign interest results with vastly different offender-victim dynamics and judicial outcomes is perhaps best represented by the common means of murder resolution. Murder ‘investigations’ would not have been led by a state force, but rather it was left for the relations of a deceased to determine who the offender was, apprehend him/her, and level charges against the accused in court. Those 'convicted' were typically be ordered to pay compensation (a ‘*bot*’) towards the estate or heirs of the victim. To the *bot*, additional payments to local administration and/or the church might be added, but not as a rule (Rubin, 1996).

Over time, the emerging norms and 'tariffs' set by the courts in response to successful applications stabilised and created compensatory norms that served to end disputes and feuds (Pollock & Maitland, 1898, p. 24 vol.1). Furthermore, stable judicial norms created a benchmark for punishment (or damages awarded) and established a system of closure and recognition of harm and victimisation

(Bentham, 1843). These norms and compensation benchmarks are important for a wider social 'acknowledgment' of victimisation, which supports closure and conclusion of interpersonal disputes (Hamilton & Rytina, 1980). The majority of responses to victimisation included material reparation that were not sufficient to reverse the crime, but were of symbolic importance, and provided an opportunity of the Crown to facilitate a widely understood sense of justice (King, 2000). In the context of Black's (1976) theory of law and third-party theory (Black & Baumgartner, 1983), insights are offered on the political development and emerging dominance in jurisdiction over inter-personal disputes, and the formation of a new stratum of law (Black, 1976; Black & Baumgartner, 1983; Shapiro, 1986).

The victim-enabling potential of the judicial process in respect to specific cases, and a systematic utility in a final and orderly conclusion of disputes appears to have contributed to common use of the courts (Shapiro, 1986). Schmidt (2005) constructs the function of sovereignty in a manner that seems to converge with the utilitarian drivers for the growing acceptance of 'judges' as 'settlement agents' through the recognition of sovereign authority over inter-personal disputes (Black & Baumgartner, 1983; Shapiro, 1986; Rubin, 1996). The essence of sovereignty is not the ability to coerce *per se*, but rather the exclusive latitude to make ultimate decisions in the jurisdiction (Cristi, 1997; Schmitt, 2005). Tensions might arise in response to the exercise of sovereign power to raise taxes and engage in ecclesiastical, administrative, trade regulation or foreign affairs. Nevertheless, the adjudication of inter-personal disputes appears to be a platform through which the sovereign is validated though a 'litmus test' of authority when it facilitates its function as a 'settlement agent' (Black & Baumgartner, 1983; Shapiro, 1986).

The administration of the courts was conducted by a local sheriff, the most important officer of government in the mediaeval England counties, who was the Crown's chief administrative, executive, and legal officer (Palmer, 1982). The sheriff presided over local undersheriffs, bailiffs and clerks. The sheriffs were not 'policing' (in the modern sense of the term) their counties, but rather providing administration for the courts, enforcing their orders, writs, and other decisions under the general duty of fulfilling the orders of the Crown. Sheriffs would only actively pursue individuals who offended against the Crown, and facilitate prosecution in the special King's courts, acting as officers of the Exchequers, or taking actions to protect the Crown estates and assets (Commissioners for Inquiring into County Rates, 1836; Chadwick, 1839; Palmer, 1982; Klerman, 2001).

The courts were not ‘open to all’. Prosecution was subject to the payment of court fees and related expenses, and at times even sheriff expenses related to the apprehension of the accused. To bring an application before the courts, victims of acquisitive crime would have to dedicate considerable resources, perhaps in concert with neighbours, and possibly interact directly with offenders. Upon apprehension, alleged offenders were rarely placed under arrest pending trial. They would be expected to appear in court under pain of ex-communication and the forfeiture of their property. These controls were sufficiently effective to make it uncommon for alleged murderers to be arrested in anticipation of, or during, their trial. (Klerman, 2001)

The courts heard applications concerning fraud in the context of transactions that had been brought into contention, in part or in full, or when compliance with deeds were not fulfilled. When the fraud was carried out against the Crown, or in trade standardised or protected by the Crown, the courts responded with corporal and custodial punishments against the perpetrators. The 'amount' of law sought by the applicants (procedural or compensatory remedies, for example) determined the course that the courts would adopt in resolving the fraud. The Anglo-Saxon and Norman Kings were using the courts to establish their power and relevance. In their enabling role, the courts were almost entirely concerned with private applications and prosecutions, primarily in search of monetary compensation (Rubin, 1996; Klerman, 2001). Third-party theory (Black & Baumgartner, 1983) does not identify the use of 'judges' as being intrinsic to either jurisdiction, but rather to the general need to apply sovereign authority to resolve disputes. In more practical terms, the principle of 'deciding on exceptions' (Schmitt, 2005) has been fulfilled in mediaeval England to, for instance, annul deeds on the grounds of fraud (Shapiro, 1986).

In the context of the 'duality' of fraud (RQ1), the distinction between those cases that were brought before the courts, and those that were not fails to provide a valid criterion by which to distinguish between 'criminal' and 'civil' frauds. The apparent contemporary dysfunction between absolutism in fraud criminalisation, and the resolution of fraud outside of the criminal justice system requires the existence of the later institutions and procedural distinctions. In chapter Three (Methodology), the researcher presented the parameters and research philosophy adopted in this thesis. These parameters included an epistemological discussion

on the study of an underlying social dynamic, or an ‘invisible hand’ (Smith, 1776) that determines the eventual course of resolution for fraud cases. This dynamic is inherently external to the researcher, as well as not necessarily fully manifested in individual observations (Durkheim, 1982).

4.2.3 Summary

In the context of the ‘’duality’ of fraud (RQ1), this section identified principles of addressing harm and victimisation in the history of English law in general, and in the context of fraud as part of a wider sets of inter-personal disputes. The contemporary framework of the ‘duality’ of fraud is not between the involvement of judiciary or its absence, but rather that of the criminal jurisdiction in particular. In a historical context, the highest ‘amount’ of law applied in response to harm and victimisation (inclusive of fraud) to which the Crown was not a party was compensatory-oriented litigation. Outcomes that represent the ‘highest’ amounts of law (imprisonment or even death), were used as means of further coercion when the defendant could or would not comply with the compensation ordered by the court. There might have been further benefits in the (often public) demonstration of the court power of coercion, but these do not appear to have been the imperative of either the court or plaintiffs (at least prior to the industrial era). The procedural preference for compensation, and victim ‘ownership’ over proceedings pertaining to modern constructs of acquisitive crime, overshadowed properties such as corporal punishment or incarceration.

There is an analytical value to the examination of the current ‘duality’ of fraud by ‘populating’ the criminal bracket with those cases that concluded with a sanction against the person found liable. In an epistemological context, the value added is in departing from an outcome (or remedy style) based approach to determine the whether a matter is ‘criminal’ or ‘civil’. The procedural remedy (or other means of undoing benefit from fraud), similar to orders of compensation from other forms of acquisitive crime, is underlined by sanctions that do not benefit the victim yet harm the offender. The application of ‘more law’ (Black, 1976) is not to indicate a different response. By virtue of appearing before the court, the aggrieved party had already appealed to the most authoritative settlement agent shared with the accused, even if only in theory (Black & Baumgartner, 1983). ‘More’ law is available to substantiate the outcome of the judicial process, and the ability of the offender to comply with the decided remedy seems to have been the determining factor.

The principles and customs which appear to have governed the resolution of fraud in mediaeval times (Bracton (c. 1210 – c. 1268) in Harvard Law School Library, 2003) may seem a familiar imperative to the modern reader, and reflect the common approach to ‘civil’ procedure, and victim preference (Bentham, 1789; Bentham, 1843; Crabb, 1831; Levi, 1987; Greenberg, 1990; Levi & Burrows, 2008). This resolution mode, which was applicable to behaviours across a range current criminal constructs, was not at all unique to fraud, or even acquisitive crime (Klerman, 2001). In the context of the contemporary examination of the ‘duality’ of fraud, the victim-led social dynamic observed above seems applicable to the ‘civil’ category but was also the ‘highest’ amount of applicable law (Black,

1976). In the next section, the above context will be specifically applied to the concept of fraud and used to examine the historical unpacking of the gestalt of fraud in comparison to the essential qualities identified by the Law Commission (2002).

4.3 A Historical Ontology

From this context emerges a discussion that relates to two of the five intermediate research objectives identified in chapter Three and the introduction to this chapter above. The first is a historical reconstruction of the gestalt of fraud, and an examination of whether it possessed different meanings, or unpacked in substantially different ways in judicial or other official records. The second component in this section relates to a functionalist analysis of the role of the judiciary system in 'interpersonal dispute' resolution in the absence of a public prosecution institution (Ashworth, 2000; Klerman, 2001). This includes an analysis of historical records relating to fraud resolution and judicial remedies in the context of fraud as well as other form of acquisitive crimes (by contemporary standards).

In the following passages, the researcher addresses another of the research philosophy parameters presented in chapter three as an assumption with respect to the ontology of fraud, and as the first of five intermediate research objectives. Whilst this study is grounded in the assumption towards the 'duality' of fraud being a continuing social self-regulation mechanism (see section 3.2.4), this section examines the historical application of the ontology of fraud in section 3.2.3. In the

referred section, the assumption made by the author with regards to the general research philosophy in this thesis was that the common understanding of the gestalt of fraud preserves its essential characteristics since time immemorial. This understanding was thought of as existing independently of statutory provisions that seek to define fraud and forms the basis of understanding onto which such legal definitions are applied. Due to the contemporary and forward-facing nature of this thesis and the analysis of the Fraud Act 2006 therein, the definition of fraud provided in the Act was adopted as a 'yardstick' for historical comparison. In the first intermediate research objective the researcher asks whether the adopted 'unpacking' of the gestalt of fraud in the Fraud Act 2006 can be applied as an ontology for the historical socio-legal analysis in this chapter.

In 1290, Ms Eleanor de Wautham petitioned before King Edward I and his council to abolish a deed of gift signed in her name. She testified to the verbal promise of a will that would provide her with rights to a tenancy upon the death of its occupant. It was alleged that the formal will was fraudulently altered to prevent her inheritance, per the expressed wishes of the deceased. The application, which presumably was made at a cost to the applicant, sought justice by appealing to a sense of equity. In this case, fraud was a term used to describe the inequitable pretext of the transaction and to justify that it should be overturned, and the financial situation resolved by awarding damages and expenses. (Petition by Eleanor de Wautham, 1290)

When de Wautham was making her application, she had done so under a rules-based system that will be familiar in certain respects to the modern-day observer.

Much like contemporary ‘civil’ fraud litigation, De Wautham was able to bring forth a claim of a tort against the alleged perpetrator and refer to a principle of equity, under which a procedural remedy was sought (Smith & Shepherd, 2017). Whilst other ‘wrongs’ might have been codified in certain terms (or in statute), the principles of justice, custom and precedent were a normalising principle, under which the King could order damages, annul contracts, and assign deeds (Pollock & Maitland, 1898, pp. 183-184 vol.1). Such customs (and systems of precedents) were recorded by Bracton, a thirteenth century judge, cleric and jurist in his collection of records *De legibus et consuetudinibus Angliae* (On the Laws and Customs of England) (Bracton (c. 1210 – c. 1268) in Harvard Law School Library, 2003). References in the text to fraud inform the contemporary reader about the legal custom to which de Wautham (and others) appealed.

Bracton discusses fraud as a category of grounds for “an obligation [to be] extinguished”, as part of an array of concerns that could be investigated around the signing of a writ as well as forgiveness in circumstances of force majeure or fraud (Bracton in Harvard Law School Library, 2003. p.228 vol.2; pp.59-60 vol.2; p.333 vol.4; pp.356-357 vol. 4). The apparent imperative for the courts to intervene in many cases was so “*…no one ought to benefit from his own fraud nor do we wish to maintain, as we ought not, that anyone be wrongfully disinherited…”* (Bracton in Harvard Law School, 2003. p.61 vol.2). Critically, access to this ideal of justice was by no means open to all; instead, access was limited by the barriers of social status, and the capability of a party to afford the required court charges.

Whilst the general principle behind judicial interventions and resolution of fraud allegations were readily understood, Bracton particularises some frauds in more detail than others (Harvard Law School Library, 2003). For example, local rulers and landlords granted protection, in the form of a legal bond, to (some) tenants, in exchange for their loyal service. This valuable status and legal instrument could be annulled if it was obtained by fraud (Bracton in Harvard Law School Library, 2003. pp. 228-231 vol.2). Other particularisations included the invalidation of the legal status of a 'gift' between a man and his wife if it serves to circumvent creditors or rightful hires, or gifts made to third parties who will, in turn, transfer the gift (or part of it) to a member of a man's family (Bracton in Harvard Law School Library, 2003. pp. 49-57 vol. 2). The contemporary reader may associate these examples of particularisation of the principle of not gaining from one's fraud to modern principles of contract law and the construct of fraudulent preference (The Cork Commission, 1982).

In order to address the first intermediate research objectives, the researcher sought to identify early legislative provisions that make explicit use of the term 'fraud'. The ontological assumption with respect to the gestalt of fraud made in chapter Three (Methodology) was that its underlying meaning has not altered over time, but rather remained the same. The test applied by the author was whether earlier references to the gestalt of fraud could be retrospectively unpacked using definitions introduced in the Fraud Act 2006. This was not a 'shot in the dark' on the part of the researcher, but rather an assumption rooted in an awareness of the historical common-law concepts of misrepresentation and failure to disclose. In the Literature Review chapter above, the researcher provides an analytical

discussion of the manner in which the Law Commission unpacked the gestalt of fraud in the work foreshadowing the introduction of the Fraud Act 2006 (Law Commission, 2002). An example of common-law origins and key case-law references to the concepts of misrepresentation and failure to disclose, which relate to sections two and Three of the Act. Thus, the challenge was not to trace the common-law concepts adapted by the Law Commission (2002) to 'unpack' the gestalt of fraud to the source. Instead, the question was whether evidence of the use of the term 'fraud' in historical records could be contextually re-constructed using the standards in the contemporary Fraud Act 2006. This challenge is also in-line with the view that fraud itself is a subject of criminalisation in the 2006 Act, and not merely a subject of characterisation (Taylor, 2013). The meaning of this framing is that the concept of fraud in English law is of a largely consistent quality, and is not strictly requiring of a substantive qualification, but rather of scoping of criminalisation.

Notwithstanding the substantive discussion on statutory fraud criminalisation (or scoping of criminalisation) in section five of this chapter ('particularisation'), the following contains an interpretivist analysis of the essential characteristics of fraud in a historical context. This discussion does not relate to the functionalist analysis of historical scoping of fraud criminalisation as it appears in section five of this chapter. Instead, it focuses on the meaning of the term as it appears in early examples of its use and relates to the assumption made in chapter Three (Methodology) with respect to the ontology of fraud in the context of the overall research philosophy and strategy. In the context of this historical socio-legal study, the same assumption, which 'unpacks' the gestalt of fraud using the Fraud

Act 2006 as a ‘timeless’ social constant, was made with respect to this study, and is substantiated further in the following paragraphs.

To that end, the author searched for the earliest examples of use of the term fraud inclusive of the terms defraud, and ‘fraude’, meaning fraud in French and Middle-English. This search, which included the example of the above petition by Eleanor de Wautham (1290), resulted with additional examples of use of the term in administrative and legislative contexts. In the case of Eleanor de Wautham (1290), her illiteracy (and presumably the deceased as well) exposed a vulnerability to an altering and misrepresentation of the will. Further examples are characteristic of the use of the term ‘fraud’ in mediaeval records included extracts from parishes administrative records, parliamentary records, and ecclesiastical records. The following discussion refers to a small number of examples of the use of the term ‘fraud’ in context from twelfth and thirteenth century records from the aforementioned sources.

In December of 1203, King Edward I issued a decree to the Abbot of Dore (presently known as the Dore Abbey, Herefordshire), which was subordinate to the Abbot of Citeaux, situated in France and under French rule. The Crown was informed that Abbot of Citeaux sent an emissary to its subordinate abbots in England to collect from them various sums of money. In order to specifically address this demand by the French and clarify pre-existing prohibitions on the export of silver from the realm without royal consent, an explicit clarification was issued. The newly issued stipulation further orders the Abbot of Dore, or anyone acting in its behalf, from making any other forms of payment to the French (be it

silver, currency or goods). The new decree specifies the prohibition of using other financial instruments from being used to satisfy the French emissary, including loans or gifts. The decree includes the following reasoning:

> *whereof money or silver may be carried out of the realm or fraud may otherwise be done to the ordinance aforesaid* [the prohibition on transferring silver outside of the real without royal consent – the author]*, by reason of any subvention, gift, loan or in any other manner, without the king's assent and licence, or from making any exaction from any abbots in the realm to pay any such subvention to the abbot of Citeaux* (Close Rolls, Edward I: December 1302, 1908, pp. 68-69).

The use of the term ‘fraud’ appears to relate to an existing gestalt. The researcher interprets the use of the term as reference to the underlying property of otherwise legitimate means of transacting wealth, which could be used by the Abbot of Dore to circumvent the ban of silver exports. Whereas such transactions may be legitimate, the Crown notices that in this context they will amounts to fraudulent means of affecting the transfer of wealth to France, but without directly trespassing against royal statutes. Attempts to facilitate a transfer by misrepresenting it as a part of a foreign transaction, or otherwise failing to disclose the ultimate beneficiary of a loan, or transfer of goods or deeds as the Abbot of Citeaux, will amount to fraud. Since the fraud is against both a statutory prohibition (the transfer of silver outside of the real), as well as specific prohibitions on the transfer of any wealth to the French via the emissary of the Abbot of Citeaux, the decree ends with a

promise of severe punitive measures that would be affected on those who engaged in such transactions directly, or by enabling it by 'fraud'.

The above example relates to the contemporary understanding of fraud, though it is not indicative of methods or specific and *actus reas* that is mutually exclusive to legitimate conduct (or other offences). Instead, fraud appears to be used to qualify otherwise legitimate means of transacting wealth on account of the underlying context in which they are connived and fulfilled (Law Commission, 2002). Furthermore, the reader will recall the discussion on the 'duality' of fraud in the context of Naylor's (2003) typology of profit-driven crimes provided in section 2.4 in the literature review. Whilst some instances of fraud may be featured in circumstances that fall under the 'predatory' set of typological and situational characteristics, and possess inherent and readily understood criminal properties, others may not. The two other categories of 'market-based' and 'commercial' categories refer to frauds that are carried out using otherwise legitimate means to either circumvent a regulatory regime ('market-based') or for illicit gain in commercial settings ('commercial') (Naylor, 2003). Both 'commercial' and 'market-based' categories refer to the use of otherwise legitimate means of transferring wealth, which are 'tainted' by an underlying criminal context. As discussed in the literature review in a contemporary context, fraud as a primary category appears to extend across the 'predatory' and 'commercial' categories of Naylor's typology. Fraud may be used in order to facilitate 'market-based'-type offences, as in the above example, but such fraudulent *techniques* relate to the concept of money laundering, which is not subject to

substantive examination in this thesis (Naylor, 2003; Financial Action Task Force, 2006).

A recurring theme in royal proclamations concerns the function of state officials in insuring that currency and other trade and measurement standards are maintained. In this context, Kind Edward I had instilled a mechanism to devalue inferior silver coins minted on the European continent, and predominantly introduced to local commerce by trade shipmen. In May 1301, the King sent a decree to the treasurer and barons of the exchequer that discusses the implementation of a recent royal decree to set the value of European silver coins at half the value of Royal Mint sterling silver coins. The decree orders the establishment of local commissions of inquiry with broad powers to investigate persons and estates that made payments to the Crown using European coins, and those who accepted them as payment. The inquiries were ordered to establish whether the original payment was made before or after the Crown's devaluation of the European coins. Furthermore, the commission of enquiry were tasked with investigating at what value were European coins accepted as payments of duties to the Crown and processed by the local administrations. The ultimate objective of these commissions of enquiry was to establish that no abuse took place at the time when the value of the currency was set at half its face value, and the enforcement of its abolishment that followed suit (Fitz-Thedmar, 1863, pp. 237-248): "*to defeat the schemes and frauds of certain persons…* [and] *that there shall be no fraud or deceit in the receiving or levying of such money*" (Close Rolls, Edward I: May 1301, 1906, pp. 444-449).

During the Parliament of 1423, the topic of losses inflicted on the Crown as a result of fraud committed by merchant sailors trading wool and other commodities with what is the modern-day Netherlands and Belgium was discussed. This was previously addressed in the Parliament of 1354, when it was proclaimed that the state would regulate and protect the production, trade and export of wool and other goods in and from the territories of England, Wales and Ireland. While this substantive piece of legislation covers many aspects of trade and export, the term '*fraud'* was used in the particular context of forbidding participants from benefiting from fraudulent trade. This applied to both domestic and foreign trade. While in this scenario the fraud was specifically aimed at avoiding tax and duties, other usage of the word in this measure was generic. For example, goods being recovered from shipwrecks are to be repatriated to their intended recipient or originator "*without fraud or deception*" (section 17); Constables are required to swear before a staple mayor that they "*shall lawfully perform their office, without fraud or deception*" (section 26) (Given-Willson, et al., 2005, pp. 329-344). The qualifier of "*without fraud or deception*" appears in many official reports of action carried out on behalf of the Crown or noblemen, or accounts concerning the affairs of the Crown or the Church

In the above examples of the use of the term fraud, it appears to possess an even further abstract and obscure meaning, as it relates to forms of abuse unknown at the time of when the commissions of enquiry were established. It appears to refer to 'straightforward' abuses, but also to other 'schemes and frauds' that are attributable to potentially more sophisticated undertakings, to which local officials

may be co-conspirators. Such use of the term fraud seems to demonstrate the advantages of utilizing the gestalt of fraud in particularised and narrow situational framing of criminalisation. In the Introduction chapter above, the author refers to correspondence between Lord Hardwicke and a jurist colleague about the futility of strictly defining fraud in the face of the "*new schemes which the fertility of man's invention would contrive*" (Holdsworth, 1909, p. 262 citing Lord Hardwicke, 1759; The Law Commission, 2002 citing The Criminal Law Revision Committee, 1966). This is seen by the author as particularly applicable in the context of 'commercial'-type fraud offences (Naylor, 2003) and the concept of white-collar crime (Sutherland, 1940). The term fraud appears to be used in relation to unknown means in which one or more may use otherwise legitimate means to subvert wider definitions of 'the public interest'. Nevertheless, this use of the gestalt does not appear to the researcher to relate to an underlying quality that is different to the contemporary meaning of the term, and its unpacking by the Law Commission (2002) as represented in the Fraud Act 2006.

In the above two examples, the underlying criminal property of the frauds discussed appears to relate to the identity of the victim (sovereign interest), as opposed to a clear self-contained *actus reus* (such as theft). Fraud is used by the Crown to denote an elusive concept to denote a variety of legitimate actions that may ultimately be part of a scheme against its interest. As will be further discussed in section five in this chapter, the criminal property of these frauds appears to be qualified by the identity of the victim (the Crown), as opposed to being intrinsic to the action itself. In the context of this discussion, the term appears to be a gestalt of familiar quality to the contemporary reader.

The gestalt of fraud also features in litigation to which the crown is not a party, and with no observable reference to statutory or other sources to qualify its meaning. As discussed in the section above, fraud allegations were brought before the courts by the alleged victim as inter-personal disputes, a category that includes concepts that would, in contemporary times, belong to either the criminal or civil jurisdiction. Records of such cases feature either the identification of fraud as the cause, or as a qualifier for other causes. The following offer discussion and analysis of such cases that were identified in the records of the Mayor of the City of London Court.

In January of 1303, the Mayor's Court in the City of London heard a petition by a local merchant, who accused a fellow merchant of a general trespass offence against himself on grounds of fraud. The petition concerned the sale of lambskins, a number of which were counterfeit. The defendant denial that he acted fraudulently, as he bought the merchandise in question from a third party, believing it to be genuine leather. The defence rejects the allegation of a trespass against the plaintiff on grounds that fraud was not committed by the defendant.

> *Simon de Canterbury, skinner, was summoned to answer Geoffrey le Lacer in a plea of trespass, wherein the latter complained that he had bought from the defendant five dozen lambskins for 10s, of which eleven were false and counterfeited out of old skins, being newly sheared again. The defendant denied the fraud and said that he bought the skins at St Botulph's Fair in their present condition and sold them as such, and thereon he put himself on his country. And Geoffrey said he bought*

> *them as lambskins, and that the defendant, knowing they were false, deceived him, and he also demanded a jury.* (City of London, 1924, pp. 142-169)

Similarly,

> *Bennet de Burgo was attached to answer Godfrey de Loveyne in a plea of trespass, wherein the latter complained that he bought from Bennet two barrels of ashes of good and faithful woad (duos barillos cinerum wisde) (fn. 79), of which one barrel was mixed with earth and the other almost all false[…] The defendant denied receiving damages from the merchants, and said that they had gone abroad before the fraud was known to him…* (City of London, 1924, pp. 170-227)

Historically, the elected role of the Mayor of London (not to be confused with the City of Westminster) includes the role of Chief Magistrate of the City of London. In this capacity, the Lord Mayor would hear cases relating to the commercial activities in the City of London that would be brought before the court by traders and guilds (Taylor, 2013). The court did not apply a different standard of law but was instead empowered by the Crown to operate as a procedural jurisdiction over commercial and inter-personal disputes, as well as other administrative and civic affairs (de Gray Birch, 1884; Taylor, 2013). The Mayor's Court traditionally sought to function in a manner that was conducive to trade and the reputation of the merchant and trade guilds. In general terms, the Mayor of the City of London is elected by an electorate that is greatly influenced by the professional guilds operating in its jurisdiction (de Gray Birch, 1884; Taylor, 2013). The way in which the Mayor's court interpreted the gestalt of fraud appears to be consistent with

both periodical sources and contemporary understanding. Furthermore, the below example from 1304 records of the Mayor's court demonstrates the dynamic between alleged offender and victim in the context of fraud related inter-personal disputes (Klerman, 2001):

> *Adam le Brochere was summoned to answer Arnold de Teler in a plea that he pay him £9 owed for five casks of wine, which the plaintiff sold him, and which he fraudulently took away on payment of 20s* [shilling – the author]*, promising to pay the rest when the plaintiff came to his house; but before the latter's arrival he sent the casks to Coventry, and when the plaintiff came and asked for his money, he did not pay it, but only said he would do his best to pay. The defendant admitted buying the wine, but said he had not the money to pay at present. He admitted also that he promised to pay and had sent the wine to Coventry. Judgment that the defendant for his fraud be committed to prison till he satisfy the plaintiff for the money. Afterwards, on Thursday following, Robert de Dodeford and Peter de Byri, skinners, entered into a Recognizance to pay the £9...* (City of London, 1924, pp. 170-227)

The term fraud also featured in records that do not directly related to legal proceedings and appear to have originated from laypersons. For example, a tombstone epitaph to a Devonshire parish clerk who died in 1755, features the following inscription:

> *This stone distinguishes no vaulted cave, A plain good man, has here as plain a grave […] His real wants his industry supplied; His labouring*

hand procured his daily bread […] sincere, religious, just; Guiltless of fraud and faithful to his trust.[…] (Lysons & Lysons, 1822, p. 565)

The above are examples and discussion are representative of the use of the term fraud as it was observed by the author in a review of thirteenth to eighteenth century records. Across the examined appearances of the term fraud in the records referred to in the introduction to this chapter, the researcher did not encounter use of the term in a manner that exceeded the scope of definition in the Fraud Act 2006. This is consistent with the general ontological assumption made by the author with respect to the gestalt of fraud in both contemporary and historical perspectives. The defining characteristics of the gestalt of fraud do not appear to have significantly changed in quality over time in both legal and colloquial usage, at least since mediaeval times. This was also the subject of the first of the five intermediate research objectives of this particular historical socio-legal research, as discussed in the introduction to this chapter above. The substantiation of the aforementioned assumption concerning the ontology of fraud gives further validity to this historical socio-legal analysis and discussion.

4.4 Pre-Industrial Justice and Acquisitive Crime

This section establishes a set of social circumstances that existed prior to the industrial revolution, and their impact on the use of social controls and 'law' to coerce compensation in response to victimisation. Sub-section 4.4.2 contains an

analysis of a ‘base point’ from which there appears to be a divergence between the concept of theft and the concept of fraud in terms of the function of social controls and the ‘law’ in their resolution. In sub-section 4.4.3, the researcher provides a depiction of the scope of sovereign interest in general, by identifying the role of the Crown as a plaintiff (or prosecutor) in the pre-industrial county courts, which related to its direct involvement as a direct or indirect ‘victim’. The dynamic between plaintiff and defendant in the context of compensatory justice in pre-industrial England in section three is compared to the dynamic between a Crown prosecutor, and a defendant. The dynamic in 4.4.3 is also provided as an introduction to the analysis and developed typology of pre-industrial constructs of Crown victimisation specific to the concept of fraud in further below in this chapter.

4.4.1 Social Circumstances and Dispute Resolution in Pre-Industrial England

Laslett (2005) describes pre-industrial England as a ‘one class system’ where those considered as the aristocracy were very few in numbers, and wielded so much power and influence over matters of state. Thus, the majority of the population experienced a ‘single class’ existence. The society of the 1560’s has been divided into four tiers according to how much authority individuals possessed, or how they ranked in comparison in relation to the division of labour (social morphology):

1. *“Nobilitas Major*,
2. *Nobilitas Minor*,
3. Citizens, Burgesses and Yeoman, and

4. Those who were at the bottom of the division of labour :"*[A] sort of men which do not rule… day labourers, poor husbandmen, [the] merchants or retailers… brick-makers, brick-layers etc. These have no voice nor authority in [the] commonwealth and no account is made of them…*" (Laslett, 2005 p.31)

Burial records of the era demonstrate that in most parishes between 3% and 4% of individuals belonged in their lifetime to the first three groups, indicating the position of up to 97% of the populace belonged in the 'one class' system.

Further analysis estimates that English society in 1688 was made up of 4.5% landed gentry and professionals (such as litigators, and senior members of the 'civil service' of the day). These 4.5% of households were nonetheless generating nearly a quarter of estimated income. Furthermore, 20% of income was earned by 9.2% of households who were involved in commercial life. Industry, construction, agriculture, general labour, and other households and vagrants accounting for nearly 80% of households, and just under 52% of estimated income. The remainder were military and maritime households, which were subject to separate jurisdiction and are, therefore, of lesser importance to the present discussion (Lindert & Williamson, 1982). This is not to suggest that the proportion of available income, asset pool, or rate of asset accumulation was entirely consistent with these figures, as they are based on an examination of reported taxable income only. For example, farming households on average enjoyed income per capita of ten pounds per annum and incurred nine pounds and ten shillings in expenses. About 80% of merchant households had four pounds of available income *per capita per annum* on average, which would

equate to just under £650 in 2015 Retail Price Index (RPI) terms (King, 1688; cited by Laslett, 2005, pp.32-33; Measuringworth.com, n.d). Furthermore, a 1696 tax and customs records survey estimated that 55% of people over sixteen years of age in England were earning less than their annual estimated cost of living. This figure is based upon households who reported their income and evidenced their deprivation and is likely lacking in representation of nomads and remote parishes (King, 1696; Coleman, 1956).

The above context of generally limited financial means appears to support that there was a substantial entry barrier to making use of the courts for dispute resolution, as well as participating in forms of trade from which disputes of fraud may arise. Furthermore, the use of contracts, multiparty transactions, and sophisticated financial vehicles, which may require astute legal adjudication for its resolution, seems to have been outside the reach of the overwhelming majority of the population (Coleman, 1956; Naylor, 2003). In the context of 'simple', 'predatory'-type acquisitive crimes (such as burglary or theft) (Naylor, 2003), presenting an application before the courts would typically be inaccessible for the average person in pre-industrialised England. Black's (1976) theory of law and third-party theory (Black & Baumgartner, 1983) suggest that such interpersonal disputes are not only subject to financial entry barriers to the justice system, but also social ones. Use of the courts to resolve a dispute between two members of the public (dispute to which the sovereign is not a party to directly, or through a later notion of public prosecution), is an outcome of the inadequacy of other available resolution mechanisms. The use of law primarily represents not the availability of means, but rather a prior failure of social controls and sources of

mutual deference in enabling (or coercing) a compensatory resolution. Amongst peer groups of similar ranking on the stratification, morphology, culture, and organisational scales, it is generally expected that 'less' law would be applied in dispute resolution (Black, 1976). Furthermore, the more intimate a group is, the more sources of common deference are available to act as resolution agents within. For a party to call upon 'judges' whose authority is external to the group and is not grounded in consensus but rather in obedience to state-authority, is similarly indicative of the prior inadequacy of other settlement agents (Black & Baumgartner, 1983).

The above theoretical reminder relates equally to the analytical view taken by the researcher with respect to both the pre-industrial landed gentry, the nobility, and those who lived in the small parishes and market towns. The four groups identified by Laslett (2005 p.31), and in the opening of this section, particularly the nobility, and those who populated the parishes and market towns in mediaeval England are analysed as having similar attributes. Both strata are characterised by internal similarity in terms of stratification, morphology, culture, and organisational scales. The landed gentry and senior nobility and administrative officials (with respect to their private capacities rather than their official roles) would sustain higher level of social intimacy and common deference. Members of this groups were therefore less likely to require an external source of authority in order to effectively resolve interpersonal disputes amongst themselves, but instead could rely on existing social control to facilitate a resolution (Black & Baumgartner, 1983).

The above discussion is not intended to portray the past in nostalgic or idealistic terms. The lack of need for an external authority to regulate the daily life of communities is not an explicit or implicit appeal to a society of 'lost values' or 'honesty'. In the words of Adam Smith:

> *The affluence of the rich excites the indignation of the poor, who are often both driven by want, and prompted by envy, to invade his possessions. It is only under the shelter of civil magistrate [jus civitas] that the owner of that valuable property, which is acquired by the labour of many years, or perhaps of many successive generations, can sleep a single night in security. …[W]here there is no property, or at least none that exceeds the value of two of three days' labour, civil government is not necessary* (Rupp, 2008, p. 59)

In other words, parish communities offered limited and exclusive membership, in which opportunities for acquisitive crime were limited (Rupp, 2008), and further controlled by familiarity and reputations (King, 2000).

Social controls imposed by these small communities of 'near equals' (Rupp, 2008) were sometimes sufficient to limit the practical exercise of sovereign powers by the Crown and the courts well into the eighteenth century (Malcolmson, 1980; King, 2000; Sharpe, 2013). Under such conditions, Black's (1976) theory of law suggests that significantly 'less' law should be applied to regulate disputes within these communities, and greater 'amounts' of law should be applied to them by external parties. The majority of the population 'technically' had access to the courts, but at a substantial cost relative to disposable income. Individuals and communities would thus resort to law not as a default position, but as a calculated

necessity, and after other settlement agents were deemed or proven ineffective (Black & Baumgartner, 1983). Intimacy, (relative) closeness in terms of stratification, morphology, culture, and organisation, together with common sources of deference (Laslett, 2005) also suggests lower quantities of law to be employed within the upper classes. Whilst the costs related to making an application before the courts was not as substantial to the upper classes, disputes would likely be resolved without the need for an external source of authority (Black & Baumgartner, 1983).

Pre-industrial prosecution of acquisitive crime is therefore analysed as fulfilling a dual functionality. Legal proceedings may result with compensation for the victim and deter others from offending in a similar manner against those equipped to bring forth a prosecution. The offender could offer the victim compensation to circumvent the legal process and avoid being subjected to punishment and the object of deterrence measures. The offender may see that it is in his or her best interest to attempt to cooperate with the victim, and to pay compensation early and avoid future costs or risks. It would appear that the desired outcome for interpersonal dispute that relate to the contemporary concept of acquisitive crime remains compensatory, irrespective of whether it was obtained bilaterally, facilitated by social controls, or through the courts. Nevertheless, some offenders against local communities with limited means were external to their systems of social controls, common adherences, and reputations (McIntosh, 1975; Hobsbawn, 2000). The courts fulfilled an enabling role with respect to such ‘external threats’ against the community (King, 2000). These benefits would be accessed by small communities that organised a ‘pool’ of resources to finance the

apprehending and initiating proceedings against those who harm the community or its members. These groups are thought to have either organised spontaneously in response to victimisation or would form longer term membership associations. These forms of community organisation made use of the Crown appointed judges (Black & Baumgartner, 1983) to enforce a source of common deference (the sovereign) in the absence of other means through which to resolve disputes. This use of the courts also communicated that a specific community and its physical surroundings were not a lawless enclave, but rather a sphere where consequences were imposed upon those who offend against its members (Shapiro, 1986; McIntosh, 1975; King, 2000; Klerman, 2001; Tyler, 2006; Schubert, 2015).

The advantages for an organised parish in using law or relying on its existence in informal settlement negotiations with offenders were considerable in addressing victimisation and establishing communal deterrence (Cottu, 1820; Hobsbawn, 2000; King, 2000; Sharpe, 2013). Social controls were generally effective to resolve most cases of acquisitive crime before being brought to the court (King, 2000; Emsley, 2010). Low literacy rates amongst parish constables as late as the seventeenth century could be seen as indicative of the nominal historical importance of statute or precedent (Royal Commission, 1823; Wrightson, 1980). Sheriffs and justices of the peace in the local parishes had to exercise judgment in enforcing the law. There was an ongoing need to fulfil the real and perceived role of the Crown as an enabler of (rather than a challenge to) social order.

Two main factors constitute the analysis of the social dynamic that determined the use of varying ‘amounts’ of law (Black, 1976), in the resolution of contemporary constructs of acquisitive crime (and particularly the concepts of theft and fraud). The first is the absence of a categorical distinction between the contemporary equivalents of the ‘civil’ and ‘criminal’ court jurisdictions. The second element is the discretionary nature of the use of the highest bracket of law (the courts), which is contrary to the (alleged) contemporary consequence of such crimes (particularly with regards ‘predatory’-type offences (Hester & Eglin, 1992; Naylor, 2003). The primary distinction between the evaluation of the ‘amount’ of applicable law used in historical typological equivalents of the contemporary concepts of acquisitive crime appears to be the lack of sovereign interest in ‘interpersonal disputes’ (Klerman, 2001). Consequently, the characterisation of the underlying social dynamic which determines the typically applicable ‘amount’ of law used in interpersonal dispute resolution is an important element of this historical socio-legal analytical discussion.

4.4.2 The Crown as a Prosecutor, and Prosecutions on Behalf of the Crown’s Local Administration

Sharpe (2013) analyses community responses to ‘simple’ types of contemporary constructs of crime (such as theft) in the absence of a prescriptive central authority response. For instance, ninety-three thefts were prosecuted between 1629 and 1631 in Essex, compared to six-hundred-and-ninety-eight cases of individuals failing to comply with their obligations to work on the highways, and six-hundred-and-fifty-two persons prosecuted for beverage trade regulation

offences (Sharpe, 2013 p.7). The latter represent 'offences' that were subject to prosecution by the Crown, or by the local administrative élites, as opposed to interpersonal disputes. This category of litigation included such 'offences' as the enforcement of personal or communal obligations, primarily road works, or regulatory prosecutions such as the unlicensed trade in ale, or non-attendance in church (Wrightson, 1980, pp. 300-303). Cases of this category were typically initiated by presenting juries, which were made of local noblemen who would present the court with allegations against individuals on behalf of the administration of the county. Cases brought by presenting juries ranged from trading specific good and services without a permit, disorderly behaviour, unregulated sporting activities, harbouring criminals, and ecclesiastical offences. The primary function of these prosecutions was to enforce the local administration, legal and tax systems, and related to a narrow concept of 'community interest' as defined by the nobility and their duties to the Crown (Walter, 1980; Wrightson, 1980).

The above examples of prosecution of cases by presenting juries represent the use of 'higher' amounts of law downwards on the stratification, morphology, and organisation social scales (Black, 1976). Whilst not entirely synonymous with explicit state interest, cases of this nature represent enforcement that is not grounded in consent, but rather in enforcement of decrees. These decrees and regulations may have related to an early notion of public interest (namely in the enforcement of weights and measurements), but this chapter refers only to the 'amount' of law used for conflict resolution (Black, 1976). Local administration, which was constituted by regional landed gentry and Crown-appointed officials,

represents a group that is of higher stratification, morphology, and organisation scales. The local administration and its members do not share a system of social controls, intimacy or common deference as local merchants, tradesmen and peasants who may be in violation of the locally imposed order. The use of 'more' law is typical in situations where consensus or resolution that is grounded in social controls does not appear likely.

Another catalyst for the use of the courts (as representative of the 'highest' amount of law that can be applied in response to allegations which relate to contemporary concepts), is the direction of harm towards the Crown. The references to the courts as grounded in 'external' sources of authority (Black & Baumgartner, 1983) are made in relation to the social function of a judge as a settlement agent. When the alleged harm is directed at the Crown, two theoretical components come into effect. The first is the identification of the Crown as the 'ultimate' entity of the stratification, morphology, culture, and organisation scales (Black, 1976).

A sovereign entity (under typical circumstances, particularly so in classic monarchies) signifies the upper most theoretical levels on each of the aforementioned scales. The Crown is traditionally thought of as representing the highest amount of riches in the land, as reigning supreme over the division of labour, as having a substantial role in codifying elements of cultural standards. Examples of the Crown's traditional 'ultimate' cultural standings include its classic functions and position as head of the Church of England, patronage of the arts, determining fashions in design and clothing, amongst others. The English people

commonly refer to the ‘golden standard’ of their language as the ‘Queen’s / King’s English’, after the title of an early twentieth century dictionary and grammar book (Fowler, 1926; Holt, 2009). In terms of organisation, the monarch in a classic monarchy is the head of government, and those officials who are not appointed but elected, swear allegiance to the Crown and operate on its behalf (Hobbes, 1651). The notion of agency of the Crown persists in British constitutional monarchy, but the Crown has far less direct practical involvement with the running of the mechanism of the state, but rather a more symbolic one (Blackstone, 1765; Bagehot, 1873).

Transgressions against this ‘ultimate’ social entity in terms of Black’s (1976) theory of law means that an offender, elevated one or more social scales, would still be exerted law upon by the Crown. The sovereign is not a peer in any social groups and does not share a common (earthly) deference with any of its subjects. Therefore, there are less grounds for consideration of possible settlement agents that could address harm against the sovereign other than the courts (Black & Baumgartner, 1983). In pre-industrial England, transgressions against the Crown and its protections would commonly be construed as ‘traitorous’, as the concept of criminal law (Hester & Eglin, 1992) had not yet emerged (Ashworth, 2000). The property that underpinned the ‘amount’ of law used to address harm against the Crown or a challenge to its protections were the undermining of royal authority. (Pollock & Maitland, 1898; Walter, 1980; Wrightson, 1980)

The scope of ‘traitorous’ offences extended beyond the contemporary meaning of the term and included matters such as taxes and other duties (Walter, 1980;

Wrightson, 1980; Sharpe, 2013). The social dynamic behind the historical relationship between the use of 'higher' and 'lower' amounts of law appears to follow the contemporary theory proposed by Black (1976). The social function of the courts in relation to contemporary equivalents of acquisitive crime appears to have been the facilitation of compensation by either direct means (litigation and enforcement), or by victim empowerment. The courts would have been used when social controls and potential settlement agents whose authority is grounded in social control and shared deference could not facilitate compensation (Black, 1976; Black & Baumgartner, 1983). The agreement of English pre-industrial historical literature and records with the Black's (1976) theory of law and third-party theory (Black & Baumgartner, 1983) supports the characterisation of the 'duality' of fraud as a manifestation of an underlying social function (Black, 1976; Durkheim, 1982; Black & Baumgartner, 1983). That which determines the use of law in resolution of interpersonal disputes before the introduction of public prosecution (Ashworth, 2000) appears to be capable of critical analytical insights through the lens of the aforementioned contemporary theoretical frameworks. The historical and contemporary 'duality' of fraud appears to be a manifestation of an underlying social dynamic that governs the use of law as a means of maintaining order when it cannot be sustained through social controls alone (Black, 1976; Black & Baumgartner, 1983).

The above discussion relates not exclusively to a pre-industrial variability of typically applicable 'amounts' of law in response to fraud, but rather to contemporary concepts of acquisitive crime to which the state is not a party. Where harm could conceivably be directed against the Crown, particularised

provisions were made to codify the practice as mutually exclusive to legitimate conduct and subject to punitive prosecution by the Crown. Whilst the nature of these offences is analysed in further detail in the following section, this section concerns itself with a characterisation of the social dynamic that determines the 'amount' of law (Black, 1976) applicable to conflict resolution.

In the above section, the author examined the dynamic between offender and victim in the context of pre-industrial private prosecution of (what modern standards would deem as) 'mainstream' acquisitive crimes. This analysis relates to the fourth intermediate research objective, which seeks to characterise the historical dynamic that determined the typical 'amount' of applicable law in acquisitive crime resolution. The analysis suggests that the underlying social dynamics behind the resolution of offences relating to the concepts of theft and fraud were similar in pre-industrial England. They reflected a victim-preference for compensation, supported by social controls (Black, 1976), regulation by reputation (King, 2000), and the courts, who appeared to have acknowledged as a wrong for which remedies should be applied (Shapiro, 1986; Klerman, 2001).

The underlying social dynamic behind the application of law to the resolution of 'predatory'-type and 'commercial'-type frauds (Naylor, 2003) bore lesser difference than it presently does. The contemporary resolution of 'commercial'-type frauds is characterised as not typically synonymous with criminal justice system responses ('more' law) as it compares to 'predatory'-type frauds (Sutherland, 1949; Black, 1976; Naylor, 2003). The historical similarity appears not to be a product of the modern age (Sutherland, 1949), or the prevalence of

capitalistic politics (Levi, 1987), but rather the scope of *effective* criminalisation of fraud within the purview of the criminal justice system (Black, 1972; Hester & Eglin, 1992).

In section 4.7 below, the researcher discusses the introduction of public prosecution and the development of its institutions around the concept of theft and the protection of the right to property (Hay & Snyder, 1989; Ashworth, 2000; Rawlings, 2002; Lentz & Chaires, 2007; CPS, 2013; Schubert, 2015). Prior to that development, interpersonal disputes relating to a cause for damages (theft, burglary, assault, or fraud), would not have been within the prosecutorial purview of the Crown. Therefore, it is argued that variability of the typical association of the gestalt of fraud to law-enforcement activities is not a 'new' phenomenon. Instead, it reflects a difference in historical paths between the role of the concept of theft and the concept of fraud in the emergence of the institutions of public prosecution. This creates a need to understand the association of 'more' law and the use of law as a mechanism for dispute resolution in both a historical and contemporary perspective.

This section investigated the underlying dynamic that determines the typical 'amount' of applicable law in the absence of adequate social controls and settlement agents who function independently of a state mandate (Black, 1976; Black & Baumgartner, 1983). The analytical approach applied in this section demonstrates social circumstances that appear to require the use of 'more' law through the courts when social controls were insufficient to facilitate a final resolution. The use of 'more' law was at the discretion and resource of the

alleged victim and could have been discontinued if a resolution was achieved outside of the court. The courts would provide compensatory remedies, which would be applied in order to undo the harm caused by a range of contemporary 'criminal' concepts, amongst them fraud. Sanctions would be applied to enforce compliance with the compensation ordered by the court and were not different from the sanctions used against debtors. In both cases, the court would use imprisonment in order to substantiate a debt it had recognised through legitimate trade, or through causes such as theft or fraud.

In relation to the fourth intermediate research objective concerning the characterisation of the historical use of variable amounts of law, this section demonstrated the applicability of Black's (1976) theory of law and third-party theory (Black, 1976; Black & Baumgartner, 1983). The result of this analysis set the underlying social dynamic that appears 'organic' to conflict resolution (Weber, 1978; Durkheim, 1982) and persistent in the absence of effective association with law-enforcement activities (Black, 1972; Hester & Eglin, 1992). Analysis of later historical evidence (4.7) combined with the context in sections 2.4, and 2.6 in the literature review relates to underlying social dynamics that characterise the use of law where the standard of effective criminalisation is not demonstrably achieved. In the following sections, the researcher examines pre-industrial circumstances that appear to have been effectively associated with Crown prosecution. In sections 4.5 and 4.6, the author analyses the effective criminalisation of the concept of theft and the divergence of the concept of fraud from the overall increase in the use of law in England and the introduction of public prosecution.

Some sanctions were imposed as a result of a prosecution by the Crown or its local representative. These prosecutions were not aimed at litigating whether a compensation to the Crown was due or not, nor were the proceedings potentially averted via bilateral negotiations. These cases addressed challenges to the administrative and economic roles, the manifestations of sovereignty and its representation at the local level (Walter, 1980; Emsley, 2010; King, 2000). As a guarantee and protection for itself, the assurance of Crown prosecution supported compliance with a range of functions such as imposed standards of measurement, registration, and taxation. These prosecutions 'fit' the (modern) criminal justice system category as they serve as a means of punishment and deterrence to achieve (symbolic) crime control rather than social control and other remedies. The following section elaborates on specific fraud related 'sovereign guarantees'.

4.5 The 'Particularisation' and Criminalisation of Fraud

This section addresses the first research question (RQ1 'duality') by identifying the essential characteristics of a *'sovereign guarantee' of trust in commercial and legal ('official')* conduct. This 'sovereign guarantee' refers to the set of fraud characteristics to which the Crown responds as prosecutor, as opposed to adjudicator. The reader will note that despite the historical socio-legal context through which the pre-industrial scope of the 'sovereign guarantee' of trust is characterised in this section, it carries contemporary analytical relevance. The identification of frauds that are synonymous with Crown prosecution and appear mutually exclusive to discretionary use of law and compensatory remedies addresses a dysfunction between legislation and effective criminalisation (Black,

1972). The below discussion synthesises a social dynamic and a sovereign function with respect to trust in commercial and official conduct (*honesty*) and identifies drivers for its association with the 'highest' quanta of law (Black, 1976).

Prior to its assumption of a prosecutorial mandate over (some) inter-personal disputes, the Crown sparingly identified itself as a party to fraud, and only in particular circumstances, which were detailed in legislation or by proclamation. In chapter two (section 2.5), the researcher provided contemporary examples of this apparent 'mode' of criminalisation that co-exist alongside the criminalisation of 'all frauds'. Such offences, which were either not repealed by the Fraud Act 2006 or subsequently legislated, do not appear to 'add' to the scope of statutory fraud prohibitions, and appear specific and otherwise indistinguishable examples of Fraud Act offences. This 'mode' of criminalisation pre-dates the Fraud Act 2006 and was traced by the author in the context of intermediate research objective three. In intermediate research objective three, the researcher investigates the contemporary role of the particularisation of fraud in criminal statute by examining its functional roots. This section examines whether the challenge to *effective* criminalisation of fraud was indeed the (alleged) absence of a legal definition for fraud (Law Commission, 2002), by attempting to re-construct the historical criminalisation of fraud. One might ask whether historical legislation sought to achieve a similar scope of fraud criminalisation as provisioned for in the Fraud Act 2006 and failed to predict or circumvent "*the fertility of man's invention [to contrive new schemes]*" (Holdsworth, 1909, p. 262 citing Lord Hardwicke, 1759; The Law Commission, 2002 citing The Criminal Law Committee, 1966). If not, meaning that the concept of fraud was historically only criminalised in part as suggested in

R. v. Jones [1703] ("*[not to indict a] man for making a fool of another*"), then a historical 'duality' in statute should be available for study.

The particularisation of fraud offences discussed in this section appear to articulate a narrow scope of sovereign interest in what is otherwise a category of inter-personal disputes. The first instance of particularisation identified by the researcher appears to date back to the Statute of Westminster in 1275. In section 29, *deceit* is disallowed by court officials and those pleading before the King's court (Pickering, 1762, pp. 88-90). This section forms part of a series of provisions set to ensure an equitable standard in the courts and appears responsive to occurrences of abuse of power by court officials, sheriffs and bailiffs (Pickering, 1762; Pollock & Maitland, 1898). The provision against deceit by officials in the King's courts is part of the cementing of the elevated status of the courts in English law and jurisprudence, alongside with other provisions from the Statute of Westminster 1275. The Statute set standards for the dispensation of justice by the courts, and the superior principles of the 'rule of law', which elevates the functional role of the courts in upholding the law, and interpreting laws and norms in judicial decisions (Shapiro, 1986).

The historical strengthening of the English courts during the reign of Edward I (1272-1307) follows from Shapiro's (1986) political (functional) analysis of the emergence of a state-backed third-party 'settlement agent' that supersedes all others (Black & Baumgartner, 1983; Shapiro, 1986). Prior to the reform of the judiciary under Edward I, sources of (alleged) judicial authority were fractured (Pollock, 1904; Prestwich, 1988). The makeup of third-party 'settlement agents'

and systems of justice was not geographically or economically uniform. In large estates, local feudal land owners would have *de facto* jurisdiction over their tenants in various aspects, particularly as it related to matters concerning agricultural production and property (Pollock & Maitland, 1898; Anderson, 2013). The Church presided over ecclesiastical affairs, but not exclusively, and local and regional aristocracy in some localities held its own court. These courts were a manifestation of sovereignty of sorts, or challenge to the Plantagenet claim over their land in more extreme cases where royal judgements and writs were not recognised, and exceptions were ultimately decided upon (Prestwich, 1988; Schmitt, 2005). Furthermore, courts of a lower jurisdiction were predominantly local, and enforcing local norms, and only a minority of them were fully beholden to the Crown (Prestwich, 1988). The legislative capacity of the King was largely in the issuance of statutes, which was not an absolutely exclusive prerogative.

The Statute of Westminster 1275 complements the political consolidation of power following a power clash between King Edward I and Council of Barons lead by Simon De Montfort in the Second Baron's war of 1264-1267, and the expansion of the realm in the 1270's (Prestwich, 1988). The Crown proclaimed (and was able to substantiate) its authority to decide on exceptions previously decided upon by the Church, and mandated due process and reasonable and proportionate fines to be imposed by the courts. In the Statute, certain provisions elevated the rule of law above the Crown and its officials and their official duties, and particularly before the courts. The statute 'guarantees' *honesty* from officers of the Crown in court pleadings, forbids extortion by officials, or excessive tolls. The statute also provides sovereign backing to the courts by imposing sanctions on those who do

not recognise or refuse to participate in the judiciary process. It strengthens trust in Crown institutions through standardisation of processing the role of the Crown as a source of uniform and proportionate justice, and the elevated status of the judiciary and role of the Crown as the guarantor of justice (Shapiro, 1986; Prestwich, 1988). It is important to note that in principle, *dishonest* conduct and perjury in particular might still have required adjudication by the court but were not subject to Crown prosecution.

The identification or certain *dishonest* manners of conduct by perpetrators and circumstance in the Statute of Westminster 1275 appears to reflect a careful and precise approach to criminalisation and the purview of Crown prosecution. The provisions that relate to the concept of fraud appear to serve a greater imperative of standardising a Crown-backed judiciary, and to make sure Crown officials do not undermine royal justice. In the above example, the Crown is not a direct victim of fraud, but rather the victimisation of others in its name is construed as an offence against sovereign interests. Other examples offer a more precise look at the sort of fraud in which the Crown takes an interest as a direct victim through further particularisation of offender and circumstances of the offence. Examples of such specific provisions include: An Act for Accompts and Clearing of Publique Debts and for discovering Frauds or Concealments of anything due to the Commonwealth 1653, or An Act for preventing Fraud and regulating Abuses in His Majesties Customes 1662 (original spellings preserved). These are examples of a considerable body of law, where specific frauds are being detailed and excluded from permissible practice, and as an offence against the Crown. These

offences do not relate to a concept of fraud that is criminal, but rather to its practice against the Crown.

In neither of the above provisions, or indeed others that were accessed and examined by the researcher in this context, the term fraud does not appear to be qualified. The Statute of Frauds 1677, which was allegedly enacted in order to address those "*fraudulent practices which are commonly endeavoured to be upheld by perjury and subornation of perjury*", does not expand on those practices either. The Statute lacks a definition of fraud, or the level of particularisation of what practices and how it seeks to inhibit. It requires any agreement reached with respect of several types of transactions to be recorded on a properly formatted and signed contract. By mandating a contract, signatories agree to one narrative of the transactions and its terms and record it on paper as a means of creating a standard of records that could be used as evidence of the agreed terms of a transaction (Ferguson, 1984, pp. 199-202). The Act in its mandate over transactions to which the Crown is not a party may appear to be similar to the purview of the Fraud Act 2006. Instead, the Act appears to impose a standard for recording transactions. This create both an expectation with 'settlement agents' to be able to refer to documentary evidence on the terms agreed upon by parties to a transaction in dispute, as well as enables both parties to refer to the terms from a mutually agreed source. The Crown does not 'insert' itself by guaranteeing prosecution in response to fraud as a means of inhibiting the aforementioned *fraudulent practices* in the introductory passage of the Act (Holdsworth, 1909). The 'scope' of criminalisation (Crown prosecution) was left unchanged under The Statute of Frauds 1677, which appears only to standardise the expectation of a

written contract in a range of transactions. This also relates to the discussion in section eight below, which examines the development of responses to the concept of fraud during the industrial era, and in parallel to the processes that have led to the contemporary synonymous relationship of theft with law-enforcement activities.

In case law, the Statute of Frauds 1766 is sometimes referred to as describing a mere technical standard, but insufficient or irrelevant in analysing merits or claims of fraud. The merits of claims were considered on a case by case basis (Holdsworth, 1909), for example: "...*this would be a good Will in Law, if attested pursuant to the Statute of Frauds, but would be set aside in Equity for the Fraud*..." (Court of Chancery, 1744). This examination tested whether 'unfair' business practices were used to render the deal, or components thereof as inequitable. A contract can also be used to test the compliance of a supplier, who will not be considered guilty of an offence by not meeting all the terms of the contact. Nevertheless, compliance may be coerced through social controls, risk to reputations, enforcement of market rules, or through applications before a court to recognised liabilities and damages (Holdsworth, 1909).

The absence of a legislative intent towards the criminalisation of the concept of fraud in pre-industrial England is further manifested in the below example where, fraud was recognised as a potentially very harmful and disruptive form of practice:

> *person shall take my money to cause and procure a third person, his trustee, to convey an estate to me; and then shall tell me he cannot prevail upon him to do it, and yet will not restore me my money, or put*

> *me in the same condition he found me: It would encourage all manner of fraud and oppression of that nature, and few men would be safe under any agreement* (Sir Cornwall Bradshaw, Knight v William Sutton, Gentleman [1698]).

The above extract from the court of equity does not indicate a 'slap on the wrist' in terms of judicial temperament towards ('civil') fraud that was not particularised by the Crown. Instead it stains the reputation of Sutton (above) and would limit the future trust that he may be afforded in future trade, whilst providing a compensatory remedy to the plaintiff.

Another driver for particularisation appears to be a requirement to standardise and regulate the practice of insolvency. The development of pre-industrial insolvency law includes, as an inseparable element to such conflicts, the concept of fraud. This discussion highlights how the law is not only a normalising force in social life, but in commercial life as well. Debts are incurred in trade for mutual benefit, yet they are based on a degree of (shared) optimism and a sense of mutual trust. While some frauds may involve a deliberate acquisition of credit or tangibles with no intention of making any return, genuine traders may find themselves in situations where assumptions about future success are no longer realisable. In other cases, the 'ease' of finding one's self with a large surplus in parts of a business cycle present an opportunity to 'go rogue' and convert the surplus to criminal benefit and 'chance it' (Levi, 2008b). The concept of credit, particularly in the mediaeval context, is not that of credit lines given by banks, other financial institutions or investors, but rather the 'float' of merchandise, micro-loans, or 'joint enterprises' from within existing networks (Granovetter, 1985).

Fraud often requires that an agreement be entered into freely, or for a transaction to be made by consent (Naylor, 2003; Smith et al., 2011; Levi, 2008a). In the above sense, it is distinct from other forms of acquisitive crime. When compared to other forms of acquisitive crime where the offender and victim interact directly without guile, the victim of fraud is unlikely to experience recognition of victimisation at the time of transaction (Tollestrup, et al., 1994). In other cases, trust given may be abused and betrayed, despite no malicious intention at the point when the victim chooses to place trust in the offender. The extension of credit embodies risk of the unknown, which may result in an amount having to be recognised as 'bad debt', meaning that it is not likely to be recovered. *Some* risk relates to fraud, but many other legitimate reasons may result in a default on a loan or other forms of credit common in trade through natural disasters, market competition, or honest errors in judgment. Furthermore, the access to securities pledged to creditors, or assets that may otherwise be duly distributed to creditors in a legitimate (non-fraud related) default may be circumvented by fraud. Circumstances may drive a trader to commit fraud against a creditor. In other cases, a fraud could be presented to creditors as an honest default to avoid civil or criminal liability, and potentially lead to debt restructuring and further harm. (Levi, 2008b)

Under common circumstances of trade in mediaeval England, trust (or the expectation of *honesty*) was rooted in mutual acquaintances, common deference, and the expectation of future collaboration given the limitations on travel (King, 2000). A farmer who allows a merchant to collect goods based on an agreement

that the former would be paid at a later time, and both may expect to repeat the transaction in the future for mutual benefit. Furthermore, the standard imposed by the Statute of Frauds 1677 required commercial transactions and some family affairs to recorded on a signed a contract detailing the terms of the exchange. This stipulation created documentary evidence on terms agreed in relation to a given transaction, which would have made it easier for third-parties to ascertain what representations were made, and whether they were met. Marketplace reputations could also be affected by demonstrable breach of contract. These factors would have made trade typically subject to normalisation by market rules, which were grounded in social controls and personal reputations and therefore seldom required further intervention by the courts. (Black, 1976; Black & Baumgartner, 1983; Granovetter, 1985; King, 2000; Laslett, 2005)

A notable exception to the above observation about the market capacity to self-regulate and use social controls and regulation by reputation to normalise conduct and resolve disputes appears to have been fraud by bankruptcy. Furthermore, given the geographically localised context in which local markets self-regulated in mediaeval England, social controls and reputations were not as effective against debtors who were concealing assets or leaving the country (The Cork Commission, 1982). The body of legislation on the matter did not seem to consider the circumstances by which a debt was created, whether it be by honest trade, negligence, or fraud. Rubin (1984) demonstrates that where cases were opened – that is, when private negotiations and arbitration failed, and the creditor could access the courts – less than 1% of debtors were imprisoned. This figure should be seen in the context of the elaborate sequence that had to take place

prior to the imprisonment of a debtor, which is seen in this context as being used to maximise recovery for the creditor and enforce debtor compliance (Innes, 1980; Rubin, 1984).

The imprisonment of debtors is a topic which bridges both the discussion on the 'duality' of fraud and the more general context of acquisitive crime resolution. On the one hand, while there is no suggestion of criminality, it would appear that the function of the prison system of the day was the substantiation of legal orders and fines. In that sense, should the court recognise a debt (via a process initiated and financed by the creditor), the instruction of the court to settle it would be subject to the same means of substantiation. On the other hand, this course of action also prevents and could deter some frauds in the modern legal sense, specifically fraudulent trading, the preference of creditors and long firm fraud (The Cork Commission, 1982; Levi, 2008; Goode, 2011).

Historically, the protection of creditors in local trade regulation and common-law created a strong compliance regime to prevent debtors from fleeing, hiding assets or otherwise obstructing the recovery of their debts (Pollock, 1904; Levinthal, 1919). Twelfth and thirteenth century courts, enforced by custom and decree, against debtors who attempted to conceal assets or abscond, using harsh and summary common-law sanctions (Levinthal, 1919). With the development of commerce and international trade, Tudor monarchs (1584 – 1603) gradually introduced legislative measures to particularise and combat fraud against, and enable, creditors to seize assets from absconded persons. Whilst these measures did not vary much from common-law practices and local trade

regulation techniques administered in English trade hubs of the era, they were still necessary to unify and codify assurances to would-be lenders (Levinthal, 1919; The Cork Commission, 1982, p. 16). Critically for the discussion on the 'duality' of fraud, sovereign backing for trust given by lenders had to be re-established in order to enable and encourage investment and trade despite the growing inadequacy of pre-existing social controls. Furthermore, prior to the introduction of dedicated legislative measures, there was no standard legal mechanism to investigate debtor assets or trace transfers to other parties. These deficiencies in law were previously supplemented by specific practices and customs in local marketplaces, where social controls and the relative simplicity of trade network made such affairs subject to local regulation. (The Cork Commission, 1982; also see Bracton, (c. 1210 – c. 1268) above in this chapter).

With the development and growth of the economy and the extent of opportunities, the attendant risks increased. The Crown was therefore required to codify into law a better system of rules to empower creditors at the expense of debtors. The increased intricacy of trade in late-mediaeval England took away from the practical means through which insolvency could have been regulated by market rules alone (and on a localised level). The increase in foreign trade and multi-regional supply chains and trade routes had also provided opportunities for debtors to challenge their creditors with the task of having to interface with multiple localised markets, where assets could be hidden (The Cork Commission, 1982). The national system of procedure and powers of investigation and trace assets that followed from this context required substantial sovereign-backing in order to be effective. The Act Against Such Persons As Do Make Bankrupts 1542

appears to be the first act to create a legal framework to regulate the relationship between debtors and creditors (Levinthal, 1919). As stated in the opening remarks of the act, it is responsive in nature, and describes what is now referred to as long-firm fraud (Levi, 1987). This fraud type is defined by the acquisition of goods on credit prior to the offender disappearing, or a business declaring bankruptcy (Levi, 2008b). The aforementioned 1542 Act was therefore aimed at those who:

> *craftily obtaining into their own hands great substance of other men's goods, do suddenly free to parts unknown, or keep their houses … for their own pleasure and … against all reason, equity and good conscience* (The Cork Commission, 1982, p.16 citing the Act Against Such Persons As Do Make Bankrupts 1542).

The 1542 Act does not fundamentally address the administration of bankruptcy or administration process, but rather criminalises the practice of intentionally going bankrupt or absconding from creditors. It was not before 1570 that an official state-standard for the liquidation of an estate and distribution of court-seized assets to creditors was legislated. This further enabled creditors and imposed a rules-based system to encourage further investment. Non-compliance with a liquidation process, or not providing access to a debtor's assets as ordered by the courts, was therefore no longer a civil wrong, but a transgression against the state. The treatment of those who were found to conceal assets from their creditors under eighteenth century insolvency laws were substantiated (potentially) by the death penalty. (Levinthal, 1919; The Cork Commission, 1982)

The development of insolvency law offers a compelling historical perspective on the development of sovereign interest in what presently falls under the definition of acquisitive crime. As discussed in chapter two, insolvency-related fraud is an area of practice that, whilst criminal, may still in some cases be resolved outside of the criminal justice system. As well as the wider concept of debtor-creditor relations, bankruptcy was traditionally regulated by social controls (Black, 1976) and by merchants' guilds and specific market authorities (Levinthal, 1919; Black & Baumgartner, 1983). Some mediaeval market authorities were empowered to take direct action against debtors who were intentionally hiding assets, but no uniform standard of enforcement was imposed. Such 'autonomies', where the Crown favoured local 'market rules' and customs (Holdsworth, 1938) reflected a lack of sovereign interest and effective reach over commercial disputes in the parishes (Levinthal, 1919; King, 2000). If there was need for further substantiation with 'more law' (Black, 1976), debts that were disputed could be litigated via an external authority (Black & Baumgartner, 1983), and court levers such as imprisonment could assist to foster compliance (Klerman, 2001). In 1791, a Parliamentary study showed that only 10% of the twelve-thousand writs issued in London and Middlesex in relation to debts resulted with a period of imprisonment even if there had not been an allegation of fraudulent conveyance or concealment of assets. The 90% of the cases where the debtor was not placed in a debtors' prison may indicate that most writs resulted in compliance (Innes, 1980). That said, we cannot discount other factors such as creditor exhaustion ('sending good money after bad') or debtors absconding.

The analysis of the regulation of insolvency in the context of pre-industrial fraud particularisation above appears to present a more responsive and 'measured' model of legislation. Whilst the concept of insolvency is vastly different to 'direct' victimisation of the Crown, it is not clear how it is distinctive from other protections by the Crown. In other words, the substantiation of state insolvency standards and powers could be seen as similar to the regulation of trade through the prisms of a commodity of Crown trade post, where Crown prosecution is readily proclaimed to be applied in response to infractions. Nonetheless, the researcher points to an underlying distinction between the threat of Crown prosecution in relation to commercial protections, and the insolvency regime. The letter does not relate to narrowly defined circumstances of trade directly regulated by the Crown like the former, but rather to all forms and circumstances of trade and credit. Furthermore, the insolvency regime addresses emerging shifts in the balance of power between debtors and creditors, which did not apply to a commercial setting created or defined by the state. Instead, transgressions against creditors and diminished ability to recover losses represent a systemic risk, which could potentially impact upon the availability and cost of credit, as well as the tax base for the state (The Cork Commission, 1982).

Durkheim (1893) theorises on the implications of an increase in the intricacy of the division of labour in terms of the avenues for enrichment it creates, legitimate, or otherwise. Individuals may play a growing number of interchangeable roles in varying circumstances, making social controls and pre-existing means of self-regulation less capable in terms of maintaining social order (Durkheim, 1893; Merton, 1934). Within that context, 'innovation' can enable one to undermine the

“acceptable modes” (Merton, 1938, p. 673) of achieving financial and material goals within a society or a marketplace. This theoretical context appears to be explaining an ‘organic’ demand for ‘more’ law (Black, 1976) from the marketplace in general, as social controls and market rules become demonstrably insufficient to keep risk to creditors from rising (The Cork Commission, 1982).

The mode of criminalisation, despite its not being delimited to specific forms or circumstances of trade and therefore applies to all circumstances of non-Crown-related creditor-debtor relations, still appears different to contemporary criminalisation. Whilst the contemporary (alleged) scope of criminalisation refers to ‘all frauds’ under the Fraud Act 2006, pre-industrial sovereign backing of the state-imposed insolvency regime does not provision against fraudulent means through which a default occurs. Instead, provisions are made to ensure the compliance of the bankrupt party with the courts and their powers to investigates the whereabouts of assets and funds, and against the hiding of assets from creditors. Unless the insolvency regime is directly challenged, pre-industrial law does not offer a prospect of Crown prosecution against the bankrupt party, even if the debt was incurred by fraud. For example, a charlatan might have recruited funds for a commercial enterprise that was based on a false premise, or did not exist, and only be exposed to Crown prosecution in relation to the hiding of securitised assets (The Cork Commission, 1982; Taylor, 2013). With respect to the initial investment, R. v. Jones [1703] appears to apply (“[not to indict a] man for making a fool of another”).

The increase in the division of labour following the industrial revolution and expansion of wealth generated higher demand for law to replace the function of previously adequate social controls (Durkheim, 1893; Merton, 1934). In the context of the 'duality' of fraud, this increase in demand for law seems to manifest itself particularly in areas where there was more disparity between parties in terms of stratification, morphology, culture, and organisation (Black, 1976). Prior to the industrial revolution, the 'duality' of fraud was similar to the 'duality' of other modern criminal constructs. Specifically, it was victim driven, and therefore 'civil' unless directed specifically against the Crown and its stated interests. The 'sovereign guarantee' in the industrial era expanded initially by the confederation of stakeholders who sought to establish standards of prosecution as a means of crime control, with less regard to the primary victim interest in compensation.

In this section, the author has discussed an application of a 'sovereign guarantee' against specific frauds, as a means of indicating that such frauds and involved offenders would be liable to prosecution by the Crown. The section relates to the intermediate research objective number three, which investigates the imperative behind the historical particularisation of fraud. This section presented an analysis of typical examples of pre-industrial statutory provisions and sought to understand whether they were intended to 'encapsulate' the concept of fraud, or rather sought to define a subset of related offences. The reader may consider this investigation to be without merit given discussion on the overall scope of Crown prosecution in pre-industrial England. Nevertheless, the particular 'mode' of fraud criminalisation appears to still be employed in parallel to the criminalisation of 'all frauds' under the Fraud Act 2006. Furthermore, the terms of reference for the proposed

legislation that was later implemented in the Fraud Act 2006 appear to reflect a legislative (or political, see Levi, 1987) intent for Crown prosecution of fraud under commercial circumstances (Law Commission, 2002, p.1). The terms of reference suggest that the scope of (allegedly) desired *effective* criminalisation was not achieved because of "*modern sorts of commercial activities*" (Law Commission, 2002, p.1). The Law Commission (2002) proceeded to recommend the introduction of a general offence to criminalise 'all frauds', and listed its predicted advantages, which the researcher critically discussed in section 2.2.

This emerging prosecution approach (in this section) was different to the prior discussion (further above) on private prosecution, which was the upper-most tier to coercion available in the course of inter-personal disputes. The 'duality' of fraud was shown to emerge from a selective process of exclusion from a general principle of deference to market rules, 'regulation by reputation' and other social controls. The Statute of Frauds of 1667 was introduced not as a means of crime control, but as a means of systematising a written source of evidence to be used in the resolution of commercial disputes, both within the courts and in the marketplace (Holdsworth, 1909). The concept of fraud was demonstrably wider than the scope of desired criminalisation in relation to *dishonesty* in pre-industrial England, notwithstanding fraud being a valid basis for judicial adjudication as an inter-personal dispute. The extent of sovereign interest appears to be consistent with the distinction between possible private prosecution as an ultimate coercive means across the contemporary concepts of theft and fraud (amongst others).

This emerging property ('duality') of fraud represents a process whereby some frauds belong within the criminal justice system or external resolution mechanisms. These are the same parameters used by the author to describe the current 'duality' under a system of law which criminalises fraud in absolute terms as a primary conduct offence (Fraud Act 2006). Those frauds that were eventually litigated on a victim-led compensatory basis represented either the insufficiency of market rules and/or other intermediate resolution mechanisms (Black, 1976; Black & Baumgartner, 1983), or a need for judicial recognition of a debt (Muldrew, 1993). The emergence of a class of frauds that was a subject of state interest, alongside the general deference to market-rules for the resolution of other frauds, is a key theme in analysis of research question one (RQ1). There is added value in understanding what drove the state in the past to resort to crime-controls measures to guarantee honest conduct when analysing the application of an indiscriminate criminalisation under the Fraud Act 2006.

4.6 The Scope of the 'Sovereign Guarantee' of Trust

The following analytical discussion represents a proposed typology of pre-industrial Crown prosecution in relation to the concept of fraud. The discussion is based on the above discussion of the narrow imposition of a 'sovereign guarantee' of trust prior to the industrialisation of the English economy, as opposed to its contemporary (alleged) all-encompassing scope. It seeks to address the apparent dysfunction between 'law-in-theory' and 'law-in-action' (Black, 1972) in the contemporary 'duality' of fraud (RQ1) by identifying typological and circumstantial theoretical suggestions (Black, 1976; Naylor, 2003) for law-

enforcement responses (Hester & Eglin, 1992). The contemporary use of particularised fraud criminalisation suggests that despite their apparent lack of contribution to the scope or definition of criminality, they serve a purpose in substantiating the association of some fraud with law-enforcement activities. To that end, the discussion below provides a characterisation of the functionality of particularised legislation in the context of the social dynamic and the 'invisible hand' behind the 'duality' of fraud (Smith, 1776).

The researcher considered the examination of the social dynamic behind particularised 'criminal' fraud provision to be particularly insightful in the context of pre-industrial legislation. The advantage of a historical perspective is that it provides context to the examination of a lack of sovereign interest in typologies and circumstances of fraud, which is different to the contemporary applicability of a criminal charge under the Fraud Act 2006. Below are three drivers that are understood by the researcher as grounds for the extension of a 'sovereign guarantee' of trust through direct victimisation of the Crown, or its intervention in commercial life. Three key drivers will be identified, including direct state-interests, state-interests in normalising trade, and state-interests in normalising the process of insolvency.

The first driver for criminalisation was the particularisation of offences against the Crown where it undermines direct state-interests or deprives the state of its revenue. Such offences may be similar in outcome to modern prosecution of acquisitive crimes, or to cases of pre-industrial private prosecution where the offender was not able to provide compensation. However, the 'criminality' of

these offences in the context of the analysis of the 'duality' of fraud is grounded in victimisation being directed at the state. The state is a different type of prosecutor to a (private) person: the authority of the courts and the 'law of the land', stems from the Crown, and it prosecutes using the public purse, and in the name of the existing system of government. To offend against the Crown is to challenge it, which has historically resulted not only with the recovery of revenue, but also severe punishments to encourage deterrence through the demonstration of sovereign authority. Within such circumstances, the individual offender typically cannot resolve the matter using social controls or bilateral agreement, but instead was subject to punitive measures.

The (considerable) body of (fraud-related) offences introduced by the Crown is too wide and diverse to be fully elaborated in this thesis, but attention to those frauds that have been particularised offers important insights. Prior to the enactment of the Fraud Act 2006, the present chapter makes clear that fraud was not inherently 'criminal' under statutory law (Law Commission, 2002; Sharpe, 2013). Allegations of fraud were valid torts and wrongs that could have been resolved bilaterally, by a third-party, or by a judge, but not a subject of interest to the Crown. The author's review of parliamentary records tends to highlight three kinds of 'particularisation': (i) those that are committed against the Crown and its coffers; (ii) those that directly challenge a protection or a guarantee by the Crown; or (iii) those that are disruptive of the Crown's regulation of debtor-creditor relations and resolution mechanisms.

Of the first type, are offences such as those specified in An Act for Accompts and Clearing of Publique Debts and for discovering Frauds or Concealments of anything due to the Commonwealth 1653, An Act for preventing Fraud and regulating Abuses in His Majesties Customes 1662, An Ordinance concerning the Excise, 1645, as well as others. These Acts refer to situations where the Crown directly forbids fraudulent conduct, which is construed as an offence against the state or its coffers. The archival research presented does not establish whether such legislation was directly responsive in nature, or whether a degree of foresight was applied in order to curb opportunities or uncertainties. In the pre-industrial context of England, the interests of the Crown would tend not to be restrained by concerns for due process, and the bar would be set even lower in pursuing any parties deemed to be causing damage to the revenue of the Crown. It is conjecture that these acts were a mixture of preventative and administrative proclamations. The underlying imperative appears to have been deterrence targeted at specific groups described in a given act from temptation or perceived opportunity by making explicit the Crown's active interest.

The second group of fraud particularisation in statute is where the Crown plays a role in the regulation of trade. There are two main types of sovereign interference in trade that form part of this group: first is the establishment of trade standards; and second is the normalisation of specific forms of trade. For the first mode of interference, the Crown standardises trade by issuing currency, regulating measurements of volume and weight (for example), establishing trade posts and encouraging domestic and international trade routes. Fraudulent practices involving standards set by the Crown may not 'harm' its financial position in a

tangible way. The Crown is not a party to these transactions, but its guarantees are eroded and its role in normalising trade is directly challenged by frauds in such circumstances. Offences under the Counterfeiting of Copper Coin Act 1771 were added, to the common-law offence against forging silver or gold coins, to ensure confidence in English currency.

The second group of Acts of Parliament is that which curtailed fraudulent practice from particular areas of trade where the Crown had an interest to encourage investment, or balance market forces that affected economic growth. In this mode of particularisation, the Crown forbids specific frauds and forgeries and, at times, specifies them as treason. These offences are an extension of the Crown's protection of itself, and a 'sovereign guarantee' of trust and standards in such areas of trade to which it was applied. Such Acts carve out criminal definitions from the principle of not "*indicting one man for making a fool of another*" (R. v. Jones [1703]), and (potentially) apply a sanction harsher than the principle of not allowing benefit from fraud (see above in this chapter).

The third group represents another form of intervention in commerce, but by managing systemic risk to investors by substantiating the priority of creditors and access to pledged securities or assets of a bankrupt party. As discussed in section four above, increasing amounts of law are made accessible to a creditor, once a debt has been recognised by the courts (Levinthal, 1919; The Cork Commission, 1982). The Crown's role in normalising the commercial aspect of social life was by making available legal instruments to be applied when social controls became insufficient to enforce a debt. As elaborated in the following

paragraphs, the Crown has a historical interest in substantiating trust in economic life (to promote trade) by playing an enabling role in the collection of debt. Such provisions included the imprisonment of debtors as sanctioned by the courts (Levinthal, 1919; Rubin, 1984), which provided greater leverage to creditors.

In legislative terms, the sovereign interest in the retention and expansion of its tax base required demonstrable efforts to address the disadvantageous position of debtors. This applied to domestic and foreign trade to encourage investment and reduce systemic risk. In mediaeval times, creditors might have sought to recover their losses from the debtor's possessions, but there was no legal mechanism to distinguish and prioritise creditors.

As explained above, the introduction of legislation on practices relating to traders and merchants provided a specific framework for debtor-creditor relations. The Crown extends protection to outlaw fraud and extends its authority to administer proceedings via the courts and related mechanisms. The Crown offers creditors access to the same protections enjoyed by the state by particularising offences within the bankruptcy regime. Furthermore, the Act to Prevent Frauds Frequently Committed by Bankrupts 1705 directly identified and criminalised fraudulent conveyance or concealment, as well as provided means of judicial examination and interrogation of debtors. The Act empowered the courts to question debtors and required them to make full disclosure to creditors, who benefited from access to sovereign authority as a tool for optimising recovery and lowering risk (Levinthal, 1919; Holdsworth, 1938).

The above section categorised the drivers for the criminalisation of fraud by analysing examples of the extension of a 'sovereign guarantee' of trust to three types of state-interest in English law. The first type was the Crown's own authority and direct interest in taxation or in the mismanagement of public funds. The second type was those frauds that undermine the Crown's role in regulating and normalising trade by imposing a rules-based system. These frauds included forgeries of currency, measurement and other standards, and against protection in areas and circumstances of trade regulated directly by the Crown.

The third driver for particularisation (insolvency), which may be seen as subordinate to the second, is the regulation of debtor-creditor relations. The Crown sought to impose a rule-based system to bankruptcies, which extended to cover the interests of creditors. This category assumed a role which was previously managed by market rules on a local level and was driven by a desire to encourage private investment and increase lender confidence. This was achieved by imposing a national standard. A system of dispensation which was not based on market rules, which enabled creditors to secure judicial recognition of debt and maximised the potential for recovery. Whilst the administration of these processes was not driven or payed for by the Crown, compliance with such proceedings was mandated and guaranteed by the Crown.

The first research question on the 'duality' of fraud (RQ1) is particularly concerned with distinguishing between those frauds which involve the criminal justice system in their resolution, and those which do not. Prior to the criminalisation of fraud in statute, this 'duality' can be observed as it emerged from legislation aimed at

deterring against specific frauds by applying onto them the (threat or) might of prosecution by the Crown. This was an extraordinary measure introduced at a time when the state did not typically prosecute other acquisitive crimes. This also begins to highlight themes that relate to RQ2, which discusses the 'streamlining' and 'mainstreaming' of the understanding and enforcement of the Fraud Act 2006. The extent to which 'genuine' state interest was manifested by prosecuting on behalf of the Crown before the 1880's institution of public prosecution (Ashworth, 2000; CPS, 2013) offers a framework to understand enforcement priorities under current law.

In the literature review chapter, the author discusses contemporary parallel provisions to the Fraud Act 2006. The literature review discussion points out the particularised nature of statutory fraud related legislation in provisions that were not repealed by the 2006 Act, and in provisions that were introduced subsequently to its enactment in 2007. The critical discussion in chapter two with respect to these provisions highlighted two key observations. The first observation related to such provisions not being mutually exclusive to legitimate actions in such way that offences are typically scoped (Tappan, 1947). Instead, if the same manner of conduct implied in such provisions is replicated under different circumstances to those particularised, they would still constitute an explicit Fraud Act 2006 offence. The second observation was that despite their lack of contribution to the scope of (alleged) fraud criminalisation, contemporary particularised offences feature an objective test that can be applied into 'mainstream' investigation, enforcement and Crown prosecution.

In the context of the ‘duality’ of fraud (RQ1), and the challenge of identifying inhibitors to the ‘mainstreaming’ and ‘streamlining’ of fraud investigation (RQ2), the researcher sought to characterise the particularised mode of criminalisation. Intermediate research objective three was therefore included in this historical socio-legal examination in order to identify the essential social function and characteristics of this mode of legislation as a social phenomenon (Weber, 1978; Durkheim, 1982). Notwithstanding the discussion in the literature review on the scope of ‘policing by consent’ (see section eight immediately below), there appears to be further insight in the examination of the pre-industrial fraud particularisation. Intermediate research objective three asks whether the particularisation of fraud represents an outdated approach to legislation, or does it function as particular means for particular ends. In other words, has this mode of legislation historically been used to denote a much narrower legislative intent, or a failure to capture the concept of fraud through the absence of a legal definition to the gestalt of fraud (Law Commission, 2002)?

The above discussion demonstrated that the historical particularisation of fraud served to sparingly define those transgressions against trust that were subject to Crown prosecution. For those breaches of trust that were not subject to Crown prosecution, compensatory remedies would have been accessible through the court, should other means of conflict resolution not suffice in coercing compensation. A ‘sovereign guarantee’ of trust in legal and commercial conduct was imposed in connection with three state functions. The first was as a means of retaliation and deterrence against those who transgress against the Crown in this fashion, which was addressed by Crown prosecution as an act of subversion. The

prosecution by the Crown could not have been circumvented by the offender making the Crown whole (which was guaranteed by the Crown's supremacy in the liquidation of an estate under section 26 of Magna Carta 1215). 'Punitive' means, which were otherwise avoidable in remedy-oriented private prosecution, were the sole object of Crown prosecution against those who offend against the Crown and its coffers.

The researcher draws a direct functional comparison between particularised provisions of this category (the Crown is a subject of victimisation), and contemporary provisions in relation to tax and social benefit-related frauds. In both cases, harm could potentially be addressed using powers such as in the Proceeds of Crime Act 2002 or the Criminal Finances Act 2017 independently of the punitive sanction, but 'voluntary' repayment does not circumvent punishment. The second historical driver relates to contemporary particularised offences that relate specifically to narrowly defined areas of trade that are directly regulated by the state, and therefore breaches of regulation are subject to Crown prosecution. This refers to offences which relate to transaction of deeds to land, food and pharmaceutical trade, as well as weights and measurements. Both sets of offences are presently defined with a similar level of particularity, which the researcher argues better fulfil the following statement made in recommendation of a general *dishonesty* offence:

> *Clear, simple law is fairer than complicated, inaccessible law. If a citizen is contemplating activities which could amount to a crime, a clear, simple law gives better guidance on whether the conduct is criminal, and*

fairer warning of what could happen if it is. (Law Commission, 2002, p.3)

The third driver for particularisation in the pre-industrial context of this chapter (thus far) relates to contemporary company (see section eight below) and insolvency law. The contemporary examples of particularised offences in the Insolvency Act 1986 (as amended) and the Companies Act 2006 relate to the analysis of the emergence of insolvency law above in this section. The essential properties of these narrowly defined fraud provisions do not relate to the conduct of a firm or its directors beyond efforts to subvert a national insolvency, creditor relations or registration regime. Frauds by a company that are not directed towards its creditors (driver three), HMRC (driver one) or a regulator such as the General Pharmaceutical Council (GPhC) (driver two), are all (technically) Fraud Act 2006 offences. The three drivers themselves, both in their historical and contemporary contexts, appear to represent a reasonable scope for (genuine) sovereign interest in the concept of fraud. It appears that the gestalt of fraud has historically been consistent and sufficient in qualifying fraud, where the scope of criminalisation has itself been made clear. There is therefore reason to question what the value-added is in providing a legal definition to fraud, and whether it enhances clarity in applied circumstances as anticipated by the Law Commission (2002)?

The reader may wonder at the apparent success of the definition of theft in section one of the Theft Act 1968 (as amended) in encapsulating the

essential properties of the offence (Griew, 1995): "*A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and "thief" and "steal" shall be construed accordingly."* The functional role of industrial and post-industrial law-enforcement around the concept of theft and the resulting utility of a simple definition for the criminalisation of 'all theft' is discussed in the following section. The roots of the transition between theft as an inter-personal dispute (Klerman, 2001) to being associated with Crown prosecution is discussed in the following section.

In the context of the criminalisation of fraud, it appears that a body of particularised fraud provisions was in itself sufficient in effectively defining and imposing a 'sovereign guarantee' of trust. Such legislation makes use of the gestalt of fraud as a means of qualifying a breach of trust that is egregious with respect to custom and market-rules (see section 4.3 for historical ontology). In the context of criminalisation of fraud in commercial settings, the gestalt of fraud appeared sufficient in qualifying an offence that particularised the 'sovereign guarantee' of trust if it was applied. The particularised mode of legislation does not, therefore, seem as a dated historical means, but rather a more precise approach to effective fraud criminalisation, and one that is still practiced today, and serves a similar function.

4.7 The Industrial Revolution (1750-1850) and the Increased Demand for Law in England

This section examines the expansion of Crown interest in acquisitive crime and its eventual association with law-enforcement activities and Crown prosecution. This discussion is presented in the context of the institution of public prosecution in England, and critical analysis of the emergent gap between the concept of fraud and the wider concept of theft. A 'duality' in consequence with regards to acquisitive crime did not appear to be as specific to the concept of fraud prior to the industrial revolution and the social developments that are discussed in part A of this section. The modern concepts of fraud and theft were typically resolved between the parties. This may have occurred in the context of a possible victim-led prosecution, whose primary function was to enhance the negotiating position of the victim. In research question one (RQ1), the contemporary context of public prosecution and the criminalisation of fraud itself after 2006 requires a critical examination of the role of acquisitive crime in the development of the institution of public prosecution. This developed by the examination of intermediate research objective five in this section, which seeks to identify the roots of the success of the association of 'all theft' with law-enforcement activities, as opposed to 'all frauds'.

The researcher seeks to understand how the two concepts, which were subject to the same social dynamics and legal outcomes as inter-personal disputes and 'criminal' particularisation, have diverged in their contemporary application. The underlying question seeks to identify the social dynamic that underpins the contemporary non-criminal fraud resolution mechanism, despite the

criminalisation of ‘all fraud’ through its definition into criminal law. This appears to be very similar to the modernisation of the law on theft through the recommendations leading to the introduction of the Theft Act 1968 (The Criminal Law Revision Committee, 1966). A similar reasoning (Law Commission, 2002) concerning the introduction of a legal definition for fraud as a key to the criminalisation of the concept in response to prosecution difficulties have nonetheless not resulted with *effective* criminalisation (Hester & Eglin, 1992). The below analysis and discussion are the result of an investigation into the transition of theft as an offence investigated and prosecuted exclusively by the Crown from its roots as an inter-personal dispute (Klerman, 2001). The researcher sought to understand the functional imperative (Weber, 1978; Durkheim, 1982) behind the *effective* criminalisation of theft through the development of contemporary criminal justice institutions.

4.7.1 Social Change and Change in the Social Functionality of Private Prosecution

In the following paragraphs, the researcher points out changes in the social fabric of industrial-era England. The below developments are presented as drivers from change for the socio-economic circumstances discussed as a ‘base point’ in section 4.4 above in this chapter. From this point of reference, the researcher discusses changes in English society, particularly the division of labour and distribution of wealth therein and re-applies Black’s (1976) theory of law in relation to the concepts of fraud and theft. The industrial era was identified by the researcher as a period of critical divergence between the functional use of law

and social controls in the resolution of the two contemporary criminal concepts. The concept of theft appears to have driven an increase demand for law, whilst Crown prosecution remained sparingly associated with fraud, particularly when harm was not direct towards the state.

In 1640 Lancashire there were seven baronets, seventy knights, one-hundred-and-forty esquires and six-hundred-and forty-one mere gentlemen (Wrightson, 2003, p. 32) within a population of under one-hundred-and-fifty-thousand. Lancashire was considered one of the poorest counties in England despite considerable exploitation of natural resources as well as trade by land and sea (Blackwood, 1978). The rapid growth in population in the county serves to demonstrate the effects of industrialisation on social structure, and its rapid pace. The population of Lancashire reached nearly 1,380,000 in 1831, after having doubled in size during a thirty-year process of urbanisation (Midwinter, 1969). In 1830, Liverpool was linked to Leeds via the Liverpool-Leeds canal and to Manchester via rail (Midwinter, 1971). These links increased the number of travellers and the ease of travel between these two (growing) communities, which contributed to the diminishing power of the pre-industrial social controls. Figures gathered from the Liverpool area estimated that in 1839 some one-hundred-and-twenty-thousand people were engaged in criminality, which provided economic benefits to those participating in such activities and illicit trade (Chadwick, 1839). Urbanisation, particularly in the sense of mass-migration of poor men from the parishes to local manufacturing and commercial hubs acted as a catalyst of social fragmentation (Durkheim, 1897). The ‘cost of crime’ in the Liverpool area was

estimated at £2,000,000, or £167,300,000 in contemporary real price index terms (Chadwick, 1839; Midwinter, 1968; measuringworth.com, nd).

Urbanisation and increases in the intricacy of the division of labour in the economy generated new opportunities for the creation of wealth, by normative means and otherwise (Durkheim, 1897). The above figures serve as an example of an emerged insufficiency of social controls to self-regulate the community. This state of anomie (Merton, 1938) encourages deviant behaviour in the sense that common deference, intimacy, and personal reputation are no longer omnipresent to normalise and uphold standards of behavioural conduct. From a control perspective, the absence of familiarity among the multitudes, ease of travel, economic participation and very limited sense of community cohesiveness made it easier for offenders to avoid detection (Durkheim, 1893; Merton, 1938; McIntosh, 1975).

The five most important changes in Industrial English society that are necessary to reflect upon in applying Black's (1976) theory of law onto industrial legislation and case law include: (i) The collapse of social controls, (ii) the rise in disposable income, (iii) the shift from a feudal mode of production and finance, (iv) the rising labour productivity, and (v) the elevated ratio between households of means and 'the poor' (Royal Commission, 1832). These shifts perhaps contextualise the role of acquisitive crime – namely theft of tangible possessions or cash – and the development of modern policing and public prosecution. The bodies entrusted with crime controls are members of the contemporary institutions of law-enforcement and public prosecution (RQ1). There is, therefore, value added to

the discussion of the ‘duality’ of fraud in critically examining the context from which the concepts of policing by consent (Hay & Snyder, 1989; Kleining & Zhang, 1993; Home Office, 2012) and public prosecution emerged (Ashworth, 2000) alongside their original social function.

With the expansion of wealth and the demise of the ‘one class’ system (Laslett, 2005), it was necessary to protect private property from ‘the poor’:

> *When… some have great wealth and others nothing, it is necessary that the arm of authority should be continually stretched forth, and permanent laws or regulation made which may protect the property of the rich from the inroads of the poor…* (Emsley, 2010, p. 9 citing Smith (1723-1790), lecture date unknown)

The ‘battle’-like terminology in the above source may relate to wider class-oriented discussion, which falls outside the scope of this thesis. Nevertheless, the above source offers insight to the exclusivity of newly generated wealth and the means of its production in relation to the ‘poor masses’ as a rational for the use of ‘more law’ to enforce the right to property (Black, 1976). The increased demand appears to flow from the creation and expansion of wealth, but also from urbanisation and the resulting physical friction between wealth and poverty in circumstances of weakening social controls and intimacy.

The increased demand for law was not only in response to weakening social controls, but also in terms of opportunities to commit crime. The analysis and discussion of pre-industrial resolution of inter-personal disputes above in this chapter did not include a discussion of investigatory challenges. Acquisitive

crime and the trade of stolen goods became less restrictive thanks to (some) valuables being mass-produced and widely marketed. These valuables were commonly available and less identifiable as personal property, and thus possession did not overtly incriminate anyone. Under such circumstances, there was greater latitude to accumulate possessions and wealth without raising suspicion, and individuals were able to reintegrate stolen goods and convert them to gains. Offenders were both less likely to be identified, and shared little by way of intimacy, common deference of reputational considerations with their victims, or with others with whom stolen goods might be traded (Midwinter, 1969; McIntosh, 1970; Blackwood, 1978; Black & Baumgartner, 1983; Wrightson, 2003).

The parish constable who operated at the time held a role that was different to the that of impartially upholding written laws. As late as the early nineteenth century, the role of the parish constable was to assist victims in bringing offenders before the court, and to report to presenting juries and local government administration. These duties did not extend to having a meaningful understanding and application of law and of evidence. The role did not include direct crime control responsibilities or 'whodunit'-type investigations (Rawlings, 2002; Innes, 2012). The typical town or parish constable was described as an "*uneducated person, from the class of petty tradesmen and mechanics*" (Commissioners for Inquiring into County Rates, 1836, p. 8). Constables were elected to a one-year term, often upon the endorsement by the incumbent, and were generally characterised as illiterate, unqualified and sometimes more of a menace than a guardian to the public peace (Commissioners for Inquiring into County Rates, 1836).

The pre-industrial constabulary was an ancillary function to courts, much like that of the contemporary bailiff in terms of decision-making and judgement remit. Unlike the bailiff's role under the current system, which is governed by due process and standards set in law, the role of keeping the peace and that of the parish constable was carried out in a much less formalised and codified set of circumstances. In the following subsection, the researcher discusses the emergence of private prosecution associations for the prosecution of felons. These local 'grassroots' initiatives operated alongside the parish constabularies and used private finance to control modes of offending that were of concern to their members and to bring private prosecutions against offenders.

4.7.2 The Associations for the Prosecutions of Felons, and the Shift Away from Compensatory Justice in the Context of Theft

In this section, the researcher focusses critical attention to historical and social circumstances that have led to a shift in the social function of the courts in the course of (procedurally) inter-personal dispute related cases. Given the socio-economic context discussed in sub-section 4.7.2 above, responses to the concept of theft appear to have gradually shifted away from victim compensation in the context of individual cases. Instead, a new imperative had emerged whereby the goal of the judicial process was no longer towards compelling compliance, but rather punitive. Local groups of factory owners and members of the emerging 'middle class' appear to have mimicked some of the characteristics of pre-industrial Crown prosecution and used the courts as a means of retaliation and deterrence. These prosecutions were not intended to recuperate losses for a

member of the group, but rather for a demonstrative denotation of members of the group and the area in which it operated as ‘zero-tolerance’ zone. A form of collaborative resourcing of prosecution by remote parishes against local bandits in order to distinguish a particular settlement from the lawless state in which its surroundings might have been located. This represents an increase in law with respect (seemingly exclusively) to the concept of theft and the protection of the right to property. Instead of seeking compensation as a means of demonstrating communal resilience, the concept of theft became synonymous with well-resourced investigative efforts, and outcome-oriented prosecutions.

The below discussion relates to the fifth intermediate research objective presented in the introduction to this chapter. This objective contributes to the analysis of RQ1 (‘duality’) and RQ2 (‘streamlining’ and ‘mainstreaming’) by directing critical attention to an underlying difference in the social dynamics between the effective criminalisation of theft, as compared with fraud. The researcher compares drivers for the application of more law as a means to substantiate a guarantee for the right to property against theft, which appear not to have been applied to a sovereign guarantee of trust against fraud. In the context of RQ2 (‘mainstreaming’ and ‘streamlining’), the discussion below examines a process whereby the concept of theft evolved from a cause in an inter-personal dispute, to being exclusively associated with Crown prosecution (Griew, 1995; Klerman, 2001). The researcher identifies the social context through ‘mainstream’ law-enforcement functions in the context of theft. The divergent course on which responses to fraud had developed to the socio-economic changes of the industrial era are analysed separately in section eight of

this chapter and add further depth to the investigation into the contemporary 'duality' of fraud (RQ1).

The prevailing view regarding industrial era acquisitive crime offenses were of ones 'harshly' addressed by an extensive use of the death penalty (popularly known as the 'bloody code'), is only partially accurate. It has been estimated that some thirty-five thousand people were sentenced to death between 1770 and 1830, but only about 20% of these sentences were carried out (Gatrell, 1996). Whether the discrepancy between death sentences and 'execution' rates was known to existing and prospective offenders, or whether this served to deter, remains unclear. The regular public spectacle of the execution of convicted felons was intended to deter future offenders and substantiated the notion of harsh treatment to encourage offenders to settle with their (victim) accusers (Cottu, 1820; Hobsbawn, 2000; King, 2000; Sharpe, 2013).

This is an extension of the dynamic examined in previous sections of this chapter, the judicial process was made disadvantageous enough for the accused so as to maximise the potential for compensation to the victim. Prior to the establishment of police forces, local groups combined the resources of their members to form local privately funded associations for the prosecution of felons. These associations existed to empower its members to investigate crime, apprehend offenders, and prosecute in the courts of law. These associations had their traditional roots in the parishes, and with the dawn of the industrial revolution their model was replicated across four-hundred-and-fifty localities in England and Wales, typically in the wake of industrialisation, urbanisation, or growth of a middle

class (Hay & Snyder, 1989; Koyama, 2012; Schubert, 2015). These associations sought to implement a measure of crime-control by generally favouring to satisfy the judicial process to address repeat victimisation (Schubert, 2015). This approach to the judicial system and its (overtly) harsh approach to sentencing, together with dedicated communal (association) resources to the detection and apprehension of offenders mimicked the modern crime control strategy of the state. It emerged from the increase in private investment in infrastructure and means of production. The above along with the emergence of the middle class and the growth of socio-economically diverse communities, increased the need for public deterrence as a means of crime control (Black, 1976). The following paragraphs elaborate on the development of this emerging form of acquisitive crime resolution, and the proposed reasoning for the exclusion of (some) frauds from the scope of interest for associations.

Local associations focused primarily on 'predatory'-type acquisitive crimes (Naylor, 2003) such as thefts, burglaries and the general protection of property (Schubert, 2015). Associations for the prosecution of felons not only presented cases, but also offered rewards to members of their local communities for information or apprehension of criminals. On March 24th 1791, the Derby Mercury recorded the formation of the Belper Association for the Prosecution of Felons in an emerging industrial community in Derbyshire. The association purpose was to jointly finance the prosecution of "*all persons guilty of murder, burglaries, felonies or larcenies*" (Belper Historical & Genealogical Website, 2011).

The Belper Association made clear its areas of concerns and priorities. The association announced to the county a crime control program whereby those who are not members, but still secure a conviction, will be rewarded by the treasurer. The thinking behind the initiative is straightforward crime control. Encouraging and rewarding prosecutions by non-members and association members alike fostered a 'safe' county in which impunity was (theoretically) not available to offenders. On the first reward tier of five pounds and five shillings were such crimes as murder, burglary, robbery, stealing a horse, or setting fire to structures or agricultural produce. On the second tier of three pounds three shillings were such crimes as stealing livestock, clothing, cloths, or produce. The third tier of two pounds and two shillings covered night-time robberies and burglaries to domicile or commercial property (half the reward for daytime burglars). The final tier of one pound and one shilling was reserved for night-time criminal damage to public property, stealing fruits and vegetables from a garden, taking wood or timber, damaging grass (be it mowed or not), or fishing without a permit (half the reward for crimes committed during the day). (Belper Historical & Genealogical Website, 2011)

The concept of fraud was evidently not included in this list, yet it would be naïve to assume that fraud was not an area of concern for the members of the Belper Association, or to others. There are several ways to approach the absence of this area of concern. The concept of fraud (prior to the introduction of the Fraud Act 2006) was not considered a crime *per se*, and it was not subject to the application of social labelling in the same way as other acquisitive crimes (Naylor, 2003). The second explanation is that fraud risk is embedded in a specific set of bilateral

relationships such as employees, supply chains, or lenders. These relationships were unique to the transactional nature within specific enterprises and their employees, supply chain frauds requiring a supply contract, creditors, and debtors.

The offences that were specified for reward by the Belper Association were directly linked to modes of victimisation that were shared between its members and the general population. Fraud-risk was generic to commercial enterprises that may also have had characteristics unique to each. Unlike the pre-industrial concern of local administrative élites with unlicensed tradesmen, or cheating with measurements, business owners were responsible to check and regulate their supply chains and build long-term business relations and trust. The prospect of supplying new emerging and (relatively) higher margin industry was theoretically sufficient to regulate trade by market rules and to impose regulation by reputation. Similarly, business risk was managed and 'policed' their own workforce and it would reward and employ individuals whom they trusted. Bringing criminal proceedings against a worker suspected of misconduct would have been a more expensive, intrusive, and prolonged process compared to dismissal. Although prosecution may serve to deter others from crime, the prolonged nature of the process would appear to offer limited value-added to dismissal. Dismissal typically required no external involvement, decision-making or indeed any scrutiny by the court.

Regardless of specific attitudes and concerns regarding supply chain or employee fraud, such risk factors were not commonly seen as shared, and the courts were

not typically seen as the preferred means of addressing harm. Observing the behaviour of private prosecution bodies such as the Belper Association offers insight into specific responses to victimisation, and also of crime control strategies. In terms of third-party theory (Black & Baumgartner, 1983), supply chain fraud and crime emanating from the workforce are also less likely to require a sovereign-backed resolution agent to achieve finality. The degree of shared social deference, reputational concerns, and intimacy in industrial-era supply-chains and other business relations may be analysed in terms of social embeddedness (Granovetter, 1985; Feld, 1997; Howard-Grenville & Boons, 2009; Paquin & Howard-Grenville, 2009). In the context of Black's (1976) theory of law, the difference in quantities of applicable law (as a continuation of social controls) are apparent from the crime control strategy of private prosecution associations. Two main social scales and the application of 'more law' from higher to lower rankings is apparent in the action of societies for the prosecution of felons, and the Belper Association in particular. In terms of stratification, it is clear in the description of offences that they are applicable either to crime amongst those lower on the stratification scale, or by those who score low on it against the better stratified. It is not likely for the relatively 'well-to-do' to engage in highway or footpath robbery, steal a horse, rob a dwelling or shop, stealing apples or damage timber. In terms of organisation, the offences of interest stated by the Belper Association were those that occurred outside of organisational frameworks and directed against generic interests of its member organisations. This is manifested in the offences of stated interest, but also by the creation of a scheme to reward those who bring prosecutions against persons unknown to the members of the

association. These were in relation to harm not necessarily linked to any particular member, but to shared risks to repeat victimisation in the area.

The institution of 'policing by consent' emerged as the logical successor to the role of the local prosecution associations (Ashworth, 2000; Koyama, 2012). For instance, the Metropolitan Police Force established in 1829, operated under nine principles set by Sir Robert Peel (Lentz & Chaires, 2007). For instance, principle number two highlights the importance of reciprocal relationships in that the: "*ability of the police to perform, their duties is dependent upon public approval…*" (Home Office, 2012, principle two). Principle four identifies the required relationship between social controls and policing powers: "*the extent to which the cooperation of the public can be secured diminishes proportionately [to] the necessity of the use of physical force and compulsion for achieving police objectives*" (Home Office, 2012). Principle seven extends the metaphor to describe the police officer as a member of society whose role in the division of labour is to maintain the social order (Lentz & Chaires, 2007).

The generic nine principles do not relate directly to the mode of crime to which they were established in order to address. Nevertheless, the urban and industrial communities who were first to establish modern constabularies communicated internally the remit and priorities of their constables. For example, the Manchester Constabulary Force, which was also active in Lancaster and Chester at the time of its formation in 1882, required its entire staff to take the following oath:

> *You swear that you shall… serve our Sovereign… and the Justices of the Peace… in the office of Constable, appointed by the Watch Committee…*

> *for preserving the peace by day and by night, and preventing robberies, and other felonies…* (Kleining & Zhang, 1993, p. 28)

In intermediate research objective five, the researcher seeks to characterise the perspective roles of the concepts of theft and fraud in the development of the institutions of law-enforcement and public prosecution in England. The above discussion on of the development of the concept of 'policing by consent' and (typical) example of a Victorian-era constable oath points to the intrinsic role of the concept of theft in the development of policing in England. Neither of the constable oaths examined by the author (see Kleining & Zhang, 1993) included references to *honesty* in commercial representations or other statements that could be seen as related to a 'sovereign guarantee' of trust. This observation as to the circumstances and context from which the contemporary policing institute emerged follows Black's (1976) analysis of law as a measure used when social controls are inadequate to address a challenge to the existing order. The inadequacy of social controls and challenge to the existing social order appear to have existed in the context of regulating the right to property and the concept of theft, as opposed to the concept of *dishonesty*.

In a contemporary context, the enforcement of particularised 'social guarantees' of trust and the three drivers for particularisation discussed in this chapter, remain distinctive from 'mainstream' policing (as discussed in the literature review). Parallel contemporary enforcement bodies, such as HMRC, Trading Standards, the FCA, local authorities and other industry-specific regulators. Although police

forces may be called upon to assist their activities, the investigatory remit of tax fraud investigation, benefit fraud or regulation and trading standards are conducted by agencies whose function does not depend upon popular consent. Instead, detection and prosecution against those who offend against the specific guarantees of trust under the mandate of such agencies is being prosecuted by the Crown in a similar way to the provisions discussed in section six above. Public prosecution in such instances may be politically or semantically attributed to a sense of 'public interest' (Naylor, 2003). Nevertheless, the researcher traces the essential characteristics of the use of law in such circumstances to a different function to the wider concept of public prosecution (punitive action against offenders who did not commit harm against the state). This analysis suggests that in the context of the 'duality' of fraud (RQ1) it appears that non-police enforcement agencies trace their functional origin to narrow criminalisation and prosecution by the Crown in response to direct victimisation. This is contrasted below with the apparent 'grassroots' use of social controls and means of coercion in inter-personal disputes to affect crime controls tactics at the expense of the compensatory orientation of private prosecutions (Klerman, 2001; Schubert, 2015).

In the context of research question one (RQ1 'duality'), the priorities of associations for private prosecution ('confederate prosecution organisations') formed a strategy by communities and investors to respond to the anomic conditions associated with emerging industrialisation and urbanisation. By 'strategy', the author identifies the proactive efforts to detect those who commit offences in general, regardless of the identity of the victim, or the victim's

membership of the association. Furthermore, the use of the courts as a primary means of combating repeat victimisation and establishing deterrence marks a strategic shift towards crime control instead of the traditional focus on compensation for individual victims. These associations for the prosecution of felons exemplify the role of theft and other offences relating to tangibles and following the concepts of larceny and theft. The concept of fraud and victimisation was not observed in records relating to the activities of such associations in the midlands area, nor were these concepts observed in wider searches of the literature. The social context from which modern crime control institutions emerged seem to have fulfilled a role only with respect to a specific subset of acquisitive crimes such as theft and burglary. This is not to say that fraud was an alien concept for law-enforcement. Outside of the narrow scope of tax collection, regulated markets, trades or measurements, or to enforce bankruptcy rules on debtors, the general category of fraud did not appear to be a concern for the bodies from which law-enforcement emerged.

The development of law-enforcement in the UK appears to reflect the industrial revolution, urbanisation, expansion of wealth (and poverty), and the role of the law of property in a capitalist society. However, the mandate and politics of law-enforcement seemed to target some forms of acquisitive crimes rather than others. Deprivation, a relative measure of stratification, expanded with the emergence of the ‘middle class’ and the formation of new financial élites outside of the landed gentry. During an 1826 Parliamentary debate, Sir Robert Peel, the then Home Secretary, presented figures according to which nearly 86% of criminal trials in previous years concerned property-related crime:

> *…the crime of theft [is] to constitute the most important class of crime. There are acts… of much greater malignity…those of theft far exceed… other species of offence… there can be no question of its paramount importance in the catalogue of offences against society*. (Emsley, 2010, p. 56)

This section contributed to the analysis of the 'duality' of fraud by examining selected historical trends towards responding to the first central research question (RQ1). This helped to distinguish the concept of fraud as distinct from modern acquisitive crime constructs and offered the opportunity for critical analysis of the changes in the role of state powers to resolve such problems. Other forms of acquisitive crime have been shown to challenge communities in a way that resulted with a 'bottom up' drive to systematise the prosecution of offenders as a means crime control. The types of offences (thefts, burglaries) targeted by the local associations for the prosecution of felons became the subsequent focus of the first police forces.

As argued in this section, contemporary acquisitive crimes relating to a workforce, supply chain and business relations (including fraud), (ACFE, 2016; Levi, 2008a; Naylor, 2003) were capable of resolution using 'less law' (Black, 1976). Resolutions were arrived at based on alternative sanctions (dismissal), common deference, and regulation by reputation or social controls (King, 2000; Taylor, 2013). The principle of not indicting one man for "*making a fool of another*" was not challenged in law (Law Commission, 2002; Sharpe, 2013). The research did not locate evidence of similar organisations, akin to the local associations, who

protected their members and the community against fraud. The majority of profit-driven crimes (Naylor, 2003) began to be proactively investigated by local associations from the 1700's (Schubert, 2015), later by law-enforcement from the 1820's, and then prosecuted by the Crown from the 1880's (Ashworth, 2000). The new industrial-era constabularies were directly charged with the relief of local communities from 'policing themselves'. This meant that the central government took active measures to supersede the role of the local associations for the prosecution of felons (Hay & Snyder, 1989; Emsley, 1996; Rawlings, 2002; Emsley, 2010; Koyama, 2012; Schubert, 2015).

The development of the contemporary 'duality' of fraud, which allows it to exist as both a concept in civil and criminal law, traces back to the pre-industrial and early industrial distinction in the identity of the prosecutor, whether state ('criminal') or private ('civil'). For instance, thefts were not 'criminal' before the instigation of the industrial constabularies and public prosecution, in the sense that they were privately prosecuted, and harsher measures existed only to enforce compliance. This mechanism was utilised by the associations for the prosecution of felons as a means of crime control. They were prosecuting as part of a crime control strategy and not in an attempt to secure compensation for the victim from the offender.

4.7.3 Summary

This section examined the role of the concept of theft as a driver for the development of the modern institutions of law-enforcement and public prosecution. In terms of the 'duality' of fraud (RQ1), the context in which law-

enforcement has emerged is the specific need to apply ‘more law’ to address the concept of theft (rather than fraud). ‘Policing by consent’ combined with public prosecution of offences (Ashworth, 2000) became the highest ‘amount’ of available law. It required little or no resources from victims in terms of access. In turn, it promised and delivered little to satisfy victim needs beyond symbolic crime control (Blumer, 1969). This approach to crime control was established to proactively investigate crime, systematically prosecute offenders, and widely apply criminal social labels to offenders (Erikson, 1962; Tyler, 2006). The structuring of law-enforcement around the concept of theft and the investigation of other social taboos (such as violent or sexual offences), establishes the dominance and authority of law-enforcement in its role of regulating English society (Erikson, 1962; Hester & Eglin, 1992; Ashworth, 2000; Rawlings, 2002).

In the context of the second research question (RQ2 ‘streamlining’ and ‘mainstreaming’), this section started to develop the analytical theme for the analysis on the application of legislation to fraud-control. The next section will analyse the parallel preference for ‘regulation by reputation’ as a means of regulating fraud as an undesirable manner of conduct, and not as part of the purview of the emerging criminal justice system (except of matters of non-compliance). The following section presents these social (and political) dynamics in the context of examination of the criminalisation of fraud under the Theft Act 1968 (as amended) and the Fraud Act 2006 in the literature review. The author will develop a discussion of the (possible) merits of a conduct offence as a means of ‘mainstreaming’ and ‘streamlining’ fraud enforcement and investigation.

4.8 ‘Regulation by Reputation’

The above section examined responses to theft and fraud as inter-personal disputes that were historically not subject to Crown prosecution, and it traced divergence in the concepts where theft became a focus of such prosecution, but fraud was resistant to this trend (Klerman, 2001; Emsley, 2010; Schubert, 2015). This section examines the development of responses to the concept of fraud. Whilst the course of *effective* criminalisation through (symbolic) law-enforcement activities did not appear to occur in relation to the concept of fraud, industrial-era law did feature responses to fraud harm and victimisation. These responses are largely historically concurrent with the developments discussed in section 4.7, but instead remain consistent with pre-industrial particularisation of fraud, and steps to enable social controls and regulation by reputation (King, 2000), which were similar to the Statute of Frauds 1677 (see section 4.5). Similar to the concept of theft, the concept of fraud was too a subject of public concern and political action, but of different underlying social dynamics and outcomes (Taylor, 2013).

This section contributes to the discussion of the fifth intermediate research objective which concerns and investigates the social dynamic behind the wilful exclusion of fraud from the purview of the development of the institutions of public prosecution as drivers behind the contemporary phenomenon of the ‘duality’ of fraud (RQ1). Prior to the introduction of public prosecution, social controls were relied upon to regulate crime, and the state offered a mechanism to empower victims through use of the courts to seek compensatory justice (Cottu, 1820; Palmer, 1982; King, 2000; Klerman, 2001). In commercial contexts, social

controls (were historically and) are grounded in the concept of reputation as a normalising force. Risk to reputation served to enforce compliance and deter participants from breaking market-rules. This section will demonstrate that pre-industrial legislation to strengthen market self-regulation, such as the Statute of Frauds 1677 or provisions to mandate compliance with insolvency proceedings, dominated industrial fraud prevention. The industrial 'fraud problem' was viewed as rare and exceptional. It gradually required intervention by the state, but such interventions mimicked pre-industrial deference to social controls and 'regulation by reputation' (King, 2000; Taylor, 2013).

The concept of market-rules was more prevalent and intuitive prior to the emergence of the modern nation-state (Smith, 1776; Weber, 1978; Wrightson, 1980; King, 2000; Wrightson, 2003; Emsley, 2010; Sharpe, 2013; Taylor, 2013). Historically, and particularly before the establishment of public prosecution, commercial disputes including allegations of fraud and debtor misconduct would have been regulated by trade associations, guilds and marketplaces (Cohen, 1982; Black & Baumgartner, 1983; King, 2000; Sharpe, 2013; Taylor, 2013). The 'natural', and political (Taylor, 2013), tendency of the Crown was to assume an enabling or supervisory role rather than challenge other processes (King, 2000).

For example, the Church was allowed to exercise its own jurisdiction, and appoint its own 'judges', under the protection of the Crown as part of the structure of power in pre-reformation times. The matters on which the ecclesiastical courts of archbishops and bishops presided were autonomies used by the Crown, similar to how market rules and customs regulated commercial affairs (Church of England,

1604; Outhwaite, 2006). Both systems were allowed (and enabled) to exercise their limited jurisdiction over certain manners, but the Crown was largely uninvolved in decisions on market, parish or affairs of divinity which did not affect matters of state.

The discussion of RQ1 is enhanced by focusing on the particularisation of fraud in legislation, and from examining interventions in commercial life as well as variations from other forms of acquisitive crime in present-day terms. The following paragraphs offer an exploration on the further divergence of fraud from the main body of acquisitive offences whilst continuing to apply Black's (1976) theory of law. It further qualifies the divergence between the common 'duality' between inter-personal and Crown prosecution in relation to the concepts of theft and fraud by focusing on responses to fraud in the socio-economic context of the day. In section eight, the researcher identifies a dysfunction between the circumstances and functionality from which contemporary policing had emerged, and the concept of fraud. Below is a further analysis of the apparent continuing use of particularisation with respect to fraud, and the persisting legislative hesitancy to regulate fraud by imposing a 'sovereign guarantee' of trust to wider sets of circumstances.

The development of international trade, banks, financial institutions, and investors enhanced the intricacies in financial systems alongside the emergence of London as an international trade hub. Part of this process included an expansion of recognised social currencies that could be used in trade. The main source of standard fiat currency was the Crown, and a key means of protecting its value

was preventing forgeries. In 1694 the Bank of England first issued notes which promised to pay back their face value weight in gold. These notes detached the symbolic representation of wealth from its precious metal source or approximation. Other banks and financial institutions followed and issued banknotes or paper bonds to be used as currency, investment, or capital. (Taylor, 2013)

Other means of paper-based trade were open to abuse. Fraudsters and forgers would sell counterfeit share certificates and bonds to unsuspecting members of the public as genuine financial instruments. As the market for stocks and bonds was growing, forgeries would be found by 'mainstream' traders, such as banks and high-volume investors. Such was the scope of this phenomenon and the concern which it raised, that forging East India or South Sea bonds, two large corporations who were also trading in British government debt, was made punishable by death in 1725 (Taylor, 2013). At the same time, the forgery of paper instruments and coins, used by merchants and the public in common trade, was still considered a misdemeanour punishable by a fine or the pillory in most cases (McGowen, 2004). The 'sovereign guarantee' that was given to companies linked to state interest was different to that which impacted upon 'common' trade to which the Crown was not a direct party.

Forgery of share certificates of Crown backed companies by individuals who were otherwise excluded from this form of trade appear to have demanded 'more' law to regulate (Black, 1976). This typology represents an abuse against those with typically higher rankings on the stratification and morphology scales to the

offender, as well as undermining a narrow sovereign interest. It is therefore consistent with the discussion on the particularisation of fraud in section six above in particular, and Black's (1976) theory of law in more general terms. For their part, members of the political and business élites who may have directed the actions of such firms or traded in legitimate articles, were "*seemingly immune from legal repercussions*" (Taylor, 2013, p. 23). In cases of grossly fraudulent activities conducted by directors of companies enjoying high publicity, there were other tactics available for shareholders looking to recover funds. In 1826, an affair became public that involved Arigna Iron and Coal Mining Company directors who were defrauding stakeholders by funnelling funds away from the company. When the true financial state of the company and the allegations became public, the share price collapsed, and triggered a media scandal and moral panic. After a number of unsuccessful attempts to resolve the dispute on bilateral terms, the shareholders directed their legal efforts towards the civil courts in order to secure compensation. This course of action was preferred over attempts to bring forward a (private) prosecution in the criminal courts. (Taylor, 2013)

As prominent public and political figures of their time, the directors and trustees were, nevertheless, challenged by the shareholders about these transactions. While not disputing the facts, the directors argued that the transactions were 'honourable'. Relying on the directors' public status and the 'simplicity' of the fraud, the shareholders managed to publish their story in the mainstream printed media. In a Parliamentary debate, the prevailing view was voiced by the Tory Attorney General, Sir John Copley, who argued against reforming the law on joint-stock companies, stating that the law was: "*Sufficient to reach any fraudulent*

attempts, by any number of persons firming themselves into illegal companies" (Taylor, 2013, p. 27). More generally at the time, accusations of fraud were often defended against by arguing that mismanagement, poor judgment, and debt were not criminal offences. For example, the Illustrated London News remarked in 1843 that:

> *If we progress at the same rate for half a generation longer, commercial dishonesty will become the rule, and integrity the exception. On every side of us we see perpetually – fraud, fraud, fraud*. (Emsley, 2010, p. 58)

In the world of financial markets and investment schemes, the most important currency was reputation (King, 2000; Taylor, 2013). In the 1840's it became clear that corporate fraud was increasingly becoming a problem that needed to be addressed by the state. As the number of schemes and the volume of trade grew, it was no longer possible to tell an honest enterprise from one that did not exist on paper. This resulted with the enactment of the Joint Stock Companies' Registration and Regulation Act 1844. Accounts were still non-disclosable until mandated by the Companies Act 1948.

The Select Committee on Joint Stock Companies (1841) adopted the view that public scrutiny is the preferable solution to the challenge to trade presented by corporate fraud and conmen. It was said that lack of scrutiny created the conditions for these phenomena to occur and the law is required to enforce more disclosure and prevail yet again on social controls. In other words, law is being used to reinstate (the otherwise allegedly sufficient) social controls and market rules (Taylor, 2013). High entry barriers were set, such as mandating the

publication of the names and addresses of all directors and shareholders as well as the introduction of a registration fee. Criticism of this approach and practice was perhaps best voiced by Judge Sir Edward Abbott Parry who wrote that:

> *Fraud is [a] more complicated offence then larceny, and defrauders sometimes get the better of the law. Cheating is not always a crime. Successful cheating is a question of better education* (Parry, 1914; Emsley, 2010, p. 7).

In addition to these provisions, some other regulatory principles were legislated. Under the Joint Stock Companies Act 1844 and concurrent legislation, the incorporated company was defined as a legal entity separate to its directors. Further criticism against the lack of anti-fraud provisions addressed this change in legal status in relation to the prospect of further fraud victimisation:

> *… the corporate conscience is ever inferior to the individual conscience… a body of men will commit as a joint act, that which every individual… would shrink from did he feel personally responsible* (Spencer, 1855; Emsley, 2010, p. 6)

Responses to harm and victimisation did not include the criminalisation, or the definition of fraud as a prohibited manner of conduct for company directors. The occurrence of fraud involving solvent companies was seen as a 'necessary evil', part of the 'ebb and flow' in venture capitalism (Taylor, 2013, p. 100; The Economist, 2014). 'Properly' registered companies under the 1844 Act were regarded as 'safe', their directors and shareholders known, and their private addresses were a matter of public record. It gradually emerged that 'registered' companies could also be engaged in fraudulent activities. Such companies

presented themselves as compliant with the new regulatory regime, which offered no real assurance to investors. Turning to market-rules and regulation by reputations was criticised as enabling fraudsters to continue to operate whilst legitimised "*by [an] act of parliament*" (The Select Committee on Assurance Associations, 1854; Taylor, 2013, p. 97). Prosecution of frauds by registered directors was still subject to earlier legislation, such as the 1757 false pretence offence which could only be prosecuted as a misdemeanour (Taylor, 2013).

'Regulation by reputation' is consistent with the capitalist ideology and system of values (Smith, 1776; Weber, 1978; Sugarman & Rubin, 1984). Before and during the industrial era, the particularisation of fraud did not extend to the guarantee of trust between an entrepreneur and his investors, as long as the enterprise was compliant with its reporting and disclosure duties in law (Sugarman & Rubin, 1984). In the City of London, abuses of investor trust were reconciled from within the trade guild, but not prosecuted or made public for fear of creating a scare and reducing the potential investment members could attract. This model of self-regulation, and the absence of a common authority to which frauds against investors could be reported, as they were not a matter of criminality, makes statistics of such practices unreliable. During economic downturns, more frauds became exposed by the press, as disenfranchised investors organised to pressure Parliament to take legislative steps (Taylor, 2013). Taylor (2013) and Robb (1992) provide examples for cases of public 'shaming' in the press of swindlers and fraudsters taking advantage of investor trust. By the 1840's it became clear that they were far more common examples to challenge the

prevailing faith in the "*untarnished character of the English merchant*" (Taylor, 2013, pp.26-27).

This section examined the extent and manner to which industrial-era fraud was addressed by the state, and the preference to enable market-rules over direct criminalisation and crime-control. The 'duality' of fraud began to emerge with the extension of Crown prosecution to specific abuses of trust that were deemed to be of state interest. The preference for market-rules was not due to an absence of state-interest, but instead manifested an overriding approach that favoured self-regulation (Balen, 2002; Taylor, 2013). The preference, and deliberate action to enhance and enable 'regulation by reputation' as a form of deference to market-rules, is an important phenomenon in the investigation into the 'duality' of fraud (RQ1).

4.9 Conclusion

The above chapter provided a historical socio-legal examination of the phenomenon of the 'duality' of fraud as part of a wider social phenomenon that governs the 'amount' of law applied in dispute resolution. The above examination was directed by the following five intermediate research objectives presented in chapter three:

1. Are the defining characteristics of the gestalt of fraud a constant in English law, or a concept shaped by case law or legislation (or both)?
2. Is the 'duality' of fraud (in terms of use of varying 'amounts' of law for fraud resolution) a historical trend, or a more recent phenomenon?

3. Was the particularisation of fraud in law aimed at substantiating an overriding criminal definition of fraud, or has it specified historical states of 'duality'?
4. Can the social dynamic behind the historical relationship between use of 'higher' and 'lower' amounts of law ('criminal' and 'civil' or bilateral resolution) (Black, 1976) be characterised?
5. Given the criminalisation of 'all thefts' (Theft Act 1968 as amended) and 'all frauds' (Fraud Act 2006), how did the two concepts relate to the development and social functions of the institutions of public prosecution?

The examination began in section two with the introduction and application of Black's (1976) theory of law and third-party theory Black & Baumgartner, 1983) to the study of the 'duality' of fraud (RQ1) as a social phenomenon (Smith, 1776; Weber, 1978; Durkheim, 1982). This discussion highlighted the advantages of the above theoretical frameworks for the study of the 'duality' of fraud, particularly through its use of social indicators as theoretical suggestions of means of dispute resolution. This discussion was developed in response to intermediate research objective four, which sought to characterise the relationship between varying 'amounts' of law as a social phenomenon as opposed to a legal one (Black, 1976). In the context of RQ1 ('duality), chapter two pointed towards a need to examine an apparent dysfunction between 'law-in-theory' and 'law-in-action' in relation to the Fraud Act 2006 (Black, 1972).

In section 4.2, the researcher provided an epistemological analysis of the concept of 'duality' in the absence of categorical indicators in the form of a distinctive legal

jurisdiction (the criminal courts) and the institutions of public prosecution. Instead, a compensatory-oriented system of private prosecution enabled self-proclaimed victims to finance proceedings against an accused party concerning a broad range of inter-personal disputes that spanned across fraud, theft and violent crime (Klerman, 2001). Sanctions that may appear to indicate a criminal quality to the contemporary reader may potentially be applicable in relations to such disputes and were used to ensure compliance with the compensatory remedy ordered by the courts. Nevertheless, the same style of outcomes was also applicable in relations to debts recognised by the courts with no suggestion of wrongdoing by contemporary or pre-industrial standards, in what would be otherwise seen as 'civil liabilities'.

In the context of intermediate research objective two, the 'duality' of fraud appears to be part of a historical trend that extended across multiple concepts that are subject to effective criminalisation in their entirety (such as theft). The state had no interest in 'inserting' itself as a party to what was regarded as an 'inter-personal dispute', but instead provided an ultimate means of coercion where social controls and other resolution mechanisms were insufficient (Black, 1976; Black & Baumgartner, 1983; Klerman, 2001). This was applied across all disputes that were seen as meriting a compensatory remedy, ranging from murder (Rubin, 1996) to insolvency (Cohen, 1982). Further analysis was provided in Part B to characterise the social function of the courts in pre-industrial inter-personal dispute resolution. The researcher examined the historical developments that have led to the emergence of an independent judiciary in England, and the functionality that it offered as its supremacy in jurisdiction over the dispute

resolution was established. The discussion included the identification of prosecution by the Crown, using its resources, and use of the courts to seek a primarily retaliatory form of justice (as opposed to compensatory) as a qualifier to pre-industrial analogues for the contemporary criminal justice system. By extension, the compensatory-oriented private prosecution is seen as analogous to contemporary civil litigation in that it offers a final means of coercion in inter-personal dispute resolution. The court may have acted in a punitive fashion in order to enforce compliance with orders that were rendered in relation to legitimately incurred debts that it had recognised, or liabilities in relation to civil wrongs (including theft and fraud). Nevertheless, such outcomes in themselves were inconsistently applied and universally applicable (in theory) in compensatory-oriented litigation where the courts recognised a debt or imposed compensation.

In section 4.3, the researcher revisited the overall ontological assumption made towards the gestalt of fraud in this thesis. In section 3.2, the ontology of fraud is associated with the unpacking of the gestalt of fraud by the Law Commission (2002) and implemented in the Fraud Act 2006. Nonetheless, it appears that the term *fraud* itself was in common use in both by jurists and laypersons for centuries of English history, but with no apparent source of definition. The first of the five intermediate research objectives sought to examine whether the contemporary approach to the definition of the concept of fraud (independent of its theoretical criminalisation) is applicable in a historical context as well. The researcher reconstructed the same defining characteristics of fraud refined by the Law Commission (2002) from pre-industrial records of its use in commercial, judicial and casual contexts. It would appear that the underlying meaning of the gestalt of

fraud had not been subject to fundamental change since time immemorial. Despite extensive searches, the researcher did not encounter examples of the use of the term fraud in any of the above contexts that relates to a different meaning than the current definition used to criminalise ‘all fraud’ under the Fraud Act 2006.

The socio-economic circumstances of pre-industrial England were subsequently discussed in section 4.4. In sub-section 4.4.2, the researcher identified key socio-economic characteristics, and an analysis of the circumstances in which the concepts of theft and fraud were manifested and resolved. Prior to the industrial revolution, the overwhelming majority of the population were of little financial means and lived in rural communities where they enjoyed relative intimacy and social exclusivity. Social controls and regulation by reputation were highly functional towards regulating and resolving disputes. The courts were available in rare cases where members could not arrive at a resolution of an inter-personal dispute, or when an individual who did not share the same group association and common deference, and judicial coercion was required. In sub-section 4.4.3, the researcher introduces the pre-industrial function of Crown prosecution in pre-industrial England. Prior to the introduction of public prosecution in the 1880’s (Ashworth, 2000), the scope of Crown prosecution was limited. Nevertheless, this mode of prosecution was functionally distinctive from the resolution of inter-personal disputes. Crown prosecution in itself does not relate to a specific inadequacy of social controls in dispute resolution, but instead to the enforcement of sovereign functions and prerogatives that define the jurisdiction (Hobbes, 1651; Rousseau, 1762; Schmitt, 2005). Crown prosecution underscores the ability of

the state (and local administration) to regulate certain social functions by punitively responding to alleged infractions. This dynamic, which represents the 'highest' amount of law that could be affected was also analysed and compared to private prosecution using Black's (1976) theory of law. The detailed theoretical discussion in Part B demonstrates the difference between prosecution in the context of inter-personal disputes ('civil'), and prosecution by the Crown ('criminal'). The former represents the use of state powers to enable victims to secure compensatory justice, whereas the latter addresses an undermining of the social order.

In sections 4.5, and 4.6, the narrow scope of frauds that are construed as undermining the Crown are discussed and characterised. The scope of pre-industrial criminalisation in itself is limited, particularly as the Crown did not seek to 'insert' itself into disputes that did not concern its interest directly. Those in specific positions through which they could fraudulently engage with the Crown and its protections would have been well aware of the particularisation of *dishonesty* in such circumstances, and its association with punitive prosecution by the Crown. The researcher identified three drivers for the imposition of a 'sovereign guarantee' of trust in commercial and official conduct. The first driver relates to the direction of harm directly towards the Crown. *Dishonest* conduct against the Crown was construed as subversive conduct, and was harshly treated, as it was deemed to directly challenge the existing social order (Black, 1976). The second driver does not follow the typology of direct harm towards the Crown, but rather the exercise of sovereign power to regulate particular aspects of commercial life. The extension of the protection the Crown affords itself, in the

form of particularised ‘sovereign guarantees’ of trust, serves to identify the Crown as the victim through the transaction in relation to the protections it imposes. The third driver is specific to the substantiation of the regime imposed by the state to regulate bankruptcy proceedings and debtor-creditor relations. Whilst the circumstances of insolvency are not subject to Crown prosecution (they might become subject to further compensatory-oriented private prosecution), compliance with the administrative provisions set by the Crown is subject to direct protection. The particularisation of fraud in this context refers to duties of compliance and transparency with respect to the investigatory powers of the local courts in administrating bankruptcy proceedings. Also included in this category are particularised provisions against the debtor evading creditors or the courts, hiding assets, or making false representations with respect to assets that may be distributable to creditors.

The above discussion relates to intermediate research objective three, which asks whether the particularised approach was used to manifest a legislative approach toward the criminalisation of the concept of fraud. In other words, was the historical legislative intent toward fraud as wide as in the contemporary criminalisation of ‘all frauds’ under the Fraud Act 2006, or was the intention narrower in scope, leaving some frauds to be resolved as inter-personal disputes? The historical and contemporary particularisation seems to relate to the enforcement of sovereign functions and prerogatives that exist outside of the scope of the concept of ‘policing by consent’. These examples are also under the purview of agencies that are presently separate and operate independently of the police. These separate agencies enforce the law with respect to tax collection,

social benefits, trading standards and measurements, and company law. Enforcement relates superficially to the particularised provisions that do not otherwise add to the scope of criminalisation under the Fraud Act 2006, but instead offer advantages in investigation and the scope of responsibility for non-police agencies.

The apparent contemporary dysfunction between the concept of fraud and mainstream policing was the subject of section 4.7. In sub-section 4.7.2, a number of key social indicators that are used in Black's (1976) theory of law and were subject to substantial changes from their pre-industrial state were discussed. Urbanisation, physical and social mobility, mass production, and the creation of new sources of wealth, social currencies, and financial instruments diminished the effectiveness of social controls, and the practicality of regulation by reputation. The above was applicable across the concepts of theft and fraud, but instead represents an apparent point of divergence between the two. The demand for 'more' law led to the imitation of the Crown prosecution dynamic detailed in sub-section 4.4.3 to the concept of theft and the protection for the right to property appeared to have come from the 'grassroots'. Local associations for the prosecution of felons expressly preferred to mimic the Crown in deterring against victimisation of their members or in the areas they assigned themselves to 'police' with punitive prosecution (Schubert, 2015). Members of these associations did not typically seek to recover compensation, but instead were collectively willing to invest investigative and legal resources in order to exercise a form of crime control effort and prevent future harm.

The association for the prosecution of felons did not appear to be subject to a limitation of the form of inter-personal disputes they elected to respond to with punishment-seeking prosecution. Nevertheless, their activities converged around the concept of theft (and criminal damage to property), in what appeared to the researcher as an 'organic' demand for more law in response to challenges to the protection of the right to property in industrial-era England (Schubert, 2015). The same imperative appears to have driven the political process behind the creation of the modern police constabularies, which relieved communities from the need to regulate crime through investigation and punishment-seeking prosecution. The resulting concepts of 'policing by consent' and public prosecution effectively 'inserted' the Crown, into what previously were litigated as inter-personal disputes, as it assumed the role of the victim through its guarantee of the right to property.

The concept of fraud was not subject to the same social and political pressure to apply 'more' law as a means of categorical replacement of resolution mechanism grounded sole in social controls (Black, 1976; Black & Baumgartner, 1983). The discussion in section 4.7 identifies a fundamental social difference that distinguishes the functionality of post-industrial Crown prosecution between the concepts of fraud and theft. The definitive and modernised definition in the Theft Act 1968 is considered successful in making plain what constitutes the offence of theft (Griew, 1995; The Criminal Law Revision Committee, 1966). The same method, the inclusion of a readily understood definition of the underlying concept (theft/fraud) as an offence, was the principle recommendation of the Law Commission (2002). However, the concept of theft *is* a driver for and a subject of policing by consent and public prosecution, and the protection of the right to

property appears to underline the development and conduct of these institutions and the use of a punitive form of justice. The addition of a useful definition to theft, a term already associated with *effective* criminalisation, resulted with different outcomes to the imposition of such wide and ethereal modes of criminalisation with respect to fraud.

In section 4.8, the researcher presents industrial-era responses to the concept of fraud that occurred largely concurrently with the processes the led to the *effective* criminalisation of theft discussed in section seven. Similar to the concept of theft, the industrial-era brought about an expansion of opportunities and means of profiting from egregiously *dishonest* practices. Despite some sense of moral panic and press coverage (see Taylor, 2013), the approach toward the criminalisation of fraud does not appear to have changed. Legislation was introduced to particularly criminalise *dishonesty* regarding narrow sovereign interest, and not as means of addressing the challenges of fraud, particularly as it relates to abuses of trust in the context of venture capitalism.

In addition, changes were made to company law in order to enable marketplace participants to know and track the identities of the individuals behind registered companies. Instead of associating fraud by companies and individuals in response to public outcry, the legislative intent with regards to fraud was to enable 'regulation by reputation' (King, 2000; Taylor, 2013). These changes are consistent with the three drivers for the pre-industrial particularisation of fraud, identified in section 4.6, and that relate primarily to the second and the third drivers. These two drivers represent the narrow 'insertion' of the Crown into

breaches of trust that were not directed against its coffers. Instead, they represent an extension of a sovereign protection to specific commercial circumstances (driver two), or the imposed regime on creditor-debtor relations and compliance with court-led liquidation processes.

The registration of companies, directors and shareholders in response to a growing challenge of fraud against investors appears to relate to the 'prevention' of fraud by the Statute of Frauds 1677. Whilst both provisions did not expand the remit of Crown prosecution, they enacted a procedure that enabled victims of fraud to use various means of coercion against their abusers, including private prosecution as required. Whilst the Statute of Frauds 1677 mandated the signing of a contract to record terms of a transaction, the Joint Stock Companies' Registration Act 1844 required companies to register the names of their shareholders and directors. In addition to being able to identify the beneficial owners of a company that may have engaged in fraud against investors, further benefits extend to legitimate bankruptcy situations as well, and limit the scope of potential downstream abuses. Furthermore, company law was expressly intended to replace marketplace intimacy by mandating the registration of stakeholders. Investors were able to estimate the level of risk they were willing to incur in the investment by referring to personal reputations of its owners (Taylor, 2013). The Financial Conduct Authority (FCA), a contemporary financial regulator that does not operate through 'mainstream' policing by consent but rather by sovereign authority. The FCA publishes advice with regards to investment fraud on its website. The advice directs potential investors to a register of FCA-authorised firm and individuals, issues a warning against prospects 'too good to the true' or

fixed returns, as directs victims of fraud to a consumer helpline and an FCA online reporting form (FCA, 2016).

The (alleged) criminal implications of investor fraud ('get-rich-fast scams' in the case of the above example), do not appear to feature in this advice. Instead, the advice encourages prospective investors to use the registration mandate to see whether the alleged investment opportunity is operated by reputable people. Those who suspect a scheme to be fraudulent may contact the regulator, but the literature discussed in chapter two points to difficulties in engaging with law-enforcement and public prosecution bodies in this context (Button, et al., 2013).

The concept of fraud was not itself a subject of association with the emerging institutions of the contemporary criminal justice system and policing by consent. Instead, it remained a subject for narrow particularisation of insular 'sovereign guarantees' of trust. Industrial-era responses to fraud did not appear to have changed in nature, but rather adapted to the changing socio-economic landscape such as from agrarian to capitalist society. In the context of the fifth intermediate research objective, the above discussion appears to underpin the difference in effectiveness in association of 'all thefts' and 'all frauds' with law-enforcement action and public prosecution. Through this investigation, the origin of the dysfunction between 'law-in-theory' and 'law-in-action' with respect to the Fraud Act 2006 (Black, 1972) is explained through contextual sociological analysis of historical evidence. The concept of theft is a useful analogue in that it historically shares a common resolution dynamic with the concept of fraud. Through social development, theft is subject to categorical association with law-enforcement

activities and is integral to the work of the institutions of policing and prosecution that are (allegedly) tasked with the challenge of fraud.

This chapter identified the dysfunction between the categorical criminalisation of fraud, and the social function of law-enforcement. In addition to the discussion of 'competing' compensatory fraud resolution mechanisms, and the investigative difficulties with an offence defined by qualified by test of *dishonesty* in chapter two, this chapter adds additional critique. The examination of the archival and literary sources accessed by the researcher point to limitations to the extent to which fraud can be regarded as categorically belonging in the purview of the criminal justice system. In this context, the contemporary 'duality' of fraud should not be viewed as a surprise but rather the constitution of material history and trajectory. What does appear to be out of the ordinary is the attempt to impose the same scope of criminalisation as theft onto the concept of fraud (Law Commission, 2002). The criminalisation of 'all frauds' under the Fraud Act 2006 appears not to account for the difference in association between the concepts of theft and fraud, law-enforcement activities, and their respective social context and function.

Chapter Five: Analysis of Survey Results and Discussion

5.1 Introduction

In this chapter, the reader is presented with the findings of the survey described as 'phase two' in section 3.4 of the methodology chapter. The findings describe and critically analyse the (typically) anticipated type of official resolution mechanism as a way of measuring 'how much law' may be applied (Black, 1976) using a five-point ordinal scale. The data refers to sixteen hypothetical cases of fraud victimisation (see section 1 in Appendix A), and respondent answers to how such cases may typically be addressed. The complete dataset is included in Appendix B, where the results are presented for the entire sample (N=140), and the sub-groups of financial investigators (N=51) in law-enforcement or otherwise and laypersons (N=89). The results are discussed in the context of the three theoretical assumptions of which this data collection tool was designed (see below in this section and in section 3.4 in the methodology chapter) and presented in this chapter.

Following each of the hypothetical questions (presented as Q1-16 in the interest of simplicity for the reader), participants were asked to indicate what they considered to be the typically most likely outcome on the following five-point ordinal scale (Stevens, 1946; 1951):

1. A criminal investigation potentially leading to an arrest.
2. The incident being reported to a law-enforcement agency but taken no further.

3. Regulatory sanction / commercial litigation
4. The victim takes other steps against the perpetrator or recovers some of the losses from the perpetrator.
5. No action is taken by law-enforcement or the victim.

These are referred to as options one, two, three, four, and five, and included in short-form in tables included below in section 5.3 and are part of the complete dataset of responses provided in Appendix B. Given the focus of the main research questions, the presentation of findings in section 5.2 below is primarily focused on the rates in which participants indicated options one and two as representative of the typically most likely outcome. Option one was defined as the 'threshold' of denoting fraud as being responded to by a law-enforcement agency for the purposes of the dichotomy between 'criminal' and other fraud resolution mechanisms in RQ1 ('duality'). Option two was designed to be indicative of the existence of a perceived barrier to the unpacking of a hypothetical example of fraud harm and victimisation as grounds for law-enforcement responses. Given the scope of analysis in this thesis, the focus of critical discussion is on the role of legislation in enabling or inhibiting the perceived propensity of law-enforcement agencies to respond to indications of fraud harm and victimisation (RQ2, 'mainstreaming' and 'streamlining'). Options three, four, and five offered to participants a variable scale of resolution mechanisms of the use of different 'amounts' of law (Black, 1976). Responses including indications of these options are included in section 5.3 and are included in the discussion of findings when they offer critical value added to the understanding of the main research questions.

The design of the sixteen hypothetical examples of fraud harm and victimisation in this study was intended to test three theoretical assumptions which emerged as key themes in the literature review. The first assumption was that 'predatory'-type fraud offences are more commonly associated with law-enforcement activities relative to 'commercial'-type examples of offending (Naylor, 2003). 'Predatory'-type offences feature simple transactions, readily identifiable victims, clear losses and gains, and are strongly associated with law-enforcement responses (Naylor, 2003, pp. 84-85). 'Commercial'-type offences occur in conventional business situations, multiple otherwise legitimate transactions that are used as part of an illegal method, and sometimes victims, losses, and gains may be difficult to identify. 'Commercial'-type offences are not as well associated with law-enforcement response (Naylor, 2003, pp. 88-89), and also related to the definition of white-collar crime as a category of circumstances of offending that is under-represented in crime statistics (Sutherland, 1940). Naylor's (2003) typology of profit-driven crimes was discussed and applied the critical discussion of the Fraud Act 2006 and the 'duality' of fraud in the literature review (section 2.4). This typological difference in *effective* criminalisation (Hester & Eglin, 1992) is examined below by comparing responses to examples of expressly 'predatory'-type frauds and 'commercial'-type frauds (Naylor, 2003). See table 2 below in this section.

The second assumption was that offending 'upwards' on the socio-economic scales of stratification, morphology, and organisation more commonly result with the application of 'more' law (Black, 1976). Black's (1976) theory of law provides a scale of resolution mechanisms as indicative of relative 'amounts' of law (as

discussed in the literature review in section 2.3). In the context of RQ1 ('duality'), the author sets the threshold for 'criminal' resolution of fraud by the use of investigatory resources by a law-enforcement agency (regardless of downstream outcomes). The use of 'more' law flows from the challenge to the existing social order that results from harm and victimisation that is directed 'upwards' on socio-economic scales and is generally directed 'downwards' in response (Black, 1976).

The third assumption was that particularised criminalisation of fraud is advantageous in its clarity to the conduct-based general offence in the Fraud Act 2006. The study included three examples of offending subject to narrow definitions in statutory law, which related the three functional categories of fraud particularisation from chapter four above (see section 4.6). The first function was the protection of the Crown coffers and its dues, which was examined by the inclusion of a Prevention of Social Housing Fraud Act 2013 in Q4. The question presents a benefit of £150,000, which is the same amount indicated in Q10, which is an example of a 'predatory'-type employee fraud not subject to particularisation. Two other particularised offences were included in this study. The second function was the narrow regulation of commerce and trade rules intended to inspire confidence and investment, which was tested using a company law, which was preferred due to its non-industry specific nature. An offence under the Theft Act 1968 (as amended) section 17 and Companies Act 2006 (as amended) sections 363 and 393 was included through Q8, which featured a financial statement fraud by company directors intended to gain favour with investors and creditors. The third function was the definition of debtor-creditor relations and the substantiation of a state-imposed bankruptcy and insolvency regime. This

function was represented in Q1, which featured an Insolvency Act 1986 (as amended) sections 213 offence of fraudulent trading (knowingly continuing to operate a company whilst insolvent).

In the following section (5.2), the results of the survey are presented with discussion of the main research questions with respect to the dataset as a whole. This discussion includes the interpretation of the contemporary 'duality' of fraud (RQ1) in reference to frequency of option one indications by participants. This is followed by discussion of indications of option two, which indicate a perceived unfulfilled demand by reporting victims for law-enforcement activities as the typically most likely outcome. Whilst options three, four, and five are indicative of functional use of other resolution mechanisms (or failure to resolve or report fraud in options five), option two represents a report of an offence to law-enforcement agency that does not result with investigative responses.

This discussion therefore relates to difficulties with mainstream application of fraud as a criminal concept in the context of the criminal justice system (RQ2) under the current system of law, and the Fraud Act 2006 in particular. This is followed by a discussion in section 5.3 in relation to the three assumptions discussed in chapter three and in the introduction to this chapter. This is followed by further critical analysis of four groups of results presented in a descending order of association with law-enforcement activities (option one) and discussed in relation to the three assumptions discussed above in this introduction. The conclusion in section 5.4 below includes specific discussion of limitations and recommendations for empirical research. This section concludes with the below

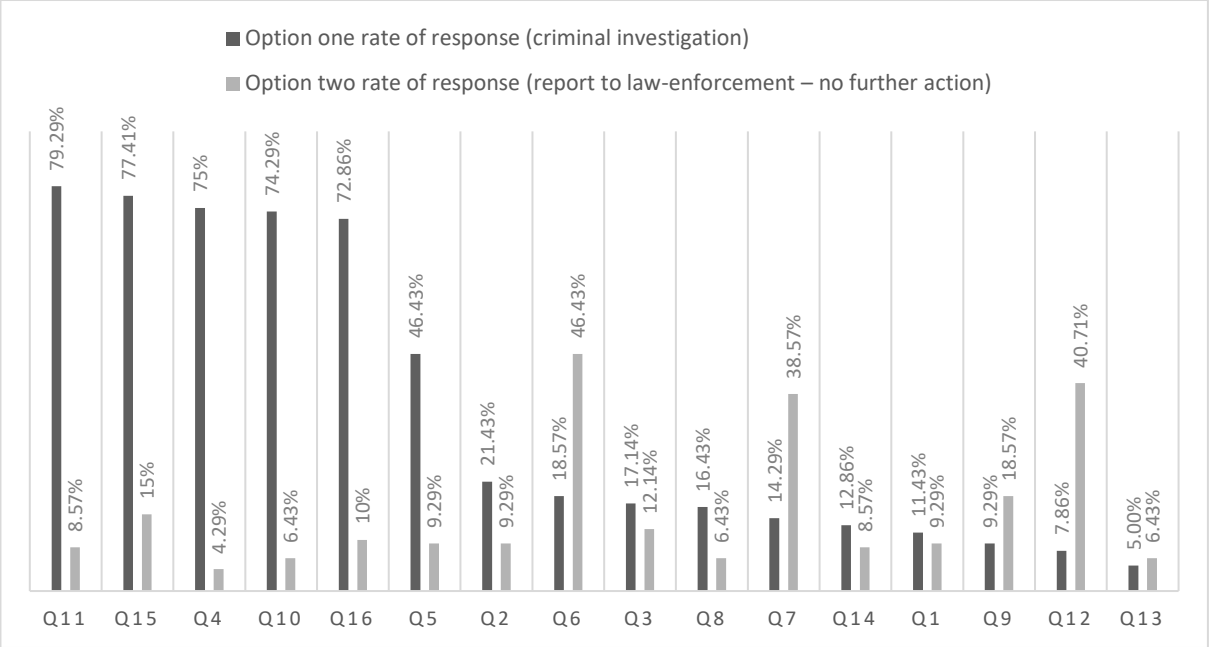
summary table of the sixteen questions summarised and accompanied by identification of typology (Naylor, 2003), 'direction' of harm (Black, 1976) and mode of criminalisation (see above three assumptions). The questions are presented in a descending order of option one selection and retain the sequential number of their presentation to participants. The table provides brief notation of how each of the hypotheticals relates to the three assumptions. In section 5.3 this discussion is developed through critical analysis of the correlation between theory and survey responses.

Table 2 – Summary of Option One Responses and the Three Theoretical Assumptions

	Short description	**Option one selection**	**Typology (Naylor, 2003)**	**Scales on which harm is transmitted upwards (Black, 1976)**	**Mode of criminalisation – for particularisation see section 4.5 in chapter four**
Q11	Organised car insurance fraud.	**79.29%**	Predatory	Stratification Morphology Organisation	Fraud Act 2006
Q15	Theft of payment card details using a card reader installed on ATMs.	**77.41%**	Predatory	Stratification Morphology Organisation	Fraud Act 2006
Q4	Housing benefits fraud (£150,000 over ten years).	**75.00%**	Predatory	Stratification Morphology Organisation	Particularised – protection of state coffers and dues.
Q10	A trader funnels funds amounting to £150,000 over three years using a bogus account.	**74.29%**	Predatory	Stratification Morphology Organisation	Fraud Act 2006
Q16	A Ponzi scheme	**72.86%**	Predatory	Stratification	Fraud Act 2006
Q5	A trader ran a scheme against a financial institution over many years that resulted with a significant loss.	**46.43%**	Predatory, same as Q10, but using commercial-type terminology.	Stratification Morphology	Fraud Act 2006

Q2	Traders conspire to boost their performance by coordinating investments.	**21.43%**	Commercial	Stratification Morphology	Fraud Act 2006
Q6	Elderly telemarketing fraud.	**18.57%**	Predatory but grounded in legitimate trade through a business front (no notion of fair market value).	None. Offending downwards on the organisational scale and unknown or near equals in terms of stratification and morphology	Fraud Act 2006
Q3	Procurement fraud (preferring a contractor for family reasons).	**17.14%**	Commercial	Unknown or offending by near equals.	Fraud Act 2006 (by *dishonest* abuse of position, Bribery Act 2010 may apply)
Q8	A board of directors obscures elements of a company's debt structure.	**16.43%**	Commercial	Offending downwards on the morphology and organisation scales.	Particularised – narrow market regulation (encouraging investment by standardising reporting standards.)
Q7*	Attempted 'phishing' attack against a personal banking account holder.	**14.29%**	Attempted predatory, no direct harm to cardholder (Levi & Burrows, 2008)	ICT-related, offender unknown (McGuire & Dowling, 2013; Levi, et al., 2015)	
Q14	A business has been sold based on an over-valuation.	**12.86%**	Commercial	Offending by an organisation head.	Fraud Act 2006
Q1	Fraudulent trading (no indication of harm)	**11.43%**	Commercial	No indication of harm. Risk of harm is caused by an organisation head.	Particularised – state-imposed debtor-creditor balance of powers and insolvency regime.
Q9	Sub-standard insulation installed by a handyman in a private residence	**9.29%**	Commercial (some notion of market-value, legitimate business transaction)	Unknown or near equals.	Fraud Act 2006
Q12*	£150 lost to a car hire app user whose account has been used by others.	**7.86%**	Predatory, but no bilateral relation.	ICT-related, offender unknown (McGuire & Dowling, 2013; Levi, et al., 2015)	
Q13	An internal report of the performance of a department is understated so to supplement the following year's figures.	**5.00%**	Commercial	Unknown or near equals.	Fraud Act 2006 (the report is internal)

Figure 1 – Option One and Option Two Responses (Descending Order of Option One)



In figure 1 above, rates of selection of both options one (as indicated in table 2 above) and option two (report to a law-enforcement agency that does not result with any further action) are presented with respect to each of the hypotheticals. The rates of response are plotted on the y axis with respect to the sixteen hypotheticals on the x axis order in descending order of option one selection (whilst retaining their sequential number for identification). This presentation provides an aggregated overview of options one and two indications in the survey results discussed in this chapter, and the two selection options from the five-points ordinal scale that directly relate to the main research questions. The following section 5.2 discusses options one and two section rates relative to the main research questions.

5.2 Results

In this section, the researcher presents the survey findings through the analysis of indications of options one and two in reference to the single measurement of sixteen hypothetical examples of fraud harm and victimisation. A table presenting the complete dataset of survey responses to the sixteen hypothetical descriptions of fraud harm and victimisation across the five-point ordinal scale provided in Appendix B. This section will focus primarily on option one and option two rates of selection (see above table 2 and figure 1), as they pertain directly to the main research question in this thesis as discussed in the above section. In the context of RQ1 ('duality'), the existence and extent of a contemporary dysfunction between 'law-in-theory' and 'law-in-action' is discussed through the variability of option one rates of responses for examples of fraud that were pre-qualified to participants as criminal offences. This discussion pertains to the concept of fraud relative to itself. The results are not normalised relative to an absolute 'threshold' for *effective* criminalisation through the common association of harm and victimisation with law-enforcement activities (Hester & Eglin, 1992) (see discussion of limitation in sections 5.4, and 6.2). This is followed by a presentation of rates of option two selections relative to the decreasing rate of option one selections. The extent to which participants perceived reports to law-enforcement agencies as indicative of no further investigatory action being taken is presented relative to option one being the most likely outcome or other resolution mechanisms. It appears that a report to law-enforcement agency that does not result with an investigation was perceived to be likely across indications of high and low expectations of law-enforcement activities (option one).

The null-hypothesis on which this the questionnaire (see Appendix A) was based represents a correlation between ‘law-in-theory’ and ‘law-in-action’ with respect to the criminalisation of ‘all fraud’ under the Fraud Act 2006 (Black, 1972; Law Commission, 2002; Farrell, et al., 2007). The results provide an empirical basis to reject the null-hypothesis (see 3.4), as they indicate a variability in the extent to which law-enforcement activities are associated with different hypothetical examples of fraud (Hester & Eglin, 1992). This insight relates directly to varying percentage of participants who have indicated a likely criminal investigation potentially resulting with an arrest available as option one on the ordinal scale (note that other than two examples, the identity of the offender is known to the victim). It emerged that participants associated the possibility of a criminal investigation as the most likely outcome at a maximum rate of 79.29% (Q11) and a minimum rate of 5% (Q13). Overall, across sixteen hypothetical descriptions of fraud offences the average rate (mean) of criminal investigation anticipation by participants was calculated to be 34.97% (standard deviation 29.84). As participants were told that all the hypothetical examples in the survey are criminal offences, the above finding demonstrate an apparent inconsistency in perceived association with with-enforcement activities across the measurement in the study. It demonstrates a low overall level of association with law-enforcement activities with pre-qualified offences that primarily feature typological and socio-economic variability according to Naylor (2003) and Black (1976) (see introduction above). The standard deviation value of 29.84 demonstrates a considerable degree of inconsistency, which is re-examined in section 5.3 below in relation to the three theoretical assumptions discussed in the introduction above.

These inconsistencies in law-enforcement interaction and response to accounts of fraud harm and victimisation, further undermine the null-hypothesis in relation to the 'mainstreaming' and 'streamlining' of state-responses to fraud (RQ2).
In theory, there should not be a statistically significant difference between responses amongst the two sub-groups in the sample, despite the above context, as FI's experience 'law-in-action' in a consistent way with other members of society. Nevertheless, departure from this null-hypothesis with respect to the shared experience of 'law-in-action' in the context of fraud between the two sub-groups may offer further insight, particularly in the context of RQ2 ('mainstreaming' and 'streamlining'). In order to identify responses to hypothetical examples of fraud presented to participants where the null-hypothesis of statistically insignificant variation between the two groups, the Mann-Whitney U-test (Ruxton, 2006) was applied to all sixteen questions. The test was used to identify statistical significance between the variation of responses between the FI and layperson sub-groups in the sample in selecting the typically most likely resolution mechanism (Cohen, 1988).

With respect to the null-hypothesis of no discrepancy between 'law-in-theory' and 'law-in-action' with respect to the range of offending criminalised under the Fraud Act 2006 ('all frauds'), figure 1 above provides the context for denying this hypothesis. Whilst this study does not set a threshold for effective criminalisation in terms of rate of association of known examples of fraud with a criminal investigation (Hester & Eglin, 1992), the data presents considerable variance. The frequencies for option one selection (investigation potentially leading to an

arrest) across the sixteen questions tested in this resulted with a standard deviation of 29.84. Through this definition of the social function of *effective* fraud criminalisation, it would appear that despite the imposition of a 'sovereign guarantee' for trust of all examples of *dishonesty* (Law Commission, p.3) is not evenly applied.

The findings presented in figure 1 in section 5.1 above demonstrate that there exists a varying divergence between 'law-in-theory' and 'law-in-action' with respect to the scope of criminalisation under the Fraud Act 2006 (Black, 1972). As discussed in section 3.4, the examples in this study included fraud offences that demonstrate different criminological (Naylor, 2003) and sociological (Black, 1976) attributes. In the following section 5.3, further analytical discussion is provided to characterise the inconsistent dysfunction between 'law-in-theory' and 'law-in-action' (Black, 1972) observed in this study in order to characterise the contemporary 'duality' of fraud (RQ1) using the aforementioned theoretical frameworks.

As discussed in the introduction to this chapter and in section 3.4 in the methodology chapter, the researcher is not aware of a defined threshold for *effective* criminalisation that could be applied to the measurement in the survey. Instead, the interpretation of option one indication frequencies as indicative of extent to which a 'sovereign guarantee' of trust is perceived to be in place by participants in relative to findings in this measurement. Rates of option one selection in response to Q11, Q15, Q4, Q10, and Q16 demonstrate a consistent (low standard deviation of 2.57) average rate of 75.77%. This value represents a

basis for comparison of lower values and is not subject to evaluation itself for its absolute value. Whilst a standard of 100% correlation between suspected homicide and an investigative response may exist, not all 'mainstream' crime (theft, sexual offences, violent crime) is reported to law-enforcement, and not all reported crime is recorded and further acted upon (Her Majesty's Inspectorate of Constabulary (HMIC), 2014; UK Statistics Authority, 2014). The rate of option one selection with respect to hypotheticals other than Q11, Q15, Q4, Q10, and Q16 is therefore considered in terms of how much lower it is from the circa 75% threshold.

Indications of option two as the typically most likely outcome provide a potential to identify types of fraud where disassociation of the offence with a criminal investigation does not stem from victim reporting inhibitions. Instead, these indications point to areas where a criminal investigation does not appear to participants as likely to be the result of an engagement with law-enforcement agencies. These indications are insightful in the context of suggesting the existence of perceived barriers to the criminal unpacking of the concept of fraud by law-enforcement agencies by participants. These perceptions might have been grounded in similar observations as those discussed in the literature review, particularly section 2.4 (see Button, et al., 2009; 2013). Furthermore, option two indications provide a measurement of the 'role' of unfulfilled demand for law-enforcement activities in the 'erosion' of the criminal fraud offence, as discussed in section 2.4 of the literature review.

As discussed in the introduction section above, option two selections are suggestive of a perceived difficulty for law-enforcement agencies to respond to a report of a fraud offence with investigative outcomes (RQ2). The question is, therefore, how does the above relate to rates of association with law-enforcement activities and whether option two rates follow a similar trend to option one selections, or are the two disconnected? In other words, what might have been the role of context in shaping perceptions by participants towards the possibility of fraud being reported to a law-enforcement agency and not investigated any further? Figure 1 (in section 5.1 above) demonstrates that there existed a base-level expectation for fraud being reported to law-enforcement agencies but not investigated further through option two selection in the data.

A report to law-enforcement which does not result with an investigation (or any other activities, option two) ranged between a maximum rate of 46.43% (Q6) and a minimum rate of 4.29% (Q4). Overall, a report to law-enforcement which does not result with a criminal investigation was indicated as the most likely outcome at an average rate of 15.53%, and a standard deviation 13.54. This demonstrates that notwithstanding inhibitions to victim engagement with law-enforcement, some demand for law-enforcement activities remains unfulfilled, and relates to challenges to ‘mainstreaming’ and ‘streamlining’ (RQ2) of fraud enforcement. Whilst the standard deviation is lower by comparison to option one selection (29.84), it remains indicative of inconsistency of unfulfilled demand for law-enforcement in the context of fraud.

Offences that are more closely associated with law-enforcement activities (Q11, Q15, Q4, Q10, and Q16) were relatively low and consistent, with an average rate of 8.86% and a standard deviation of 2.84 (and see figure 1 in section 5.1). The aforementioned five hypotheticals are theoretically (Black, 1976; Naylor, 2003) suggested to likely result with a criminal investigation and represent the highest group of option one indications in this study (further discussion is provided in the following section 5.3). This 'criminal' connotation also resulted with low and consistent option two indications, meaning that the sample overall assessed the likelihood of a report by a victim to typically be investigated no further at a relatively low rate. In section 5.4 below, the author discusses the limitations of this study, including the absence of a parallel study to normalise findings relative to the context of theft. The denotation of the rate of association of option two with Q11, Q15, Q4, Q10, and Q16 as 'low' refers to this measurement of typical outcomes across the concept of fraud and is relative to this study and the scope of the main research questions only. In the context of this discussion, the results suggest that the perceived existence of an unfulfilled demand for law-enforcement activities does not directly flow from fulfilled demand, but rather from contexts where the likelihood of an investigatory response is otherwise low. Furthermore, it would appear that the standard deviation for option two selection percentages across the measurement (13.54) is due primarily to 'peak values' in Q6, Q7, and Q12.

Tukey (1977) defines statistical outliers as exceeding the value of the three times the interquartile range (the middle half of all values), which is 9.28% for option two rates of selection across the sixteen hypotheticals in this study. Therefore, rates

of option two indications that exceed three times 9.28% (=27.84%) are statistical outliers with values of 46.43%, 38.57%, and 40.71% respectively. Of the above outliers, Q7 and Q12 refer to the only two examples where the identity of the offender is not known to the victim (or readily discoverable). These examples relate to frauds that are facilitated through the use of information communication technology (ICT), where the literature lists considerable difficulties to attribute harm and victimisation to a legal entity (Levi, et al., 2015; McGuire & Dowling, 2013). These difficulties fall outside the scope of this thesis, yet their emergence as outliers alongside Q6 provide a basis for further discussion on the attributes of Q6 in the context of RQ2 in particular ('mainstreaming' and 'streamlining'). In Q6, participants are presented with an offence where 'simple' bilateral exchanges between offender and victim are facilitated through a business front in order to sell household items at up to ten times their fair market value. This hypothetical presents an unambiguous morality, as the scheme targets a vulnerable population (the elderly) and does not trade in a similar fashion in the open market. The identity of the victim is readily apparent, as well as the losses that were incurred. The offence therefore appears to possess all the hallmarks of a 'predatory'-type offence (Naylor, 2003), nevertheless it did not appear to participants as an overwhelmingly suggestive of law-enforcement activities (option one rate of response: 18.57%). Instead, participants indicated that the family member who discovered the victimisation (a non-vulnerable person) would attempt to involve law-enforcement agencies and engage them through assertion of *dishonesty* against the trading firm. As discussed in the literature review, the qualification of fraud through *dishonest* misrepresentation, failure to disclose or abuse of position does not appear to offer an objective test to determine whether a crime had

occurred. Instead, law-enforcement agencies would have to engage in a subjective evaluation of where it is likely that an offence took place based on a victim account of a wilful transaction. In chapter four, the historical dysfunction between mainstream policing and the concept trust in commercial conduct was discussed in sections 4.7 and 4.8. The emergence of contemporary law-enforcement appears to have flowed from the increased challenge to social order in the context of theft and the protection of the right to property in the wake of industrialisation and urbanisation (Emsley, 2010; Schubert, 2015). The concept of *dishonesty* did not appear to challenge the existing social order in such to a similar extent, and response to harm and victimisation included strengthening of self-regulation and regulation by reputation mechanisms (Taylor, 2013).

The average rate of option two responses for all questions other than Q6, Q7, and Q12 is 9.56%, and a standard deviation of 6.38. With the exclusion of the three outliers, the low mean value of rates and the relatively low standard deviation reflects a base-level of perceived unfulfilled demand by participants for investigation activities in the context of fraud that is reported to law-enforcement agencies. This finding relates to the discussion in section 2.4 in the literature review where the 'erosion' of the concept of fraud is discussed in terms of difficulties to engage law-enforcement agencies in response to harm and victimisation, and in similar manner to other types of acquisitive crime. The findings therefore suggest that perceived challenges to the realisation of the 'law-in-theory' by law-enforcement agencies is consistent regardless of perception of the most likely resolution mechanism (option one, or options three, four, and five). This highlights the potential role of legislation in the context of RQ2 to enable the

criminal unpacking of the gestalt with respect to frauds that are otherwise associated and disassociated with law-enforcement activities. This is not to suggest that there are no grounds for individuals to perceive a likelihood of crime being reported but investigated no further in the context of other offences (HMIC, 2014; UK Statistics Authority, 2014). Nevertheless, the literature does point to contextual and procedural difficulties with the concept of fraud (Levi & Burrows, 2008; Button, et al., 2013), which the critical discussion in the literature review attribute in part to difficulties with the current law in sections 2.4, and 2.6.

The data also suggests that the use of a business front in order to systematically defraud a vulnerable victim group (the elderly) presents a perceived challenge to the existing social order (Black, 1976) through selections of options one and two. In response to Q6, 46.43% of participants regarded a report to law-enforcement that is not followed by any further action as the typically most likely outcome. The option one (criminal investigation) was indicated at a rate of 18.57%, nearly on par with indications of option five (no action taken in response to fraud) at a rate of 17.86%. In the following section (5.3), the difference in perceptions towards Q6 between the FI and non-FI sub-groups in the sample is discussed. The literature accepts that some frauds may be under-investigated and prosecuted by law-enforcement agencies, yet this suggestion is generally reserved for 'commercial'-type frauds or white-collar crime (Sutherland, 1949; Naylor, 2003;). Nevertheless, Q6 provides an example of the challenge that *dishonesty*-based criminalisation presents to the effective criminalisation of 'predatory'-type fraud that is primarily defined by dishonesty (Naylor, 2003). Whilst some frauds do present a lesser challenge to the social order (Black, 1976), there appears to be a demand for law-

enforcement activities in the context of this insular example of *dishonest* behaviour that goes unfulfilled. This context relates to the discussion in section 2.6, where conduct-based criminalisation is critically discussed through Tappan's (1947) dissent from non-specific definitions for criminality. The standard for clarity alleged by the Law Commission (2002) with respect to the general fraud offence seems to theoretically apply to Q6, yet perceptions in this study appear to point away from applied clarity in this context.

5.3 Discussion

In this section, the author discusses survey findings relative to the three assumptions that were made with respect to theoretical suggestions for relative correlation between 'law-in-theory' and 'law-in-action' in the context of fraud (Black, 1972). The first assumption that is being discussed is Naylor's (2003) typology of profit-driven crime and how participants perceived the likelihood for law-enforcement activities in response to 'predatory'- and 'commercial'-type hypotheticals. The second assumption that is being discussed is that 'more' law is applied in response to challenges to the existing social order that flow from offending 'upwards' on the social scales of stratification, morphology, and organisation (Black, 1976). The third assumption tests the limits of the theoretical advantages of particularisation in terms of applied clarity, and relative to the first and second assumptions, which refer to crime typologies (Naylor, 2003) and the use of law as a social phenomenon (Black, 1976).

The above discussion is developed by the examination of the increasing disassociation between known examples of fraud harm and victimisation with law-enforcement activities. The rates of option one selections are discussed compared to Q11, Q15, Q4, Q10, and Q16 ('group one') and three groups arranged in descending order or option one indications for the purpose of presentation. Additional critical discussion is provided with respect to the hypothetical examples of fraud harm and victimisation that form the groups, and further critical insight in reference to the main research questions.

This is followed by a discussion of four groups of responses that demonstrate. The first assumption was that 'predatory'-type frauds, particularly those which exhibit readily identifiable losses and are morally unambiguous will be more closely associated with law-enforcement activities (Naylor, 2003). Figure 2 below presents the percentage of respondents who have indicated that law-enforcement activities are the typically most likely outcome for thirteen of the sixteen examples of fraud offences that are clearly 'predatory' or 'commercial' (Naylor, 2003). The three questions that are not included are Q6, Q7, and Q12, and are discussed separately. As indicated in table 2 above, Q7 and Q12 are the only two ICT-related offences in this study, where the identity of the offender in not known or reasonably subject to discovery (McGuire & Dowling, 2013; Levi, et al., 2015). A discussion specific to Q6 (elderly fraud) was provided in section 5.2 above in reference to Naylor's (2003) typology of profit-driven crimes and focuses attention on limitations to *effective* criminalisation that stem from the use of a 'business front'. The six examples on the upper end of figure 2 represent 'predatory'-type

offences, whereas the seven examples on the lower end include rates of law-enforcement action indication in relation to ‘commercial’-type frauds.

Figure 2 – Option one (‘criminal investigation’) Indication in Response to ‘Predatory’ and ‘Commercial’ Type Offences (Naylor, 2003)

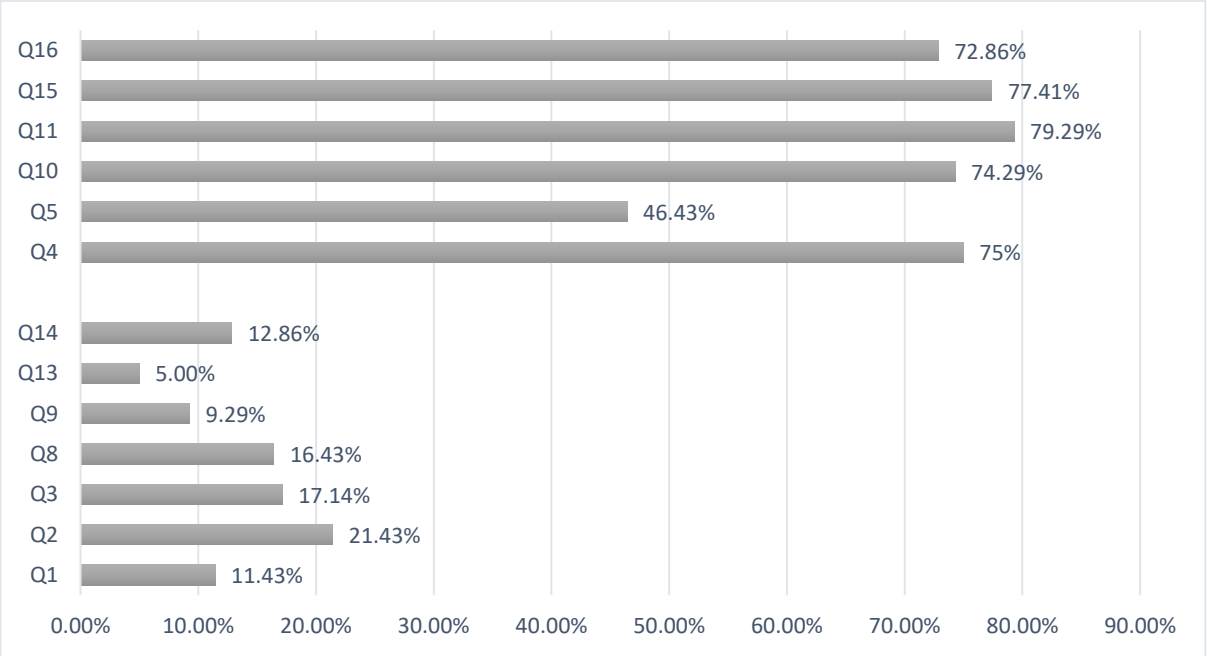
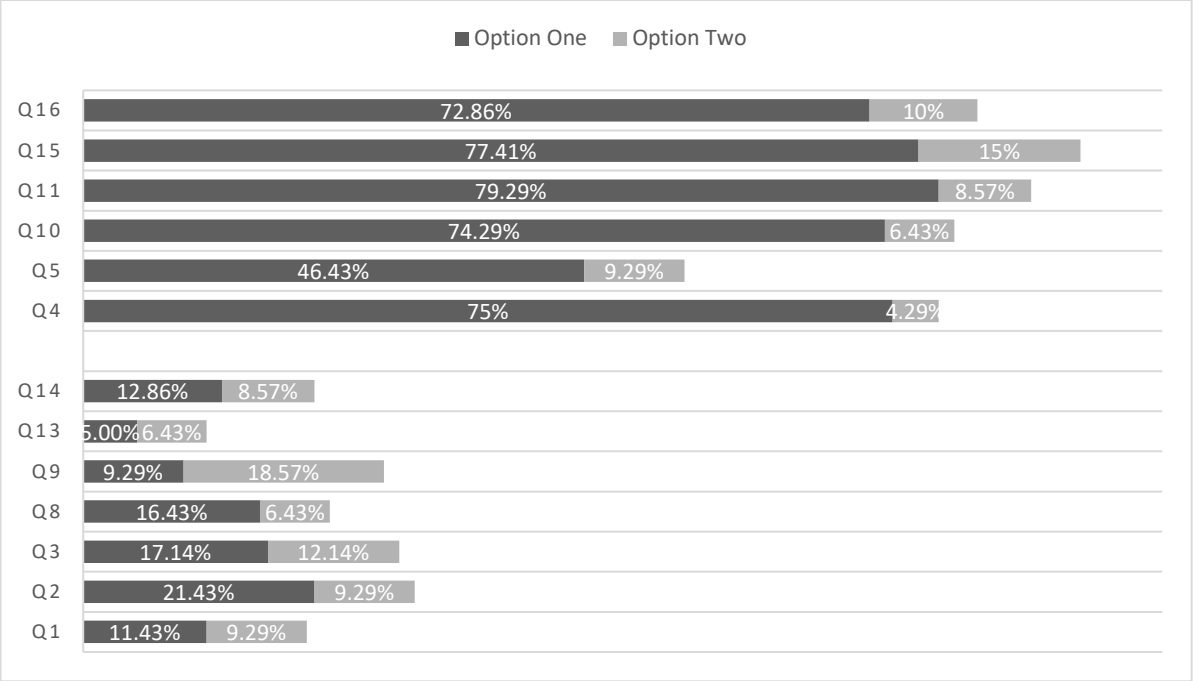


Figure 3 immediately below presents the same structure but includes both indications of option one (criminal investigation) and option two (no action taken following a law-enforcement report). The inclusion of option two rates of response provides further visualisation of the variable extent to which the two categories from Naylor’s (2003) typology were associated with law-enforcement activities (RQ1) or the unfulfilled demand for such a manner of response (RQ2).

Figure 3 – Figure 2 with the Addition of Option Two (Unfulfilled Demand for Law-enforcement Activities)



'Predatory'-type examples of harm and victimisation were much more clearly associated with law-enforcement activities (as indicated by about 75% of respondents). By contrast, between 5% and 21.5% of participants indicated the same outcome as the typically most likely outcome with respect to 'commercial'-type offences. The reader will note that Q5 is classed as 'predatory'-type, yet it was not as closely associated with law-enforcement activities in the same manner as the other offences of this type. In table 3 below, the author demonstrates the differences between the 'simple' terms used in Q10 and vague references and obscured identification of losses in Q5, which was designed so as to appear as a 'commercial'-type offence (Naylor, 2003).

In chapter two, the insight in Naylor's (2003) theory of profit-driven crimes and Black's (1976) theory of law is applied to the critique of the Fraud Act 2006 in the context of the 'duality' of fraud (RQ1). It emerged that the concept of fraud is present in both 'predatory' and 'commercial' constructs, and that victims of 'predatory'-type frauds are typically in a favourable position to apply 'more' law against offenders in response to victimisation (Black, 1976; Naylor, 2003). Furthermore, 'predatory'-type frauds employ simple financial vehicles, involve tangible and readily identifiable losses, and are therefore 'easier' to investigate, particularly as they are simple to translate to points of proof and evidential tests (Naylor, 2003).

The two hypotheticals (Q5 and Q10) were designed to examine the effects of terminology and ease of loss identification on association with law-enforcement engagement and the possible subsequent investigatory actions (Naylor, 2003). Table 3 demonstrates these similarities and differences between Q5 and Q10 in terms of the references included in the hypothetical descriptions that relate to differentiating factors between 'predatory'-type and 'commercial'-type frauds. These differences relate to means of transaction, and the ability to identify and quantify losses in simple terms (Naylor, 2003). This comparison relates to the discussion in section 2.4 in the literature review, where Naylor's (2003) typology and the suggestions of typologically variability between association of law-enforcement activities with different acquisitive crime typology was discussed in the context of the 'duality' of fraud (RQ1).

Table 3– Key Differences and Similarities Between Q5 and Q10 in Terms of Naylor's (2003) Theory of Profit-Driven Crime

	Q5	Q10	Discussion
Financial vehicle	Unspecified. Qualified as a multi-annual scheme by an investment banker.	Generally specified as funnelling funds (simple): ("funnelling funds to a bogus account in order to benefit from it")	Are not necessarily materially different. Q5 is perceived as 'commercial'.
Losses	Estimated at 2 per-cent of an investment bank's annual profit for the year of detection.	£150,000 over three years.	Q5 losses are not quantified in currency terms, but could amount to more. Q10 losses are clearly stated.
Option one indication:	**46.43%** FI: 45.10% Non-FI: 47.19%	**74.29%** FI: 78.43% Non-FI: 79.91%	
Options one and two combined:	**55.72%** FI: 58.83% Non-FI: 53.93%	**80.72%** FI: 80.39% Non-FI: 80.09%	

The above comparison appears to provide empirical support to Naylor's (2003) suggested effects of perceived complexity of financial vehicles and the quantification of losses on the likelihood of a law-enforcement responses. Across

this typological ‘fault line’ in terms of suggested law-enforcement activities, option one indications shifted from 74.29% to 46.43%, and the overall likelihood of crime being reported (option one and two combined) shifted from 80.72% to 55.72%. The above in notwithstanding the implied possibility of a higher loss in Q5, and the typological similarity between the two examples of ‘occupational fraud’ (ACFE, 2016). It is important to note that whilst the physical setting is a place of business, the transactions in both Q5 and Q10 are not themselves conducted in a business situation, but rather they occur as fraud against the firm and without consent.

The second assumption that was made identified Black’s (1976) theory of law as a possible framework through which socio-economic factors can suggest stronger of weaker association with law-enforcement responses. ‘More’ law in generally suggested to be applied in responses to harm and victimisation being directed ‘upwards’ on the social scales of stratification, morphology (the division of labour), culture and organisation (Black, 1976). Only three of the social scales were included in this study, as the ‘culture’ social scale was not readily captured in short harm and victimisation descriptions and may not have been interpreted in a consistent fashion. The following tables represent the direction of harm in each of the sixteen hypothetical fraud offences presented to participants of this study: the following tables (4, 5, and 6) refer to direction of harm in terms of stratification, the direction of harm in terms of morphology, and the direction of harm in terms of organisation. Given the context of RQ1 (‘duality’) the tables below only contain indications of option one (criminal investigation) and its indications relative to the ‘direction’ of harm and victimisation.

Table 4 – Indications of Option One (Criminal Investigation) According to 'Direction' of Harm in Terms of Stratification (Black, 1976)

	Downwards	Unknown/Near Equals	Upwards
Q1		11.43%	
Q2			21.43%
Q3		17.14%	
Q4			75.00%
Q5			46.43%
Q6		18.57%	
Q7*		14.29%	
Q8		16.43%	
Q9		09.29%	
Q10			74.29%
Q11			79.29%
Q12*		07.86%	
Q13		05.00%	
Q14		12.86%	
Q15			77.41%
Q16			72.86%

'*' – offender unknown fraud

Table 5 – Indications of Option One (Criminal Investigation) According to 'Direction' of Harm in Terms of Morphology (Black, 1976)

	Downwards	Unknown/Near Equals	Upwards
Q1	11.43%		
Q2			21.43%
Q3		17.14%	
Q4			75.00%
Q5			46.43%
Q6		18.57%	
Q7*		14.29%	
Q8	16.43%		
Q9		09.29%	
Q10			74.29%
Q11			79.29%
Q12*		07.86%	
Q13		05.00%	
Q14		12.86%	
Q15			77.41%
Q16		72.86%	

'*' – offender unknown fraud

Table 6 – Indications of Option One (Criminal Investigation) According to 'Direction' of Harm in Terms of Organisation (Black, 1976)

	By Heads of Organisation	By Internal to an Exclusive Organisation or by Near Equals	Against a Better Organised Entity
Q1	11.43%		
Q2		21.43%	
Q3		17.14%	
Q4			75.00%
Q5		46.43%	
Q6	18.57%		
Q7*	14.29%		
Q8	16.43%		
Q9		09.29%	
Q10			74.29%
Q11			79.29%
Q12*		07.86%	
Q13		05.00%	
Q14	12.86%		
Q15			77.41%
Q16		72.86%	

'*' – offender unknown fraud

As the above tabular breakdown of option one (criminal investigation) indication demonstrates, law-enforcement activities are better associated with offenses committed 'upwards' on the social scales of stratification, morphology, and organisation (Black, 1976). Furthermore, in some cases, 'more' law appears to be applied to circumstances where there is no clear indication of the relative positionality between offender and victim in the hypothetical narrative provided to participants. In other cases, the difference in positionality is implied from job titles or typologies, yet relatively few participants indicated that a criminal investigation is the typically most likely outcome in responses to offending 'upwards' on these social scales.

Finally, the literature review in chapter two discussed ‘overlapping’ offences to the general conduct-based offence in the Fraud Act 2006, which particularises narrow offences through specification of that which amounts to fraud. These offences do not qualify what fraud is, but rather provide an insular example of specific actions that are criminalised as frauds. These offences appear to present a clearer association of ‘law-in-theory’ and ‘law-in-action’ (Black, 1972), as they are tied to narrow sovereign interest (such as the collection of taxes), and enforcement bodies (HMRC and local authorities *inter alia*). These offences specify either a general duty that is communicated to all (for example, benefit fraud), or to specific populations that are in position to engage in such fraud (fraudulent trading, compliance with insolvency regime and industry-specific state-imposed standards).

The latter category of offences is not as broadly communicated, and the association of known examples of the behaviour particularised as fraud and law-enforcement activities may not be as clear to all. That said, some particularised offences that relate to company and insolvency law may still be resolved bilaterally or through the civil court jurisdiction. For example, the particularised offence of fraudulent trading may be resolved by the administrator and former director of a company on a bilateral basis, or as a tort of ‘wrongful trading’ provisioned for under the Insolvency Act 1986. Notwithstanding the victim imperative enabling element of this provision discussed in the literature review and in a socio-historical context in chapter four, the latitude for law-enforcement activities in this context appears to be clear. The difference between

particularisation that potentially applies to all (benefit fraud), and that which is more socially exclusive (fraudulent trading) is examined in Q1, and Q4. Law-enforcement activities were associated by 11.43 % of participants in relation to hypothetical example of fraudulent trading, whereas 75% associated an example of known housing benefit fraud with such an outcome as the typically most likely.

Whilst the difference between these two examples can be explained using Naylor's (2003) typology of profit-driven crimes and Black's (1976) theory of law, it addresses a further theoretical theme. In the literature review, the categorical criminalisation of theft under the Theft Act 1968 was compared to the categorical criminalisation of Fraud under the Fraud Act 2006. It appears that the categorical criminalisation of theft through the introduction of a legal definition into criminal law related to a pre-existing social function that enabled categorical criminalisation of violations against the right to property (The Criminal Law Revision Committee, 1966). The strength of this principle and its role in the formation of the contemporary institutions of policing and public prosecution is discussed in chapter four (Ashworth, 2000; Emsley, 2010; Schubert, 2015). Nevertheless, *dishonesty* itself and the violation of trust does not in itself seem to be a categorical challenge to the existing social order and merit use of the highest 'amount' of law.

This discussion adds another dimension to the discussion of particularised offences. The difference in association with law-enforcement activities between a hypothetical example of benefit fraud and fraudulent trading demonstrates that despite an offence particularisation, these examples are subject to different

sociological and criminological ‘predictions’ (Black, 1976; Naylor, 2003). Particularisation of fraud offences does not in itself drive *effective* criminalisation (Hester & Eglin, 1992). Instead, particularisation appears to enable stakeholders to qualify an action as criminal through an objective test and a narrow definition in law, from which ‘mainstream’ application of law may stem. In other words, general suggestions of a lesser likelihood of law-enforcement activities may still apply along typological (Naylor, 2003) and social (Black, 1976) ‘fault lines’, to which particularisation appears secondary (Sutherland, 1949).

Another point of comparison to evaluate the relationship between particularisation and the aforementioned theoretical frameworks (Black, 1976; Naylor, 2003) is the comparison of responses to Q4 (housing benefit fraud) and Q10 (a trader who funnels funds). Both hypothetical descriptions included a quantification of harm through determining the criminal benefit at a hundred-and-fifty-thousand pounds (£150,000). Respondents indicated the typical likelihood of a criminal investigation at rates of 75% and 74.29% with respect to Q4 (particularised) and Q10 (non-particularised) offences respectively. This nearly identical rate of association with law-enforcement activities demonstrates the applicability of Naylor’s (2003) typology of profit-driven crimes. Both Q4 and Q10 are ‘predatory’-type frauds (see figures 1, and 2), and results seem to strongly echo their theoretical association with law-enforcement activities. On the other hand, the offence in Q1 (fraudulent trading) belongs in the ‘commercial’ category of offence and is therefore subject to the theoretical suggestion of a lesser association with law-enforcement activities (Naylor, 2003). The association of Q1 with law-enforcement activities by 11.43% of participants demonstrates empirical

agreement with the definition of such offences by Naylor (2003) as not commonly associated with law-enforcement activities.

Below the reader will find tables 7 through 10, which present segments of the table in Appendix B in descending order of the percentage of participants who indicated option one (criminal investigation potentially resulting with an arrest). Tables 7, 8, 9, and 10 represent four groups of offences that are subject to further analytical discussion relative to key themes from the literature review. Each of the table segments include the question number (Q1-16), a short description (the questions in full are included in Appendix A), and the percentages of indications of options one through five with respect to the sample at large, and the subgroups therein (financial investigators and laypersons).

The tables include the U-test results (Ruxton, 2006), which are marked for significance using asterisks along with the respective probability value: * for $p<0.05$. The distribution of responses in relation to each question is accompanied by Mann-Whitney (U-test) results. The U-test assesses statistical significance in the variation between responses in the subsets of the sample, financial investigators and laypersons. The test examines whether results from two samples (financial investigators and laypersons in the context of this study) exhibit an inter-compatible distribution. The U-test is defined by a null-hypothesis of two samples that are homogeneous in terms of the distribution of results. In this study, the two populations represent subsets of the same non-probability convenience sample (financial investigator and laypersons). When the U-test results with a probability of $p<0.05$, the difference in distribution of responses

between the two subsets is statistically significant with only a 5% likelihood that the results are due to chance. Such a degree of variability in distribution of responses requires further consideration in the context of the sub-group characteristics in the paraments of the question (Ruxton, 2006; Nachar, 2008).

Table 7 – Group One

	Short description	**1: (investigation and potential arrest)**	**2: (compliant to law-enforcement does not result in an investigation)**	**3: (regulatory sanction or commercial litigation)**	**4: (Bilateral or attempted bilateral resolution)**	**5: (No action taken by law-enforcement or the victim)**	**Mann-Whitney U-test (FI/non-FI)**
Q11	Organised car insurance fraud.	**79.29%** 80.39% 78.65%	**8.57%** 9.80% 7.87%	**4.29%** 1.96% 5.62%	**5.00%** 3.92% 5.62%	**2.86%** 3.92% 2.25%	0.795
Q15	Theft of payment card details using a card reader installed on ATMs.	**77.41%** 80.39% 75.28%	**15%** 19.61% 12.36%	**0.71%** 0.00% 1.12%	**4.29%** 0.00% 6.74%	**2.86%** 0.00% 4.49%	0.251
Q4	Housing benefits fraud (£150,000 over ten years)	**75.00%** 82.35% 70.79%	**4.29%** 3.92% 4.49%	**6.43%** 5.88% 6.74%	**9.29%** 1.96% 13.48%	**5.00%** 5.88% 4.49%	0.129
Q10	A trader funnels funds amounting to £150,000 over three years using a bogus account.	**74.29%** 78.43% 71.91%	**6.43%** 1.96% 8.99%	**9.29%** 13.73% 6.74%	**7.14%** 5.88% 7.87%	**2.86%** 0.00% 4.49%	0.391
Q16	A Ponzi scheme	**72.86%** 82.35% 67.42%	**10.00%** 13.73% 7.87%	**5.00%** 1.96% 6.74%	**6.43%** 1.96% 8.99%	**5.71%** 0.00% 8.99%	**0.021***
		Total Financial Investigators Non-Financial Investigators					Asymp. Sig. (2-tailed): * Statistically significant

The results of the five hypothetical scenarios above presented the highest proportion of participants indicated an investigation leading to an arrest as the most likely outcome (75.72% on average). Group one results do not represent or relate to threshold for *effective* criminalisation. Instead, the findings in group one demonstrate the highest level of association between known examples of fraud and law-enforcement activities (Hester & Eglin, 1992). In terms of RQ1 ('duality'), these offences demonstrate the lowest dysfunction between 'law-in-theory' and 'law-in-action' observed in this study (Black, 1972). These offences appear to offer clarity with regards to the means of transaction, loss and moral imperative, and thus were more commonly associated with and aligned to law-enforcement activities. Responses appear to be consistent with the underlying theoretical construct of 'predatory'-type frauds (Naylor, 2003), and offences committed upwards on the social scales of stratification, morphology and organisation (Black, 1976).

Furthermore, Q4 refers to a particularised offence that is subject to investigation by dedicated non-policing resource (although operational assistance may be called upon) (Chartered Institute of Public Finance & Accountancy (CIPFA), 2017; Elmbridge Borough Council, 2017). The question refers to the first of the three historical functional drivers for particularisation discussed in section 4.6 in the above chapter, which relate to the protection of the Crown's coffers and dues. It represents a narrow set of circumstances where *dishonest* conduct is specifically prohibited, and an objective test is available through the implicit identification of the evidence generated by the offence (a false housing benefit claim). Of note is the rate of option one indications by the FI group in the sample (82.35%), which is

the highest for this group across all question in this study together with Q16 (discussed below). This suggests the existence of a level of working-knowledge of the effectiveness of enforcement of fraud in this context, which encouraged perception of an association with law-enforcement activities in this context. Furthermore, it is not clear to what extent individuals who are not claiming social benefits are aware of particularised legislation and special enforcement resources in this context.

The Ponzi-scheme example (Q16) was not anticipated by the author to be included in the first group. The assumption was that the victimology of fraud and association with investment advice would have resulted with fewer indications of law-enforcement involvement by participants (Ganzini, et al., 2001; Levi, 2001; Titus & Gover, 2001; Button, et al., 2009; Perri & Brody, 2012). Responses from laypersons have better reflected this expectation, but financial investigators indicated a clearer association between Ponzi-schemes and law-enforcement intervention. The variance in responses between the two sub-groups in the sample is statistically significant (U-test probability value p=.021) (Nachar, 2008), and therefore requires further discussion and rationalisation.

Participants with a financial investigation background seem to echo in their responses a high association between Ponzi schemes and law-enforcement activities. Financial investigators (in law-enforcement or otherwise) would not be a preferable target for offenders involved in a Ponzi scheme. The financial investigators are also less likely to gather knowledge of Ponzi schemes from within their social circles without it resulting in a law-enforcement outcome;

capable guardians (Cohen & Felson, 1979) are better situated to provide direct and indirect victim support and assistance in response to a *dishonesty* offence. These assumptions appear to offer an explanation to the difference between FI and layperson responses to Q16, with option one at 82.35% and 67.42%, respectively.

Group one questions present a ‘simple’ ‘predatory’-type fraud case, where the criminality (*dishonesty*) is inherent (Naylor, 2003). The findings with respect to the above description of harm relates to ‘simple’ financial vehicles and bilateral transactions, readily quantifiable losses, and the *dishonesty* reflected is inherent and not interwoven with legitimate conduct (Naylor, 2003; Sutherland, 1940). Furthermore, the offence descriptions depict relative positionality in terms of stratification, morphology and organisation (Black, 1976) and reduced likelihood of constructive bilateral resolution or one that is grounded in social controls or market rules (Black & Baumgartner, 1983). These characteristics appear to describe social and typological circumstances to which ‘blanket’ criminalisation of fraud could be applied and result with a lesser degree of dysfunction between ‘law-in-theory’ and ‘law-in-action’ (Black, 1972). This tendency is more pronounced when considering both option one (an investigation by a law-enforcement agency) and option two (no action taken despite a report to a law-enforcement agency. This combined measurement of the anticipated demand for law features high values demonstrating a social tendency toward to function of law-enforcement activities in the context of these examples of fraud.

Table 8 – Group Two

	Short description	1: (investigation and potential arrest)	2: (compliant to law-enforcement does not result in an investigation)	3: (regulatory sanction or commercial litigation)	4: (Bilateral or attempted bilateral resolution)	5: (No action taken by law-enforcement or the victim)	Mann-Whitney U-test (FI/non-FI)
Q5	A trader ran a scheme against a financial institution over many years that resulted with a significant loss.	**46.43%** 45.10% 47.19%	**9.29%** 13.73% 6.74%	**24.29%** 23.53% 24.72%	**12.86%** 15.69% 11.24%	**7.14%** 1.96% 10.11%	0.716
Q2	Traders conspire to boost their performance by coordinating investments.	**21.43%** 17.65% 23.60%	**9.29%** 3.92% 12.36%	**29.29%** 47.06% 19.10%	**7.41%** 1.96% 10.11%	**32.86%** 29.41% 34.83%	0.978
Q6	Elderly telemarketing fraud.	**18.57%** 27.45% 13.48%	**46.43%** 52.94% 42.70%	**3.57%** 1.96% 4.49%	**13.57%** 9.80% 15.73%	**17.86%** 7.84% 23.60%	**0.002***
Q3	Procurement fraud (preferring a contractor for family reasons).	**17.14%** 21.57% 14.61%	**12.14%** 9.80% 13.48%	**23.57%** 29.41% 20.22%	**12.14%** 11.76% 12.36%	**35.00%** 27.45% 39.33%	0.178
		Total % Financial Investigators % Non-Financial Investigators %					Asymp. Sig. (2-tailed): * Statistically significant

The analysis of this group provides the reader with the results of four (4) hypotheticals (out of the sixteen) to which a lower proportion of participants indicated a criminal investigation as the most likely options (25.89% on average). Respondents indicated that the hypothetical offence would typically result with a report to law-enforcement but not followed by an investigation at an average of 19.29%.

The observed tendency in the data to associate law-enforcement engagement and investigation (options one and two) at a lower rate for similar cases that differ primarily in terminology and accessibility is insightful. It would appear that a fraud that typologically relates to the category of 'predatory'-type offences may be less associated with law-enforcement action where it is described using terms more appropriate to 'commercial'-type offences (Naylor, 2003). This finding may reflect a tendency by participants to perceive obscure presentation of harm and victimisation in the context of a professional working environment as typically less associated with potential for law-enforcement action (Sutherland, 1940). The extension of the concept of fraud across typologically 'predatory'-type and 'commercial'-type offences (Naylor, 2003) appears to be grounded in a perception of complexity of the transactions and the quantification of losses.

The hypothetical in Q2 was fashioned to resemble R. v. Hayes [2015] (LIBOR rigging prosecution by the SFO and see section 2.7), which might have increased the number of individuals who have indicated a likely criminal-justice system outcome. Nevertheless, it would appear from the rate of responses with respect to Q2 that the sample may have perceived the prosecution by the SFO as the 'exception that proves the rule' rather than the most likely outcome. This is perhaps grounded in at least two occasions where the media reported that the SFO had requested separate funding to progress the investigation, fostering the public and practical notions that such an investigation was not a matter of course (Binham & Parker, 2012; Shoffman, 2013; Dakers, 2014).

A stated component in the reasoning for the regulatory action against a number of banks was the lack of compliance as well as obstruction of the regulatory investigation into the LIBOR rigging itself, upon which it appears that prosecutorial attention was directed (Treanor, 2015). This discussion relates the general theme of substantiating regulatory frameworks and the wider concept of obstruction of an investigation under US law, a topic for which substantive discussion would fall outside of the scope of this thesis. The use of law to substantiate state-imposed regulation regimes was discussed as one of three drivers for the extension of a 'sovereign guarantee' of trust both historically and in contemporary society (see sections 2.5, and 4.6).

The hypothetical in Q6 (elderly telemarketing fraud) describes an example of inherent *dishonesty* (no sense of market value and the targeting of a vulnerable segment of the population (the elderly), bilateral exchanges and readily understood harm (Naylor, 2003). These properties of an otherwise 'predatory'-type offence are conflicted with the appearance of a legitimate business transaction, and augment the consensual nature of some frauds, and relate to the principle in R. v. Jones [1703]. It exposes the difficulty to associate law-enforcement activities with transactions that are grounded in ill-judgement, even if a third-party (a family relative in this case) is aware of the fraudulent nature of the transactions. This difficulty appears to inhibit the association of knowledge by a family relative with law-enforcement activities, particularly amongst non-FI participants (option one: FI: 27.45%, non-FI: 13.48%). Both groups associated a report to law-enforcement that does not result with any further action above any other option, representing a perceived high and unfulfilled demand for law-

enforcement activities in this context (option two: FI: 52.94%, non-FI: 42.7%). Finally, nearly a quarter of non-FI participants indicated that the discovery of telemarketing fraud involving the sale of price-inflated goods to an elderly family member would typically result with no action at all. This is a much higher figure than that of similar indication by FI participants (FI: 7.84% non-FI: 23.6%). Overall, the variance in responses between the two sub-groups in the sample was statistically significant and reflected the highest level of inter-group variance across the measurement U-test probability value p=.002 (Nachar, 2008).

This difference on perception towards the existence of a 'sovereign guarantee' of trust in the context of *dishonesty* between the two groups in the sample. Both FI and non-FI participants indicated a high unfulfilled demand for law-enforcement activities. Nevertheless, non-FI participants were less likely to associate Q6 with law-enforcement activities, and instead tended to indicate no resolution (23.6%) or extra-judicial bilateral resolution (15.73%). The findings appear to provide further empirical basis for the theoretical misalignment discussed in section 2.4. Although 'predatory'-type offences are subject to stronger association with law-enforcement activities, in the context of *dishonesty* alone such an association refers to demand for such activities, as opposed to their perceived likelihood. The literature review also refers to qualitative evidence that demonstrates the strength of perceived disassociation amongst victims identified though their reporting (Button, et al., 2009), by the criminal justice system (Button, et al., 2013), and by jurists (Fraud Trials Committee, 1986). The use of *dishonesty* as a criminal qualifier in the Fraud Act 2006 was a subject of critical analysis in chapter two (Tappan, 1947; Cressey, 1961). Participants of this survey appear to have

superimposed their difficulties in identifying a means of articulating an offence despite being informed in the briefing that all sixteen questions refer to criminal fraud offences. The cumulative frequency for options one and two (indicating an interaction with law-enforcement) was 65%. However, the sample at large was two-and-a-half times more likely to indicate option two (report to law-enforcement which does not result with an investigation) rather than option one (a criminal investigation).

In the context of the 'duality' of fraud (RQ1), the difference between group one and group two responses demonstrate an emergence of a 'dysfunction' between 'law-in-theory' and 'law-in-action' in the context of fraud (Black, 1972). As discussed in this chapter above and in section 5.5 below, this dysfunction does not refer to an absolute threshold of *effective* criminalisation, but instead to relative perceptions in the context of fraud. Group one represents those offences that were indicated by participants to be the most closely associated with law-enforcement activities and high demand for criminal justice system resolution as discussed in the above section. The offences featured in group two demonstrate the 'widening of the gap' between legislation and legal theory (Law Commission, 2002) and *effective* criminalisation (Hester & Eglin, 1992). In the context of RQ2 ('streamlining' and 'mainstreaming'), evidence of persisting 'duality' under the Fraud Act 2006 highlights the dysfunction between a conduct offence and the stated aim and legislative intent towards simplification and standardisation (Law Commission, 2002).

The hypotheticals in Q3 and Q6 demonstrate the influence of 'moral ambiguity' (Naylor, 2003) in the context of 'predatory' and 'commercial'-type frauds. Both raise questions of the location of a dividing line between ethics and the remit of criminal law, and the lack of functional support for the imposition of a categorical 'sovereign guarantee' of trust. Tappan (1947) questions the extension of the concept of ethics and equitable conduct into the domain of criminal law, and in particular the study of such conduct as 'crime' in the absence of a judicial finding. Empirical findings in this group substantiate the theoretical discussion developed in chapter two on conduct-based criminalisation in its vagueness (Tappan, 1947) and the absence of an objective test for criminality. Group two offences appear to demonstrate how the categorical criminalisation of 'all frauds' (Law Commission, 2002, p.3) may fall short of the promise of clarity that underpinned the rationale for adopting a conduct-based approach to criminalisation. The apparent lack of clarity is relative to frauds that are subject to particularised criminalisation and occur in circumstances that are generally associated with law-enforcement activities (Black, 1976; Naylor, 2003). Similar to group one, offences in group two feature *inherent* dishonesty, and relate to RQ2 in terms of role of legislation on perceived disassociation of fraud and law-enforcement activities. The following discussion is an analysis of offence descriptions where *dishonesty* is implied, and outcomes may not necessarily include financial harm (readily understood or otherwise) (Naylor, 2003), yet are still subject to criminalisation under the Fraud Act 2006.

Table 9 – Group Three

	Short description	1: (investigation and potential arrest)	2: (compliant to law-enforcement does not result in an investigation)	3: (regulatory sanction or commercial litigation)	4: (Bilateral or attempted bilateral resolution)	5: (No action taken by law-enforcement or the victim)	Mann-Whitney U-test (FI/non-FI)
Q8	A board of directors obscures elements of a company's debt structure.	**16.43%** 15.69% 16.85%	**6.43%** 3.92% 7.87%	**60.00%** 68.63% 55.06%	**5.00%** 1.96% 6.74%	**12.14%** 9.80% 13.48%	0.783
Q7*	Attempted 'phishing' attack against a personal banking account holder.	**14.29%** 9.80% 16.85%	**38.57%** 43.14% 35.96%	**3.57%** 0.00% 5.62%	**9.29%** 3.92% 12.36%	**34.29%** 43.14% 29.21%	0.279
Q14	A business has been sold based on an over-valuation.	**12.86%** 11.76% 13.48%	**8.57%** 5.88% 10.11%	**25.00%** 39.22% 16.85%	**45.00%** 39.22% 48.31%	**8.57%** 3.92% 11.24%	0.174
Q1	Fraudulent trading (no indication of harm)	**11.43%** 3.92% 15.73%	**9.29%** 5.88% 11.24%	**32.86%** 37.25% 30.34%	**33.57%** 35.29% 32.58%	**12.86%** 17.65% 10.11%	**0.041***
		Total % Financial Investigators % Non-Financial Investigators %					Asymp. Sig. (2-tailed): * Statistically significant

Group three includes three offences where *dishonesty* is implied in a manner of 'commercial'-type frauds (Naylor, 2003) (Q1, Q8, and Q14). The following relate to these three offences, and further below Q7 is discussed. Unlike the examples of this category of offending by professional against their employers in group two, group three offences are done so as to create the potential of a financial benefit for the firm (Sutherland, 1949; Naylor, 2003). Losses are, therefore, not necessarily inflicted (but rather a risk assumed), and there is no indication of what

(if any) losses were suffered, how they could be quantified, and the identity of the victims (Naylor, 2003; Levi & Burrows, 2008; Smith, et al., 2011). Furthermore, whilst group two examples of 'occupational fraud' (ACFE, 2016) were committed by employees, group three refers to offences committed by company directors. This reflects offending by those who rank explicitly high on the morphology and organisation scales, as well as implicitly high on the stratification scale (Black, 1976). These two theoretical suggestions (which are discussed above as the first and second assumption) converge with the concept of white-collar crime, and a lesser correlation between the level of discovered fraud and law-enforcement action (Sutherland, 1940; Black, 1976; Naylor, 2003).

The above discussion appears to be notwithstanding the particularisation of fraudulent trading and financial statement fraud under the Insolvency Act 1986 Theft Act 1968 respectively (as well as additional particularisation under the Fraud Act 2006) in the context of Q8. It would appear that particularised legislation is also subject to the social dynamic that underpins the use of law in the context to which it belongs. This finding relates to the discussion of role of particularised legislation in the context of historical fraud use of fraud particularisation. As discussed in section 4.6, the function of particularised fraud provision in the context of company and insolvency law is the substantiation of a state-imposed regime by threat of punitive-seeking prosecution in response to violation of the regime. In the context of company and insolvency laws, industrial nineteenth century principles of company law that were introduced to address the increasing risk of fraud address compliance in registration and financial reporting (Taylor, 2013). The extent to which this 'guarantee of trust' is associated with law-

enforcement activities in this context appear to be lesser in this study than those frauds that affect harm against companies (group two) and outside of a business context (group one).

Furthermore, the variance in responses between the two groups in the sample (FI and non-FI) in their responses to Q1 (U-test probability value *p*=.041) (Nachar, 2008) is statistically significant and requires further consideration. It would appear that the degree of association with law-enforcement activities in relation to an example of fraudulent trading amongst financial investigators was low (3.92%) relative to non-FI participants (15.73%). Furthermore, FI participants indicated civil litigation or regulatory action (option three) or no action being taken (option five) at higher rates than non-FI participants. The experiences of FI participants in this study appear to have contributed to an increased perception of dysfunction between 'law-in-theory' and 'law-in-action' in the context of the particularised offence of fraudulent trading (Black, 1972). It would appear that the role of criminal law in this contemporary context relates to the functional historical analysis with respect to the 'sovereign guarantee' of trust as it relates to the state-imposed insolvency regime (see chapter four).

The hypothetical in Q7 is one of two offence descriptions that were included in this study and display a typology where the identity of the offender is not known or discoverable by the victim or investigators. The hypotheticals in Q7 and Q12 (in group four below) both refer to ICT-related frauds ('cybercrime'), where offending is facilitated through technology that both obscure the identity of the offender and enables non-UK based offender to interact with British victims (Levi, et al., 2015).

These offence descriptions appear to relate to investigatory difficulties and challenges with transnational enforcement (Levi, et al., 2015) in the context of ICT-related offences. These difficulties and low rates of effective law-enforcement responses contribute to perceptions of a 'clever' and 'mysterious' type of offending which is often conducted with practical impunity (Wall, 2008). Nevertheless, the data suggests that the association of these offences with law-enforcement activities is on par with suggestion of most likely resolution mechanism of other frauds where the identity of the offender is known or readily discoverable (groups three and four).

Table 10 – Group Four

	Short description	**1: (investigation and potential arrest)**	**2: (compliant to law-enforcement does not result in an investigation)**	**3: (regulatory sanction or commercial litigation)**	**4: (Bilateral or attempted bilateral resolution)**	**5: (No action taken by law-enforcement or the victim)**	**Mann-Whitney U-test (FI/non-FI)**
Q9	Sub-standard insulation installed by a handyman in a private residence	**9.29%** 5.88% 11.24%	**18.57%** 21.57% 16.85%	**14.29%** 21.45% 10.11%	**46.43%** 39.22% 50.56%	**11.43%** 11.76% 12.14%	0.634
Q12*	£150 lost to a car hire app user whose account has been used by others.	**7.86%** 7.84% 7.87%	**40.71%** 58.82% 30.34%	**3.57%** 1.96% 4.49%	**37.14%** 19.61% 47.19%	**10.71%** 11.76% 10.11%	**0.019***
Q13	An internal report of the performance of a department is understated so to supplement the following year's figures.	**5.00%** 1.96% 6.74%	**6.43%** 3.92% 7.87%	**49.29%** 47.06% 50.56%	**7.14%** 9.80% 5.62%	**32.14%** 37.25% 29.21%	0.099
		Total % Financial Investigators % Non-Financial Investigators %					Asymp. Sig. (2-tailed): * Statistically significant

In the above discussion of group three, the researcher referred to the dysfunction that exists in the context of particularised criminalisation of 'commercial'-type frauds and law-enforcement activities (Sutherland, 1940; Naylor, 2003). Group four offences represent the highest degree of disassociation of fraud offences with law-enforcement responses. The researcher contextualises Q9 (the installation of a sub-standard insulation) to the discussion in the literature review of the absence of a lower threshold to an offence that is designed to capture 'complex' financial frauds (Law Commission, 2002). Q9 demonstrates that whilst 'petty theft' remains a challenge to the protection of the right to property, 'petty fraud' does not seem to commonly be perceived as a basis for law-enforcement activities. This relates to the growing contemporary dysfunction between the concept of theft and the concept of fraud. Both are subject to categorical criminalisation, but breaches of the 'sovereign guarantee' of trust do not present a categorical challenge to the existing social order and therefore do not (necessarily) require the use of 'more' law for their resolution (Black, 1976).

The hypothetical in Q12 is the second of the two examples of 'cybercrime' in this study (alongside Q7A statistically significant differences between the two groups in the sample was observed in the responses to Q12 (U-test probability value p=.019) (Nachar, 2008). The difference was primarily grounded in selection of the bilateral steps (option four), which were selected by 19.61% of FIs and 47.19% of laypersons. As the identity of the victim is unknown, it is unclear with which party 37.14% of participants indicated the victim is likely to engage with bilaterally (option four, as compared to 9.29% in Q7, where it was indicated that no direct

losses were inflicted). The researcher assumes that in bilateral resolution (option four), participants may have considered interaction with the firm that operates the mobile application service in question (as opposed to the actual offender).

The hypothetical in Q12 may have been subject to different interpretations by participants in terms of the applicability of option four (which was intended to represent bilateral resolution between offender and victim). Nevertheless, there is still some analytical value as to the essential characteristics of the 'invisible hand' (Smith, 1776) that shapes the social dynamic of fraud resolution and the role of criminal law therein (RQ1, 'duality'). Given the potential for an inconsistent understanding of whether options four related to the offender exclusively or could be extended, this discussion is developed in principle in relation to Q12. The literature appears to point to a contemporary and historical compensation-seeking victim imperative in relation to the concept of fraud (Bracton (c. 1210 – c. 1268) in Harvard Law School Library, 2003; Bentham, 1789; Levi & Burrows, 2008; Fisher, 2015; Rawlings & Lowry, 2017; Smith & Shepherd, 2017). In the context of Q12, 47.19% of non-FI participants indicated bilateral resolution presumably because of their perception of the likelihood of compensation.

5.4 Conclusion

This chapter addressed the results of the survey conducted as part of this thesis and provided critical analysis specific to RQ1 ('duality') and RQ2 ('mainstreaming' and 'streamlining'). The survey (included in Appendix A) featured a single measurement using a five-point ordinal scale of typically most likely resolution

mechanisms across sixteen hypothetical examples of fraud pre-qualified to participants as criminal offences. The dataset on which the analysis was carried out represented responses from a convenience sample of one-hundred-and-forty (N=140) participants. The sample included two sub-groups. The first groups included participants with professional experience as financial investigators (N=51), and the second groups included laypersons without financial investigation experience (N=89). In section 5.2, the three main assumptions that the sixteen questions included in this single measurement were designed to examine were discussed. The first assumption was that associations of fraud with law-enforcement activities will flow from Naylor's (2003) typology of profit-driven crime and the distinction between 'predatory' and 'commercial'-type offences (Naylor, 2003). The second assumption was that the social function of 'law' and the role of law-enforcement activities relative to other resolution mechanisms in the context of fraud flows from Black's (1976) theory of law. The third assumption that was tested was the advantage of particularisation as a clear means of criminalisation (Tappan, 1947), and its relative impact on responses relative to the above two assumption

The analysis of the findings relative to the first and the second theoretical assumptions appears to be consistent with the context provided in section 2.4 of the literature review. In terms of an association with law-enforcement activities with the concept of fraud, the data demonstrated that 'predatory'-type offences were more closely associated with law-enforcement activities relative to 'commercial'-type offences (Naylor, 2003). The application of Black's (1976) theory of law to the finding appears to demonstrate that the use of 'more' law, and

particularly an association with law-enforcement activities flows from relative socio-economic positionality between offender and victim.

Responses to Q4 (benefit fraud), which related to the first driver for particularisation (protection of the Crown's coffers and its dues), demonstrated one of the highest degrees of association with law-enforcement activities in this study. This driver relates to the 'sovereign guarantee' of trust in interactions with mechanisms of the state. Transgressions against this protection were historically amongst a few types of behaviour that were associated with punishment-seeking prosecution by the Crown, as discussed in section 4.5. The hypothetical Q4 therefore belonged with the first group of responses ('group one') and ranked amongst the highest in this study in terms of association with law-enforcement activities. The two other examples of particularised offences in this study (Q1, and Q8) were not as closely associated with law-enforcement activities and related to the substantiation of business regulation (driver two, Q8), and state-imposed debtor-creditor relations (driver three, Q1).

This chapter also contributed to the critical analysis of the lack of uniform practical understanding and enforcement of hypothetical Fraud Act 2006 offences (RQ2). The data seems to suggest that there is a lack of uniformity in the manner that law-enforcement 'unpacks' the concept of fraud and responds to reports of harm and victimisation as evidenced by the perception of study participants. It is interpreted from the average frequency of 15.53% for option two selection (standard deviation 13.52), which indicates an expectation from participants of a

fraud offence being reported to a law-enforcement agency but does not result in an investigation. The author discussed the structural (Button, 2011; Button et al., 2013; Levi et al., 2015), theoretical (chapter two), and contextual (chapter four) barriers to a uniform application of a *dishonesty*-based general offence.

The evidence in the results above would appear to undermine the null-hypothesis by demonstrating material inconsistencies in the extent to which the 'sovereign guarantee' of trust is perceived to be applied by indication of typical responses. It would also appear that approaches to law-enforcement (combining options one and two) were indicated to be the most likely outcome with an average of 50.71% across the sixteen questions. In addition to the examination of the dataset, this chapter provided additional analytical discussion in relation to the growing dysfunction between 'law-in-theory' and 'law-in-action' in the context of fraud as it emerged from the survey results.

The theoretical context used to evaluate the alleged clarity attributed to the Fraud Act 2006 offence in chapter two, and the historical functional contextual analysis in chapter four, appear to agree with the above findings. The ordinal scale from which participants in the above study selected the typically most likely resolution mechanism for different fraud offences resulted with uneven results, particularly in terms of association with law-enforcement activities. Some offences were more commonly associated with law-enforcement activities or an unfulfilled demand for a response by the criminal justice system (options one and two). The dysfunction between 'law-in-theory' and 'law-in-action' (Black, 1972) in the context of the

Fraud Act 2006 appears to vary according to three main assumptions noted below.

The first assumption related to the theoretical 'fault line' in terms of association with law-enforcement activities between 'predatory' and 'commercial'-type offences (Naylor, 2003). The pre-qualification of offences in this study as criminal at the briefing stage was intended to clarify doubts about the criminal law, and thus the applicability of law-enforcement responses. It would appear that 'predatory'-type offences better associated with law-enforcement activities than 'commercial'-type frauds. In table 3, the researcher compared two typologically similar offences that were communicated to participants through clarity in terms of means of transaction and readily identifiable losses ('predatory') and using ambiguity so to resemble a 'commercial'-type offence. The clearly communicated 'predatory'-type offence (Q10) was associated with a law-enforcement response by 74.29%, whilst 46.43% answered in the same way in relation to Q5 that was worded as a 'commercial'-type offence (Naylor, 2003).

The second assumption related to the historical analysis of the functional role of the criminal justice system and different 'settlement agents' in the context of fraud resolution. This assumption relates to the discussion in chapter three of an 'invisible hand' (Smith, 1776) that is grounded in a social dynamic, and the relevance of social theory and methodology to the study of a phenomenon such as the 'duality' of fraud (Black, 1972). The relative positionality between offender and victim and 'direction' of offending on the social scales of stratification,

morphology and organisation suggest that the ‘amount’ of law applied in response (Black, 1976). As demonstrated above in this chapter, better association with law-enforcement activities tended to be indicated by participants in response to the direction of harm ‘upwards’ on socio-economic scales (Black, 1976).

The third assumption associated particularisation with a stronger association of known examples of fraud with law-enforcement activities. Nevertheless, there appears to exist a dysfunction between ‘law-in-theory’ and ‘law-in-action’ in relation to white-collar (Sutherland, 1949) ‘commercial’-type (Naylor, 2003) offences, despite their particularisation in company and insolvency law. It would appear that particularisation may assist law-enforcement agencies to initiate an investigation and engage with victims in cases where fraud presents clear moral imperatives for prosecution (Naylor, 2003), or upwards on social scales (Black, 1976). In response to the particularised housing benefit fraud in Q4, 75% of participants associated it with law-enforcement activities. Nevertheless, only 11.43% of participants associated law-enforcement activities with known examples of fraudulent trading (an offence particularised in company and insolvency law) in Q11. Similarly, only 16.43% of participants associated law-enforcement activities with false accounting (an offence particularised in company law) in Q8. Q8 and Q11 suggest that particularisation of fraud offences fulfilled a secondary role in comparison to general criminological (Naylor, 2003) and sociological (Black, 1976) theory. This appears to underline the advantages of social theory and methodology as a means of studying the dysfunction between ‘law-in-theory’ and ‘law-in-action’ in the context of the ‘duality’ of fraud (Black, 1972).

The above chapter appears to demonstrate a correlation between empirical results generated by use of the measurement tool developed for the purpose of this study (see chapter three). The results that were produced strongly tended to agree with theoretical suggestions from the literature (Black, 1976; Naylor, 2003) and the functional context provided in the historical analysis in chapter four. Nevertheless, the researcher is aware of the low sample size (N=140) and it being a non-probability sample as limitations to its external validity (Bryman, 2012), particularly as compared with the large-scale US crime severity survey (Wolfgang, et al., 1985). Further validation of the approach presented in this study to the study of *effective* criminalisation (Hester & Eglin, 1992) through the use of Black's (1976) theory of law could be achieved in the context of fraud (or indeed other offences) through probability sampling and greater sample size.

Furthermore, this study does not appear to present a definitive threshold for effective association of known examples of fraud and law-enforcement activities so as to demonstrate a categorical denotation of an example of fraud as 'criminal'. For example, had the study included examples of other offences outside the category of fraud, it is conceivable that these could demonstrate a much stronger association with a criminal investigation than the 79.29% as in Q11 (organised car insurance fraud). Had a hypothetical question pertaining to a body that had been recovered in residential area of a large city, it would most likely have resulted near unanimous association with a criminal investigation by participants. To a lesser extent, sexual offences and violent crime too would conceivably produce comparable results. Specific examples in the context of theft are also considered by the author to have produce near-complete association of a hypothetical

example and a criminal investigation, even when the identity of the offender is not readily discoverable. These assumptions are primarily based on literature on crime severity, and particularly the late 1970's US survey of sixty-thousand (N=60,000) participants (Wolfgang, et al., 1985), and the later 1980's survey of England and Wales police officers (Levi & Jones, 1985).

The concept of 'severity' relates directly to Black's (1976) association of law with the degree to which actions challenge the existing social order. The concept of severity therefore measures the demand for law-enforcement. The researcher discusses the critical difference between the aforementioned methodologies and the tool designed in the context of this study in section 3.2. The concept of severity relates to a question of 'what ought to be', whereas the measurement in the above study asks 'what is' the typically most applicable 'amount' of law (cf Black, 1976; Wolfgang, et al., 1985). The researcher did not include questions that relate to concepts that are demonstrably more 'severe', as the purpose of this study was the measurement of the dysfunction between 'law-in-theory' and 'law-in-action' in the context of fraud, and not the relative perceived 'severity' of fraud. The inclusion of other 'brackets' of severity would likely have skewed the results through implicit bias alongside perceptions of severity (Levi & Jones, 1985; Wolfgang, et al., 1985).

The absence of an empirically validated 'threshold' for effective criminalisation in the context of this study could have been addressed by the repetition of the measurement in the context of violent and 'volume' crime. Such a survey would

pertain to ‘traditional’ crime categories adapted from the CSEW (Office of National Statistics, 2017), and performed on a separate sample. Such a study would also benefit from wider application of Black’s (1976) theory of law and the study of fraud that fell outside the scope of this thesis. These include (*inter alia*) a further validation of this measurement tool, and application of Black’s (1976) theory of law to the research interests that pertain to fraud relative to other crime categories. A study of this nature was not included in this thesis due to the low overall relevance of such an endeavour to the core research questions and considering the challenges to data collection discussed in the methodology chapter.

Chapter Six: Conclusion and Recommendations

6.1 Conclusion

This thesis provides a critical assessment of the applicability of the categorical criminalisation of the concept of fraud using a singular 'catch all' conduct-based offence – The Fraud Act 2006. This assessment is based on a social science examination of the 'duality' of fraud as a historical and contemporary phenomenon of variability of mechanisms used for fraud resolution (RQ1). The current scope of criminalisation ('all frauds') does not appear to be realised or provide the necessary clarity for the fulfilment of demand for law-enforcement activities consistently across the concept of fraud. The approach adopted by the author directs attention to the limitations of the Fraud Act 2006 in fostering clarity and supporting 'mainstreamed' and 'streamlined' enforcement against 'criminal' fraud (RQ2). These limitations are examined through the development of a functional understanding of the *effective* criminalisation in the context of fraud and an examination of its contemporary applicability across the concept of fraud. The criminalisation of fraud appears to flow from non-fraud-specific social and criminological frameworks that demonstrate the potential of social science input in defining and shaping legislation towards applied clarity.

Through systematic inquiry in the preceding chapters, an original contribution to knowledge is developed through critical focus on the variability of fraud resolution mechanisms relative to contemporary criminal law. The concept of fraud appears

to be both historically, and in contemporary society, subject to multiple resolution mechanisms and different offender-victim dynamics. Nevertheless, the concept of fraud is presently subject to categorical criminalisation in English law.

In chapter two, the Fraud Act 2006 was introduced through an examination of the work of the Law Commission (2002) and its recommendations that were later adopted in the Act. The creation of a general *dishonesty*-based offence appears to have resulted from anecdotal difficulties to secure and sustain fraud convictions under an 'untidy' body of law and provisions that existed in 2002 (*inter* alia) under the Theft Act 1968 (as amended). The standard of clarity and applicability are then critically discussed in the context of Black's (1976) theory of law and Naylor's (2003) typology of profit-driven crime. The two frameworks provide suggestions of high and low associations of crime with law-enforcement activities across socio-economic and typological 'fault lines' transcended by the conduct-based approach in the 2006 Act. The author also demonstrated that perceptions of attributes of the under-policed category of 'commercial'-type fraud appear in perceptions towards 'predatory'-type offences (Button, et al., 2009; 2013).

This 'crossover' in perceptions is further contextualised in the literature review by comparing the conduct-based criminalisation of the concept of fraud with narrow overlapping legislation. This mode of criminalisation is referred to in terms of 'particularisation', and examples of operative legislation of this stem from both pre-2006 and post-2006 provisions that are discussed in section 2.5. These offences define specific activities that

amount to fraud and imply the nature of evidence that are generated by the offence. This mode of criminalisation appears to offer a simpler way to communicate and understand fraud harm and victimisation. Different to the litigious qualifier of *dishonesty*, an objective test to establish a reasonable suspicion that a crime had occurred is available for victims and other stakeholders in the context of particularised offences.

In chapter three, a consideration of methods from the literature was presented in the context of developing a research philosophy and strategy for the study of the historical and contemporary 'duality' of fraud (RQ1). Research methods from the literature accessed by the author did not appear to present a validated tool that could be used in the context of the principle research questions RQ1 and RQ2. The author discussed the considerations that have led to the adoption of a mixed-methods approach to the study of the 'duality' of fraud as a latent social function not available for direct observation (Smith, 1776; Weber, 1978). Nevertheless, the researcher sought to identify its essential characteristics through an examination of historical records and relevant contributions to the study of historical crime control and dispute resolution. In 'phase one' (chapter four) the resolution of the phenomenon of fraud is discussed in the context of the socio-economic shift from agrarian to industrialised society subject to interpretivist functionalist analysis (Weber, 1978). In 'phase two' (chapter five) a survey was operationalised to realise a positivist approach to the measurement of the contemporary 'duality' of fraud as a social fact (Durkheim, 1982) that featured a bespoke design to the study of 'law-in-action' (Black, 1972).

In chapter four, the researcher developed an understanding of the social function of the criminalisation of fraud relative to non-criminal dispute resolution mechanisms, and relative to the concept of theft. The two concepts prior to the industrial resolution were generally not a subject for Crown prosecution then as they occurred as inter-personal disputes subject to resolution using social controls or private prosecution (Klerman, 2001). Judicial remedies in the context of fraud and theft were compensatory, and the litigation was financed and driven by the victim. Similarly, seemingly 'punitive' sanctions by contemporary standards appeared to have functioned as 'means to an end' of substantiating compensation orders and coercing payment by the convicted person, or family relatives. This mechanism was applicable across cases of theft and fraud, but also torts and personal insolvency – all resolved by private and compensation-seeking prosecution (Cohen, 1982; Klerman, 2001). Exceptions to this generalisation related to particularisation of narrow circumstances in statutory law where the Crown directly prosecuted offenders in search for punitive sanctions, and harm was construed in terms of treason. Functional analysis of these bodies of law associating particularised examples of fraud with Crown prosecution identified three drivers. First, the response to harm and victimisation against the Crown through its coffers or its dues. Second, the response to activities that undermine specific regulations of currency, measurement, or in relation to specific commodities or in Crown trade-posts. Third, the response to fraud that undermined the state-imposed insolvency regime or against the 'balance of powers' between creditors and debtors shaped by the Crown.

Through the process of industrialisation and urbanisation, the concept of theft appears to have no longer been controlled sufficiently through social controls and private compensation-seeking prosecution of offenders. The researcher discussed the 'grassroots' operation of privately resourced associations for the prosecution of felons in England and Wales. These associations appear to have mimicked Crown prosecution in the sense that they used the procedure of private-prosecution to bring charges against individuals, but in search for punitive sanctions. Compensation-seeking victims would tend to settle with the offender and maximise their recovery potential through the threat of prosecution and would typically not finance proceedings against the destitute if not for the purpose of deterrence. The association for the prosecution of felons explicitly sought to prosecute and with no inclination to settle. Furthermore, the associations typically defined categories of offending in their area where they would prosecute any examples of harm and victimisation, regardless of the victim being a member or not. These extended to the concept of theft and criminal damage to property – not the concept of fraud. (Koyama, 2012; Schubert, 2015)

The work of the association for the prosecution of felons and their crime control response to challenges to the right to property in their geographical areas appear to have provided the social context for 'policing by consent'. The largely passive and justice administrating parish constabularies (Commissioners for Inquiring into County Rates, 1836) were gradually replaced by pro-active police forces that were established in urban areas and

were primarily concerned with the concept of theft (Kleining & Zhang, 1993; Emsley, 2010). This was later complemented by the establishment of public prosecution by the Crown in the 1880's (Ashworth, 2000). At the same time, responses to fraud harm and victimisation resulted with reinforcement of 'regulation by reputation' as the primary means of fraud control outside the scope of narrow particularisation. Examples for such measures include company registration (Taylor, 2013).

The function of effective fraud criminalisation was surmised in terms of an imposition of a 'sovereign guarantee' of trust in commercial and official conduct. Prior to its categorical criminalisation as a headline offence under the 2006 Act, fraud was not grounds for Crown prosecution unless committed in violation of a criminal law (Taylor, 2013). This context demonstrates that whilst the protection for the right to property is both functionally and contextually integral to mainstream policing, *dishonesty* does not (appear to) present a categorical challenge to the existing social order (Black, 1976). Furthermore, the inter-personal dispute dynamic remains operative in the context of fraud and its regulation inside the marketplace and using the civil remedy-seeking jurisdiction (Fisher, 2015; Smith & Shepherd, 2017). The question that emerged was to what extent is the 'sovereign guarantee' of trust experienced as a social fact by members of the British public?

In chapter five, the results of a single measurement survey completed by a hundred-and-forty (N=140) participants were presented and analysed. The bespoke questionnaire asked participants to indicate the typically most likely

resolution mechanism of sixteen examples of fraud on a five-point ordinal scale. This tool is unique in the sense that it does not measure 'what ought to be' through the concepts of 'severity' (Wolfgang, et al., 1985) or 'seriousness' (Levi & Jones, 1985). Instead, this tool was designed specifically to ask participants 'what is' through their perception of the workings of the social dynamic that underpins the determination of fraud resolution mechanisms (RQ1) (Durkheim, 1982; Weber, 1978). The five-point scale was adapted from Black's (1976) theory of law, which places dispute resolution mechanisms of a relative scale of use of social controls and 'law'.

The findings demonstrated the contemporary existence of a 'duality' between criminal and non-criminal resolution of fraud (RQ1) as a varying dysfunction between 'law-in-theory' and 'law-in-action' across the concept of fraud (Black, 1972). Three assumptions were made about the association of examples of fraud harm and victimisation with law-enforcement activities, and the questions in the measurement were fashioned so as to test these assumptions. The first two assumptions were Black's (1976) theory of law and Naylor's (2003) typology of profit-driven crimes and their varying theoretical suggestions of association of law-enforcement activities with known examples of fraud. Questions pertaining to 'predatory'-type frauds and examples of harm and victimisation being affected 'upwards' on socio-economic scales were better associated with law-enforcement activities and a demand for such services (Black, 1976; Naylor, 2003). The third assumption was that particularisation offers the clarity and objective test

required to enable law-enforcement responses to an offence. Nevertheless, examples of white-collar fraud against shareholders and creditors (Sutherland, 1949) relating to a particularised offence (which negate the above two assumptions) were not commonly associated with law-enforcement activities. This suggests the continuation of the historical functionality of an enabling environment for creditors to achieve market-based or civil resolution under the protection of criminal law (The Cork Commission, 1982).

6.2 Limitations and Recommendations for Further Research

Notwithstanding the above contributions to the literature included in this thesis, there is room for further critique of the above scope of investigation and the reliability and validity of the findings. Whilst a degree of disassociation between known examples of offending and law-enforcement activities likely exists in relation to other offending categories, this thesis did not provide a basis of discussion of such phenomena relative to the 'duality' of fraud (RQ1). The scope of this thesis is centred around fraud and does not offer substantive comparative discussion of the 'duality' of fraud relative to other categories of crime. Instead, this thesis offered a social-science-based systematic inquiry of the dysfunction between 'law-in-theory' and 'law-in-action' (Black, 1972) relative to the Fraud Act 2006. The critique of categorical and monolithic criminalisation of fraud was also relative to the range of other resolution mechanism and the social dynamic of fraud resolution, and not relative to means of criminalisation in other areas.

In terms of reliability, the approach adopted by the author towards historical socio-legal analysis in chapter four integrates a considerable element to the findings and analysis. The 'journey' through the historical records, the denotation of time periods of interest, and historical re-construction of pre-industrial analytical analogues for the modern distinction between the civil and criminal jurisdiction in section 4.2 were subject to perception and decision-making. Researchers from different backgrounds might have placed more emphasis on case-law or legislation at the expense of contextual social analysis, confined their investigation to localised archives, or included more analysis of records.

A particular avenue that appears to hold the potential for further insight in this context is comparative international law. Nonetheless, in the context of the tension between a general offence and particularisation in the context of fraud (see section 2.6), a (brief) comparison between the jurisdiction of England and Wales and that of large state economies in the US appears apt. The author did not include in this thesis a comparative discussion due to the scope of focus of the main research questions, and particularly given the objective of making recommendations specific to England and Wales (RQ2). California, Texas, and New-York (*inter alia*) appear (superficially) to be similar to England in the sense that their laws (in concert with Federal law) regulate extensive and diverse local, national, and international commercial activities. The three jurisdictions mentioned above feature considerable particularisation of fraud offences in felonies and misdemeanours that relate to specific industries (healthcare, insurance, real-estate), identity theft, and financial representations. Particularisation is also featured in the context of consumer protection laws,

description of Ponzi-type fraudulent investment schemes, and miscellaneous offences such as handicapped parking fraud. Specific attention was provisionally drawn to: California's Penal Code § 484, § 528-539, § 25400, and § 25402; Texas' § 17.46 Deceptive Trade Practices – Consumer Protection Act of 1973 (as amended); and New-York's Penal Code Title K.

US states operate under the supreme jurisdiction of the Federal government, and its laws. Title 18, chapter 47 of the US code provides a definition for fraud and particularised Federal offences therein, such as making a false statement to the Federal Government (§ 1001) or defrauding the government (§ 1031). Fraud against the government is also particularised against separately in the context of tax fraud in Title 26. Other federal provisions substantiate regulatory and insolvency related regimes at the Federal level, such as fraud against federally chartered banks (§ 1344), identify theft (§ 1028), and securities fraud (Title 19). Federal law also contains offences against bankruptcy laws and procedure (§ 151). These offences appeared on the surface to functionally relate to the categorisation of pre-industrial fraud particularisation in England in section 4.6, but this analysis was not fully developed for this thesis. Nevertheless, there should be benefit from further research to compare and contrast approaches to fraud in the US as compared and contrasted with the UK.

With respect to the primary data analysis presented in chapter five, the primary limitation to the validity of the findings appears to be the non-probabilistic nature of the sample and its small size (N=140). The findings did tend to conform with

theoretical frameworks (Black, 1976, Naylor, 2003) and therefore suggested a degree of external validity, these frameworks are not themselves grounded in empiricism. Furthermore, since the measurement was a bespoke instrument and not a validated tool from the literature, the reliability of the data that was collected is somewhat limited. There are a number of possible limitations to the overall reliability of the question of 'most likely dispute resolution mechanisms': First, it has not been demonstrated that a measurement across hypothetical descriptions of harm that are theoretically similar in terms of suggested expectation for law-enforcement activities (or their absence) is valid. A measurement that includes a set of hypotheticals that is subject to theoretically consistent association with law-enforcement activities was not conducted in isolation and in tandem with hypotheticals that are theoretically less likely to be associated with law-enforcement activities. As a result, it is not clear to what extent the measurement itself may cause an augmented variability of responses, particularly relative to the dichotomy between the association with law-enforcement activities and other outcomes. The findings in chapter five may have appeared to correlate with theoretical assumptions as a result of an implication that the variability of outcomes was necessary the 'correct' type of findings expected from participants. Second, it has not been demonstrated that results with respect to a singular headline offence are replicable in either absolute or relative terms when included alongside with hypotheticals from multiple headline categories of crime. Third, as discussed in section 5.4, the analysis of the 'duality' of fraud was conducted relative to the highest level of association with law-enforcement activities in the data in lieu of an absolute threshold.

6.3 Fraud Policy Development (Recommendations)

The critique of the Fraud Act 2006 in this thesis should not be seen as a call to abolish the Act itself. Instead, this thesis calls for a legislative approach to the criminalisation of fraud that is independent of the 2006 Act in scoping the 'sovereign guarantee' of trust. This advocated approach is different from the categorical criminalisation as it exists for the concept of theft (under the Theft Act 1968), and the Fraud Act 2006 (*inter alia*). Both Acts contain a clear definition for the headline offence and, yet legal clarity does not appear to 'translate' to a uniform association of fraud with law-enforcement activities across the scope of criminalisation in the 2006 Act (see 2.4). The call for particularisation flows from the functional difference between the protection of the right to property as a 'social fact' (Durkheim, 1982) that underpins the regulation of the concept of theft, and the 'sovereign guarantee' of trust (see 4.6). The aforementioned self-regulation mechanisms appear to have historically been realised through similar states of 'duality' with respect to the role of Crown prosecution in their regulation (see 4.2). Nevertheless, it would appear that in a post-agrarian society the challenge to the existing social order that is presented by violations of the right to property is generally beyond the capacity of social controls to regulate (see 4.7). The Theft Act 1968 is therefore an articulation of the post-industrial categorical protection of the right to property through law-enforcement activities.

The process of industrialisation appears not to have resulted with a similar categorical replacement of social controls with law-enforcement activities in the

context of *dishonesty* (see 4.8). Instead, nineteenth and twentieth century legislation appears to fulfil one of the three pre-industrial drivers for association of Crown prosecution with the concept of fraud through narrow particularisation: the protection of the treasury and dues of the Crown, substantiating state-imposed regulatory and commercial standardisation regime, and the management of creditor-debtor relation and the administration of bankruptcy proceedings (see 2.5, 4.5, and 4.6). The Fraud Act 2006 therefore does not seem to reflect the role of law-enforcement and Crown prosecution in the regulation of *dishonesty* with sufficient accuracy despite the unpacking of the gestalt of fraud into criminal law by the Law Commission (2002).

Whilst the above thesis added value to the (academic) pursuit of the historical and contemporary scope of fraud criminalisation ('in-action') (Black, 1972) in the context of RQ1, it has also sought to develop legislative recommendation. The standard for such recommendations was determined in RQ2 as contributing to the 'mainstreaming' and 'streamlining' of criminalisation in the context of fraud. Whilst the literature (see 2.4) demonstrates that some particularised offences are subject to similar observations and particularly so in the context of white-collar crime (Sutherland, 1949; Naylor, 2003), the 'duality' of fraud applies more broadly (Levi & Burrows, 2008; Button, et al., 2013; National Fraud Authority, 2013). The discussion of the survey findings in section 5.3 provides additional discussion to the understanding of law-enforcement activities in relation to the concept of fraud in the context of Black's (1976) theory of law. A hypothetical fraud offence that relates to a particularised fraud offence of the first driver for particularisation (protection of the Crown) was included in the first group of offences most widely

associated with law-enforcement activities. Two hypothetical fraud offences subject to particularisation of the second (trade regulation) and third (insolvency laws) drivers that were included in the study. The aforementioned hypotheticals were associated with law-enforcement activities to a similar (and relatively lower) degree together with other 'commercial'-type (Sutherland, 1940; Naylor, 2003) offences in the study.

Unlike the concept of theft (or other headline categories of 'mainstream' harm and victimisation), a 'duality' between resolution by the criminal justice system and other resolution mechanisms appears integral to *dishonesty* related disputes (Taylor, 2013; Fisher, 2015; Rawlings & Lowry, 2017; Smith & Shepherd, 2017). A 'duality' across the concept of fraud is not seen by the author as an objective to 'overcome'. Non-criminal resolution mechanisms and civil litigation appear to fulfil a similar function to private prosecution in the context of pre-industrial inter-personal disputes in the sense that it serves to regulate and enforce market-rules and may enable extra-judicial resolution (Klerman, 2001). Rawlings and Lowry (2017) cite the Law Commission (2014) in its analysis of the contemporary role of civil law in regulating insurance fraud:

> *It is important for the law to set out clear sanctions to deter policyholders from acting fraudulently. Although insurance fraud is a criminal offence, prosecutions are relatively rare, meaning that the civil law has an important part to play in deterring fraud.* (Law Commission, 2014, p. 19)

This appears contrary to the standard for clarity set by the Law Commission (2002):

> *Clear, simple law is fairer than complicated, inaccessible law. If a citizen is contemplating activities which could amount to a crime, a clear, simple law gives better guidance on whether the conduct is criminal, and fairer warning of what could happen if it is.* (Law Commission, 2002, p.3).

It therefore appears that cerebral clarity as to the criminalisation of fraud ('law-in-theory') is secondary to the 'social fact' of the 'duality' of fraud that compounds 'law-in-action' (Black, 1972; Durkheim, 1982). As the Fraud Act 2006 is not sufficiently accurate in identifying fraud that is generally subject to law-enforcement responses in the context of RQ1 ('duality'), the Act poses difficulties to the 'mainstreaming' and 'streamlining' of fraud enforcement (RQ2). The categorical and monolithic *dishonesty*-based offence in the Fraud Act 2006 is applicable across 'predatory' and 'commercial'-type frauds (Naylor, 2003). The findings presented in chapter five demonstrated an agreement with Naylor's (2003) typology of profit-driven crimes and Black's (1976) theory of law, including in the context of particularised offences (see 5.3). One might therefore wonder why the policy recommendations in the context of RQ2 leans towards further particularisation. The answer to this question in twofold.

The first form of reasoning relates to the literature discussion of the relationship between anti-social behaviour and criminalisation. Traditionally, criminal conduct is narrowly defined to identify a clear subset of anti-social behaviour that is subject to responses from law-enforcement agencies (Tappan, 1947; Hester & Eglin, 1992), as it cannot be satisfactory regulated by social controls (Black, 1976). This

observation relates to ‘law-in-theory’ (legislation), and may still result with a dysfunction relative to ‘law-in-action’, such as in the context of white-collar crime (Sutherland, 1949) and other degrees of relative challenge to social order (Black, 1972; 1976). In imposing categorical criminalisation on a phenomenon that in itself is not a challenge to the existing social order (such as murder or theft), the Fraud Act 2006 appears to present an inversion of the above relationship. Section 2.6 contains specific discussion of examples of the dysfunction between anti-social (and quasi-anti-social) *dishonest* behaviour and the expansion of criminalisation under the Fraud Act 2006 (Ormerod, 2007; Allgrove & Sallars, 2009; Monaghan, 2010). This expansion combined with the monolithic nature of the conduct-based offence in the 2006 Act is connected in this thesis to evidence of difficulties to attribute criminality to some ‘predatory’-type fraud offences (Naylor, 2003; Button, et al., 2009; 2013).

The second form of reasoning relates to the functionalist identification of three drivers for fraud particularisation in sections 2.5, 4.5, and 4.6 as mentioned above in this section. The categorisation of drivers proposed in this thesis provides a platform through which to develop a body of particularised offences, and the extent to which the role of criminal justice therein. The first driver it addresses is harm and victimisation against the state through its treasury or dues. This form of particularisation appears in contemporary society (KPMG, 2016) and historically (Walter, 1980; Wrightson, 1980) to be effectively associated with prosecution by the Crown. The primary data analysis in section 5.3 demonstrates accordingly that a hypothetical example of this form of offending was associated with law-enforcement activities in a similar rate as other group one offences. In other

words, the survey data in chapter five demonstrates that a particularised offence that stems from the first driver was consistent with the highest levels of *effective* criminalisation observed in this study.

The second and third drivers do not address harm and victimisation against the Crown, but instead against narrow guarantees of trust it imposes in narrowly defined circumstances (see 4.6). The examples of offences from these categories that were examined in the study presented in chapter five related to 'commercial'-type offences (Naylor, 2003), and were scarcely associated with law-enforcement activities by participants (see discussion in section 5.3). The third driver (substantiation of state-imposed debtor-creditor relations and insolvency regimes) is exclusive to 'commercial'-type offending due to its applicability to otherwise legitimate business settings (Naylor, 2003). Nevertheless, the second drivers for particularisation (substantiation of state-imposed regulation and standardisation of trade) is not exclusive to a business setting.

For example, under section 17 of the Weights and Measurements Act 1985 it is a criminal offence to possess for the use of trade false measurements equipment, or to engage in trade based on false measurements or instrumentation. The 1985 Act imposes a regulatory regime and extends a 'sovereign guarantee' for trust in weights and measurements, substantiated by the narrow criminalisation of activities that could be taken to undermine the state-imposed standard. As with other particularised offences (see 2.5), the above example defines an objective (*actus reus*) test for an offence otherwise subject to *means rea* criminalisation under the Fraud Act 2006 and the subjective test of *dishonesty* (see 2.2, and 2.6).

This mode of criminalisation appears to provide an arguably preferable standard for clarity to the approach favoured by the Law Commission (2002). Whilst particularised fraud offences may not encapsulate the full meaning of the term or be directly transferable to other forms of *dishonest* conduct, it offers clarity in the circumstances of its application, and identifies evidence generated by the offence.

A body of fraud particularisation provisions will not 'undo' the 'duality' of fraud. Instead, it will enable victims to assert their victimisation should social controls and regulation by reputation not be sufficient in resolving fraud-related disputes (Black, 1976; Black & Baumgartner, 1983). This form of victim empowerment relates to the analysis of the role of state-law in resolving pre-industrial inter-personal disputes in relation to concepts such as fraud (and theft) in section 4.2 (Klerman, 2001). When imposed, particularisation holds the potential to facilitate interaction between victims and law-enforcement agencies in a context of a specific offence and evidence that could support an objective test of whether an offence has occurred ('streamlining'). By comparison to the present law, particularisation appears to offer a platform through which 'mainstream' police interfaces may be possible to re-establish in the context of some fraud offences.

There is therefore a basis to re-examine the question of what ought to be the extent of a 'sovereign guarantee' of trust in English law. The imposition of the *de facto* categorical 'sovereign guarantee' of trust as advocated by the Law Commission (2002) has been a subject of a systematic critiqued in this thesis based on the literature (chapter two), historical socio-legal analysis (chapter four) and primary data (chapter five). It is doubtful that there exists a categorical

‘grassroots’ demand for the high ‘amount’ of law in association with law-enforcement activities in the context of *dishonesty*. Alternately, a legislative process of consideration for what narrow types and circumstances of fraud ought to be controlled through criminalisation and the commitment of law-enforcement and Crown prosecution resources. This consideration can benefit from development relative to the identification of functions that are subject to regulation. For example, the Fraud Trials Committee (1986) identifies an imperative to provide households the security needed to invest some of their savings in British firms. This function could be particularised through a particularised criminalisation of producing a false statement pertaining to an investment portfolio, or to misrepresent the source of distributed returns to investors.

A body of particularised offences that imposes narrow ‘guarantees’ for trust where Parliament identifies an imperative to criminalise *dishonest* anti-social behaviour could offer more to promote trust and control harm and victimisation. Such a body of laws should provide narrow *actus reus* definitions of the offence and greater fidelity of the degree of ‘sovereign guarantee’ of trust expressed through variable maximum sentences. Offences should be defined so as to imply an objective test for a reasonable suspicion of offending, and possible evidence created by the offence to the extent possible. Levi (2008a) provides a typology of frauds based on types of victims by sector, type, and modes of fraud harm to which they are particularly susceptible. The above victim-centric matrix does not identify frauds using mutually exclusive fraud typologies, but rather by generic techniques used by offenders in such circumstances of interaction with the victim. This typology

appears to offer an appropriate basis for categorisation of areas of fraud risk, and the extent to which criminal law is needed to sufficiently regulate and 'guarantee' trust in circumstances that pertain to each category. The reader will note that similar to the scope of discussion across this thesis, the above typology mostly relates to examples of fraud where the identity of the offender is known to the victim, or readily discoverable.

As discussed in section 2.7, the common-law offence of conspiracy to defraud presently functions as a 'fall-back' offence to the Fraud Act 2006 for use in circumstances where *conduct* cannot be as effectively prosecuted under the 2006 Act (CPS, 2012). Relative to the recommended body of particularised offences to denote the scope of fraud criminalisation, the Fraud Act 2006 (and the conspiracy to defraud common-law offence) should be used as 'fall-back' offences. As discussed in section 5.3, the use of criminal law with respect to particularised frauds appears to be less likely in some typological and social circumstances (Sutherland, 1949; Black, 1976; Naylor, 2003). Nevertheless, particularisation and clarity are functionally important in substantiating the state-imposed protection to which they apply (see section 4.6), and in enabling dispute resolution through the use of mechanisms that are representative of 'less' law (Black, 1976; Black & Baumgartner, 1983; Klerman, 2001). The scope of particularisation should therefore refer to known types of *dishonest* conduct to which Parliament wishes the Crown to prosecute on behalf of a victim who seeks to involve an appropriate law-enforcement agency. Where this protection is not afforded, fraud would be subject to resolution as a commercial or an inter-personal dispute in the civil courts (as required by the parties).

The recommended function of the Fraud Act 2006 as a 'fall-back' offence is therefore to provide for means of prosecuting an example of *dishonesty* that had not been foreseen when it presents a challenge to the existing social order (Black, 1976). The Fraud Act 2006 should not be used to codify the extent to which fraud is an offence in English law. In other words, an identified form of fraud harm and victimisation that legislators wish to criminalise should be subject to particularised legislation and a definition of the evidence that are generated by the offence. Investigators and prosecutors may use the 2006 Act as a general framework to test in court whether a fraud technique that emerged, not-subject to particularisation, can meet a criminal threshold of *dishonesty*. In other words, the definition for fraud in the 2006 Act may offer a means to retrospectively ensure a means of addressing acute challenges to the economy from "*schemes which the fertility of man's invention would contrive*" (Holdsworth, 1909, p. 262 citing Lord Hardwicke, 1759; The Law Commission, 2002 citing The Criminal Law Revision Committee, 1966).

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Appendix A - Survey

Fraud Enforcement

1. Briefing and Consent

This study examines perceptions towards fraud enforcement in the UK and is aimed at practitioners and non-practitioners alike, and is conducted as part of a doctoral research conducted by Nir Tolkovsky MSc CFE at the University of Derby, under the supervision of Dr David C. Hicks. In the following pages, you will be presented with 16 short offence description and be asked to choose what would be the likeliest legal response to the victimisation described. Please consider the identity of the offender known to the victim, but the crime is not by default reported to a law-enforcement agency. You will be able to choose between:

• A criminal investigation potentially leading to an arrest
• The incident being reported to a law-enforcement agency but taken no further
• Regulatory sanctions / commercial litigation
• The victim takes other steps against the perpetrator or recovers some of the losses from the perpetrator
• No action is taken by law-enforcement or the victim

In the following section, you will be asked two general questions designed to test different priorities towards corporate fraud enforcement for indirect victims. You will be asked to assign priorities and allocate resources for the investigation team in the way which of the following you feel best represent your interest: Future prevention, Criminal prosecution, Asset tracing and victim compensation (unpredictable result and returns) This questionnaire is completely anonymous. You will only be asked to indicate whether you are a financial investigation or law-enforcement practitioner or not professionally involved in the field. The study will not include subset of findings from of any particular agency, nor does the dataset allow for such analysis.

No UK law-enforcement or private sector body identification details are recorded by this study. This online survey platform used does not record IP addresses and web browser information and is Data Protection Act 1998 registered. This study is conducted under the University of Derby's Research Ethics Policy and Code of Practice:http://www.derby.ac.uk/media/derbyacuk/contentassets/documents/research/ethicsandgovernance/University-of-Derby-Research-Ethics-Policy-and-Code-of-Practice-June-2011.doc) and the Data Protection Act 1998For any question or queries please contact the researcher using the details below.
Thank you!
Nir Tolkovsky MSc CFEn.tolkovsky@derby.ac.uk *

☐ I have been informed and understand the purpose of this study.

2. Participation in this study is completely anonymous. *

☐ I chose freely to take part in this study.

3. Please tick the following box to confirm. *

- [ ] I understand that the study is completely anonymous.

4. Are you professionally involved in financial crime investigations (law-enforcement or otherwise)? *

- [ ] Yes, I am a practitioner
- [ ] No

5. For Practitioners:

- [ ] I have received appropriate consent from my employer
- [ ] I do not require further consent from my employer to participate in an anonymous study

6. Please indicate your area of residence from the list below (localities are based on local police forces). *

- [ ] Scotland
- [ ] Northern Ireland
- [ ] Avon and Somerset
- [ ] Bedfordshire
- [ ] Cambridgeshire
- [ ] Cheshire
- [ ] Cleveland
- [ ] Cumbria
- [ ] Derbyshire
- [ ] Devon & Cornwall
- [ ] Dorset
- [ ] Durham
- [ ] Dyfed-Powys
- [ ] Essex

- [ ] Gloucestershire
- [ ] Gwent
- [ ] Hampshire
- [ ] Hertfordshire
- [ ] Humberside
- [ ] Kent
- [ ] Lancashire
- [ ] Leicestershire
- [ ] Lincolnshire
- [ ] Manchester
- [ ] Merseyside
- [ ] London
- [ ] Norfolk
- [ ] North Wales
- [ ] North Yorkshire
- [ ] Northamptonshire
- [ ] Northumbria
- [ ] Nottinghamshire
- [ ] South Wales
- [ ] South Yorkshire
- [ ] Staffordshire
- [ ] Suffolk
- [ ] Surrey
- [ ] Sussex
- [ ] Thames Valley
- [ ] Warwickshire
- [ ] West Mercia

- [ ] West Midlands
- [ ] West Yorkshire
- [ ] Wiltshire

2. Section 1

In this section you will be presented with hypothetical descriptions. Please indicate which outcome, in your opinion, is the most typical of the kind of incident describe. Note that this study examines what outcomes are considered most likely, and not necessarily what is desired, 'just', or prescribed by law. Please tick the most applicable answer for each case.

7. In hope of winning a major contract, a director decides to allow her business another three months of trade knowing full well that the company is unable to pay its lenders. Which of the following is typically the most likely outcome? *

- [ ] A criminal investigation potentially leading to an arrest
- [ ] The incident being reported to a law-enforcement agency but taken no further
- [ ] Regulatory sanctions / commercial litigation
- [ ] The victim takes other steps against the perpetrator or recovers some of the losses from the perpetrator
- [ ] No action is taken by law-enforcement or the victim

8. Three traders are coordinating investment activities in order to boost their portfolio performance. Which of the following is typically the most likely outcome? *

- [ ] A criminal investigation potentially leading to an arrest
- [ ] The incident being reported to a law-enforcement agency but taken no further
- [ ] Regulatory sanctions / commercial litigation
- [ ] The victim takes other steps against the perpetrator or recovers some of the losses from the perpetrator
- [ ] No action is taken by law-enforcement or the victim

9. A Procurement officer for a large construction company decides to favour one supplier over another as the winner of an open bid due to an undisclosed family connection. Which of the following is typically the most likely outcome? *

- [ ] 1. A criminal investigation potentially leading to an arrest
- [ ] 2. The incident being reported to a law-enforcement agency but taken no further

- [ ] 3. Regulatory sanctions / commercial litigation
- [ ] 4. The victim takes other steps against the perpetrator or recovers some of the losses from the perpetrator
- [ ] 5. No action is taken by law-enforcement or the victim

10. Whilst claiming unemployment and housing benefits, a household benefited from rent payments paid for undeclared properties. The total benefit from undue payments and un-paid tax amounted to £150,000 over ten years. Which of the following is typically the most likely outcome? *

- [ ] A criminal investigation potentially leading to an arrest
- [ ] The incident being reported to a law-enforcement agency but taken no further
- [ ] Regulatory sanctions / commercial litigation
- [ ] The victim takes other steps against the perpetrator or recovers some of the losses from the perpetrator
- [ ] No action is taken by law-enforcement or the victim

11. A global investment bank's internal control have uncovered a rogue trader whose scheme lasted for a many years and have resulted with the bank having to write off 2% of its annual profit in one year. Which of the following is typically the most likely outcome? *

- [ ] A criminal investigation potentially leading to an arrest
- [ ] The incident being reported to a law-enforcement agency but taken no further
- [ ] Regulatory sanctions / commercial litigation
- [ ] The victim takes other steps against the perpetrator or recovers some of the losses from the perpetrator
- [ ] No action is taken by law-enforcement or the victim

12. Bob discovers that his elderly parent has been purchasing household items over the phone for up to ten times their market value. Which of the following is typically the most likely outcome? *

- [ ] 1. A criminal investigation potentially leading to an arrest
- [ ] 2. The incident being reported to a law-enforcement agency but taken no further
- [ ] 3. Regulatory sanctions / commercial litigation
- [ ] 4. The victim takes other steps against the perpetrator or recovers some of the losses from the perpetrator

- [ ] 5. No action is taken by law-enforcement or the victim

13. Paul received an email with an urgent notice from his bank to confirm his contact details. Paul pressed a link to log in to his account and enters his online banking credentials and confirms his payment card details in what he later discovers was another website designed to copy the layout of his bank's login screen. Paul's bank identifies suspicious transactions on his card shortly after and contacts Paul. Paul's online banking account is closed and his payment card cancelled. In a matter of days, he receives a new payment card and a new online account without suffering any losses. Which of the following is typically the most likely outcome?

- [ ] A criminal investigation potentially leading to an arrest
- [ ] The incident being reported to a law-enforcement agency but taken no further
- [ ] Regulatory sanctions / commercial litigation
- [ ] The victim takes other steps against the perpetrator or recovers some of the losses from the perpetrator
- [ ] No action is taken by law-enforcement or the victim

14. The board of a global firm intentionally obscures some components of the company's debt structure so as to appear more attractive to investors and have better access to credit. Which of the following is typically the most likely outcome? *

- [ ] A criminal investigation potentially leading to an arrest
- [ ] The incident being reported to a law-enforcement agency but taken no further
- [ ] Regulatory sanctions / commercial litigation
- [ ] The victim takes other steps against the perpetrator or recovers some of the losses from the perpetrator
- [ ] No action is taken by law-enforcement or the victim

15. A person undertakes to install high-end insulation in a private residence but uses regular insulation materials to make a higher profit, leaving the property owner with a higher energy bill. The property owner discovers that the insulation is to blame a couple of years later. Which of the following is typically the most likely outcome? *

- [ ] 1. A criminal investigation potentially leading to an arrest
- [ ] 2. The incident being reported to a law-enforcement agency but taken no further
- [ ] 3. Regulatory sanctions / commercial litigation
- [ ] 4. The victim takes other steps against the perpetrator or recovers some of the losses from the perpetrator

- [ ] 5. No action is taken by law-enforcement or the victim

16. A trader in a large and successful investment firm has been funnelling funds, amounting to £150,000 over three years, to a bogus account in order to benefit from it. Which of the following is typically the most likely outcome? *

- [ ] A criminal investigation potentially leading to an arrest
- [ ] The incident being reported to a law-enforcement agency but taken no further
- [ ] Regulatory sanctions / commercial litigation
- [ ] The victim takes other steps against the perpetrator or recovers some of the losses from the perpetrator
- [ ] No action is taken by law-enforcement or the victim

17. A group is carrying out a scheme against multiple car insurers involving the faking and orchestration of road accidents. Which of the following is typically the most likely outcome? *

- [ ] A criminal investigation potentially leading to an arrest
- [ ] The incident being reported to a law-enforcement agency but taken no further
- [ ] Regulatory sanctions / commercial litigation
- [ ] The victim takes other steps against the perpetrator or recovers some of the losses from the perpetrator
- [ ] No action is taken by law-enforcement or the victim

18. Claire discovers that her popular car hire app service account was used for journeys she did not make, costing her £150 prior to her closing the account. Which of the following is typically the most likely outcome? *

- [ ] A criminal investigation potentially leading to an arrest
- [ ] The incident being reported to a law-enforcement agency but taken no further
- [ ] Regulatory sanctions / commercial litigation
- [ ] The victim takes other steps against the perpetrator or recovers some of the losses from the perpetrator
- [ ] No action is taken by law-enforcement or the victim

19. A department head in a large multinational company reports only some of the department's revenues in the end of year 1 and carries some of them through to the following year so to project a more stable income stream. Which of the following is typically the most likely outcome? *

- [ ] A criminal investigation potentially leading to an arrest
- [ ] The incident being reported to a law-enforcement agency but taken no further
- [ ] Regulatory sanctions / commercial litigation
- [ ] The victim takes other steps against the perpetrator or recovers some of the losses from the perpetrator
- [ ] No action is taken by law-enforcement or the victim

20. A business owner sells his business based on an over-valuation he knows to be false. Later on, the buyer recognise a substantial loss as a result. Which of the following is typically the most likely outcome? *

- [ ] A criminal investigation potentially leading to an arrest
- [ ] The incident being reported to a law-enforcement agency but taken no further
- [ ] Regulatory sanctions / commercial litigation
- [ ] The victim takes other steps against the perpetrator or recovers some of the losses from the perpetrator
- [ ] No action is taken by law-enforcement or the victim

21. A criminal gang installs devices on local cash machines (ATMs) in order to acquire card and pin numbers so to sell them on the internet. Which of the following is typically the most likely outcome?

- [ ] A criminal investigation potentially leading to an arrest
- [ ] The incident being reported to a law-enforcement agency but taken no further
- [ ] Regulatory sanctions / commercial litigation
- [ ] The victim takes other steps against the perpetrator or recovers some of the losses from the perpetrator
- [ ] No action is taken by law-enforcement or the victim

22. A person targets wealthy business owners in his social reach and persuades them to invest thousands of pounds each in a scheme which does not exist. Which of the following is typically the most likely outcome? *

- [ ] A criminal investigation potentially leading to an arrest
- [ ] The incident being reported to a law-enforcement agency but taken no further

- [ ] Regulatory sanctions / commercial litigation
- [ ] The victim takes other steps against the perpetrator or recovers some of the losses from the perpetrator
- [ ] No action is taken by law-enforcement or the victim

Section 2

Below are two hypothetical description of indirect fraud damage. Please consider how your interest as a victim and justice are best served when assigning law-enforcement resources towards the following goals: Future prevention Criminal Prosecution Asset tracing and victim compensation (unpredictable results and actual returns) Please note that in victim compensation the intention is the victim of the fraud(s) and not necessarily yourself.

23. Your pension fund has depreciated by 5% last year due to an investment in a FTSE 100 company which had to recognise a loss, due to a long term procurement fraud, and thus suffered a drop in share price. Please allocate law-enforcement resources as you see fit (adding up to 100%). *

Future prevention	%
Criminal prosecution resulting in an arrest	%
Asset tracing and victim compensation (unpredictable result and returns)	%
Total:	%

24. Last year, the cost of excess rates and premiums imposed on you by various vendors and service providers due to losses from fraud amounted to around £200.Please allocate law-enforcement resources as you see fit (adding up to 100%). *

Future prevention	%
Criminal prosecution	%
Asset tracing and victim compensation (unpredictable result and returns)	%
Total:	%

Section 2

Below are two hypothetical description of indirect fraud damage. Please consider how your interest as a victim and justice are best served when assigning law-enforcement resources towards the following goals: Future prevention Criminal Prosecution Asset tracing and victim compensation (unpredictable results and actual returns) Please note that in victim compensation the intention is the victim of the fraud(s) and not necessarily yourself.

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Future prevention	%
Criminal prosecution resulting in an arrest	%
Asset tracing and victim compensation (unpredictable result and returns)	%
Total:	%

24. Last year, the cost of excess rates and premiums imposed on you by various vendors and service providers due to losses from fraud amounted to around £200.Please allocate law-enforcement resources as you see fit (adding up to 100%). *

Future prevention	%
Criminal prosecution	%
Asset tracing and victim compensation (unpredictable result and returns)	%
Total:	

You have completed this survey!

Thank you for participating in this survey, which form a part of a study into the application of fraud in English law and Practice. This survey is part of a study which examines current expectations towards fraud enforcement in terms of 'how much law' is expected to be applied towards typical fraud victimisation scenarios as part of a doctoral research project provisionally titled "The Dual Nature of Fraud in English Law and Practice".
Should you have concerns regarding fraud that you have experienced or witnessed, please contact Action Fraud, or refer to one of the support organisations listed on their website for any other concerns and enquiries:

Action Fraud - http://www.actionfraud.police.uk/support-and-prevention/ive-been-a-victim-of-fraud

Support organisations recommended by Action Fraud - http://www.actionfraud.police.uk/support-and-prevention/useful-organisations

Please consider referring this survey to others in your network, practitioners and non-practitioners alike.

https://www.smartsurvey.co.uk/s/frauduk/

Many thanks,

Nir Tolkovsky
n.tolkovsky@derby.ac.uk

Appendix B – Survey Results

	Short description	1: (investigation and potential arrest)	2: (compliant to law-enforcement does not result in an investigation)	3: (regulatory sanction or commercial litigation)	4: (Bilateral or attempted bilateral resolution)	5: (No action taken by law-enforcement or the victim)	Mann-Whitney U-test (FI/non-FI) Asymp. Sig. (2-tailed):
Q1	Fraudulent trading (no indication of harm)	**TOT: 11.43%** FI: 3.92% Non-FI: 15.73%	**TOT: 9.29%** FI: 5.88% Non-FI: 11.24%	**TOT: 32.86%** FI: 37.25% Non-FI: 30.34%	**TOT: 33.57%** FI: 35.29% Non-FI: 32.58%	**TOT: 12.86%** FI: 17.65% Non-FI: 10.11%	**0.041***
Q2	Traders conspire to boost their performance by coordinating investments.	**TOT: 21.43%** FI: 17.65% Non-FI: 23.60%	**TOT: 9.29%** FI: 3.92% Non-FI: 12.36%	**TOT: 29.29%** FI: 47.06% Non-FI: 19.10%	**TOT: 7.41%** FI: 1.96% Non-FI: 10.11%	**TOT: 32.86%** FI: 29.41% Non-FI: 34.83%	0.978
Q3	Procurement fraud (preferring a contractor for family reasons).	**TOT: 17.14%** FI: 21.57% Non-FI: 14.61%	**TOT: 12.14%** FI: 9.80% Non-FI: 13.48%	**TOT: 23.57%** FI: 29.41% Non-FI: 20.22%	**TOT: 12.14%** FI: 11.76% Non-FI: 12.36%	**TOT: 35.00%** FI: 27.45% Non-FI: 39.33%	0.178
Q4	Housing benefits fraud (£150,000 over ten years)	**TOT: 75%** FI: 82.35% Non-FI: 70.79%	**TOT: 4.29%** FI: 3.92% Non-FI: 4.49%	**TOT: 6.43%** FI: 5.88% Non-FI: 6.74%	**TOT: 9.29%** FI: 1.96% Non-FI: 13.48%	**TOT: 5.00%** FI: 5.88% Non-FI: 4.49%	0.129
Q5	A trader ran a scheme against a financial institution over many years that resulted with a significant loss.	**TOT: 46.43%** FI: 45.10% Non-FI: 47.19%	**TOT: 9.29%** FI: 13.73% Non-FI: 6.74%	**TOT: 24.29%** FI: 23.53% Non-FI: 24.72%	**TOT: 12.86%** FI: 15.69% Non-FI: 11.24%	**TOT: 7.14%** FI: 1.96% Non-FI: 10.11%	0.716
Q6	Elderly telemarketing fraud.	**TOT: 18.57%** FI: 27.45% Non-FI: 13.48%	**TOT: 46.43%** FI: 52.94% Non-FI: 42.70%	**TOT: 3.57%** FI: 1.96% Non-FI: 4.49%	**TOT: 13.57%** FI: 9.80% Non-FI: 15.73%	**TOT: 17.86%** FI: 7.84% Non-FI: 23.60%	**0.002***
Q7*	Attempted 'phishing' attack against a personal banking account holder.	**TOT: 14.29%** FI: 9.80% Non-FI: 16.85%	**TOT: 38.57%** FI: 43.14% Non-FI: 35.96%	**TOT: 3.57%** FI: 0.00% Non-FI: 5.62%	**TOT: 9.29%** FI: 3.92% Non-FI: 12.36%	**TOT: 34.29%** FI: 43.14% Non-FI: 29.21%	0.279

Q8	A board of directors obscures elements of a company's debt structure.	**TOT: 16.43%** FI: 15.69% Non-FI: 16.85%	**TOT: 6.43%** FI: 3.92% Non-FI: 7.87%	**TOT: 60.00%** FI: 68.63% Non-FI: 55.06%	**TOT: 5.00%** FI: 1.96% Non-FI: 6.74%	**TOT: 12.14%** FI: 9.80% Non-FI: 13.48%	0.783
Q9	Sub-standard insulation installed by a handyman in a private residence	**TOT: 9.29%** FI: 5.88% Non-FI: 11.24%	**TOT: 18.57%** FI: 21.57% Non-FI: 16.85%	**TOT: 14.29%** FI: 21.45% Non-FI: 10.11%	**TOT: 46.43%** FI: 39.22% Non-FI: 50.56%	**TOT: 11.43%** FI: 11.76% Non-FI: 12.14%	0.634
Q10	A trader funnels funds amounting to £150,000 over three years using a bogus account.	**TOT: 74.29%** FI: 78.43% Non-FI: 71.91%	**TOT: 6.43%** FI: 1.96% Non-FI: 8.99%	**TOT: 9.29%** FI: 13.73% Non-FI: 6.74%	**TOT: 7.14%** FI: 5.88% Non-FI: 7.87%	**TOT: 2.86%** FI: 0.00% Non-FI: 4.49%	0.391
Q11	Organised car insurance fraud.	**TOT: 79.29%** FI: 80.39% Non-FI: 78.65%	**TOT: 8.57%** FI: 9.80% Non-FI: 7.87%	**TOT: 4.29%** FI: 1.96% Non-FI: 5.62%	**TOT: 5.00%** FI: 3.92% Non-FI: 5.62%	**TOT: 2.86%** FI: 3.92% Non-FI: 2.25%	0.795
Q12*	£150 lost to a car hire app user whose account has been used by others.	**TOT: 7.86%** FI: 7.84% Non-FI: 7.87%	**TOT: 40.71%** FI: 58.82% Non-FI: 30.34%	**TOT: 3.57%** FI: 1.96% Non-FI: 4.49%	**TOT: 37.14%** FI: 19.61% Non-FI: 47.19%	**TOT: 10.71%** FI: 11.76% Non-FI: 10.11%	**0.019***
Q13	An internal report of the performance of a department is understated so to supplement the following year's figures.	**TOT: 5.00%** FI: 1.96% Non-FI: 6.74%	**TOT: 6.43%** FI: 3.92% Non-FI: 7.87%	**TOT: 49.29%** FI: 47.06% Non-FI: 50.56%	**TOT: 7.14%** FI: 9.80% Non-FI: 5.62%	**TOT: 32.14%** FI: 37.25% Non-FI: 29.21%	0.099
Q14	A business has been sold based on an over-valuation.	**TOT: 12.86%** FI: 11.76% Non-FI: 13.48%	**TOT: 8.57%** FI: 5.88% Non-FI: 10.11%	**TOT: 25.00%** FI: 39.22% Non-FI: 16.85%	**TOT: 45.00%** FI: 39.22% Non-FI: 48.31%	**TOT: 8.57%** FI: 3.92% Non-FI: 11.24%	0.174
Q15	Theft of payment card details using a card reader installed on ATMs.	**TOT: 77.41%** FI: 80.39% Non-FI: 75.28%	**TOT: 15%** FI: 19.61% Non-FI: 12.36%	**TOT: 0.71%** FI: 0.00% Non-FI: 1.12%	**TOT: 4.29%** FI: 0.00% Non-FI: 6.74%	**TOT: 2.86%** FI: 0.00% Non-FI: 4.49%	0.251
Q16	A Ponzi scheme	**TOT: 72.86%** FI: 82.35% Non-FI: 67.42%	**TOT: 10%** FI: 13.73% Non-FI: 7.87%	**TOT: 5%** FI: 1.96% Non-FI: 6.74%	**TOT: 6.43%** FI: 1.96% Non-FI: 8.99%	**TOT: 5.71%** FI: 0.00% Non-FI: 8.99%	**0.021***