

April 23, 2018

Dear Workshop Participants:

Attached you will find the draft of an essay drawn from a new book project, provisionally entitled *The Apprehension of Fraud in American Legal Culture*. Both the essay and the larger project are broadly concerned with the problem of trust in the nineteenth-century U.S. The essay was originally prepared for a conference at the University of Chicago Law School on “Money in Law and Literature,” and it will appear in *Power, Prose, and Purse: Law, Literature, and Economic Transformations*, edited by the conference organizers, Alison LaCroix, Saul Levmore, Martha Nussbaum and to be published by Oxford University Press later this year.

As you will see, the essay focuses on Herman Melville’s 1857 novel, *The Confidence-Man: His Masquerade*. I have appended the chapters of the novel discussed in the second part of essay, which concern an agreement negotiated between the titular character and the steamboat barber. Readers short on time should feel no need to consult them, however, as the essential bits are in the essay itself.

Thanks in advance for reading. I very much look forward to your comments and suggestions.

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Counterfeiting Confidence: The Problem of Trust in the Age of Contract

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“As if it had been a theatre-bill,” passengers embarking on the steamboat *Fidèle* crowded around a warning sign posted outside the captain’s door, offering a reward for the capture of “a mysterious imposter.” The wanted man, who was reputed to be “quite an original genius in his vocation,” may or may not have been the titular character of Herman Melville’s famously cryptic *The Confidence-Man: His Masquerade*. Tacking between “the comedy of thought” and “the comedy of action,” the novel takes place over the course of a single April Fools’ Day as the Mississippi steamer makes its way to New Orleans, serving as a staging ground for a procession of swindles. Assuming a variety of guises, the protagonist ensnares his marks by means of conversational bids, arresting their attention and leading them down philosophical blind alleys. In most cases, his fellow-travelers are talked into giving him money, whether in the form of a donation, loan, or purchase, the proceeds of which are all taken as tokens of confidence.¹

A stark contrast is set up in the opening pages between a “lamb-like” deaf-mute in “cream-colors,” whose “advent” on the boat coincides with sunrise, and its resident barber, a “crusty-looking” character who is opening his shop for the day. The deaf-mute, “unaccompanied by friends” and unencumbered by luggage, is figured as “a stranger” in “the extremist sense of the word.” He elbows his way through the throng and plants himself just beside the warning sign, where he proceeds to scrawl a series of Pauline epistles on a small slate held up for the same audience to see. “Charity thinketh no evil,” he initially writes, then changing the words after the first to indicate that it also “endureth all things,” “believeth all things,” and “never faileth.” Two doors down, the barber expresses a diametrically opposed view as he proceeds “with business-like dispatch” to hang a sign over his door, “gilt with the likeness of a razor elbowed in readiness to shave, and also, for the public benefit, with two words not unfrequently seen ashore gracing other shops beside barbers’:—‘NO TRUST.’”²

Perhaps for this reason, the inscription is regarded by passersby as unremarkable, which cannot be said of those of the stranger. They provoke their fair share of stares and jeers, some of which escalate to the level of pushes and punches, moving the stranger to retreat to a less trafficked area where he falls asleep and inspires an array of “epithetic comments” from a new assemblage of onlookers from a balcony above, going to show that “many men have many minds.” “Odd fish!” exclaims one. “Poor fellow!” another. “Who can he be?” inquires one more. “Green prophet from Utah,” comes one response. “Humbug!” is another. “Means something,” assures a third, followed by a chorus of others, whose conflicting judgments range from

¹ Herman Melville, *The Confidence-Man: His Masquerade*, ed., Hershel Parker (New York: Norton, 1971). Critics disagree as to whether there is a single protagonist or a series of swindlers. There are also disputes among those in the former camp as to which and how many roles he inhabits.

² Id.

“Escaped convict, worn out with dodging” to “Jacob dreaming at Luz.” But their attention is soon drawn to more imposing curiosities, which send them off in differing directions, the narrator likening their interactions on deck to those of to “merchants on ‘change” as they try to take each other in, engaging in dizzying dialogues that perpetually beg the questions, “What are you? What am I?”³

Playing on these uncertainties, Melville’s *Confidence Man* is conventionally read as a literary enactment of the fluidity and theatricality of the market society that was antebellum America, where nothing could be taken at face value. Set on a “ship of fools” continually filled and refilled with “strangers still more strange,” the novel is readily summoned up as an expression of the atomizing forces of capitalism, eroding traditional hierarchies, loosening the ties of family, community, and religion, and encouraging bursts of creative destruction. The fictional Mississippi steamer that carries “that multiform pilgrim species, man” forward in time and space is an agent and emblem of these transformations, constituting a microcosm of this sprawling commercial democracy. Its mazelike corridors lead to darkened saloons and secluded staterooms as well as garish promenades and sun-drenched balconies, which “present like facilities for publicity or privacy,” evoking the mystery and anonymity of urban space, where charming swindlers daily preyed on the unsuspecting. The captain of the *Fidèle* never makes an appearance, nor are there any other visible signs of authority on this free-floating, extra-territorial performance space, and so travelers are left to their own devices in judging the credentials and credibility of one another, mirroring the vicissitudes of a boom and bust economy built upon paper promises. Readers are similarly situated as they make their way through the puzzling sequence of episodes that constitute this imaginative world, for the guidance they receive from the pointlessly devious narrator is at best unreliable. Displaying a remarkable flair for saying almost nothing with too many words, his language is marked by circularity and riddled with double negatives, mainly serving to frustrate comprehension. The hints and clues he offers about the characters’ characters lead “everywhere and nowhere,” and the same is true of the trio of metafictional digressions that break up the action of the novel, as they tend to lapse into tautology, promising to be “worth the consideration of those to whom it may prove worth considering.” *Caveat emptor* is the moral most commonly drawn from this story by critics and historians alike, and it has, in turn, been folded into broader narratives about the shiftiness of American character and the imperatives of moneymaking in what was fast becoming “a nation of counterfeiters.”⁴

³ Id.

⁴ Stephen Mihm, *A Nation of Counterfeiters: Capitalists, Con Men, and the Making of the United States* 4-5 (2007) (observing “it was a novelist [Melville] who painted one of the more disturbing portraits [*The Confidence-Man*] of this confusing system of currency and the capitalist society it both symbolized and sustained”); Edward Balleisen, *Fraud: An American History from Barnum to Madoff* 26-27, 43-106 (2017) (crediting Melville’s novel with revealing “a basic truth” that “has structured business frauds from Melville’s time to our own” and casting the period from the 1810s to the 1880s as a “World of Caveat Emptor”); see also Jean-Christophe Agnew, *Worlds Apart: The Market and the Theater in Anglo-American Thought, 1550-1750* (1986); James W. Cook, *The Arts of Deception: Playing with Fraud in the Age of Barnum* (2001); Wai-chee Dimock, *Empire for Liberty: Melville and the Poetics of Individualism* (1996); Karen Halttunen, *Confidence Men and Painted Ladies: A Study of Middle-class Culture in America, 1830-1870* (1982); Walter Johnson, *River of Dark Dreams: Slavery and Empire in the Cotton Kingdom* (2013); Susan Kuhlmann, *Knave Fool, and Genius: The Confidence Man as He Appears in Nineteenth-Century American Fiction* (1973); William E. Lenz, *Fast Talk & Flush Times: The Confidence Man as a Literary Convention* (1985); Gary Lindberg, *The Confidence Man in American Literature* (1982); Walter A. McDougall, *Freedom Just around the Corner: A New American History, 1585-1828* (2004); Michael Petit, *The Science of*

These ways of relating text and context imply that antebellum Americans were as little protected by the law as the passengers on the *Fidèle*, trusting at their peril. To the extent that the bench and bar figure in their analyses, it is as exponents of a capitalist ideology, enabling if not legitimating the deceptive ways of confidence men. Such accounts invariably and uncritically rest upon Morton J. Horwitz's classic but much controverted *The Transformation of American Law* (1977). This work chronicles "the triumph of contract" effected by antebellum legal elites, including Melville's own father-in-law, the famed Massachusetts jurist Lemuel Shaw. Such men elaborated an "instrumental" view of law to promote economic development, one grounded upon the formal consent of the parties rather than communal norms of fairness, favoring "entrepreneurs" at the expense of "farmers, workers, and consumers." The law of misrepresentation provides a case in point for Horwitz, finding as he does that courts in this period sharpened the distinction between "facts" and "opinions" so as to strictly delimit what constituted actionable fraud as opposed to promotional ingenuity. Viewed against this legal historical backdrop, Melville's *The Confidence-Man* is read as an especially "disturbing portrait" of "the anonymity and anarchy of the modern marketplace," revealing the empty promise at the core of era's "contract ideology." At the same time, the novelist's fiction corroborates the Horwitzian account, as the apparent absence of authority on the *Fidèle* is taken to reflect how American law actually worked in its formative era. Projecting an abstract and illusory vision of freedom and equality, the managers of the legal system constituted the "shock troops of capitalism," promoting the reorientation of social life around an impersonal cash nexus and enforcing an individualistic ethos which effectively ensured that the victims of real-life confidence men would have only themselves to blame.⁵

In drawing such conclusions about the role of law in Melville's novel and the society he inhabited, historicists old and new have run aground, obscuring as much as they reveal about the regulation of fraud in antebellum America. Fixing the meaning of the author's words in relation to his times is an especially tricky enterprise because reading itself is problematized in *The Confidence-Man*, a work that arguably defies both generic classification and historical contextualization. Those who embark upon this literary journey can never be sure when or whether the author is speaking through his characters about the relationship between law and justice in antebellum America. To be sure, there are stories, dialogues, and narrative asides that seem to address such matters, recounting the plight of victims of judicial proceedings and revealing the forms of oppression and uncharitable behavior legitimated by the law of the land. But Melville dangles cultural references only to give the reader the slip, frustrating the expectations of his audience even as he floats the possibility that there is more to the story, which noncommittally concludes with the words: "Something further may follow of this Masquerade." It is difficult not to feel strung along and, paradoxically, driven to discover a deeper significance, the artfulness of the work's design simultaneously fueling the sense that it means something and that it is an elaborate humbug. As Jean-Christophe Agnew encapsulates the experience,

Deception: Psychology and Commerce in America (2013); Michael Paul Rogin, *Subversive Genealogy: The Politics and Art of Herman Melville* (1979); Scott Sandage, *Born Losers: A History Of Failure in America* (2005); Brook Thomas, *Cross-Examinations of Law and Literature: Cooper, Hawthorne, Stowe, and Melville* (1987).

⁵ Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (1977); Thomas, *Cross-Examinations*, 183; Mihm, *Counterfeiters*, 14; see also Rogin, *Subversive Genealogy*; Dimock, *Empire for Liberty*; Cook, *Arts of Deception*.

“Melville so encumbers his prose with various ambiguous codicils and self-canceling clauses that, from a contractualist point of view, the narrative seems entirely in small print. The reader is both taken and taken aback.”⁶ The trouble with this interpretive stance, however, is that it assumes the existence of a unitary perspective, which hardly accords with the substantial body of scholarship critiquing the Horwitz thesis and more broadly challenging traditional narratives about the movement from status to contract in nineteenth-century America.⁷ Contrary to the critics’ renderings of this transformation as so all-encompassing that “no one” could “escape the fate of becoming a contracting party,”⁸ legal historians have demonstrated the persistence of status, relational categories, and property regimes in this era, emphasizing in particular the formal exclusions built into the law of contract by appellate judges and jurists, who elaborated a conception of civil citizenship that entailed the subordination of various classes of “disabled” persons, including not only children but also married women, Native Americans, slaves, free blacks, and an ever-expanding category of “insane persons.”⁹ Moreover, recent scholarship decoupling law from the state and emphasizing legal pluralism has widened the field of historical inquiry to encompass contractual disputes in lower courts that often involved individuals without the formal legal standing to sue or be sued.¹⁰ These studies reveal the intricate webs of obligation that continued to bind antebellum Americans together, demonstrating the extent to which exchange relations remained embedded in social networks mediated by trust; customary gifting behaviors were not so much crowded out by market mentalities as melded with them in myriad ways, constituting new modes of “being, seeing, and ruling.”¹¹ Still the legalities of this “paper-and-credit economy” are only beginning to receive their due,¹² and the literary representations of

⁶ Agnew, *Worlds Apart*, 198-99.

⁷ For a thoroughgoing critique and counter-narrative, see Peter Karsten, *Heart versus Head: Judge-Made Law in Nineteenth-Century America* (1997). Other important correctives include A.W.B. Simpson, “The Horwitz Thesis and the History of Contracts,” *University of Chicago Law Review* 46 (1979): 533; David Lieberman, “Contract Before ‘Freedom of Contract,’” in *The State and Freedom of Contract* 89-121 (1998).

⁸ Dimock, *Empire for Liberty*, 241.

⁹ John V. Orth, “Contract and the Common Law,” in *The State and Freedom of Contract* 44 (Harry N. Scheiber ed., 1998); Roy Kreitner, *Calculating Promises: The Emergence of Modern American Contract Law* (2007); Holly Brewer, *By Birth or Consent: Children, Law, and the Anglo-American Revolution in Authority* (2007); Amy Dru Stanley, *From Bondage to Contract* (1998); Barbara Young Welke, *The Borders of Belonging in the Long Nineteenth Century United States* (2010); Susanna L. Blumenthal, *Law and the Modern Mind: Consciousness and Responsibility in American Legal Culture* (2016).

¹⁰ See especially Laura Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (2009).

¹¹ See, for example, Edward Balleisen, *Navigating Failure: Bankruptcy and Commercial Society in Antebellum America* (2001); Hildegard Hoeller, *From Gift to Commodity: Capitalism and Sacrifice in Nineteenth-Century American Fiction* (2012); Leon Jackson, *The Business of Letters: Authorial Economics in Antebellum America* (2008); Peter Knight, *Reading the Market: Genres of Financial Capitalism in Gilded Age America* (2016); Rowena Olegario, *A Culture of Credit: Embedding Trust and Transparency in American Business* (2006); Richard White, *Railroaded: The Transcontinentals and the Making of Modern America* (2012); Wendy A. Woloson, *In Hock: Pawning in American from Independence through the Great Depression* (2009).

¹² While much of the scholarship to date has focused on bankruptcy law, see Balleisen, *Navigating Failure*; Bruce Mann, *Republic of Debtors: Bankruptcy in the Age of American Independence* (2009); David Skeel, *Debt’s Dominion: A History of Bankruptcy Law in America* (2004), new legal histories of money also shed considerable light on debtor and creditor relations and the legal constitution of capitalism more broadly. See especially Jeffrey Sklansky, *Sovereign of the Market: The Money Question in Early America* (2017); Christine Desan, *Making Money: Coin, Currency, and the Coming of Capitalism* (2014); Roy Kreitner, “Legal History of Money,” 8 *Annual Review of Law and Social Science* 415-431 (2012).

its workings have not been much tapped as primary sources by those exploring anew the historical dynamics between law and American capitalism.¹³

Mining the archive of fiction is a particularly rewarding venture for the legal historian, in view of the preoccupation with credit, credibility, and truth-telling that marks the work of imaginative writers as well as lawyers in the antebellum era. Moreover, it is worth recalling that practicing and lapsed lawyers were among some of the most prolific producers of fiction in this period, and it was a rare author who escaped the legal entanglements and embarrassments of debt.¹⁴ Melville certainly could not have survived as a writer without the monetary advances provided by his publisher and his father-in-law, the jurist Lemuel Shaw, to whom he owed thousands of dollars at the time he penned *The Confidence-Man*. Its publication hardly improved his financial or literary standing, as confounded critics accused him of perpetrating “a hoax on the public—an emulation of Barnum,” complaining that they took up “the work with as much confidence in its worth, as we should feel in the possession of a cheque drawn by a well-known capitalist,” only to be disappointed by his failure to live up to his own reputation. “The book will sell, of course, because Melville wrote it,” one reviewer projected, “but this exceedingly talented author must beware or he will tire out the patience of his readers.”¹⁵ This turned out to be wrong so far as sales of *The Confidence Man* was concerned. More than half of the copies had to be sold as scrap paper, though this was in some measure the result of bad

¹³ Literary and cultural historians of the nineteenth-century United States tend to draw overly sharp distinctions between a “gift” or “moral economy” and a “market economy,” the latter being associated with a modern will theory of contract while the former is treated as a premodern, non-legal mode of exchange. The interrelations between law, economy, and literature are more fully explored in the scholarship on exchange relations in Georgian and Victorian England. See especially Patrick Brantlinger, *Fictions of State: Culture and Credit in Britain 1694-1994* (1996); Christopher W. Brooks, *Lawyers, Litigation and English Society since 1450* (1998); Randall Craig, *Promising Language: Betrothal in Victorian Law and Literature* (2000); Kieran Dolan, *Fiction and the Law: Legal Discourse in Victorian and Modernist Literature* (2009); Margot C. Finn, *The Character of Credit: Personal Debt in English Culture, 1740-1914* (2003); Catherine O. Frank, *Law, Literature and the Transmission of Culture in England, 1837-1925* (2010); Ian Klaus, *Forging Capitalism: Rogues, Swindlers, Frauds, and the Rise of Modern Finance* (2014); Jill Rappaport, *Giving Women: Alliance and Exchange in Victorian Culture* (2011); Anat Rosenberg, *Liberalizing Contracts: Nineteenth-Century Promises Through Literature, Law and History* (2018); James Taylor, *Boardroom Scandal: The Criminalization of Company Fraud in Nineteenth-Century Britain* (2013); Nicola Lacey, “The Way We Lived Then: The Legal Profession and the Nineteenth-Century Novel,” *Sydney Law Review* 599 (2011).

¹⁴ Robert A. Ferguson, *Law and Letters in American Culture* (1984); Jackson, *The Business of Letters*; Andrew Lawson, *Downwardly Mobile: The Changing Fortunes of American Realism* (2014).

¹⁵ Philadelphia North American and United States Gazette (April 4, 1857); *Literary Gazette, and Journal of Archaeology* (London)(April 11, 1857); *Boston Evening Transcript* (April 10, 1857); *New York Day Book*, (April 1, 1857); *Burlington Free Press* (Vermont)(April 25, 1857); *Berkshire County Eagle* (June 19, 1857); *London Illustrated Times* (April 25, 1857); *Albany Evening Journal* (April 2, 1857); *New York Dispatch* (April 5, 1857); see also *New York Atlas* (April 19, 1857)(casting the work as “a remarkably lazy one” and adding the lament that “the author has expended so much labor to so little purpose, when we have a right to expect from him better things. It looks too much like a job of book making, instead of a work of love stimulated by the best faculties of the intellect.”); cf. *Leader* (London)(April 11, 1857)(describing the work as more “tempered” than previous productions and praising its “strangely diversified narration of events,” particularly the manner in which “philosophy is brought out of its cloisters into the living world”). Ironically, the negative reviews may have been the result of Melville’s attempt to widen the appeal of his work as he was pressed by creditors. His use of “elaborately qualified ‘assertions’ which may be hedgingly offered and ambiguously retracted” is shown by Hershel Parker in *Herman Melville: A Biography, Volume II: 1851-1891* (2002), 287 to have been added in the final stages of the manuscript’s preparation for submission, a time when Melville was moved by financial need to conceal or blunt some of its satirical barbs: “The style forged in private agonies was finally used to communicate, not to conceal—but only the rarest of readers in Melville’s own time (a couple of the London reviewers) understood it.”

timing. The publishing firm that released the book with a knowing wink on April 1, 1857 folded several weeks later due to the defalcations of one of its partners, prefiguring the financial panic and depression that would seize the nation in the fall of the same year. The printer's plates were likewise liquidated after the already overextended Melville tried and failed to raise enough money to buy them himself, which was the beginning of the end of his career as a writer. After a brief and unsuccessful stint on the lyceum circuit, he was compelled to pursue a new line of work as a customs inspector in lower Manhattan, where he spent the better part of twenty years "quietly, steadfastly doing his duty" in an office that was swarming with "corrupting merchants," persevering until he could afford to retire on his wife's inheritance.¹⁶ Meanwhile, just blocks away at the American Museum, the self-proclaimed Prince of Humbug was winning fame and fortune by capitalizing on the problem of trust at the heart of Melville's novel, ingeniously turning the confidence games of everyday life into a wildly popular form of entertainment and justifying his enterprise with the observation that "the public appears disposed to be amused even when they are conscious of being deceived."¹⁷

The contrasting fates of Barnum and Melville certainly go to show that fraud was a funny business in antebellum America, but it is exceedingly problematic to read *The Confidence Man* or contemporary accounts of his real-life counterparts as evidence that the country was in fact governed by the maxim of *caveat emptor*. To take as true reports in the popular press declaring that "all America is one gigantic Mock Auction" and to credit literary and legal representations of humbug's ubiquity is to risk being taken in, for exaggeration was rife within the print culture of the period.¹⁸ Nor can this puffery be simply regarded as evidence of the law's laxity, for doing so would beg all sorts of questions about the ways and means by which the legal category of fraud was given meaning and force in the circumstances of everyday life, not only by participants in forensic contests and legislative debates, but also among those who operated in the shadows of the law. While it is concededly true that *caveat emptor* was "loudly proclaimed" by leading judges and jurists were wont to "contrast the stern simplicity (real or imagined) of the common law with the paternalism (real or imagined) of the civil law," as Lawrence Friedman has put it, his parentheticals caution against taking such statements at face value, suggesting this obscures a more complicated and multi-faceted legal universe.¹⁹ Casting the evidentiary net to encompass the workings of lower courts and law enforcement agencies in addition to newspapers, novels, trade journals, and other cultural forms, this essay is part of a broader investigation into the modes of representation and regulation and —public and private, formal and informal, federal, state, and local—that Americans deployed as they reckoned with the specter of the con artist over the course of the long nineteenth century. These sources indicate

¹⁶ Parker, *Melville*; Andrew Delbanco, *Melville: His World and Work* (2005); Neil Harris, *Humbug: The Art of P. T. Barnum* (1973), 221-25.

¹⁷ P.T. Barnum, *The Life of P. T. Barnum, Written by Himself* 171 (1855).

¹⁸ Balleisen recognizes the *economic* incentives that might have moved showmen like Barnum to emphasize and perhaps exaggerate the ethos of *caveat emptor*, see *Fraud*, 44-45, but his reading of appellate case law and treatises alongside newspapers as well as popular literature leads him to conclude that they were close to the mark. *Ibid.*, 73-74 (quoting from the travelogue of German journalist Moritz Busch, with additional cites to Charles Dicken's *American Notes for General Circulation* and George G. Foster's *New York in Slices*). But his analysis, which is confined to cases involving "fraud committed by business firms against external counterparties," *ibid.*, 10 (emphasis in original), does not consider the extent to which the legal and literary sources he uses to confirm the showmen's estimations were themselves part of a culture of "puffery," as documented and explored in Lara Langer Cohen, *The Fabrication of American Literature: Fraudulence and Antebellum Print Culture* (2012).

¹⁹ Lawrence M. Friedman, *A History of American Law*, 3rd ed. 194-95 (2005).

that antebellum judges generally worked to expand traditional common law remedies for misrepresentation and sharp dealing, seeking to enforce norms of fairness that reflected public expectations, rather than adhering to a literalistic doctrine of contractual freedom. This era also saw the proliferation of statutes and ordinances ratcheting up the civil and criminal sanctions attaching to an ever-widening array of cheats, counterfeits, and forgers, even as the latter were removed from the list of offenders eligible for the death penalty.²⁰ Indeed, it might even be said that law enforcers in Melville's day manifested an "increase in seriousness," to borrow the title of *The Confidence-Man*'s last chapter, registering apprehensions about the darker side of the "genial" con artist's charades.

Yet there is no getting around the fact that the public did appear to be amused by some forms of creative deception, an aspect of the culture that Melville's comedy of thought and action reflected, like a funhouse mirror, in the jokes that pepper the dialogue, eliciting laughter or what "seemed intended for a laugh" from its characters. These sorts of responses posed a vexing dilemma for law enforcers at the time and leave historians with interpretive puzzles today: did the apparent amusement of the audience constitute a defense to the charge of fraud? Was their reaction fairly taken a sign of consent, as evidence that they were either the authors of their own injuries or not really harmed, so far as the law was concerned? Did laughter transform a victim into a willing accomplice or a satisfied customer, one who was in on the joke or had at least gotten his money's worth? With the aim of clarifying the norms and stakes of the confidence games that antebellum Americans played with each other, this essay brings literary and legal discourses to bear upon one another, illustrating the ways they were used to negotiate the ambiguous borderlands between capitalism and crime, thereby shining considerable light on the contours of fraud in this period. Attempting a triangulation of sorts among law, literature, and history, this inquiry proceeds in three parts. The first part reconstructs the jurisprudential context within which the novel was composed, showing that the challenge presented by the original confidence man and those who imitated his ways prompted judges, jurists, and legislators to match the ingenuity of these characters in their elaborations of rules of law, deliberately remaining vague so as to maximize the discretion of law enforcers and minimize the ability of malefactors to evade its strictures. With these features of the legal landscape in view, the second part returns to the pages of *The Confidence Man*, focusing on the literary passages set in the ship's barbershop, whose owner promises to give the confidence man as good a shave as any Wall Street broker. Their ensuing dialogue may be read as something of a send-up of the maxim of *caveat emptor*, suggesting that those who think they can function without trust in a world of strangers only fool themselves. This fictional transaction invites comparison with the real-life brokers who made a business of shaving each other and the broader public, exemplifying the "money-mania" that threatened the moral and financial integrity of the nation as a whole. The question of who was to bear the consequences of their risky behavior was thrown into especially sharp relief in the sensational 1856 trial of Charles B. Huntington, a remarkably brazen forger whose distinctive combination of cupidity, duplicity, and stupidity inspired his defense attorneys to plead "moral insanity" even as their client laughed it off, ultimately earning him a cell in Sing Sing. The third part considers the historical and cultural significance of this legal episode in the "revolving Drummond light" that rays outward from "the original character" in *The Confidence-*

²⁰ Ibid., 195; see also Karsten, *Heart versus Head*; Lawrence Friedman, *Crime and Punishment in American History* 464 (1994); cf. Michael Lobban, "Contractual Fraud in Law and Equity, c. 1750-c1850," *Oxford Journal of Legal Studies* 17 (Autumn 1997): 440-76.

Man. Read in this way, Melville's confounding novel not only brings us face to face with the fiction of the self, as critics have long appreciated. It also encourages us to venture beyond its pages and explore the ways the law and its instrumentalities shored up social confidence, enabling the processes of trust-formation, rather than leaving Americans to their own devices.

"No. 1, the Original Confidence Man"

"Now, could you really place any confidence in me?" So asked Samuel Williams, alias Samuel Thompson, alias Samuel Thomas, alias William Thompson again and again as he traversed the streets of New York City in the summer of 1849, accumulating a sizeable collection of gold watches and a considerable stash of dollar bills in the process. Genteelly dressed, he was distinguished by his powers of persuasion, reputedly possessing "the gift of speech to such a degree that sensible men—yes, men of business—have parted with watch and money besides." As one of his marks later recalled, "He smiled but said nothing; he next asked me if I would lend him five dollars . . . he talked to me so that he fascinated me; and as soon as he was gone the charm left me." His arrest on July 7 of that year generated a media sensation within and beyond this urban setting on account of the "novelty" of his mode of operation and he was the first swindler to whom the particular appellation *confidence man* was applied, attaining minor celebrity status. While there is much to suggest that Melville "picked up" the titular character of his novel from these news stories, it is important to stress that the real individual who was the subject of all these reports was made to pay for his crimes. He was twice tried and convicted of larceny, reputedly dying in Sing Sing while serving out his second sentence in October of 1856. But if the juries did not need to leave their seats to determine he was guilty as charged in each instance, public opinion was rather more ambivalent.²¹

Consider first the way the *New York Herald* broke the story on July 8, matter-of-factly describing the art of the con:

[H]e would go up to a perfect stranger in the street, and being a man of genteel appearance, would easily command an interview. Upon this interview he would say, after some little conversation, 'have you confidence in me to trust me with your watch until to-morrow;' the stranger, at this novel request, supposing him to be some old acquaintance, not at the moment recollected, allows him to take the watch, thus placing 'confidence' in the honesty of a stranger, who walks off laughing, and the other, supposing it to be a joke, allows him so to do.

As a supplemental means of law enforcement, the article appealed to "all those persons who have been defrauded by the 'Confidence Man,' to call at the police court, Tombs, and take a view of him." Within the week, however, the paper's editor, James Gordon Bennett redirected his prosecutorial discretion, running a biting commentary entitled "'The Confidence Man' on a

²¹ Michael S. Reynolds, "The Prototype for Melville's Confidence-Man," *PMLA* 85 (1971): 1009-13; Johannes Dietrich Bergmann, "The Original Confidence Man," *American Quarterly* 21 (1969): 560-77; Hans Bergmann, *God in the Street: New York Writing from the Penny Press to Melville* (1995); "Court of General Sessions," (October 10, 1849). Thompson may not have been his only source; there was a Melville imposter abroad in 1850, "personating the author of 'White-Jacket,' and one of his disguises was that of a deaf mute." See William B. Dillingham, *Melville's Later Novels* (1986), 297-98.

Large Scale” that took Thompson to task for aiming too low. “During the last week or ten days, the public have been entertained by the police reporters with several amusing descriptions of the transactions of a certain financial genius, who rejoices in the *soubriquet* of the ‘Confidence Man,’” the writer observed. But his accomplishments truly paled in comparison with another class of men with similar talents who resided in “*palazzos* with all their costly furniture and all their splendid equipage” in a fashionable neighborhood far removed from the very small apartment where he was now confined in Centre Street. While the “financial genius” of Thompson was “employed on a small scale in Broadway,” for which he was branded “a rogue” and “collared by the police,” the others were making millions “in Wall street” and “cherished by society for it.” His mock-sermonizing about Thompson’s life choices registers deep misgivings about the era’s paper economy and its corrupting effects:

Miserable wretch! He should have gone to Albany and obtained a charter for a new railroad company. He should have issued a flaming prospectus of another grand scheme of international improvement. He should have entered his own name as a stockholder, to the amount of one hundred thousand dollars. He should have called to his aid a few dozen chosen associates. He should have quietly got rid of his stock; but on the faith of it got a controlling share in the management of the concern. He should have involved the company in debt, by a corrupt and profligate expenditure of the capital subscribed in good faith by poor men and men of moderate means. He should have negotiated a loan, and taken it himself, at his own rates. He should have secured himself by the capital of the concern. He should have run the company into all sorts of difficulty. He should have depreciated the stock by every means in his power. He should have brought the stockholders into bankruptcy. He should have sold out the whole concern, and got all into his own hands, in payment of his “bonds.” He should have drawn, during all the time occupied by this process of “confidence,” a munificent salary; and, choosing the proper, appropriate, exact nick of time, he should have retired to a life of virtuous ease, the possessor of a clear conscience, and one million of dollars!

Done in by his own lack of ambition, Thompson was justly condemned to prison while “the genuine ‘Confidence Man’ stands one of the Corinthian columns of society—heads the lists of benevolent institutions—sits in the grandest pew of the grandest temple—spreads new snares for new victims—and heaps up fresh fuel for the day of wrath, which will one day follow the mandate of the God of Justice and the poor man! . . . Success, then, to the real ‘Confidence Man.’ Long life to the real ‘Confidence Man!’—the ‘Confidence Man’ of Wall street . . . As for the ‘Confidence Man’ of ‘the Tombs,’ he is a cheat, a humbug, a delusion, a sham, a mockery! Let him rot!”²²

The *Herald* satire won the plaudits of some influential members of New York’s literati, such as the editor of the upper-crust *Knickerbocker*, Lewis Gaylord Clark, who pronounced it “as true as it was keen.” Yet a different note was sounded by his nemesis at the *Literary World*, Evert Augustus Duyckinck, who nurtured a rising generation of literary intellectuals—including Melville—that collectively adopted the name Young America. He submitted that it was “not the

²² “Arrest of the Confidence Man,” *New York Herald* (July 8, 1849); “‘The Confidence Man’ on a Large Scale,” *New York Herald* (July 11, 1849).

worst thing that may be said of a country that it gives birth to a confidence man” and then proceeded to quote from a “clever” piece in the *Merchants’ Ledger* “which we are glad to see has a column for the credit as well as for the debtor side of humanity.” While conceding that American public and private life had its share of men who were hypocritical to the bone, this business writer nonetheless found it heartening that Thompson was “able to drive so considerable a trade on an appeal to so simple a quality as confidence of man in man,” insisting “it is a good thing, and speaks well for human nature, that, at this late day, in spite of all the hardening of civilization, and all the warning of newspapers, men can be swindled.” Still more lighthearted was the producer of a farce called “Confidence Man” which played to favorable reviews in the month following Thompson’s arrest, with even the *Herald* reporting that it “created much fun” and was sure to be “a hit.” The one media outlet that was not at all amused, however, was the *National Police Gazette*, whose editors cast him as a sinister character in a series of articles headlined with the accusation, “Corruption of Authority: The Confidence Man and the District Attorney,” alleging that Thompson was running “the operations of justice in New York City” from within prison, where he occupied “the keeper’s chair” and exacted tribute from the other inmates. By 1859, the confidence man had become a full-fledged criminal type, warranting a lengthy and exceedingly dour entry in their publication, *The Rogue’s Lexicon*, which cynically observed, “Of all the rogue tribe, the Confidence man is, perhaps, the most liberally supplied with subjects, for every man has his soft spot, and nine times out of ten the soft spot is soften by an idiotic desire to overreach the man that is about to overreach us. This is just the spot on which the Confidence man works. He knows his subject is only a knave wrongside out.”²³

This complex of responses to Thompson and his street crimes has long been situated by historians in a larger narrative about a new nation undergoing the wrenching process of democratization and modernization. The early republic was marked by unprecedented levels of geographical and social mobility, which had a corrosive effect on traditional hierarchies, encouraging the reorganization of social relations along more horizontal lines, in accordance with ideals of equality rather than mastery and deference. At the same time, these democratic notions fueled the formation of mass political parties and the concomitant “nationalization of the power of the majority.” The power and influence of local authorities were diminished all the more by an expanding market economy and the “speculative mania” it induced in the citizenry. In this young and impressionable nation, the age-old problem of knowing whom and what to trust was especially pronounced, rising to crisis proportions in the minds of opinion leaders, who described their social world as teetering on the edge of anarchy.²⁴ The rising generation, forging new paths that often led to urban centers, were used to concretize what was at stake, particularly in guidebooks and etiquette manuals that emphasized the perils presented by friendly strangers.

²³ Knickerbocker, XXXIV (Sept. 1849), 279; *Literary World*, V (Aug. 18, 1849).

²⁴ Halttunen, *Confidence Men and Painted Ladies*, 50-52. According to Halttunen, their distress was largely rooted in the fact that they “had left behind them the traditional conventions of a familiar social world, where character unfolded slowly within relatively stable social relations and men came to know one another gradually and well. But they had not yet developed new conventions for the world of strangers, where character had to be assessed quickly within relatively fleeting relationships and men often came to know very little of one another.” Id. For a somewhat overly-schematic argument that trust relationships are peculiarly modern, arising as societies move from status to contract, see Adam B. Seligman, “Role Complexity, Risk, and the Emergence of Trust,” 81 *Boston University Law Review* 619, 621-22 (2001) (distinguishing trust from confidence and faith). For an illuminating philosophical perspective, see Annette C. Baier, “Trusting People,” 6 *Philosophical Perspectives* (1992): 137-53.

Although the dissemination of this advice literature predated the coining of the term *confidence man*, the villains they conjured up essentially fit this description. In these strangely alluring characters, which importantly included a female type, “the painted lady,” advice writers concentrated their anxieties about the direction of social change; their works expressed “the growing conviction that the urban-industrial world was becoming distressingly illegible, a place in which human eyes, spoken words, and written texts could not be trusted in the traditional ways.” Indeed, the worries about deception were “positively endemic to the culture of the new middle class,” whose members saw the potential for fraud and imposition in a wide range of cultural settings—not only in market transactions and political activity, but also in more sacred and intimate spaces, like the church and parlor, and possibly even in the more private reaches of the home. Indeed, this distrust ran so deep as to extend inward, moving individuals to doubt the testimony of their own God-given senses.²⁵

Cultural and intellectual historians have provided rich accounts of the sorts of cultural antidotes evolved to address this pervasive problem of trust—at both the metaphysical and social levels. Numerous works have shown how the Scottish Common Sense philosophy was deployed by antebellum moralists to provide assurance that the mind was a reliable instrument, affirming that “the senses and self-consciousness were trustworthy and conveyed what humanity thought they conveyed.”²⁶ Karen Halttunen has illustrated how these ideas about the human mind were deployed in advice literature to engender both self-confidence and social cohesion. This literature promoted a “cult of sincerity,” prescribing rules of conduct and deportment which were intended to render social relations more transparent. Yet these rules paradoxically inclined its followers toward increasingly elaborate and self-conscious displays of their virtue, which only made it more difficult to distinguish the truly trustworthy from those who were merely acting the part. Advice writers thus fueled “the same anxieties they claimed to alleviate” as they effectively communicated that the “cultural work of guarding against social impersonation was never done.”²⁷ Promoting the very social masquerade they were designed to dismantle, their works ultimately encouraged middle-class Americans to embrace theatricality as a way of life and enjoy artful deception as a form of entertainment. Indeed, they formed a willing audience for the Barnum’s trickery, as James Cook has convincingly argued, the showman’s artful deceptions

²⁵Cook, *Arts of Deception*, 26-27. On the obsessive concern about fraud and imposture within the middle-class culture of the nineteenth-century, see, e.g., R. Laurence Moore, *In Search of White Crows*, (New York: Oxford University Press, 1976); Halttunen, *Confidence Men and Painted Ladies*; Elaine Abelson, *When Ladies Go A-Thieving: Middle-Class Shoplifters in the Victorian Department Store* (New York: Oxford University Press, 1989); John Kasson, *Rudeness and Civility: Manners in Nineteenth-Century America* (New York: Hill and Wang, 1990); Ann Fabian, *Card Sharps, Dream Books, & Bucket Shops: Gambling in 19th-Century America* (Ithaca: Cornell University Press, 1990); Jackson Lears, *Fables of Abundance: A Cultural History of Advertising in America* (New York: Basic Books, 1994).

²⁶Mark A. Noll, “The Rise and Long Life of the Protestant Enlightenment in America,” in William M. Shea and Peter A. Huff, eds., *Knowledge and Belief in America: Enlightenment Traditions and Modern Religious Thought* (Cambridge: Cambridge University Press, 1995). The literature on this subject is voluminous; representative works include Theodore Bozeman, *Protestants in an Age of Science: The Baconian Ideal and Antebellum American Religious Thought* (1977); Merle Curti, *Human Nature in American Thought* (1980); Herbert Hovenkamp, *Science and Religion in America, 1800-1860* (1978); Daniel Walker Howe, *The Unitarian Conscience: Harvard Moral Philosophy, 1805-1861* (1970); Bruce Kuklick, *Churchmen and Philosophers* (1985); Henry May, *The Enlightenment in America* (1976); D.H. Meyer, *The Instructed Conscience: The Shaping of the American National Ethic* (1972).

²⁷Halttunen, *Confidence Men and Painted Ladies*, 33-55; Cook, *Arts of Deception*, 16, 25, 27.

proving popular and provocative largely because they revealed and exploited the fine line between entertainment and social deviance, that which separated “clever promotional ingenuity” from “devious commercial fraud,” “respectable selves in the audience” from “freakish others on stage,” and “artistic imitation” from “criminal counterfeiting.” In other words, the source of the Barnum’s appeal lay in the ambiguity his performances, as they “alternatively defined, buttressed, skirted, and violated the values of their consumers, often in the very same show.”²⁸ Although these ambiguities could not be completely entertained away, the shows themselves the functioned as something of a training ground, providing means of dealing with the corrosive and isolating effects of skepticism, with what Walt Whitman referred to as “the terrible doubt of appearances.”²⁹

As the problem of fraud and imposition moved to center stage in nineteenth-century American culture, new challenges emerged for law itself, long preoccupied with marking these fine lines and conventional moral thresholds. Lawyers, judges, and jurists were, by their prescribed social roles, concerned with addressing the problem of trust in nineteenth-century America. What might happen to their deliberations as vernacular forms of radical skepticism jostled with the impulse to trust one’s common sense? The conventional story, as alluded to above, is that these managers of the legal system adhered to a “let-alone policy,” requiring citizens to fend for themselves in this expanding market society. Yet the statements to this effect that can be drawn from leading cases and commentaries present what is at best a partial perspective. For even in these published sources one finds ample evidence pointing toward a more complicated normative universe. Indeed, judges and jurists often prefaced their analyses by repeating the words of Lord Hardwicke: “Fraud is infinite; and were a Court of equity once to lay down rules, how far they would go, and no farther, in extending their relief against it, or to define strictly the species of evidence of it, the jurisdiction would be cramped and perpetually eluded by new schemes, which the fertility of man’s invention would contrive.” Originally expressed in a 1759 letter to Lord Kames, these words acquired increasing currency in an era of dizzying commercial development, finding their way into American legal discourse about criminal as well as civil definitions of fraud in the following century. They passed from Joseph Story’s *Commentaries on Equity Jurisprudence* into the decisional law of several states, which was recapitulated in treatises such as Melville Bigelow’s *Law of Fraud*, perpetuating the notion that the law had to remain open-ended if fraudsters were to be brought to justice. “Fraud is kaleidoscopic, infinite,” a Missouri judge affirmed in a 1913 opinion, embellishing only slightly as he reiterated the conventional judicial wisdom that “a hard and fast definition” was neither possible nor desirable as a matter of law. Without relieving the buyer of the requirement to beware, he maintained that “there is a boundary that may not be crossed” by sellers, though he deliberately declined to say where it was: “Fraud-feasors would like nothing half so well as for courts to say they would go thus far, and no further in its pursuit.”³⁰

²⁸Cook is careful to note that commercial success should not be equated with “universal or unambiguous social acceptance,” observing that these cultural forms were “energetically contested” throughout the century. Cook, *Art of Deception*, 22-23.

²⁹Walt Whitman, “Of the Terrible Doubt of Appearances,” *Leaves of Grass* (1860).

³⁰ Joseph Parkes, *Correspondence of Lord Hardwicke and Lord Kames on the Principles of Equity, in A History of the Court of Chancery; With Practical Remarks* 501, 508 (1828); 1 Joseph Story, *Commentaries on Equity Jurisprudence: As administered in England and America* (1836); Melville M. Bigelow, *The Law of Fraud and the Procedure Pertaining to the Redress Thereof* (1877); *Stonemets v. Head*, 154 S.W. 108, 113-14 (Mo. 1913).

No one illustrated this point more vividly than P. T. Barnum, who weighed in on the matter of in *The Humbugs of the World*, his 1865 treatise/exposé of “the tricks of the trade” comprising this “universal science.” At once mimicking and mocking the learned professors of his day, he began with a disquisition on definitions, taking particular aim at the dictionary of “Dr. Webster,” which defined humbug as “imposition under fair pretences.” In the showman’s estimation, this was misleadingly broad, for it could be read to embrace “crimes and arrant swindles” as well as perfectly innocent ways of playing with the truth. Manifestly seeking to clear humbug of any implication of wrongdoing, (not least because his name had become synonymous with it), Barnum submitted that the word was most commonly understood to refer to the “putting on” of “glittering appearances” to “suddenly arrest public attention, and attract the public eye and ear.” What distinguished the humbug from his disreputable doubles—from rank forgers, counterfeits, pickpockets, and cheats—was his want of the intent to injure. He was not as foolhardy as to think that he could get something for nothing—that he could succeed in his endeavors if he failed to give his audiences “a full equivalent for their money.” And he might well be an honest man, a philanthropist even, if he shared Barnum’s aim of improving the minds and morals of his countrymen under the cover of entertainment. Though he admitted to using “a little drapery” in the design of his exhibitions, they amused without abusing the public, at least on his own account, which not only placed him on the right side of the law but also associated his work with “the spread of real Christianity.” Indeed, the revelations Barnum offered for public consumption were benevolently crafted to put him out of business, hastening “the time when men are kind and just and honest; when they only want what is fair and right, judge only on real and true evidence, and take nothing for granted,” at which point “there will be no place left for any humbugs, either harmless or hurtful.”³¹

Despite, or perhaps because of, these professions of good faith, Barnum is often associated with the ethos of *caveat emptor*. In biographies and broader cultural studies, he is made to stand for the creative deceptions enabled and validated by the era’s legal system. A number of the new histories of capitalism have reinforced this rendering of the legal landscape, leaving the impression that police and prosecutors were overmatched by a wily class of money-makers, who took full advantage of the murky territory between promotional ingenuity and actionable deceit. The law and its enforcers most often figure as flouted authorities in these accounts, uncoordinated and ill-equipped to meet the challenges posed by the confidence man in his various guises. Although there is surely some truth to these characterizations, they are too often uncritically based upon popular literature ambivalently chronicling “the rogues and their rogueries” and the published confessions/boasts of the swindlers themselves. Put differently, the appearances of legal permissiveness drawn from these sources are deceiving, significantly understating the extent to which fraud was policed, not only through criminal processes but also in the course of civil litigation.³² And in a certain sense Barnum was himself a part of this endeavor. In attempting to write humbug out of the law of fraud, the showman was certainly playing with its indeterminacy. But he was also invested in establishing himself as a legitimate sort of imposter, the purveyor of a valuable and edifying form of amusement. *The Humbugs of the World* was, in a sense, the homage he paid to *The Law of Fraud*. Moreover, upon closer

³¹ P.T. Barnum, *The Humbugs of the World* (1866), vii; see generally Neil Harris, *Humbug: The Art of P.T. Barnum* (1973); Bluford Adams, *E. Pluribus Barnum: The Great Showman and the Making of Popular Culture* (1997); Cook, *Arts of Deception*.

³² See especially Kamensky, *The Exchange Artist*; Mihm, *A Nation of Counterfeiters*.

inspection, it becomes clear that the play in the law was often a source of its strength because it enabled public and private prosecutors to keep pace with and sometimes make like the malefactors they endeavored to bring to justice. Attempting to beat confidence men at his own game was, to be sure, a treacherous tactic, in tension with moral and political precepts about truth-telling and transparent governance. And law enforcement efforts were undeniably hampered by institutional limitations and rendered peculiarly challenging in a culture that valorized entrepreneurial ingenuity and preached the virtue of looking sharp. Still the evidence on this score does not warrant the conclusion that the enterprises of capitalists and criminals were practically indistinguishable in this burgeoning market society. Operating in the shadow of a legal system that distributed regulatory powers to a widening network of municipal, state, and federal officials; relying all the while upon the vigilance of private citizens and the popular press as well as the self-policing of a host of trade associations; Americans tested the meaning of the law of fraud daily, inside and outside of court.

The statute books provide a valuable starting point for mapping the boundary lines as between acceptable, immoral, and criminal conduct in this society of placeless men and paper fortunes. For while post-revolutionary American legislators had expressed a strong aversion to centralized control of monetary policy and an even greater abhorrence of sanguinary punishments as applied to “crimes of theft, forgery, and the like,” this hardly signaled the dawn of an era of toleration for fraudsters. To the contrary, these reformers were primarily concerned with putting an end to the public exhibitions of “counterfeit contrition” staged whenever such wrongdoers were about to be hanged and working instead to inspire more genuine forms of repentance within the confines of penitentiaries. Nearly all jurisdictions held forgery, counterfeiting, and cheating to be indictable offenses, with most enlarging and enhancing the penalty schemes that had obtained under English common law. Federal and state criminal codes enacted in the antebellum period contained extensive provisions delineating various classes of crime, including not only counterfeiting, but also debasing the coinage, passing bad coins, forging public securities, bank notes, and others sorts of financial instruments. And they also prescribed norms of economic behavior, more than a few retaining prohibitions of usury, though this was mainly enforced by means of civil sanctions. Criminal penalties prescribed for forgery and counterfeiting, words often treated as synonymous, ranged from death (under federal law) to prison terms (the typical range being from three to twenty years) to fines.³³ Nor was this the only—or even primary—means by which fraud was penalized. The term had a broader signification on the civil side of the docket, where relief was provided to victims of both “actual” and “constructive” fraud. The latter term was broadly cast to encompass conduct which tended to deceive or mislead other persons, violate private or public conscience, or otherwise pose a threat to the public interest, regardless of whether or not there was evidence of the intent to defraud on the part of the actor.³⁴

³³ Susanna Blumenthal, “Humbug: Toward a Legal History,” 64 *Buff. L. Rev.* 161, 178-79 (2016); Steven Wilf, *Law’s Imagined Republic: Popular Politics and Criminal Justice in Revolutionary America* (2010), 148; see generally John D. Bessler, *Cruel and Unusual: The Death Penalty and the Founders’ Eighth Amendment* (2012).

³⁴ Paula Dalley, “The Law of Deceit, 1790-1860: Continuity Amidst Change,” *American Journal of Legal History* 39 (1995); cf. Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* 67-82, 213-15 (2016) (detailing the treatment of fraud under the criminal law of the Victorian era).

The existence of such doctrines reminds us of the importance of attending to the ways that nineteenth-century American courts mediated between considerations of substantive justice and individual freedom in this liberal capitalist order. Though they subscribed to the notion that theirs was a society based upon contract, judges emphatically did not dispense with traditional doctrines designed to protect against abuses of trust; they continued to provide remedies not only in cases involving fraud, but also undue influence and mental unsoundness, doctrinal categories that underwent considerable expansion across the nineteenth century. Indeed, as I have shown in previous work, courts in this era were plagued with capacity litigation—with suits that placed the mind “in issue,” calling into question whether a given actor had sufficient intelligence and volition to be deemed a free and responsible agent as a matter of law. Accustomed as we are to thinking of the insanity plea as the last resort of the violent criminal, legal contests about mental competency were far more common on the civil side of the docket, reflecting a public expectation that courts would provide redress in cases of unfair dealing. Litigants were, in fact, all too eager to allege their own incompetence, or that of others, in disputes involving wills, contracts, and deeds, and they regularly coupled such claims with those of fraud, undue influence, and duress. In petitions to the court, they chronicled the multifarious ways Americans were falling short of the ideal of the autonomous individual, falling victim to all manner of mental maladies which left them vulnerable to the artful deceptions of others. And more often than not, the individuals whose minds were placed in issue, whose capacity to act rationally and live autonomously in the world of contract was called into question, were the white propertied men and women who seemed to work the hardest in their separate spheres to conform to the moral prescriptions about self-formation that were set out in antebellum advice manuals.³⁵

The representations made about diseased minds and overborne wills during the course of these proceedings were no doubt stylized for strategic purposes. Nonetheless the forensic battles they touched off constitute telling indicators of the growing sense of a split between subjective experience and objective reality in a country that valorized the sovereign self. The diversity of perspectives in play within the courtroom mirrored and magnified those that were daily proliferating beyond its walls, epitomizing the difficulty of “generating commonality out of innumerable individualities” in this sprawling democratic society. Although mediated by lawyers, the witnesses’ testimony expressed the strains, tensions, and anxieties middle-class Americans experienced as their lives became more subject vagaries of the market and they could less stably define themselves in relationship to others within this fluid social order. The trial stories crafted into arguments by the attorneys evidenced the abiding force of “the self-making axioms of an age of free men and free labor,” but they also revealed the ways this ideological structure was being undermined by the corrosive dynamics of industrial capitalism. As they contended about what constituted the legal threshold of *competency*—a term acquiring a distinctly mental sense in this period, denoting the ability to hold one’s own in the competitive “the race of life”—litigants and their lawyers manifested the mental stresses and psychic traumas occasioned by these transformations, giving voice to what cultural historians of the period have described as “an existential dread of failing not just in business but in life.”³⁶

³⁵ Susanna L. Blumenthal, *Law and the Modern Mind: Consciousness and Responsibility in American Legal Culture* (2016).

³⁶ *Ibid.*, 172-73; Michael Zakim, “Free Soil, Free Labor, and Free Markets,” in *Contested Democracy: Freedom, Race, and Power in American History* (New York: Columbia University Press, 2007), 95-116, 97, 104; Sklansky, “The Elusive Sovereign,” 240; see also Stanley, *Bondage to Contract*; Thomas Augst, *The Clerk’s Tale: Young Men*

The litigants and their trial stories exhibited the destabilizing effects of America's halting passage from status to contract, and the accompanying confusion about social roles. In these courtroom contests, participants testified to the new freedoms, constraints, and dependencies Americans experienced as they lived out the "nervous logic" of an expanding market economy. While some involved parties who were well-acquainted with one another, essentially amounting to family feuds, others concerned strangers who bargained at a distance. At stake in each instance was the practical meaning of contractual freedom and the question repeatedly presented was whether the same standards of competence and responsibility were to apply across the board. Seeking to channel the enterprising energies of rising generations without denaturing the home as a space of love, nurture, and repose, antebellum judges elaborated distinct rules to regulate parties involved "in relations of trust and confidence." Traditionally, these rules were applied to relations between parent and child, husband and wife, guardian and ward, attorney and client, doctor and patient, and confessor and penitent. But nineteenth-century judges did not treat this as an exhaustive list. Reasoning by analogy, many opined that adulterous relations ought to be included as well, and some were inclined to think that scrutiny was warranted in any case in which one party was "dependent upon and subject to the control of another." Where a confidential relation was found to exist, the party taking the benefit had to prove that the transaction was "righteous," that nothing was done to prevent the other party from exercising "due freedom and deliberation." Some courts went so far as to raise a presumption of undue influence that could only be overcome by proof that it was "fairly conducted, as if between strangers" proceeding "at arm's length." This turn of phrase was used not only to signify a want of closeness between two parties. It also operated as a measure of fairness and a means of keeping one from exercising a controlling personal influence over the other.³⁷ To determine whether or not a disputed transaction resulted from an abuse of confidence or power, courts put strangers in the place of the actual parties and imagined what the process of negotiation and the terms of the deal would have looked like had there been no ties of blood, affection, or friendship, no bonds of trust or personal obligation, and no asymmetries of power or habits of obedience in their relationship. The question was not whether the complainant "knew what she was doing," but "how was she rendered willing?" Perhaps unsurprisingly, *inter vivos* transactions within the family circle were subject to far greater scrutiny than testamentary dispositions, particularly where the instrument was supported only by "the consideration of love," though this was deemed a perfectly sound reason to dispose of the same property by will, unless the object of the testator's bounty was a mistress or his disposition inexplicably left those supposed to be nearest and dearest to him empty-handed.³⁸

The twists and turns of this decisional law records the efforts of nineteenth-century American judges to reconcile the conflicting imperatives of liberty and equality that were built

and *Moral Life in Nineteenth-Century America* (Chicago: University of Chicago Press, 2003); Balleisen, *Navigating Failure*; Brian Luskey, *On the Make: Clerks and the Quest for Capital in Nineteenth-Century America* (New York: New York University Press, 2010); Sandage, *Born Losers*.

³⁷ Blumenthal, *Law and the Modern Mind*, 177-85. The phrase appears to have been taken from the field of boxing, where it was said that "the weaker man may overcome the stronger, if he can keep him from closing" by holding him "at arm's end." Samuel Johnson, *A Dictionary of the English Language* (London: W. Strahan, 1755).

³⁸ *Huguenin v. Baseley*, 14 Vesey 273 (1807); *Parfitt v. Lawless*, L.R. 2 Prob. & Div. 468 (1872), followed in *Bancroft v. Otis*, 91 Ala. 279 (1890). See John Davison Lawson, *The Principles of the American Law of Contracts at Law and in Equity* (St. Louis: F. H. Thomas, 1893), 276-282 (collecting cases).

into their doctrines of contractual freedom. Rather than articulating a clear doctrine of *caveat emptor*, their decisions instead register concern with imposing moral order on a boom-and-bust economy, lest the processes of self-making and moneymaking become hopelessly confused. Positing a world of competent individuals who were capable of exercising the liberty of contract, judges were inclined to let them to decide for themselves what constituted adequate consideration. “Indeed, from the fluctuation of prices, owing principally to the gambling spirit of speculation, that now unhappily prevails,” they reasoned, “it would be difficult to determine, what is an inadequate price for anything sold.” But when push came to shove they were often inclined to qualify this general statement, precisely because of the volatility of the market and its psychological effects. For while “the merchant of ‘sanguine and ardent temperament and imagination’ was not to be relieved from the obligation of his contract ‘merely from its being a rash, improvident, or hard bargain,’” judges allowed that “if the same contract be made with a person of weak understanding”—whether arising from “temporary illness, general imbecility, the natural incapacity of early infancy, the infirmity of extreme old age, or those accidental depressions, which result from sudden fear or overwhelming calamities”—“there arises a natural inference, that it was obtained by circumvention or undue influence.” Businessmen with their backs against the wall could and were assimilated into the class of the mentally unsound. Blurring the line distinguishing the intrepid speculator from the incompetent dupe, judges declared it to be “the peculiar duty of a court of equity to protect the rights and interests of persons of weak understanding and feeble judgment, and who are disabled by distress of mind, arising from pecuniary troubles, or overwhelming calamities, from properly managing and disposing of their property.”³⁹

In entertaining suits of these sorts, judges reluctantly assumed jurisdiction over dealings in the home as well as the market, cognizant of the unreliability of the narratives offered by many of those called to the stand. Whether genuine, feigned, or merely exaggerated for purposes of litigation, the claims of incapacity, undue influence, and fraud made before the bar provided members of the bench with occasions to delimit and police the boundaries between licit and illicit economic activity. Law reports illuminate the doctrinal ways and means by which judges endeavored to institute a set of ground rules for the market that were imbued with notions of fairness and yet distinct from those supposed to be observed in the home, with the ardent hope of preserving the family as a sacred precinct where trust could be safely reposed, with confidence in the returns on emotional investments. That they were inclined to talk in terms of the profit motive suggests how tied in knots they often became as they struggled to keep the ways of love from being contaminated by those of the market. But this is still a far cry from Charles Seller’s characterization of them as constituting “the shock troops of capitalism,” as well as those of many other historians who have likewise credited the antebellum members of the bench with perpetuating an ideal of “rugged individualism” and a formalistic conception of freedom, rigidly holding parties to the terms of their bargains, however “hard” or “unequal” they were.⁴⁰ These accounts of the historical dynamics between law and capitalism fail to capture the apprehensiveness with which those who sat in judgment viewed the speculative frenzy that

³⁹ Story, *Commentaries on Equity Jurisprudence*, 221–228; *Wilson v. Watts*, 9 Md. 356 (1856); *Somers v. Pumphrey*, 24 Ind. 231 (1865); Wharton, *Law of Contracts*; Blumenthal, *Law and the Modern Mind*.

⁴⁰ Sellers, *The Market Revolution*; Horwitz, *Transformation*; Lawrence Friedman, *A History of American Law*, 3d ed. (2005); William E. Nelson, *The Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society* (1975).

seemed to have seized the public at large. The opinions they have left behind provide a window on the daily distresses, anxious preoccupations, and gnawing fears of those who were supposed to be in charge: the heads of household who were at the center of so many of these trials and those who sat in judgment of them—men torn between competing impulses to trust and not to trust, much like the barber on the *Fidèle* to which we now return.⁴¹

“Will you be shaved, or won’t you?”

“Bless you, barber!” So says the cosmopolitan Frank Goodman, who occupies a central place in the second half of the novel. Rather more garishly than genteelly dressed, Goodman is nonetheless taken by most critics as the final avatar of the confidence-man. His “benediction,” pronounced “in tones not unangelic,” awakens the proprietor from a nap that had left him “dreaming in his chair” in his shop as midnight approached. At first taking the voice to be a figment of his imagination, the barber quickly comes to see “‘it is only a man, then.’” But this is a proposition the cosmopolitan will not let stand: “*Only* a man? As if to be a man were nothing. But don’t be too sure what I am. . . . You can conclude nothing absolute from the human form, barber.” Turning this over in his mind, the latter “shrewdly” assures himself “‘I can conclude something from that sort of talk, with that sort of dress,’” but before he has a chance to finish the thought, the former declares “it is my desire that you conclude to give me a good shave,” asking as he loosens his collar, “‘Are you competent to a good shave?’” Instinctively assuming this “business-like proposition” is uttered solely for “business-ends,” the barber replies, “‘No broker more so,’” which appears to bewilder the cosmopolitan, as he replies, “Broker? What has a broker to do with later? A broker I have always understood to be a worthy dealer in certain papers and metals.” This elicits something like laughter in the form of a “He, he!” from the barber, who endeavors to humor his customer, sounding more nervous than amused as he asks him to take a seat, gesturing towards an elevated, overstuffed, crimson-hued chair, making it “in aspect quite a throne.”⁴²

Nineteenth-century readers would have appreciated this play on words, as *shave* was common slang for “con,” *shaver* for “cunning fellow, one keen in making bargains, close-shaving being sharp dealing,” and *barber* for “thief,” one who “lathered up” his victims before separating them from their property. Similar associations had long attached to the word *broker*, carrying as it did the connotation of pimping or double-dealing, particularly in the context of the stock market, which had hardly shed its reputation for being “founded in Fraud, born of Deceit, and nourished in Trick, Cheat, Wheedle.” The use of such language by Melville has accordingly been read to imply that the cosmopolitan and his barber were “doubles for one another.” This interpretation is strengthened by the fact that steamboats were regularly made the setting of all sorts of chicanery in the popular literature of the day, perhaps most notably the story Barnum

⁴¹ Blumenthal, *Law and the Modern Mind*. On the broader cultural context within which these contract suits arose, see Ann Fabian, “Speculation on Distress: The Popular Discourse of the Panics of 1837 and 1857,” *Yale Journal of Criticism* 3, no. 1 (1989): 127–142; Jessica M. Lepler, *The Many Panics of 1837: People, Politics, and the Creation of a Transatlantic Financial Crisis* (2013); Lawson, *Downwardly Mobile*; Jonathan Levy, *Freaks of Fortune: The Emerging World of Capitalism and Risk in America* (2012); Sharon Ann Murphy, *Investing in Life: Insurance in Antebellum America* (Baltimore: Johns Hopkins, 2010); Amy Dru Stanley, “Slave Breeding and Free Love,” in *Capitalism Takes Command*, ed. Zakim and Kornblith, 119–44.

⁴² Melville, *The Confidence-Man*, 192–93.

told in his 1855 autobiography, as it involved a “mulatto barber” on a Mississippi steamer who was made to believe the showman had entered into a bargain with the devil and thereby acquired the power to divest the barber of all of his money and turn him into a black cat. Fearing the barber was so frightened he might jump overboard, Barnum “explained the whole thing to the subject of my fun,” revealingly describing how the latter laughed it off: “‘By golly!’ said the barber, in the exultation characteristic of his race, ‘by golly! when I get back to New-Orleans I’ll come Barnum over de colored people. Ha! ha!’” There are good reasons for thinking Melville was familiar with this anecdote, to say nothing of the tricks of the showman’s trade, and those of the barber’s as well. Indeed, black barbering figures prominently in his novella, *Benito Cereno*, a fictionalized account of a revolt on a Spanish slave ship also published in 1855, during which the captain is forced to enter into a written contract with his manservant, Babo, and all the other slaves, agreeing “to carry them to Senegal and make over to them the ship, with the cargo” (themselves included) in exchange for “the lives of the remaining whites.” Appearing to be in distress, the ship attracts the assistance of the captain of an American merchant ship, who foolishly fails to perceive the danger as Babo wields a “gleaming steel” razor, only playing the part of the obliging barber as he uses it to draw blood from his master’s throat. Conceived in a time and place when the shaving of white men was a service typically performed by slaves and free blacks, Babo’s masquerade presents in sharp relief the unnerving vulnerabilities of exchange relations, even as he meets “his voiceless end,” for while his revolt is ultimately put down, the “fractured, self-referential form” of the narrative prefigures the “fragmentation, uncertainty, and impending apocalypse” that are thematized in *The Confidence-Man*.⁴³

Though the razor figured on the gilt-edged sign hanging outside the barbershop on the *Fidèle* was rather less threatening, it nonetheless arrests the cosmopolitan’s attention. “No trust means distrust; distrust means no confidence,” he excitedly says to the barber, deeming it “a scandalous confession” and an insult to “the whole haughty race of man,” and he proceeds to work from a number of angles to get the barber to take down his sign and change his mind about human nature, or to at least “try the experiment of trusting men for this one little trip.” The barber resists these entreaties in various ways. First, he tries deflection by insisting “all this sort of talk is not in my line.” Then he offers the excuse that “I have a family.” And when both of these tactics fail, he uses shaving cream to shut his annoying interlocutor up. But cleanly shaven, the cosmopolitan seems to the barber to have an aura about him that is “magical, in a benign way,” and just like that the barber is “irresistibly persuaded” to give the experiment a try, although the agreement he negotiates with this singular customer is not without conditions. “To save his credit as a free agent,” the narrator observes, the barber was “loud in averring that it was only for the novelty of the thing that he so agreed,” requiring security from the cosmopolitan against “any loss that might ensue” and further insisting “that the agreement should be put in black and white, especially the security part.” This the cosmopolitan is more than willing to do, though he requires that the sign be taken down before he puts pen to paper, disarmingly noting he should make “a poor lawyer” though the document he drafts suggests otherwise:

⁴³ *A Dictionary of Slang, Jargon & Cant*, Albert Barrere and Charles G. Leland, eds. (1890); Cohen, *Fabrication*, 165; Douglas W. Bristol, Jr., *Knights of the Razor: Black Barbers in Slavery and Freedom* 55-56 (2010); Steve Fraser, *Every Man A Speculator: A History of Wall Street in American Life* 11 (2005); David S. Reynolds, *Beneath the American Renaissance: The Subversive Imagination in the Age of Emerson and Melville* 552-53 (2011); Barnum, *Life*, 333-35; Herman Melville, *Benito Cereno* in *Billy Budd, and Other Stories* (1986); Quincy T. Mills, *Cutting Along the Color Line: Black Barbers and Barbershops in America* 15-18 (2013); Rogin, *Subversive Genealogy*, 207-218; Maurice S. Lee, *Slavery, Philosophy, and American Literature, 1830-1860* 136-(2005).

AGREEMENT

Between

FRANK GOODMAN, Philanthropist, and Citizen of the World,
and

WILLIAM CREAM, Barber of the Mississippi steamer, Fidèle.

“The first hereby agrees to make good to the last any loss that may come from his trusting mankind, in the way of his vocation, for the residue of the present trip; PROVIDED that William Cream keep out of sight, for the given term, his notification of NO TRUST, and by no other mode convey any, the least hint or intimation, tending to discourage men from soliciting trust from him, in the way of his vocation, for the time above specified; but, on the contrary, he do, by all proper and reasonable words, gestures, manners, and looks, evince a perfect confidence in all men, especially strangers; otherwise, this agreement to be void.

“Done, in good faith, this 1st day of April 18 — at a quarter to twelve o’clock, P. M., in the shop of said William Cream, on board the said boat, Fidèle.”

Before the ink is even dry on the parties’ signatures, the said William Cream comes rather close to violating the agreement, as he asks and answers the question of who should have custody of it for the duration of the voyage, settling upon the captain because he is “a party disinterested” and also someone who could not “make anything by a breach of trust.” Objecting that this “don’t show the right spirit,” the cosmopolitan “magnanimously” allows the barber to keep the document himself and refuses to provide a cash advance against future losses or even to pay for his shave, referring the other to the terms of “your agreement,” which he reads to require the other to extend through the end of the voyage. With that the cosmopolitan bids him a good night and saunters off, at which point the barber comes back to his senses, signifying the recovery of “his self-possession” by tearing the agreement up, feeling “the more free to so from the impression that, in all human probability,” he would never see the “queer customer” again.⁴⁴

Although Melville’s narrator cannot say whether “that impression proved well-founded or not,” the literary critic Brook Thomas takes a decisive position. Within the context of this novel, “where every transaction is a potential swindle,” he maintains that “there is little doubt that the cosmopolitan has used the contract to cheat the barber,” who cannot indulge in the luxury of trust without imperiling the material well-being of his household. For Thomas, *The Confidence-Man* constitutes “Melville’s most realistic response to the conditions of the rising market economy,” accurately reflecting a legal system that enabled fraud because it had no way of distinguishing capitalists from con artists, ultimately leading to “the failure of charity and the American dream of justice.” Providing the most thoroughgoing analysis of the jurisprudential context within which the novel was written as well as the role of law within its confines, he reads it as exposing the fictive nature of “the free-agent ideology” that judges and lawyers reflected and reinforced in their work. Thomas makes much of the fact that Melville’s father-in-law, Lemuel Shaw, Chief Justice of the Massachusetts Supreme Judicial Court, was one of the leading expositors of this system of thought, as well as a source of indispensable financial support in the period when this novel was composed, and he convincingly shows that the novelist was well-

⁴⁴ Melville, *The Confidence-Man*.

acquainted with and importantly influenced by “the opinions behind the opinions” rendered by the nation’s courts. These opinions, he further observes, privileged written contracts over the spoken word, as they seemed to hold out the promise of providing a measure of fixity in the fluid social world that was antebellum America. “It was hoped that if potential confidence men inscribed their words in a written contract,” Thomas explains, “they would be forced to stick to their promises.” But as the cosmopolitan demonstrates in his dealings with the barber, “contracts can be as untrustworthy as the spoken word,” arguably doing more to exacerbate than contain the instabilities produced by a paper economy, as parties become “names on pieces of paper rather than faces and personalities.” Moreover, the act of putting an agreement into writing hardly guarantees a stable meaning, for the words themselves can take on a life of their own, admitting of multiple interpretations, which Thomas rightly points out was true even within the relatively closed community of legal elites, who debated whether contracts were to be read to express the intentions of the parties or an objective meaning, independent of what they actually had in mind. Complicating the task of interpretation all the more was the fact that written documents were easy to forge and pass off as real in a mobile society where contracting parties were increasingly strangers to one another. At best, then, agreements like the one concluded between the characters in *The Confidence-Man* provided a false sense of security, ultimately vindicating the barber’s misanthropic point of view, at least in the world as Melville had come to understand it.⁴⁵

The implication of this reading of the barber’s failed experiment, is that he had no choice but to revert back to his policy of “No Trust” if he wanted to make a living. To underscore the bind nineteenth-century businessmen were in, Thomas invites us to imagine how the barber would have fared had he taken his to court in order to recover his losses. From the standpoint of the law, he submits, the barber would have been the one deemed to be in violation of the contract, because it was he who failed to adhere to its terms by tearing it up and replacing the sign without any demonstrative proof that the cosmopolitan was not going to hold up his side of the bargain. And so, Thomas concludes, the best the barber could do within his historical circumstances was cut his losses by refusing to extend credit in the future so as to ensure he will always be compensated for his labor.

Closer inspection of antebellum legal culture provides grounds for questioning whether Thomas is right about the hypothetical case he presents and if he is warranted in treating the cosmopolitan as an obvious cheat. Moreover, if ever Melville is speaking sincerely in this novel, it might well be the moment when the reader as well as the barber is cautioned by the cosmopolitan not to conclude anything absolute from the human form. While the latter goes on to mock Cream for keeping “one foot on confidence and the other on suspicion” during the course of the contract negotiation, one might well read this as an unavoidable if not desirable stance to take when faced with relative strangers.⁴⁶ In other words, when the cosmopolitan says, “Don’t you think, barber, that you ought to elect?” I don’t not sure Melville is counseling that we must choose. As other critics have argued, the cosmopolitan may be read as a model of sorts in his genial misanthropy, a means of dealing with the uncertainties of daily life and what they terrifyingly suggest may be true of the human condition—that there are masks all the way down.

⁴⁵ Thomas, *Cross-Examinations*, 182-98.

⁴⁶ On the imperatives of trust, suggesting that giving may be necessary for exchange to “get off the ground,” see Carol M. Rose, “Giving, Trading, Theiving, and Trusting: How and Why Gifts become Exchanges and (More Importantly) Vice Versa,” 44 *Florida L. Rev.* 295, 311 (1992).

On this reading, Melville ultimately inclines toward a philosophical perspective that shares affinities with men like William James, who could “believe that worse things than being duped may happen to a man in this world.”⁴⁷ To support this conclusion, critics take *The Confidence-Man*’s last chapter, when “the cosmopolitan increases in seriousness” and guides an old man mistaking a toilet for a life preserver into the dark of night, as a not entirely disheartening conclusion to the novel. As Maurice Lee has put it, “I cannot believe here at the end of the book that Melville’s skepticism goes all the way down. Perhaps it is an old habit, the desire to care about characters and find meaning, pleasure, and even goodness in the texts we read. Whatever the case, to take *The Confidence-Man* seriously at its end is to feel that utter doubt is more easily thought than lived, even if, as the faithful old man admits, ‘I don’t know what else to think.’ Perhaps, then there, is a moral to a book that only seems to set literature and philosophy at odds: fictions of the self are hard to abjure in reading as in life.”⁴⁸

In this, I would simply add by way of conclusion, Melville arguably shared something with his father-in-law and others who were compelled by their profession to bring more closure to the problems of life tried before them. Although their literary remains might not provide the same sorts of insights into the law and life that can be obtained from the works of men like Melville and James, and although their opinions did not come close to resolving the conundrums brought to the surface in everyday adjudication, they nonetheless performed important cultural work, modeling a practical way of living with the uncertainty and terrors of ordinary existence, particularly the dilemma of whether to trust or not to trust. These judges supplied through their modes of doctrinal reasoning a means of keeping afloat amidst the tumults of ordinary life. And in so doing they buoyed up a self-conflicted culture by stopping short of the conclusion that the world is entirely composed of knaves and fools. To substantiate this claim, this paper concludes with a real-life case involve shavers of the Wall Street sort.

Melville – simultaneously bridges and exploits gaps between lived experience and abstract speculation

Relationship between fiction and philosophy; showing how literature (and law?) might figure in the search for truth.

Moral of book? = skepticism can preempt moral judgment; tense dynamic between novelistic and philosophical traditions at the time. “What if lit in general and novels in particular end to be more sensitive than philosophy to the threat skepticism poses to moral, emotional, and intersubjective life?” Originality comes at a price, though.

“The Wall street spirit”

The arrest in early October of 1856 of a New York note broker by the name of Charles B. Huntington on the charge of forgery quickly became the talk of the town. It was reported to be “the chief theme of conversation, not only in Wall street, among the bulls and bears, but among all classes of the community,” both within and far beyond the city, facilitated in no small part by an entrepreneurial press. The initial charge was based upon a single note for \$6,500, but during the police investigation that followed the Huntington’s arrest more and more “spurious paper”

⁴⁷ William James, *The Will to Believe: And Other Essays in Popular Philosophy* 19 (1896)

⁴⁸ Maurice S. Lee, “Skepticism and *The Confidence-Man* in *The New Cambridge Companion to Herman Melville*, ed. Robert S. Levine (2014), 124. See also Elizabeth Keyser and Elizabeth Foster.

came to light, rumored to amount to half a million dollars. According to the emerging story, which on most accounts presumed his guilt, “HUNTINGON THE FORGER” was amazingly brazen in his exploits. Entirely unknown in financial circles until the last year or two, he nonetheless managed to finagle ever larger loans from the most “responsible” and “respectable” of firms. Offering a combination of forged and genuine notes as collateral, he endeavored to redeem them before their maturity so as to “conceal the fraudulent *modus operandi* by which he effected his designs.” His success was not easily attributed to his skill and circumspection as a financier, however. For many of the forged notes he passed contained signatures that “did not even pretend to be imitations” and he spent the money he had made by living extravagantly in plain sight. Indeed, Huntington was the most conspicuous of consumers, famously addicted to the finest cigars, fastest horses, and prettiest women that money could buy and also well-known for hosting ostentatious parties at one of two ridiculously over-furnished houses he leased in lower Manhattan to provide separate living spaces for his family and a lady friend who was not his wife. Therein lay the puzzle for many a newsman and presumably his readers as well: why did it take so long for this unabashed double-dealer to be apprehended as such?

The perplexity only deepened as the case was set for trial. Huntington retained the services of the veteran trial attorney James Brady and maintained an air of nonchalance as he awaited his day in court, enjoying the “sumptuous fare” his fashionable wife dutifully brought every evening to his well-appointed cell at the Tombs. His reticence on the advice of counsel hardly prevented reporters from painting oddly celebratory biographical portraits of this “prince of financiering.” With a varied mix of indignation, fascination, and admiration, his ostentatious mode of living was likened to “a display of fireworks—brilliant, but evanescent,” thereby “throwing a great deal of light on the operations of men of money in Wall Street and the neighborhood.” However the most arresting disclosure about Huntington’s career was that he had been indicted four years earlier for a similar swindle, one that had received “all due publicity” at the time, though the charges against him were ultimately dismissed on some sort of technicality, leaving him free to set up “his shingle anew” and return to business as usual. His brush with the law seemed, in fact, to enhance his credit-worthiness within the financial world, winning him the “unlimited confidence of his brother sharpers.” Some press accounts fingered his fellow brokers as willing accomplices, disdainfully suggesting it was common practice among members of this “codfish aristocracy” to discount bills suspected to be forgeries at usurious rates, thus implicating them “morally, if not legally” in Huntington’s crime. “This, perhaps, is the cause which deters some of the negotiators from stepping forward as prosecutors,” speculated one reporter, “although there are others doubtless who object simply to appear in the character of dupes.” Because Huntington’s notes and bills were so obviously bogus, the reading public was informed, the paper would not have been accepted in ordinary arms-length dealings and the “eminent” money-lenders who held them as collateral securities were unlikely to now come forward and admit their victimization. Lamentably but unsurprisingly, they were far more concerned with avoiding guilt or embarrassment by association than seeing to it that this “vulgar” forger was brought to justice.

The most audacious fraud of all in the case of Huntington was arguably yet to come, perpetrated as it was within the confines of an over-packed courtroom in December 1856. There he was tried before Judge Elisha S. Capron on the first of twenty-seven indictments. After two solid days of tedious testimony leaving “little doubt of the defendant’s guilt,” (or so the papers

reported), Brady's junior law partner—the self-styled neophyte John A. Bryan—rose to offer “our theory of the innocence of this defendant,” promising that “the features of this case will develop absurdities which tower up to the sublime.” In his prolix opening argument, skillfully written and delivered to build suspense, Bryan conceded “the atrociousness of the crime of forgery” and further intimated that forged commercial paper that had been recovered to date was actually but a fraction of that which Huntington had manufactured in the preceding year, estimating it must have reached “the staggering amount of nearly twenty millions!” This might have seemed a damaging admission for a defense attorney to make, but Bryan assured the audience that his client was not the criminal mastermind behind this colossal money-making scheme. To the contrary, he darkly suggested that Huntington was the mere puppet of a more sophisticated and truly nefarious set of brokers, the very ones who had initially posted bail for Huntington and then recast themselves a day later as the most victimized of his victims, turning him over to authorities only after they had secured an assignment of all of the accused's assets. Yet this hardly constituted a basis for acquittal, as the artful young Bryan was the first to acknowledge, readying his audience for the *coup de grace*. Although it might well have seemed, at first blush, that Huntington's clumsy forgeries were simply evidence of the insatiable greed that marked so many financial fraudsters, his attorneys were prepared to show that his incompetence was of a peculiar sort, being rooted in mental disease rather than moral depravity. “We say that he acted under the influence of that insanity which is commonly called *monomania*,” Bryan submitted, further explaining that the defendant suffered from a hereditary affliction that deprived him of the ability to distinguish between right and wrong, at least so far as forgery was concerned, his hand having been “guided by a power which he cannot resist” when he penned the note in question. This declaration caused an immediate sensation in the courtroom and seemed to have come as a shock to prosecutors, who looked on with disgust as Bryan went on to note that he was proceeding contrary to his client's own wishes and only after gaining the consent of his family. As if to confirm the truth of his counselor's proposition, the heretofore expressionless Huntington was heard to say: “A splendid farce this! A capital joke, by gad!”

The ensuing days of the trial figured the problem of fraud in a manner at once entertaining and disquieting, providing much lucrative work for lawyers, just as newsmen had sardonically predicted in the days before it began. And of course the startling defense strategy also provided lucrative material for the popular press. Reporters who had stopped following the case now returned to the courtroom in droves, as testimony too dull to recount suddenly acquired a new salience and fascination, warranting coverage on the front pages of newspapers across the country and prompting many editorial commentaries. While the trial story as told by Huntington's attorneys showed him to be an easy mark because he was “morally insane,” this did not play well as the defendant was tried by newspapers, most editorial writers found it difficult to see how his supposed disease was to be distinguished from the unquenchable thirst for money that animated the common run of financial fraudsters. The jury was apparently not persuaded either, as they found the defendant guilty and he was accordingly sentenced to a five-year prison sentence. Though this officially closed the case, it would linger on as a puzzling precedent in the decades that followed: Was the whole defense a humbug, or was the defendant's refusal to play along truly a sign of his insanity? And were they the only ones who might be plausibly and fairly charged with stretching the truth?

The Trial of Charles B. Huntington was published by the losing lawyers in the same year Herman Melville published *The Confidence-Man: His Masquerade*, an intriguing coincidence that is indicative of the multiple ways of apprehending fraud in antebellum American culture. By time *The Confidence Man* was put in circulation and Huntington placed behind bars, Americans were already well-acquainted with their type, as we have seen. Indeed, they immediately recognized this “ubiquitous personage” as an “indigenous” character who “has figured long in our journals, courts, and cities.” The confidence man’s countless dodges earned him notice not only in police blotters and newspapers, but also in etiquette manuals and urban guidebooks, where his captivating charms were at once anatomized, vilified, and accorded a sort of grudging admiration. Even as they sought to expose and condemn the exploits of this shifty figure, opinion leaders struggled mightily to distinguish his inventiveness from that of the self-made man who was valorized in their conduct manuals. Entertainers like Barnum even suggested that being duped had an educational value, and the success of such showmen indicated that the broader public found certain forms of humbuggery downright amusing. The problem of identifying “the real ‘Confidence Man’” in Melville’s work was thus mirrored in real life, where it likewise appeared “that many men have many minds” about the phenomenon of fraud. And certainly the same could be said of women, whose forms of masquerade may not have been featured as often in popular literature, though this can hardly be read to indicate they were any less common or less threatening than their male counterparts.

Read together, these legal and literary texts serve to illustrate the contested middle ground between outright deceit and complete candor, and the trickiness of determining the intent to defraud in the courtroom context. Every trial was a credibility contest on multiple levels, as insinuations of false witnessing were freely made on both sides of this adversarial process, even as the opposing counselors strenuously maintained the utter veracity of their respective renderings of the material facts, sometimes bearing more than a little resemblance to the promotional claims of rival businessmen like Barnum and his competitors. Both feeding off and playing into the popular anxieties about deception, these legal battles were chronicled and editorialized about in newspapers and professional journals, the contributing writers clearly regarding the trials as critical testing grounds for competing psychological theories, behavioral ideals, and visions of moral order. As they operated within this charged environment, presiding judges were left in the unenviable position of deciding whom and what to believe, and repeatedly pressed to consider the broader social and economic implications of a finding of liability in any given case. The results of their deliberations, preserved in trial records and law reports, collectively constitute a rich repository of judicial reflections upon the grounds of trust, the just limits of entrepreneurial freedom, and the extent to which the unwary ought to be shielded from the consequences of their inadvertence. In rendering judgment, members of the bench provided an important form of closure, though it hardly could have proved satisfying to all concerned. Indeed, what emerges from a close inspection of the legal record is that the adjudication of fraud was a cultural practice that not infrequently served to amplify as much as to allay suspicions and doubts about the trustworthiness of others, to say nothing of one’s own mental faculties. And yet this want of resolution hardly diminishes the historical significance of these dizzying legal trials. Indeed, the nagging uncertainties that remained after the cases closed render them all the more intriguing episodes in the legal history of fraud in a country that was coming to be known, for better or worse, as “the chosen land of quackery.”

“Crime Contagious”

“Thus has terminated one of the most remarkable trials of the day,” reported the *Springfield Republican* as reprinted in *St. Alban’s Messenger* on January 15, 1857, “and contrary to general expectation, a New York court has decreed the punishment of a magnificent swindler.” While this was but one of “hundreds of forgeries committed by the defendant,” this report of a report conveyed the expectation that “the other [indictments] will not be pressed, the ends of justice being fully served, it is believed, by the result of this case.” Other newspaper reports were downright exultant in their renderings of the outcome of this trial. “A great and good thing in behalf of justice, public morality, individual honesty and the safety of society has been achieved in the conviction and sentence of Huntington, the forger and swindler, to the utmost penalty of the law,” gloried the self-consciously self-righteous *New York Herald*, in an editorial worth quoting at length:

Considering the success of New York financiers, defaulters, political rowdies, bullies, burglars and assassins, in escaping the penalty of the penalties of their crimes, through ‘the law’s delay,’ and the tricks of artful shysters and corrupt officials, we had reason to fear the acquittal of Huntington upon some microscopic flaw, some technical informality or a divided jury. The result, therefore, exceeds our highest expectations in behalf of justice, law and order. We are disposed to regard it as the inauguration of a new epoch in the prosecution of rogues, ruffians and swindling financiers before our courts. The conviction and the full sentence of Huntington are particularly gratifying in view of the outrageous defence set up for the criminal by his counsel. ‘Moral insanity.’ The impudence of this plea stands out in conspicuous relief, ‘grand, gloomy and peculiar.’ — ‘Moral insanity!’ We have no doubt that the shocking insolence of this miserable discovery contributed much to give emphasis to the verdict of the jury and the sentence of the Judge.

In fact, the editor adjudged the defense was “worse than useless” to the defendant, opining that he would have been far better served had his counselors pursued “a legal line of defence . . . to wit: the mitigation plea—that the forgeries complained of were not in reality perfected, and were not forgeries in the ordinary sense of the word, but financial experiments of a ‘confidence man,’ of a bold and dashing, and singularly romantic and successful character.” Without pausing to reflect upon the ethical standards the *Herald* were effectively advancing—not least by publicizing this advice—the paper took its leave of the matter of Huntington the Forger with its expression of “the hope that his case gives quietus to this insolent dodge of ‘moral insanity.’”⁴⁹

This hope was not to be realized, in no small part because papers like the *Herald* continued to milk such trials for all they were worth, arguably rendering them responsible for turning these legal events into the sorts of spectacles that the editors purported to deplore. The penny presses were even more obsessed with the subject of crime, devoting considerable space to all manner of deviant behavior, from petty thieving to murders most foul. Their practices

⁴⁹ *Springfield Republican* (reprinted in *St. Alban’s Messenger*); *New York Herald* (reprinted in *Richmond Whig*).

excited the concern of more “respectable” (or so they called themselves) news outlets, who ran stories about “those newspapers which labor most earnestly to give the earliest and the fullest details of crime,” repeating a long-standing worry about the potential of news stories of vice to breed more of the same. Appearing under the headline “CRIME CONTAGIOUS,” one especially self-righteous 1858 editorial published by the Boston Recorder tallied the social costs of such journalistic conventions:

Multitudes have been led into crime by reading the details of our police gazettes, and other sickening receptacles of abomination, who, but for this mental contamination, would have lived and died honored, respected, and beloved. . . . Woe to the man that inhales it; woe to the individual who becomes contaminated with its poisonous exhalations; woe to him who studies the literature of our criminal courts, and makes police reports a portion of his daily mental food. . . . Who ever saw a minute report of a cunning fraud, an accomplished act of villainy, forgery, theft, embezzlement, that was not immediately followed by a multitude of similar cases, excited by reading the description in our public journals?

Sounding not a little like the agonized writings of earlier criminal law reformers, as they observed the effects of public hangings, this editorial concluded that crime stories threatened to turn offenders like “Huntington, the forger” into “heroes of the hour.” Yet thankfully a prescription was near at hand, on this analysis, the paper enlisting “public opinion” as well as other newsmen in the task of improving the mental environment, envisioning a kind of virtuous cycle. “This avidity for the recital of the monstrous and the horrible in crime,” it was suggested, “should be checked by a wholesome restriction by the public opinion upon the press, and not fostered, nourished, maddened by such printed histories of horrors. . . . Present as seldom as possible to the public gaze the sickening accounts of the morbidly insane, the abandoned and the corrupt, and the mania of crime will be diminished according.”⁵⁰

Perhaps needless to say, this was wishful thinking, and while the complex role of newspapers in the cultural process of capturing fraud is a story for another day, it is perhaps worth noting, by way of conclusion, what finally became of Huntington. In the months after he was committed to Sing Sing, there were periodic reports about how he lived in prison—stories which indicated he had become a model prisoner, initially taking up the honest craft of furniture building, which was had been his father’s main occupation, and subsequently becoming “one of the chief-book-keepers of the establishment.” However the contagion of his crime proved not so easily quarantined. In April of 1857 a story broke about a stranger called John Scatchard, who had been arrested on a very peculiar charge of attempted forgery: he had approached several friends of Huntington, claiming to be working with an unnamed person in New Orleans, to secure the release of the prisoner and ensure his safe passage to Cuba. While claiming at first to be intending to do so lawfully, it eventually became clear that he intended to accomplish by means of a faked pardon and bogus bench warrant as well as “a counterfeit telegraph pole,” which he claimed would keep the warden from communicating with the Governor’s office and finding out the papers were frauds. His real aim was to extract money from Huntington’s friends and skip town before he was discovered. Newsmen had a field day with the whole affair, since it also implicated Bryan and Brady, who seemed to have initially displayed some interest in

⁵⁰ *New York Herald; Boston Recorder.*

participating in the plot. The ensuing trial was described by one reporter as “really interesting and amusing, and might suggest the idea of moral insanity, although it would be somewhat difficult where to locate the disease.” Although he was ultimately found guilty as charged by a jury, they “strongly recommended him to mercy” and the presiding judge accordingly suspended judgment, prompting Scatchard to “exit from the Court majestically.” What became of him thereafter is difficult to piece together, though there are hints that his real name was James. B. Cross and that this was neither his first nor his last forgery. He surfaced again in the popular press in 1867 upon being arrested in New York and taken to Chicago to stand trial on another forgery charge, by which time he had earned the reputation of “a prodigy in his way.” What he had done this time is not clear from the surviving newspaper accounts, though the last published story on the matter promised more: “It is said that one-half of this queer transaction is not yet known, and that some singular developments will be made on the examination, which will take place at an early day.” The reading public may have been left in suspense about what became of Scatchard/Cross, but it is more than possible that they read about him again without even knowing it, given the elusive nature of the subject. Like the title character in *The Confidence Man*, this imposter may have gone on to con again, proving the truth of the last words of Melville’s disquietingly amusing novel: “Something further may follow of this Masquerade.”⁵¹

Huntington the forger was not so fortunate, so far as we know. Upon release from Sing Sing in 1862, several of his creditors obtained a judgment against him and an order of arrest was granted, which landed him in the Westchester County Jail. Although he petitioned for discharge under New York’s insolvency law, the court sustained the objection of his creditors, who insisted that Huntington’s status as an unpardoned felon rendered him incompetent to make the necessary affidavit. “Out of the frying pan and into the fire,” read the last news report of his whereabouts. Of course, something further might have followed in his case as well. But from the standpoint of legal history, what matters is that he did not simply get away with his crimes. While lawyers and showman both had their reasons for playing with the boundaries of fraud, accounts of the blurriness of this line have been greatly exaggerated. Attending more closely to the cases of those brought to justice will shed important light on the defining features of white and black lies in Barnum’s America.

⁵¹ *New York Tribune*; *New York Evening Post*; *New London Chronicle*; *New York Herald*; *Harrisburg Patriot*.

Excerpt from Herman Melville's *The Confidence-Man: His Masquerade* (1857)

**CHAPTER XLII.
UPON THE HEEL OF THE LAST SCENE THE COSMOPOLITAN ENTERS THE
BARBER'S SHOP, A BENEDICTION ON HIS LIPS.**

"Bless you, barber!"

Now, owing to the lateness of the hour, the barber had been all alone until within the ten minutes last passed; when, finding himself rather dullish company to himself, he thought he would have a good time with Souter John and Tam O'Shanter, otherwise called Somnus and Morpheus, two very good fellows, though one was not very bright, and the other an arrant rattlebrain, who, though much listened to by some, no wise man would believe under oath.

In short, with back presented to the glare of his lamps, and so to the door, the honest barber was taking what are called cat-naps, and dreaming in his chair; so that, upon suddenly hearing the benediction above, pronounced in tones not unangelic, starting up, half awake, he stared before him, but saw nothing, for the stranger stood behind. What with cat-naps, dreams, and bewilderments, therefore, the voice seemed a sort of spiritual manifestation to him; so that, for the moment, he stood all agape, eyes fixed, and one arm in the air.

"Why, barber, are you reaching up to catch birds there with salt?"

"Ah!" turning round disenchanted, "it is only a man, then."

"*Only* a man? As if to be but a man were nothing. But don't be too sure what I am. You call me *man*, just as the townsfolk called the angels who, in man's form, came to Lot's house; just as the Jew rustics called the devils who, in man's form, haunted the tombs. You can conclude nothing absolute from the human form, barber."

"But I can conclude something from that sort of talk, with that sort of dress," shrewdly thought the barber, eying him with regained self-possession, and not without some latent touch of apprehension at being alone with him. What was passing in his mind seemed divined by the other, who now, more rationally and gravely, and as if he expected it should be attended to, said: "Whatever else you may conclude upon, it is my desire that you conclude to give me a good shave," at the same time loosening his neck-cloth. "Are you competent to a good shave, barber?"

"No broker more so, sir," answered the barber, whom the business-like proposition instinctively made confine to business-ends his views of the visitor.

"Broker? What has a broker to do with lather? A broker I have always understood to be a worthy dealer in certain papers and metals."

"He, he!" taking him now for some dry sort of joker, whose jokes, he being a customer, it might be as well to appreciate, "he, he! You understand well enough, sir. Take this seat, sir," laying his hand on a great stuffed chair, high-backed and high-armed, crimson-covered, and raised on a sort of dais, and which seemed but to lack a canopy and quarterings, to make it in aspect quite a throne, "take this seat, sir."

"Thank you," sitting down; "and now, pray, explain that about the broker. But look, look—what's this?" suddenly rising, and pointing, with his long pipe, towards a gilt notification swinging among colored fly-papers from the ceiling, like a tavern sign, "*No Trust?*" "No trust means distrust; distrust means no confidence. Barber," turning upon him excitedly, "what fell suspiciousness prompts this scandalous confession? My life!" stamping his foot, "if but to tell a dog that you have no confidence in him be matter for affront to the dog, what an insult to take that way the whole haughty race of man by the beard! By my heart, sir! but at least you are valiant; backing the spleen of Thersites with the pluck of Agamemnon."

"Your sort of talk, sir, is not exactly in my line," said the barber, rather ruefully, being now again hopeless of his customer, and not without return of uneasiness; "not in my line, sir," he emphatically repeated.

"But the taking of mankind by the nose is; a habit, barber, which I sadly fear has insensibly bred in you a disrespect for man. For how, indeed, may respectful conceptions of him coexist with the perpetual habit of taking him by the nose? But, tell me, though I, too, clearly see the import of your notification, I do not, as yet, perceive the object. What is it?"

"Now you speak a little in my line, sir," said the barber, not unrelieved at this return to plain talk; "that notification I find very useful, sparing me much work which would not pay. Yes, I lost a good deal, off and on, before putting that up," gratefully glancing towards it.

"But what is its object? Surely, you don't mean to say, in so many words, that you have no confidence? For instance, now," flinging aside his neck-cloth, throwing back his blouse, and reseating himself on the tonsorial throne, at sight of which proceeding the barber mechanically filled a cup with hot water from a copper vessel over a spirit-lamp, "for instance, now, suppose I say to you, 'Barber, my dear barber, unhappily I have no small change by me to-night, but shave me, and depend upon your money to-morrow'—suppose I should say that now, you would put trust in me, wouldn't you? You would have confidence?"

"Seeing that it is you, sir," with complaisance replied the barber, now mixing the lather, "seeing that it is *you* sir, I won't answer that question. No need to."

"Of course, of course—in that view. But, as a supposition—you would have confidence in me, wouldn't you?"

"Why—yes, yes."

"Then why that sign?"

"Ah, sir, all people ain't like you," was the smooth reply, at the same time, as if smoothly to close the debate, beginning smoothly to apply the lather, which operation, however, was, by a motion, protested against by the subject, but only out of a desire to rejoin, which was done in these words:

"All people ain't like me. Then I must be either better or worse than most people. Worse, you could not mean; no, barber, you could not mean that; hardly that. It remains, then, that you think me better than most people. But that I ain't vain enough to believe; though, from vanity, I confess, I could never yet, by my best wrestlings, entirely free myself; nor, indeed, to be frank, am I at

bottom over anxious to—this same vanity, barber, being so harmless, so useful, so comfortable, so pleasingly preposterous a passion."

"Very true, sir; and upon my honor, sir, you talk very well. But the lather is getting a little cold, sir."

"Better cold lather, barber, than a cold heart. Why that cold sign? Ah, I don't wonder you try to shirk the confession. You feel in your soul how ungenerous a hint is there. And yet, barber, now that I look into your eyes—which somehow speak to me of the mother that must have so often looked into them before me—I dare say, though you may not think it, that the spirit of that notification is not one with your nature. For look now, setting, business views aside, regarding the thing in an abstract light; in short, supposing a case, barber; supposing, I say, you see a stranger, his face accidentally averted, but his visible part very respectable-looking; what now, barber—I put it to your conscience, to your charity—what would be your impression of that man, in a moral point of view? Being in a signal sense a stranger, would you, for that, signally set him down for a knave?"

"Certainly not, sir; by no means," cried the barber, humanely resentful.

"You would upon the face of him——"

"Hold, sir," said the barber, "nothing about the face; you remember, sir, that is out of sight."

"I forgot that. Well then, you would, upon the *back* of him, conclude him to be, not improbably, some worthy sort of person; in short, an honest man: wouldn't you?"

"Not unlikely I should, sir."

"Well now—don't be so impatient with your brush, barber—suppose that honest man meet you by night in some dark corner of the boat where his face would still remain unseen, asking you to trust him for a shave—how then?"

"Wouldn't trust him, sir."

"But is not an honest man to be trusted?"

"Why—why—yes, sir."

"There! don't you see, now?"

"See what?" asked the disconcerted barber, rather vexedly.

"Why, you stand self-contradicted, barber; don't you?"

"No," doggedly.

"Barber," gravely, and after a pause of concern, "the enemies of our race have a saying that insincerity is the most universal and inveterate vice of man—the lasting bar to real amelioration, whether of individuals or of the world. Don't you now, barber, by your stubbornness on this occasion, give color to such a calumny?"

"Hity-tity!" cried the barber, losing patience, and with it respect; "stubbornness?" Then clattering round the brush in the cup, "Will you be shaved, or won't you?"

"Barber, I will be shaved, and with pleasure; but, pray, don't raise your voice that way. Why, now, if you go through life gritting your teeth in that fashion, what a comfortless time you will have."

"I take as much comfort in this world as you or any other man," cried the barber, whom the other's sweetness of temper seemed rather to exasperate than soothe.

"To resent the imputation of anything like unhappiness I have often observed to be peculiar to certain orders of men," said the other pensively, and half to himself, "just as to be indifferent to that imputation, from holding happiness but for a secondary good and inferior grace, I have observed to be equally peculiar to other kinds of men. Pray, barber," innocently looking up, "which think you is the superior creature?"

"All this sort of talk," cried the barber, still unmollified, "is, as I told you once before, not in my line. In a few minutes I shall shut up this shop. Will you be shaved?"

"Shave away, barber. What hinders?" turning up his face like a flower.

The shaving began, and proceeded in silence, till at length it became necessary to prepare to relather a little—affording an opportunity for resuming the subject, which, on one side, was not let slip.

"Barber," with a kind of cautious kindliness, feeling his way, "barber, now have a little patience with me; do; trust me, I wish not to offend. I have been thinking over that supposed case of the man with the averted face, and I cannot rid my mind of the impression that, by your opposite replies to my questions at the time, you showed yourself much of a piece with a good many other men—that is, you have confidence, and then again, you have none. Now, what I would ask is, do you think it sensible standing for a sensible man, one foot on confidence and the other on suspicion? Don't you think, barber, that you ought to elect? Don't you think consistency requires that you should either say 'I have confidence in all men,' and take down your notification; or else say, 'I suspect all men,' and keep it up."

This dispassionate, if not deferential, way of putting the case, did not fail to impress the barber, and proportionately conciliate him. Likewise, from its pointedness, it served to make him thoughtful; for, instead of going to the copper vessel for more water, as he had purposed, he halted half-way towards it, and, after a pause, cup in hand, said: "Sir, I hope you would not do me injustice. I don't say, and can't say, and wouldn't say, that I suspect all men; but I *do* say that strangers are not to be trusted, and so," pointing up to the sign, "no trust."

"But look, now, I beg, barber," rejoined the other deprecatingly, not presuming too much upon the barber's changed temper; "look, now; to say that strangers are not to be trusted, does not that imply something like saying that mankind is not to be trusted; for the mass of mankind, are they not necessarily strangers to each individual man? Come, come, my friend," winningly, "you are no Timon to hold the mass of mankind untrustworthy. Take down your notification; it is misanthropical; much the same sign that Timon traced with charcoal on the forehead of a skull stuck over his cave. Take it down, barber; take it down to-night. Trust men. Just try the experiment

of trusting men for this one little trip. Come now, I'm a philanthropist, and will insure you against losing a cent."

The barber shook his head dryly, and answered, "Sir, you must excuse me. I have a family."

CHAPTER XLIII VERY CHARMING.

"So you are a philanthropist, sir," added the barber with an illuminated look; "that accounts, then, for all. Very odd sort of man the philanthropist. You are the second one, sir, I have seen. Very odd sort of man, indeed, the philanthropist. Ah, sir," again meditatively stirring in the shaving-cup, "I sadly fear, lest you philanthropists know better what goodness is, than what men are." Then, eying him as if he were some strange creature behind cage-bars, "So you are a philanthropist, sir."

"I am Philanthropos, and love mankind. And, what is more than you do, barber, I trust them."

Here the barber, casually recalled to his business, would have replenished his shaving-cup, but finding now that on his last visit to the water-vessel he had not replaced it over the lamp, he did so now; and, while waiting for it to heat again, became almost as sociable as if the heating water were meant for whisky-punch; and almost as pleasantly garrulous as the pleasant barbers in romances.

"Sir," said he, taking a throne beside his customer (for in a row there were three thrones on the dais, as for the three kings of Cologne, those patron saints of the barber), "sir, you say you trust men. Well, I suppose I might share some of your trust, were it not for this trade, that I follow, too much letting me in behind the scenes."

"I think I understand," with a saddened look; "and much the same thing I have heard from persons in pursuits different from yours—from the lawyer, from the congressman, from the editor, not to mention others, each, with a strange kind of melancholy vanity, claiming for his vocation the distinction of affording the surest inlets to the conviction that man is no better than he should be. All of which testimony, if reliable, would, by mutual corroboration, justify some disturbance in a good man's mind. But no, no; it is a mistake—all a mistake."

"True, sir, very true," assented the barber.

"Glad to hear that," brightening up.

"Not so fast, sir," said the barber; "I agree with you in thinking that the lawyer, and the congressman, and the editor, are in error, but only in so far as each claims peculiar facilities for the sort of knowledge in question; because, you see, sir, the truth is, that every trade or pursuit which brings one into contact with the facts, sir, such trade or pursuit is equally an avenue to those facts."

"How exactly is that?"

"Why, sir, in my opinion—and for the last twenty years I have, at odd times, turned the matter over some in my mind—he who comes to know man, will not remain in ignorance of man. I think I am not rash in saying that; am I, sir?"

"Barber, you talk like an oracle—obscurely, barber, obscurely."

"Well, sir," with some self-complacency, "the barber has always been held an oracle, but as for the obscurity, that I don't admit."

"But pray, now, by your account, what precisely may be this mysterious knowledge gained in your trade? I grant you, indeed, as before hinted, that your trade, imposing on you the necessity of functionally tweaking the noses of mankind, is, in that respect, unfortunate, very much so; nevertheless, a well-regulated imagination should be proof even to such a provocation to improper conceits. But what I want to learn from you, barber, is, how does the mere handling of the outside of men's heads lead you to distrust the inside of their hearts?"

"What, sir, to say nothing more, can one be forever dealing in macassar oil, hair dyes, cosmetics, false moustaches, wigs, and toupees, and still believe that men are wholly what they look to be? What think you, sir, are a thoughtful barber's reflections, when, behind a careful curtain, he shaves the thin, dead stubble off a head, and then dismisses it to the world, radiant in curling auburn? To contrast the shamefaced air behind the curtain, the fearful looking forward to being possibly discovered there by a prying acquaintance, with the cheerful assurance and challenging pride with which the same man steps forth again, a gay deception, into the street, while some honest, shock-headed fellow humbly gives him the wall! Ah, sir, they may talk of the courage of truth, but my trade teaches me that truth sometimes is sheepish. Lies, lies, sir, brave lies are the lions!"

"You twist the moral, barber; you sadly twist it. Look, now; take it this way: A modest man thrust out naked into the street, would he not be abashed? Take him in and clothe him; would not his confidence be restored? And in either case, is any reproach involved? Now, what is true of the whole, holds proportionably true of the part. The bald head is a nakedness which the wig is a coat to. To feel uneasy at the possibility of the exposure of one's nakedness at top, and to feel comforted by the consciousness of having it clothed—these feelings, instead of being dishonorable to a bold man, do, in fact, but attest a proper respect for himself and his fellows. And as for the deception, you may as well call the fine roof of a fine chateau a deception, since, like a fine wig, it also is an artificial cover to the head, and equally, in the common eye, decorates the wearer.—I have confuted you, my dear barber; I have confounded you."

"Pardon," said the barber, "but I do not see that you have. His coat and his roof no man pretends to palm off as a part of himself, but the bald man palms off hair, not his, for his own."

"Not *his*, barber? If he have fairly purchased his hair, the law will protect him in its ownership, even against the claims of the head on which it grew. But it cannot be that you believe what you say, barber; you talk merely for the humor. I could not think so of you as to suppose that you would contentedly deal in the impostures you condemn."

"Ah, sir, I must live."

"And can't you do that without sinning against your conscience, as you believe? Take up some other calling."

"Wouldn't mend the matter much, sir."

"Do you think, then, barber, that, in a certain point, all the trades and callings of men are much on a par? Fatal, indeed," raising his hand, "inexpressibly dreadful, the trade of the barber, if to such conclusions it necessarily leads. Barber," eying him not without emotion, "you appear to me not so much a misbeliever, as a man misled. Now, let me set you on the right track; let me restore you to trust in human nature, and by no other means than the very trade that has brought you to suspect it."

"You mean, sir, you would have me try the experiment of taking down that notification," again pointing to it with his brush; "but, dear me, while I sit chatting here, the water boils over."

With which words, and such a well-pleased, sly, snug, expression, as they say some men have when they think their little stratagem has succeeded, he hurried to the copper vessel, and soon had his cup foaming up with white bubbles, as if it were a mug of new ale.

Meantime, the other would have fain gone on with the discourse; but the cunning barber lathered him with so generous a brush, so piled up the foam on him, that his face looked like the yeasty crest of a billow, and vain to think of talking under it, as for a drowning priest in the sea to exhort his fellow-sinners on a raft. Nothing would do, but he must keep his mouth shut. Doubtless, the interval was not, in a meditative way, unimproved; for, upon the traces of the operation being at last removed, the cosmopolitan rose, and, for added refreshment, washed his face and hands; and having generally readjusted himself, began, at last, addressing the barber in a manner different, singularly so, from his previous one. Hard to say exactly what the manner was, any more than to hint it was a sort of magical; in a benign way, not wholly unlike the manner, fabled or otherwise, of certain creatures in nature, which have the power of persuasive fascination—the power of holding another creature by the button of the eye, as it were, despite the serious disinclination, and, indeed, earnest protest, of the victim. With this manner the conclusion of the matter was not out of keeping; for, in the end, all argument and expostulation proved vain, the barber being irresistibly persuaded to agree to try, for the remainder of the present trip, the experiment of trusting men, as both phrased it. True, to save his credit as a free agent, he was loud in averring that it was only for the novelty of the thing that he so agreed, and he required the other, as before volunteered, to go security to him against any loss that might ensue; but still the fact remained, that he engaged to trust men, a thing he had before said he would not do, at least not unreservedly. Still the more to save his credit, he now insisted upon it, as a last point, that the agreement should be put in black and white, especially the security part. The other made no demur; pen, ink, and paper were provided, and grave as any notary the cosmopolitan sat down, but, ere taking the pen, glanced up at the notification, and said: "First down with that sign, barber—Timon's sign, there; down with it."

This, being in the agreement, was done—though a little reluctantly—with an eye to the future, the sign being carefully put away in a drawer.

"Now, then, for the writing," said the cosmopolitan, squaring himself. "Ah," with a sigh, "I shall make a poor lawyer, I fear. Ain't used, you see, barber, to a business which, ignoring the principle of honor, holds no nail fast till clinched. Strange, barber," taking up the blank paper, "that such flimsy stuff as this should make such strong hawsers; vile hawsers, too. Barber," starting up, "I won't put it in black and white. It were a reflection upon our joint honor. I will take your word, and you shall take mine."

"But your memory may be none of the best, sir. Well for you, on your side, to have it in black and white, just for a memorandum like, you know."

"That, indeed! Yes, and it would help *your* memory, too, wouldn't it, barber? Yours, on your side, being a little weak, too, I dare say. Ah, barber! how ingenious we human beings are; and how kindly we reciprocate each other's little delicacies, don't we? What better proof, now, that we are kind, considerate fellows, with responsive fellow-feelings—eh, barber? But to business. Let me see. What's your name, barber?"

"William Cream, sir."

Pondering a moment, he began to write; and, after some corrections, leaned back, and read aloud the following:

"AGREEMENT
Between
FRANK GOODMAN, Philanthropist, and Citizen of the World,
and
WILLIAM CREAM, Barber of the Mississippi steamer, Fidèle.

"The first hereby agrees to make good to the last any loss that may come from his trusting mankind, in the way of his vocation, for the residue of the present trip; PROVIDED that William Cream keep out of sight, for the given term, his notification of NO TRUST, and by no other mode convey any, the least hint or intimation, tending to discourage men from soliciting trust from him, in the way of his vocation, for the time above specified; but, on the contrary, he do, by all proper and reasonable words, gestures, manners, and looks, evince a perfect confidence in all men, especially strangers; otherwise, this agreement to be void.

"Done, in good faith, this 1st day of April 18—, at a quarter to twelve o'clock, P. M., in the shop of said William Cream, on board the said boat, Fidèle."

"There, barber; will that do?"

"That will do," said the barber, "only now put down your name."

Both signatures being affixed, the question was started by the barber, who should have custody of the instrument; which point, however, he settled for himself, by proposing that both should go together to the captain, and give the document into his hands—the barber hinting that this would be a safe proceeding, because the captain was necessarily a party disinterested, and, what was more, could not, from the nature of the present case, make anything by a breach of trust. All of which was listened to with some surprise and concern.

"Why, barber," said the cosmopolitan, "this don't show the right spirit; for me, I have confidence in the captain purely because he is a man; but he shall have nothing to do with our affair; for if you have no confidence in me, barber, I have in you. There, keep the paper yourself," handing it magnanimously.

"Very good," said the barber, "and now nothing remains but for me to receive the cash."

Though the mention of that word, or any of its singularly numerous equivalents, in serious neighborhood to a requisition upon one's purse, is attended with a more or less noteworthy effect

upon the human countenance, producing in many an abrupt fall of it—in others, a writhing and screwing up of the features to a point not undistressing to behold, in some, attended with a blank pallor and fatal consternation—yet no trace of any of these symptoms was visible upon the countenance of the cosmopolitan, notwithstanding nothing could be more sudden and unexpected than the barber's demand.

"You speak of cash, barber; pray in what connection?"

"In a nearer one, sir," answered the barber, less blandly, "than I thought the man with the sweet voice stood, who wanted me to trust him once for a shave, on the score of being a sort of thirteenth cousin."

"Indeed, and what did you say to him?"

"I said, 'Thank you, sir, but I don't see the connection,'"

"How could you so unsweetly answer one with a sweet voice?"

"Because, I recalled what the son of Sirach says in the True Book: 'An enemy speaketh sweetly with his lips;' and so I did what the son of Sirach advises in such cases: 'I believed not his many words.'"

"What, barber, do you say that such cynical sort of things are in the True Book, by which, of course, you mean the Bible?"

"Yes, and plenty more to the same effect. Read the Book of Proverbs."

"That's strange, now, barber; for I never happen to have met with those passages you cite. Before I go to bed this night, I'll inspect the Bible I saw on the cabin-table, to-day. But mind, you mustn't quote the True Book that way to people coming in here; it would be impliedly a violation of the contract. But you don't know how glad I feel that you have for one while signed off all that sort of thing."

"No, sir; not unless you down with the cash."

"Cash again! What do you mean?"

"Why, in this paper here, you engage, sir, to insure me against a certain loss, and——"

"Certain? Is it so *certain* you are going to lose?"

"Why, that way of taking the word may not be amiss, but I didn't mean it so. I meant a *certain* loss; you understand, a CERTAIN loss; that is to say, a certain loss. Now then, sir, what use your mere writing and saying you will insure me, unless beforehand you place in my hands a money-pledge, sufficient to that end?"

"I see; the material pledge."

"Yes, and I will put it low; say fifty dollars."

"Now what sort of a beginning is this? You, barber, for a given time engage to trust man, to put confidence in men, and, for your first step, make a demand implying no confidence in the very

man you engage with. But fifty dollars is nothing, and I would let you have it cheerfully, only I unfortunately happen to have but little change with me just now."

"But you have money in your trunk, though?"

"To be sure. But you see—in fact, barber, you must be consistent. No, I won't let you have the money now; I won't let you violate the inmost spirit of our contract, that way. So good-night, and I will see you again."

"Stay, sir"—humming and hawing—"you have forgotten something."

"Handkerchief?—gloves? No, forgotten nothing. Good-night."

"Stay, sir—the—the shaving."

"Ah, I *did* forget that. But now that it strikes me, I shan't pay you at present. Look at your agreement; you must trust. Tut! against loss you hold the guarantee. Good-night, my dear barber."

With which words he sauntered off, leaving the barber in a maze, staring after.

But it holding true in fascination as in natural philosophy, that nothing can act where it is not, so the barber was not long now in being restored to his self-possession and senses; the first evidence of which perhaps was, that, drawing forth his notification from the drawer, he put it back where it belonged; while, as for the agreement, that he tore up; which he felt the more free to do from the impression that in all human probability he would never again see the person who had drawn it. Whether that impression proved well-founded or not, does not appear. But in after days, telling the night's adventure to his friends, the worthy barber always spoke of his queer customer as the man-charmer—as certain East Indians are called snake-charmers—and all his friends united in thinking him QUITE AN ORIGINAL.