

# Scamming: The Misunderstood Confidence Man

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*“Swindling is not a crime known to our law.”*  
—*Chase v. Whitlock* (1842)<sup>1</sup>

*“The origin of the diddle is referable to the infancy of the Human Race. Perhaps the first diddler was Adam.”*  
—Edgar Allan Poe (1843)<sup>2</sup>

*“One of the indigenous characters who has figured long in our journals, courts, and cities is the Confidence Man.”*  
—*Boston Daily Evening Transcript* (1857)<sup>3</sup>

## I. INTRODUCTION

Scamming—also known as the confidence game, diddling, conning, and swindling—loosely refers to schemes where the confidence man (the “con man”) persuades the victim (the “mark”) to trust him with her money

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1. *Chase v. Whitlock*, 3 Hill 139, 139 (N.Y. Sup. Ct. 1842).
2. Edgar Allan Poe, *Diddling: Considered as One of the Exact Sciences*, in 4 THE COMPLETE WORKS OF EDGAR ALLAN POE 267 (1867) [hereinafter Poe, *Diddling*].
3. Knick, *Literary*, BOSTON DAILY EVE. TRANSCRIPT, Apr. 10, 1857, at 2 (reviewing Herman Melville's *The Confidence-Man: His Masquerade* (1857)).

using persuasion tricks that may include false or misleading promises. The game has evolved considerably over time and continues through good and bad times on both a small and large scale. The confidence game has many forms and variants. Familiar examples include telemarketing frauds, fraudulent charities, pyramid and Ponzi schemes, work-from-home schemes, quack medicines, home repair scams, and Nigerian scams. As the examples illustrate, scams often, though not always, exploit the marks' unrealistic hopes for profit, cure, and inexpensive quality.<sup>4</sup> The concept of scamming cannot be precisely defined and outlawed. It is essentially a form of opportunism, "self-interest seeking with guile."<sup>5</sup> The voluntary participation of the victims and the challenges associated with identifying scamming often result in skepticism toward the plausibility of scams and demands that individuals would be responsible for the choices they make.<sup>6</sup>

Scamming, however, is a common, persistent, and costly human activity.<sup>7</sup> In his seminal 1940 book, *The Big Con*, David Maurer explained the uniqueness of confidence games as crimes:

Although the confidence man is sometimes classed with professional thieves, pickpockets, and gamblers, he is really not a thief at all because he does no actual stealing. The trusting victim literally thrusts a fat bank roll into his hands. It is a point of pride with him that he does not have to steal.

Confidence men are not "crooks" in the ordinary sense of the word. They are suave, slick and capable. Their depredations are very much on the genteel side. Because of their high intelligence, their solid organization, the widespread convenience of the law, and the fact that the victim [sometimes] must admit criminal intentions if he wishes to prosecute, society has been neither willing nor able to avenge itself affectively [sic].<sup>8</sup>

This Article traces the intellectual origins of the confidence game. We study how the game was introduced to the public and explain some of its complexities.

In early July 1849, the *New York Herald*, then the most profitable and most widely circulated newspaper in the United States,<sup>9</sup> published in its *Police Intelligence* column a series of four unsigned short reports about

4. See Keyes Winter, *Fools and Their Money*, HARPER'S MONTHLY MAG., Aug. 1, 1927, at 361.

5. OLIVER E. WILLIAMSON, MARKET AND HIERARCHIES 26 (1975).

6. See Barak Orbach, *A State of Inaction: Regulatory Preferences, Rent, and Income Inequality*, 16 THEORETICAL INQ. 45 (2015).

7. See TAMAR FRANKEL, TRUST AND HONESTY (2006); ARTHUR ALLEN LEFF, SWINDLING AND SELLING (1976); DAVID MAURER, THE BIG CON 313 (1940) ("Confidence games are cyclical phenomena. They appear, rise to a peak of effectiveness, then drop into obscurity. But they have yet to disappear altogether.")

8. *Id.* at 1-2.

9. See *The Progress of Journalism*, N.Y. HERALD, Aug. 2, 1849, at 2 (bragging that "the *Herald*, with an aggregate circulation of fifty-five thousand, stands at a point far beyond that of any other newspaper . . . in this country or Europe.")

the arrest of a swindler, purportedly known as the “Confidence Man.”<sup>10</sup> With the exception of one piece, the articles were published in the internal pages of the paper. The *Herald* also published a provocative editorial about the Confidence Man, comparing him to the “real” (or “true”) confidence men—Wall Street “financiers.”<sup>11</sup> The swindler, Samuel Thompson, was a “graduate of the college at Sing Sing”<sup>12</sup> and used a highly distilled version of an old trick: he expressly asked his victims to place confidence in him by lending him money or a watch. *The Herald* did not treat the story an important one. During July 1849, the *Herald* allocated considerably more space to reports about a few other swindlers, the whereabouts of Father Mathew,<sup>13</sup> and general matters, such as political and foreign affairs, the cholera outbreak in New York, the movements of major steamboats, and theater reviews. The articles about the Confidence Man, however, drew considerable attention<sup>14</sup> had an immediate impact on journalism, literature, law, and culture.<sup>15</sup> The *Herald* redefined swindling and introduced the modern analysis of scamming. The *Herald* is credited for coining the term “confidence man” and the original report about the arrest of Thompson is still frequently cited.<sup>16</sup>

The popular account of the term “confidence man,” however, istoo

10. *Arrest of the Confidence Man*, N.Y. HERALD, July 8, 1849, at 2 [hereinafter *Arrest*]; *The Confidence Man*, N.Y. HERALD, July 9, 1849, at 2 [hereinafter *Confidence 1*]; *The Confidence Man*, N.Y. HERALD, July 10, 1849, at 1 [hereinafter *Confidence 2*]; *Incident of the “Confidence Man,”* N.Y. HERALD, July 14, 1849, at 2 [hereinafter *Incident*].

11. “*The Confidence Man*” on a Large Scale, N.Y. HERALD, July 11, 1849, at 2 [hereinafter *Large Scale*].

12. *Arrest*, *supra* note 10.

13. Theobald Mathew (1790–1856), known as Father Mathew, was an influential temperance reformer. He happened to visit New York in July 1849. See MARY FRANCIS CLARE, *THE LIFE OF FATHER MATHEW* 199–206 (1872) (describing the visit and the *Herald*’s coverage).

14. See, e.g., *The Confidence Man*, ALEXANDRIA GAZETTE, July 16, 1849, at 1 (describing the Confidence Man as a news item that shares with Father Mathew, Captain McCerren [a prominent swindler], and the cholera, the public attention.”)

15. See Johannes Dietrich Bergmann, *The Original Confidence Man*, 21 AM. Q. 560 (1969); Robert E. Mensel, “*A Diddle At Brobdingnag*”: *Confidence and Caveat Emptor During the Market Revolution*, 38 U. MEM. L. REV. 97 (2007–2008); Paul Smith, *The Confidence-Man and the Literary World of New York*, 16 NINETEENTH-CENTURY FICTION 329 (1962).

16. The arrest report states that the swindler “was recognized as an old offender by the name of Wm. Thompson.” *Arrest*, *supra* note 10. Subsequent reports clarified that Thompson used many names. We discuss his name in Part II.E. There are numerous contemporary sources that reference this report. See LARA LANGER COHEN, *THE FABRICATION OF AMERICAN LITERATURE* 170 (2012) (“The term ‘confidence man’ was originally coined by the *New York Herald* to describe an ingratiating gentleman named William Thompson.”); STEVE FRASER, *EVERY MAN A SPECULATOR: A HISTORY OF WALL STREET IN AMERICAN LIFE* 30 (2006) (“In July 1849, the *New York Herald* published an extraordinary article about the arrest of a local confidence man.”); KAREN HALTTUNEN, *CONFIDENCE MEN AND PAINTED WOMEN: A STUDY OF MIDDLE-CLASS CULTURE IN AMERICA, 1830–1870*, at 6 (1982) (“The term *confidence man* was probably first coined by the New York press in 1849 during coverage of the arrest of a swindler named William Thompson.”); David Samuels, *The Confidence Man*, NEW YORKER, Apr. 26, 1999, at 150, 152 (“The Term ‘confidence man’ was purportedly invented by the *New York Herald* in 1849 to describe the activities of a petty grafter named William Thompson.”); AMY READING, *THE MARK INSIDE* 25 (2012) (“It was a reporter at the *Herald* who coined the name ‘Confidence Man.’”); H. BARBARA WEINBERG, *AMERICAN STORIES: PAINTINGS OF EVERYDAY LIFE, 1765–1915*, at 60 (2009) (“The term ‘confidence man’ was coined in 1849 to describe the exploits of William Thompson.”).

simplistic. It is unclear why Thompson's story was so influential leaving us with the phrases "confidence game," "confidence man" and "con man." Thompson did not contribute to his trade any new scheme nor did he develop one.<sup>17</sup> We show that he was a clumsy burglar and unsophisticated swindler. Many, however, mistakenly interpreted Thompson's lack of sophistication and boldness as genius. We argue that the popularity of the story demonstrates and emphasizes a broad misunderstanding of the complexity of scamming.

We utilize the story of the Confidence Man in its historical context to explain the nature of scams as the exploitation of predictable imperfect decisions. We specifically focus on bounded rationality and other human imperfections of both scammers and their victims, as well as the ways scammers utilize time, information, and institutional complexity to advance their schemes. First, our study illustrates an obvious point—individual scammers and victims are imperfect humans. The literature sometimes offers depictions of hyper-calculated scammers and rational consumers. Such images cannot guide good policies. Second, we describe the use of time in scams. Scammers often use time to sort the population and trap vulnerable individuals. Common instruments used for this purpose are the utilization of (1) actual or perceived time pressure, (2) uncertainty due to changes of circumstances (such as booms, busts, and volatile conditions), and (3) cognitive impairments resulting from aging. Third, we discuss common effects of complexity of scams on their legal analysis. Fourth, we show that the intuitive legal requirements for knowledge and intent to establish liability for scams are sometimes too broad and result in poor laws and policies. Finally, we explain how scams may be integrated into industry standards.

Our study is fundamentally an inquiry into the abuse of trust for profit. Successful scammers—individual or institutional ones—are opportunistic and take advantage of circumstances where the legal system does not offer protection to trusting individuals, is vague about liability for abuse of trust, or is not precise enough to detect abuse of trust. We explain some of the reasons for the tendency to focus on crude scams and neglect nuanced ones.

Nobel Laureates George Akerlof and Robert Shiller observed that "[e]conomists have a particular interpretation of the meaning of the term *confidence*[, which] is nothing more . . . than a prediction."<sup>18</sup> They recognized, however, that the term has "additional shades" that include "trust" and "full belief" and argued that "[e]conomists have only partly captured" those meanings.<sup>19</sup> As a result, the common economic premise is

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17. Cf. READING, *supra* note 17, at 24, 26 ("Confidence artistry began one day in May 1849 [with] a well-dressed young man named . . . William Thompson. . . . [Thompson] conceived an entire industry.").

18. GEORGE A. AKERLOF & ROBERT J. SHILLER, *ANIMAL SPIRITS* 12 (2009).

19. *Id.*

that “confidence is rational: people use the information at hand to make rational predictions; they then make a rational decision based on those rational predictions.” Our normative argument is that economists are not alone and that the interpretation of confidence as a prediction is rather common. The misguided attribution of sophistication to the original confidence man illustrates the point. We discuss several other misconceptions that follow the discounting of abuse of trust.

## II. CREATING THE CONFIDENCE MAN

### A. *Introducing the Confidence Man to the Public*

#### 1. *The Branding of an Uninspiring Swindler*

Among thieves, Samuel Thompson was regarded a clumsy criminal. Many professional criminals were unwilling to work with him.<sup>20</sup> He started his criminal career in New York, where he engaged in “pocket picking and small burglaries, but prov[ed] more audacious than adroit.”<sup>21</sup> In 1841, he and his brother were caught robbing a lace store and were sent to prison for two and a half years.<sup>22</sup> Upon his release, Thompson moved to Philadelphia, where the “High Constable Jim Young, [the] common patron of all nefarious genius,” assigned him to work with an “old gang of English thieves.”<sup>23</sup> Thompson, however, did not “meet the expectations” of the gang and “was regularly cast out, as dangerous [for] his clumsiness, to the more proficient.”<sup>24</sup> Failing to enter the crime circle in Philadelphia, Thompson “sought a lower order of acquaintances” and pursued more modest types of property crimes. At some point, he decided to try swindling.<sup>25</sup> For some time, he engaged both in swindling and “traditional” property crimes but discovered that he was more successful in swindling. As a swindler, Thompson operated in several large cities and returned to New York City in late 1848. He understood the elements of swindling but was much less sophisticated than many of his contemporaries. Rather than creating an impression of confidence, Thompson expressly asked for confidence. His technique utilized

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20. See, e.g., *The “Confidence” Man*, NAT’L POLICE GAZETTE, July 28, 1849, at 2; *The Confidence Man and His Crimes*, NAT’L POLICE GAZETTE, Aug. 18, 1849, at 2.

21. *The “Confidence” Man*, NAT’L POLICE GAZETTE, July 28, 1849, at 2.

22. *Id.*

23. *Id.* James Young was a robber and a thief, who became the High Constable in Philadelphia Police, guarded by the mayor and a few local judges. He used his position to patronize crime until his exposure by the *National Police Gazette*. See *The Philadelphia Police*, NAT’L POLICE GAZETTE, Nov. 4, 1848, at 2; *More Developments of Police Rascality*, NAT’L POLICE GAZETTE, Nov. 18, 1848, at 4; *Astounding Developments*, NAT’L POLICE GAZETTE, Mar. 10, 1849, at 2; *A Free Press: The New York Police Gazette and Judge Parsons of Philadelphia*, BOSTON HERALD, Mar. 19, 1849, at 3; *Response of the Press*, NAT’L POLICE GAZETTE, Mar. 29, 1849, at 3; *Recovery of the Jewels*, NAT’L POLICE GAZETTE, Apr. 14, 1849, at 2; *Tribute from Abroad*, NAT’L POLICE GAZETTE, June 23, 1849, at 2.

24. *The “Confidence” Man*, NAT’L POLICE GAZETTE, July 28, 1849, at 2.

25. *Id.*

confidence without any meaningful scheme: Thompson approached his victims—strangers—on the street, disarmed them with a friendly chat, sometimes led them to believe that they knew him in the past, and then asked them to place confidence in him and express their trust by lending him a watch or money.<sup>26</sup> Other swindlers were using much more sophisticated forms of the game for larger scores.<sup>27</sup>

In December 1848, the *New York Evening Post* reported about an “accomplished swindler” who used Thompson’s modus operandi:

AN ACCOMPLISHED SWINDLER recently called upon a worthy Baptist clergyman in Division Street, and after expressing his regard and proffering any amount of pecuniary assistance which might be desired by the pastor, he remarked that few persons would have so much confidence in a stranger as to make such an offer. “You,” said [the swindler] to the pastor, “would not place such confidence in me.” The pastor thought he would, and to prove it placed \$30 in the stranger’s hands, but his confidence met a sorry return. The benevolent strangers, as if overpowered with his emotions, stepped to the door, remarked that the pastor would hear from him again and vanished. He has not been heard from since.<sup>28</sup>

On Saturday, July 7, 1849, Thompson was arrested in New York.<sup>29</sup> One of his victims—Hugh McDonald—recognized him on the street and called the police.<sup>30</sup> The next day, the *Herald* published a short report announcing the arrest of “the man . . . known as the ‘Confidence Man.’”<sup>31</sup> The report briefly summarizes Thompson’s signature method that explains the sobriquet:

[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 your watch until to-morrow?” [T]he stranger . . . supposing him to be some old acquaintance, not at the moment to be recollected, allows him to take the watch, thus placing “confidence” in the honesty of a stranger who walks off laughing.<sup>32</sup>

The report also offers details about Hugh McDonald, the mark who identified Thompson. He lived on Madison Street (the lower east side of Manhattan) and gave Thompson a gold lever watch valued at \$110 (about

26. See *By the Pilot Line*, PHIL. INQ., July 11, 1849, at 2; *Trial of the Confidence Man*, N.Y. HERALD, Oct. 9, 1849, at 1; *The Case of the Confidence Man*, N.Y. HERALD, Oct. 10, 1849, at 4.

27. See, e.g., LIFE AND ADVENTURES OF THE ACCOMPLISHED FORGER AND SWINDLER, COLONEL MONROE EDWARDS (1848) (author unknown).

28. *City Intelligence*, N.Y. EVENING POST, Dec. 7, 1848, at 2.

29. See *Smith v. People*, 1 Parker Cr. Cas. 317, 317 (N.Y. 1851) (describing the arrest).

30. *Arrest*, *supra* note 10.

31. *Id.*

32. *Id.*

\$3,100 adjusted to 2015 values).<sup>33</sup> the arrest report describes Thompson as an “old offender” and notes that he had operated in the city for a few months prior to his arrest. It concludes by inviting people to see Thompson in the city jail: “It will be well for all those persons who have been defrauded by the ‘Confidence Man’ to call at the [city jail, the] Tombs, and take a view of him.”<sup>34</sup> A distinctive quality of the arrest report is the elegant presentation of Thompson in a sketch. We discuss the significance of this quality later.

On Monday, July 9, 1849, the *Herald* reported that Thompson was known to use also the aliases Samuel Williams and Samuel Thomas. On his arrest, the police found in his possession another gold watch that was believed to be stolen.<sup>35</sup> That day (just one day after the publication of the arrest report), according to the *Herald*, “in consequence of the publicity given in the daily journals respecting . . . the arrest of the ‘confidence man’ quite a numerous attendance was brought to the police office, who were all anxious to witness a man who could so far humbug any sensible man to trust him with a gold watch, under the pretense of establishing ‘confidence.’”<sup>36</sup> The *Herald’s* reference to “daily journals” meant the *Herald* itself. Other newspapers started reporting about the Confidence Man only on Tuesday, July 10th.<sup>37</sup> Yet, the call for victims to come forward was productive. Two additional individuals identified Thompson as the person who duped them using the method described in the *Herald*.<sup>38</sup> The *New York Tribune*, the *Herald’s* primary competitor, did not report on the arrest. Rather, at the end of a condensed report of the police activities during July 9th, the *Tribune* noted that Hugh McDonald and two additional individuals “appeared at the Tombs and identified Thompson alias Williams as being the individual that had by his winning manner obtained their watches and money.”<sup>39</sup>

On July 11, the Philadelphia Inquirer published a lengthy report about the Confidence Man written by its New York correspondent.<sup>40</sup> The Inquirer’s correspondent summarized his visit at the Tombs:

[T]he celebrated “Confidence Man” . . . made himself so notorious by his successful swindling during the last eighteen months or two years. . . . As soon as it was announced that the “Confidence Man” was in durance vile, it was requested by the authorities that all who

33. *Id.*

34. *Id.*

35. *Confidence 1, supra* note 10.

36. *Confidence 2, supra* note 10.

37. See, e.g., *Arrest of the Confidence Man*, TRENTON STATE GAZETTE, July 10, 1849, at 1; *The Last Device of a Swindler*, PUB. LEDGER, Jul. 12, 1849, at 2; *The Last Device of a Swindler*, SUN (BALTIMORE), July 13, 1849, at 1; *The Last Device of a Swindler*, NEW ORLEANS DAILY PICAYUNE, Jul. 20, 1849, at 1.

38. *Confidence 2, supra* note 10; *By the Pilot Line, supra* note 28.

39. *Law Courts*, N.Y. TRIB., July 10, 1849, at 3.

40. *By the Pilot Line, supra* note 28.

had been duped by him should visit the Tombs, recognize him, and make their complaints. The result is that [the] building has been crowded ever since, by a group of victims to confidence, and so great is the rush, that it is difficult matter for the magistrate to give attention to the complaints. Indeed the scene . . . [is] somewhat . . . ridiculous.”<sup>41</sup>

The *Inquirer* also quotes several individuals who identified Thompson at the Tombs and described his use of confidence. The article concludes stating that there were “complaints against [Thompson] already sufficient to send him to Sing Sing for one hundred and fifty years or more.”<sup>42</sup>

On Saturday, July 14th, the *Herald* published a forth article offering more details about the “notorious individual . . . extensively known as the ‘Confidence Man.’”<sup>43</sup> Thompson, we learn, operated in Boston, Philadelphia, and New York City for two or three years before his arrest during which he found many men “ready to place confidence in him.”<sup>44</sup> The article explains that the “rogues” used the term “putting them to sleep” to describe the “confidence process” because the victims were too ashamed to report about the swindle and preferred to absorb the losses. The article explains that, through his “persuasive powers,” the Confidence Man had the ability to influence “sensible men” to act like fools and give their money and valuables to a stranger. He disarmed his victims with friendly conversations and then asked them to place confidence in him by lending him money or a watch implying that their decision reflected on personal morality in some way. The article emphasizes that the Confidence Man “obtain[ed] money by the confidence process” that other swindlers used though he was particularly effective.<sup>45</sup> It criticizes the police for having “quite a laugh over the cunning maneuver[s] of the Confidence Man.”<sup>46</sup>

## 2. *The Editorial: Large-Scale Confidence Men*

Three days after the publication of the arrest report, on Wednesday, July 11th, the *Herald* published an editorial, entitled “*The Confidence Man*” on a *Large Scale*.<sup>47</sup> Like the articles, the editorial was unsigned. However, Lewis Gaylord Clark, the highly regarded editor of the literary magazine *Knickerbocker* “suspected” that the author was Dr. James Alexander Houston, a celebrated reporter and one of the principal editors of the *Herald*.<sup>48</sup>

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41. *Id.*

42. *Id.*

43. *Incident, supra* note 10.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Large Scale, supra* note 11.

48. *Editor's Table*, 34 *KNICKERBOCKER* 257, 279 (Sept. 1849). *See also infra* note 73 and

The editorial opens by suggesting that its author had nothing to do with the Confidence Man articles: “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.’”<sup>49</sup> The introduction of the Confidence Man to the public, however, was an accomplishment of the *Herald* and was about 72-hour old. The depiction of the press coverage is similar the *Herald*’s reference to “the publicity given in the daily journals respecting . . . the arrest of the ‘confidence man.’”<sup>50</sup> The editorial though recognizes that the “Confidence Man” is “euphonious and winning designation.”

The editorial is a satire that further develops the concept of “confidence man.” It explains that the Confidence Man, a “certain financial genius,” disarmed his victims by his appearance, tricked them with “moral suasion,”<sup>51</sup> and vanished with grin. Yet, despite his “genius, address, tact, and skill” he was arrested. By contrast, “true” and “real” confidence men, those who operate on a large scale—Wall Street financiers—live comfortably in palaces and keep scamming the public:

His genius has been employed on a small scale in Broadway. Theirs has been employed in Wall Street. That’s all the difference. He has obtained half a dozen watches. They have pocketed half a million of dollars. He is a swindler. They are exemplars of honesty. He is a rogue. They are financiers. He is collared by the police. They are cherished by society. He eats the fare of a prison. They enjoy the luxuries of a palace. . . . Long life to the real “Confidence Man!”—the “Confidence Man” of Wall street—the “Confidence Man” of the palace up town—the “Confidence Man” who battens and fattens on the plunder coming from the poor man and the man of moderate means! As for the “Confidence Man” of “the Tombs,” he is a cheat, a humbug, a delusion, a sham, a mockery! Let him rot!<sup>52</sup>

What was the failure of the Confidence Man? “He struck too low!”<sup>53</sup> He should have breached fiduciary duties and caused others to do so, rather than swindling “perfect strangers”:

He should have issued a flaming prospectus of another grand scheme of internal 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 chosen associates.

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accompanying text.

49. *Large Scale*, *supra* note 11.

50. *See supra* note 36 and accompanying text.

51. Houston, a critique of religious institutions, compared the effectiveness of the Confidence Man to that of Father Mathew who visited New York City that week. *See supra* note 13 and accompanying text.

52. *Large Scale*, *supra* note 11.

53. *Id.*

He should have quietly got rid his stock; but on the faith of it get a controlling share in the management of the concern. He should have got all the contracts on his own terms. 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 to 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!<sup>54</sup>

### 3. *The Birth of the Confidence Man*

The *Herald's* articles were exceptionally effective. While Thompson was waiting for his trial, his new public identity became a common currency. He enjoyed the publicity and started presenting himself as the "Confidence Man."<sup>55</sup> On July 23, 1849, about two weeks after the publication of the arrest report, William E. Burton's Chambers Street Theatre launched a new farce entitled *The Confidence Man*. (See Figure 1.) Critics praised the show that was inspired by the story of the Confidence Man.<sup>56</sup> The *Herald* declared that "[t]his little farce, though written in such a short time, and got up in such a short notice, is one of the funniest things of the season."<sup>57</sup> By the end of July, the *National Police Gazette* started using the phrase "confidence game" to describe the swindles of the Confidence Man.<sup>58</sup> This phrase became a term of art as well.

Shortly after his publicized arrest, Thompson attempted to buy his release on bail. His unsuccessful scheme exposed corruption at the District Attorney's office and further implicated Thompson in the court of public opinion.<sup>59</sup> Held in the Tombs, waiting to be tried for "charges of felony of

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54. *Id.*

55. See, e.g., *The Case of the Confidence Man*, *supra* note 26 (referring to a letter from Thompson, which he signed as the "Confidence Man.").

56. See Bergmann, *supra* note 16, at 567-68.

57. *Burton's Theatre*, N.Y. HERALD, Aug. 1, 1849, at 1.

58. See *The "Confidence" Man*, NAT'L POLICE GAZETTE, July 28, 1849, at 2.

59. On August 9, 1849, the judge who was involved in the case, together with two police officers, published in several daily newspapers a statement arguing that the District Attorney, exercising "illegal and dishonorable conduct," endorsed the "notorious 'Confidence Man' No. 1" and the two are allies. See *The Administration of Justice*, N.Y. HERALD, Aug. 10, 1849, at 2. See *The "Confidence" Man*, NAT'L POLICE GAZETTE, July 28, 1849, at 2.

a serious character,”<sup>60</sup> Thompson persuaded one of the prison guards to serve as his “secret agent” and deliver him funds and valuables to “purchase . . . bail and to corrupt the authorities.”<sup>61</sup> Being able to pay, Thompson bribed some of the prison guards “to regard him as a man to be respected.”<sup>62</sup> He further “gained the confidence of . . . the Assistant District Attorney, and induced him to get up on a Sunday morning and go down to the Tombs to let him out on straw bail [and] he even won the confidence of . . . the District Attorney himself and induced him not only to believe all that he said, but to endorse it for truth, and to direct its publication in the public print.”<sup>63</sup> He also arranged for one of his associates to pay the bail and have him released.<sup>64</sup> During the bail hearing, on July 29, Thompson unwisely talked about a burglary in Philadelphia that he committed disclosing his source of funding and accomplices. Thus, upon release on bail he was immediately rearrested and the District Attorney faced harsh public criticism.<sup>65</sup> Summarizing the incident, the *Herald* insisted that Thompson was a “modern genius of persuasion, though the *Herald* recognized that Thompson returned to jail because he placed “too much confidence in persons who professed to be his friends [and swindled him].”<sup>66</sup> The *Herald* also recognized that Thompson’s unsuccessful attempt to buy his release on bail caused him “infinite harm in the eyes of the public, going to show conclusively that he was afraid to meet the charges standing against him.”<sup>67</sup> The District Attorney, whose reputation was questioned for the events, later prosecuted Thompson and had incentives to appear tough.

During the summer of 1849, New York newspapers published commentaries exploring the meaning of the concept “confidence man.” In August 1849, the *National Police Gazette* described the contrast between Thompson’s new public identity as an accomplished thief and a “supreme swindler” and his actual profile of a fool:

The Confidence Man is fulfilling a greater destiny than even he, in the vastness of his self-complacency ever expected for himself. Previous of his recent incarceration[,] . . . he was satisfied to be regarded among his associates, as an adroit thief, and supreme swindler, but now he claims to be considered as a great man in the eyes of the world . . . .

For all [he accomplished], the Confidence Man has a right to

60. *Corruption of Authority*, NAT’L POLICE GAZETTE, Aug. 4, 1849, at 2.

61. *Id.*

62. *Id.*

63. *The Confidence Man and His Crimes*, NAT’L POLICE GAZETTE, Aug. 18, 1849, at 2.

64. *Id.*; see also *Smith v. People*, 1 Parker Cr. Cas. 317 (N.Y. 1851) (discussing the legality of the bail); *Confidence Business*, NAT’L POLICE GAZETTE, Aug. 11, 1849, at 2 (reporting about the bail hearing); *The Confidence Man*, SPECTATOR, Aug. 9, 1849, at 1 (reporting about the bail hearing).

65. *Confidence Men Bailed*, N.Y. HERALD, July 30, 1849, at 2.

66. *Confidence Man*, N.Y. HERALD, Aug. 3, 1849, at 3.

67. *Id.*

consider himself “some,” and were it not for the drawback of reputation derived from the overthrow of fools, we should regard him as “some,” too. But the Confidence Man is a fool like those whom he has been playing with, and like all fools, is destined to be strangled by his own folly. . . . He will be well known by [the] title [Confidence Man].<sup>68</sup>

On August 18, the *Literary World* reprinted an editorial from the *Merchants' Ledger* assessing the effectiveness of confidence games.<sup>69</sup> The comments preceding the reprint described the Confidence Man as “the new species of the Jeremy Diddler [and] a subject of police fingering, [who was] . . . impressed into the service of Burton's Comicalities in Chambers Street.”<sup>70</sup> The *Ledger* editorial observes that, in every social circle, confidence men, such as the “confidence man of politics” and “confidence man of merchandise,” are rather common.<sup>71</sup> It then argues that

“[i]t is a good thing, and speaks well for human nature, that, . . . in spite of all the hardening of civilization and all the warning of newspapers, men *can be swindled*. The man who is *always* on his guard, *always* proof against appeal, who cannot be beguiled into the weakness of pity by *any* story—is far gone, . . . toward being himself a hardened villain.”<sup>72</sup>

In a similar spirit, a month later, Lewis Gaylord Clark, the editor of the literary magazine *Knickerbocker* wrote:

One of the good effects resulting from the arrest of the ‘Confidence Man’ was an article in the ‘*Herald*’ daily journal, from the pen, we suspect of Dr. Houston, the accomplished congressional reporter, upon ‘*The Confidence-Man of Society*.’ It was a masterly, trenchant satire, as true as it was keen; but for its length, and for the fact that it has already been widely circulated, we should have transferred it entire to these pages.<sup>73</sup>

Thompson's trial was held on October 8 and 9, 1849, three months after his arrest.<sup>74</sup> The prosecution based its case on the testimony of Hugh McDonald, the victim who led to Thompson's arrest. McDonald told the jury that Thompson actually “snatched” his watch leaving him “thunderstruck” and not understanding how “a man who was so much my friend . . . [would] steal my watch.”<sup>75</sup> He also told the jury about an attempt to bribe him not to testify against Thompson.<sup>76</sup> The defense tried

68. *The Confidence Man and His Crimes*, *supra* note 59.

69. *What Is Talked About*, LIT. WORLD, Aug. 18, 1849, at 132, 133.

70. *Id.* For Jeremy Diddler, see *infra* notes 106-110 and accompanying text; and *infra* Part II.F.

71. *Id.*

72. *Id.*

73. *Editor's Table*, 34 KNICKERBOCKER 257, 279 (1849).

74. *Trial of the Confidence Man*, *supra* note 26; *The Case of the Confidence Man*, *supra* note 26.

75. *Trial of the Confidence Man*, *supra* note 26.

76. *The Case of the Confidence Man*, *supra* note 26.

to establish the argument that no theft was committed because there was consent to give the watch.<sup>77</sup> One of Thompson's associates testified that, immediately after Thompson swindled McDonald, he warned McDonald about the swindle and advised him to follow Thompson but his advice was rudely rejected.<sup>78</sup> The witness did not have much credibility and probably even harmed Thompson since he mentioned that Thompson swindled him the first time they met and then asked for feedback.<sup>79</sup> The jury delivered a guilty verdict from their seats.<sup>80</sup> Thompson was sentenced for two years and six months in prison.

#### 4. *Was Thompson a Notorious Scammer Prior to His Arrest?*

Thompson had misleading appearance and certain persuasion skills. He probably obtained watches and money from people who did not come forward and from people in New York and other cities. Overall, however, there were only "six complaints [that Thompson] obtain[ed] money and watches, by false pretense, from different individuals in [New York City]."<sup>81</sup> He was indicted for two counts of alleged grand larceny in connection of two incidents of obtaining gold watches through his swindle but was tried only for swindling the individual who led to his arrest.<sup>82</sup> For the nineteenth century, Thompson was an unsuccessful small-time street swindler who did not accomplish much other than publicity. The chronology below his rise to stardom.

By and large, Thompson has mostly been understood as some kind of a "genius operator." In his classic article, *The Original Confidence Man*, Johannes Bergmann explained that "[w]hat is noteworthy about Thompson's swindle is not just his rather astonishing ability to condense all the steps of the usual confidence game into a brief exchange but also that his game provides a strikingly clear illustration of just what a confidence game is."<sup>83</sup> While Thompson's story is illustrative, it is important to recognize that his skills as a swindler were limited and, in fact, journalists in several newspapers used his limitations to develop social critique.

Together, the *Herald's* articles present a sophisticated analysis of scamming: First, the articles conceptualize the confidence game and introduce a new term—"confidence man." Second, the articles illustrate that the confidence game erodes trust in society because the victims are shamed as fools and the villain is admired. Third, the articles stress the

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77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Confidence Men Bailed*, N.Y. HERALD, July 30, 1849, at 2.

82. *The Confidence Man*, N.Y. HERALD, Aug. 9, 1849, at 1.

83. Bergmann, *supra* note 15, at 562.

tension created in modern society where people often trust “strangers.” Fourth, the articles emphasize that both scammers and their victims may act like fools. Fifth, the articles, primarily the editorial, criticize the way society perceives and treats scammers. Sixth, the articles reflect the view that, in addition to the benefit of their scores, swindlers enjoy the harm they impose on their marks.

### *B. Meaning and Context*

Three core aspects in the story of the Confidence Man cannot be properly appreciated outside their historical context: (1) concerns and anxieties regarding strangers, (2) economic circumstances that influenced perceptions and decisionmaking during the first half of the nineteenth century, and (3) the use of sketches during the era.

#### *1. The Confidence Man as Stranger*

The Confidence Man was arrested during an era of concerns and anxieties regarding interactions with strangers.<sup>84</sup> Social and technological changes situated many individuals as inexperienced in their environments compared to others, leaving them vulnerable to scams. Specifically, people in rural areas were “strangers” in the city and “strangers” visited communities that were not familiar with confidence games.

An example for a typical swindle that fed the fears of strangers is the story of Hagerstown, Maryland. In July 1817, while an economic depression was burdening the country, a swindler named Jonathan Parks came to Hagerstown and “completely enlisted the confidence of some of [the] citizens,” for talking effectively “against drunkenness, profane swearing, Sabbath breaking, etc.”<sup>85</sup> Then, “[a]fter enlisting the confidence and good wishes of many of [the town’s] citizens, . . . he commenced the exhibition of an optical show, by which he . . . amassed a considerable sum of money, [as] many persons contributed liberally under the impression that he was really . . . *an honest man*—laboring for the good of his fellow men.”<sup>86</sup> William D. Bell, the editor of the local paper, the *Hagers Town* [sic] *Torch Light and Public Advertiser*, tried to track down Parks by asking “every editor in the United States” to print ads calling for information about Parks and demanding Parks to turn himself in. (See **Figure 2.**) Since Parks did not turn himself in, Bell distributed a warning that numerous newspapers printed, describing the events in Hagerstown and informing the public that any person “who reposes confidence in

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84. See HALTTUNEN, *supra* note 16 (studying the concerns regarding confidence men and painted women).

85. The quotes are taken from a warning, entitled “*To the People of the United States. Beware of a Swindler!!!*,” which numerous newspapers published in February and March 1818. The warning describes the events of July 1817.

86. *Id.*

[Parks would] find that such restraint is but [a] feeble barrier against the duplicity of an accomplished swindler.”<sup>87</sup> Park’s swindle and its depiction by the local newspaper were quite common and illustrate that Thompson’s use of confidence was neither innovative nor impressive.

The frequent reports about unfortunate interactions with strangers inspired a new writing genre in the early nineteenth century. The press and independent authors emphasized and amplified the concerns, through “advice” for inexperienced individuals, mostly those who moved to the city.<sup>88</sup> For example, newspapers and periodicals frequently printed the essay *How to be Rich*, advising: “Trust no man upon appearances—they are deceptive . . . Beware of a gaudy exterior. Rogues usually dress well. The rich are plain men. . . Trust no stranger. . . No, is a very useful word—be not afraid to use it.”<sup>89</sup> William Alcott’s exceptionally popular *Young Man’s Guide* included a chapter, entitled *How to Know With Whom to Deal*.<sup>90</sup> The chapter attempts to reconcile two “common-life” “maxims”: “Use every precaution with a stranger, that you would wish you had done, should he turn out to be a villain,” and “Treat every man as an honest man, until he proves to be otherwise.”<sup>91</sup> Alcott advised the inexperienced man that it “will be your wisdom . . . to be cautious of . . . those who are very talkative, and who, in dealing with you, endeavor to draw off your attention from the point in hand by incoherent or random expressions.”<sup>92</sup> Edward Martin’s 1868 *The Secrets of the Great City* is “a simple narration of actual facts. It is designed to warn the thousands who visit the city [the “strangers”] against the dangers and pitfalls into which their curiosity or vice may lead them, and it is hoped that those who read the book will heed its warnings.”<sup>93</sup> The book describes common swindles. John Todd’s *The Young Man* spells out the concerns: “The moment the inexperienced youth sets his foot on the side-walk of the city, he is marked and watched by eyes that he never dreamed of.”<sup>94</sup> In the same spirit, Walt Whitman in an essay for *Life Illustrated* advised inexperienced individuals how to cope with urban swindlers and observed that “[e]very great city is a sort of countryman-trap.”<sup>95</sup>

In her study of the genre, cultural historian Karen Halttunen explains that “[d]uring the first half of the nineteenth century, unprecedented numbers of young men were leaving their rural homes and families to seek work in the booming cities of industrializing America.”<sup>96</sup> Social change,

87. *Id.*

88. *Id.*

89. *How to Be Rich*, NEW ENG. FARMER, Oct. 23, 1829, at 112 (anonymous author).

90. WILLIAM A. ALCOTT, THE YOUNG MAN’S GUIDE 133 (20th ed. 1849).

91. *Id.*

92. *Id.* at 134.

93. EDWARD WINSLOW MARTIN, THE SECRETS OF THE GREAT CITY 15-16 (1868).

94. JOHN TODD, THE YOUNG MAN: HINTS ADDRESSED TO THE YOUNG MEN 122 (1845).

95. Walt Whitman, *Advice to Strangers*, LIFE ILLUSTRATED, Aug. 23, 1856, at 133.

96. HALTTUNEN, *supra* note 16, at 1.

Halttunen shows, alarmed “middle-class moralists” and triggered massive amounts of writing about “manners, morals, personal appearance, [and] mental development.”<sup>97</sup> During that era, the confidence game was “a symbolic expression of deep[] fears about the direction of American Society.”<sup>98</sup>

It was the prominence of these fears that contributed to the interest in the Confidence Man.<sup>99</sup> The *Herald* emphasized the Confidence Man’s ability to engage “perfect strangers” and make them believe that he was “some old acquaintance, not at the moment to be recollected.”<sup>100</sup> This talent epitomized the fear of strangers.

## 2. Confidence in Booms, Busts, and Volatile Times

The era of the Confidence Man was challenging for most people in the United States. During the first half of the nineteenth century, the U.S. economy underwent twelve recessions, including two depressions.<sup>101</sup> Such negative economic conditions considerably impact the lives of individuals,<sup>102</sup> though the effects are sometimes underappreciated.<sup>103</sup> Stripped of wealth, assets, and economic opportunities, many contemporaries of the Confidence Man had to find new ways to make ends meet. One consequence of the needed adjustments was social mobility that turned many into “strangers” in new environments. Another consequence of the frequent booms, busts, and volatile economic conditions was the degradation of decision-making capacity resulting from exposure to new

97. *Id.*

98. *Id.* at 10.

99. See Samuels, *supra* note 16, at 153 (“The widespread fear of impostors was . . . a symptom of deeper anxieties, provoked by America’s unrivalled social mobility.”).

100. *Arrest*, *supra* note 10.

101. The National Bureau of Economic Research’s (NBER) chronology of business cycles provides the following recessions: (1) 1802-1804, (2) 1807-1810 (depression), (3) 1812 (two quarters), (4) 1815-1821 (depression), (5) 1822-1823, (6) 1825-1826, (7) 1828-1829, (8) 1833-1834, (9) 1836-1838, (10) 1839-1843, (11) 1845-1846, and (12) 1847-1848. The available data for this period, including the economic indicators used to establish this chronology, is limited. Several studies suggest that the periods of decline in trade and economic activity were shorter. However, this debate is mostly about the details. See, e.g., Joseph H. Davis, *An Improved Annual Chronology of U.S. Business Cycles since the 1790s*, 66 J. ECON. HIST. 103, 106 (2006); see also OTTO C. LIGHTNER, *THE HISTORY OF BUSINESS DEPRESSIONS* (1922) (describing six “business depressions” and recognizing three additional “minor depressions.”).

102. See, e.g., Anne Case et al., *The Lasting Impact of Childhood Health and Circumstance*, 24 J. HEALTH ECON. 365 (2005); Philip Oreopoulos, *The Short- and Long-Term Career Effects of Graduating in a Recession*, 4 AM. ECON. J.: APPLIED ECON. 1 (2012) (finding that the cost of recessions for new graduates is substantial and unequal across graduates); Gerard J. van den Berg et al., *Economic Conditions Early in Life and Individual Mortality*, 96 AM. ECON. REV. 290 (2006) (finding a significant negative effect of recessions in early life on mortality rates).

103. A series of influential papers by Christopher Ruhm documents that recessions are “good for your health.” See Christopher J. Ruhm, *Are Recessions Good for Your Health?*, 115 Q. J. ECON. 617 (2000); Christopher J. Ruhm, *Good Times Make You Sick*, 22 J. HEALTH ECON. 637 (2003); Christopher J. Ruhm, *Healthy Living in Hard Times*, 24 J. HEALTH ECON. 341 (2005). The findings of these papers and their progeny are frequently interpreted by scholars as resulting from the better opportunities to exercise and maintain a healthy diet that a person has while unemployed.

circumstances and uncertainty.<sup>104</sup> The situations of strangers in environments where people tend to make mistakes created scamming opportunities.

The adverse effects of economic conditions on the quality of decision-making capacity partially explains why swindlers, like the Thompson, often succeed in manipulating relatively sensible individuals.

### 3. *The Conceptualization of Crime*

The *Herald* used the exploits of an actual swindler to conceptualize “confidence men.” Such conceptualization was not entirely innovative. Sketches were very popular during the nineteenth century.<sup>105</sup> During the 1840s (and probably also before), a few sketches of swindlers had impact on popular culture. Jeremy Diddler, Peter Funk, and David Hines are the most known predecessors of Thompson, though not the only ones.

“Jeremy Diddler,” the protagonist of a popular 1803 farce,<sup>106</sup> became a term used for swindlers. It inspired Edgar Allan Poe’s 1843 essay, *Diddling: Considered as One of the Exact Sciences* (“*Diddling*”), which popularized the character and its use as a metaphor.<sup>107</sup> Indeed, the *Literary World* described the Confidence Man as a “new species of the Jeremy Diddler.”<sup>108</sup> Poe argued that Diddler “gave name to the most important of the Exact Sciences.”<sup>109</sup> However, it was Poe’s essay that turned Diddler and diddling into common currencies used in everyday language.<sup>110</sup> As explained below, the *Herald*’s editorial clearly builds on Poe’s *Diddling*.

“Peter Funk” was a fictional character whose name meant a mock auctioneer—a person who inflates auction prices.<sup>111</sup> The scheme was very common during the nineteenth century.<sup>112</sup> Asa Greene is credited for creating the character for his 1834 satire, *The Perils of Pearl Street*.<sup>113</sup> However, a 1848 sketch of Walt Whitman, *Peter Funk, Esq.*, appears to

104. Nicholas Bloom, *Fluctuations in Uncertainty*, 28 J. ECON. PERSP. 153 (2014); (*Nearly Nothing to Fear but Fear Itself*, ECONOMIST, Jan. 29, 2009, at 84. See generally DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011) (discussing decision-making under uncertainty).

105. For sketches during the nineteenth century, see DANA BRAND, *THE SPECTATOR AND THE CITY IN NINETEENTH-CENTURY AMERICAN LITERATURE* (1991); KRISTIE HAMILTON, *AMERICA’S SKETCHBOOK: THE CULTURAL LIFE OF A NINETEENTH-CENTURY LITERARY GENRE* (1998); and Thomas H. Pauly, *The Literary Sketch in Nineteenth-Century America*, 17 TEX. STUD. LIT & LANGUAGE 489 (1975).

106. JAMES KENNEY, *RAISING THE WIND* (1803).

107. See POE, *supra* note 2; Burton R. Pollin, *Poe’s “Diddling”: The Source of the Title and Tale*, 2 S. LITERARY J. 106 (1969); *infra* Part II.E.

108. *What Is Talked About*, *supra* note 69, and accompanying text.

109. POE, *supra* note 2, at 267.

110. Pollin, *supra* note 107.

111. Louise Pound, “*Peter Funk*,” *The Pedigree of Westernism*, 4 AM. SPEECH 183 (1929).

112. See, e.g., Harry Branco, *Peter Funk’s Revenge*, 27 KNICKERBOCKER 58 (1846); *Mock Auctions and Inventions*, SCI. AM., Aug. 16, 1951, at 381 (explaining the nature of “Peter Funk shops”); *Peter Funk’s Little Game*, CHI. TRIB., Jan. 14, 1872, at 4; see also MARTIN, *supra* note 93, at 540-43.

113. ASA GREENE, *THE PERILS OF PEARL STREET* 50-54 (1834) (describing Peter Funk).

suggest that Greene used an already existing term whose sources were unknown.<sup>114</sup> Whitman, a contemporary of Greene, opens the sketch writing that “Funk, like all other illustrious personages who have become so well known, . . . was born and brought up no one knows where.”<sup>115</sup> He concludes by expressing skepticism of the validity of the speculations regarding his origins.<sup>116</sup> Peter Funks dominated the auction scene in New York City during the era of the Confidence Man.<sup>117</sup>

Finally, Dr. David Theodosius Hines, also known as Colonel Dorset Hamilton or simply the “notorious Dr. Hines,” was a colorful swindler, who operated between 1831 and 1864, primarily in the South.<sup>118</sup> Hines was born (apparently in 1810) to a “highly respectable family” in South Carolina that was “most popular and prosperous” in his childhood but lost its fortune.<sup>119</sup> He used numerous aliases and was known as a “bigamist, ‘nigger thief,’ swindler, and a confidence man.”<sup>120</sup> Hines loved publicity, often provided information to newspaper editors, and occasionally also gave public lectures. He “pursued his villainous career with more persistency than success”<sup>121</sup> and enjoyed a certain degree of stardom even among law enforcement officers. His “rascally propensities in the way of swindling unwary tradesmen and abusing the confidence of unsuspecting females” were widely known and fascinated the public.<sup>122</sup> In August 1840, he was arrested in Louisiana, convicted for slave stealing, and sentenced to fourteen years in prison.<sup>123</sup> In July 1852, Louisiana Governor Joseph Marshall Walker pardoned him.<sup>124</sup> Shortly before his 1940 arrest and immediately after his release, Hines published autobiographies written as letters from prison to the *Herald* publisher, James Gordon Bennett.<sup>125</sup> By 1849, when the Confidence Man was arrested, the 1840 autobiography

114. Walt Whitman, *Peter Funk, Esq.*, NEW ORLEANS DAILY CRESCENT, March 13, 1848, at 1.

115. *Id.*

116. *Id.*

117. See, e.g., *New York in Slices: The Mock Auctions*, N.Y. TRIB., Aug. 10, 1848, at 1 (“Let all strangers remember, once and for all, that there is establishment in the City where real watches and valuable jewelry are sold at auction.”). The article was part of a series of articles about schemes in the city, later published in GEORGE G. FOSTER, *NEW YORK IN SLICES: BY AN EXPERIENCED CARVER* 33 (1849).

118. See *A Proclamation*, CHARLESTON CITY GAZETTE, May 19, 1831, at 1 (declaring a \$300 reward for the apprehension and delivery of Hines); *David T. Hines*, CHARLESTON COURIER, Nov. 18, 1939, at 2 (reporting about the apprehension of Hines); *Incidents in the Life of David Hines*, CAMDEN J., June 20, 1840, at 2 (providing the known biography of Hines); *Doctor David Theodosius Hines*, NEW ORLEANS DAILY PICAYUNE, Sept. 1, 1840, at 2;

119. DAVID T. HINES, *THE LIFE, ADVENTURES & OPINIONS OF DAVID THEO. HINES (1840)* 21-22 [hereinafter *LIFE, ADVENTURES & OPINIONS*].

120. *Dr. Hines, Alias Col. Hamilton, Turned Up*, LOUISVILLE DAILY COURIER, June 13, 1859, at 1.

121. *Dr. Hines, Alias Col. Hamilton, Turned Up*, *supra* note 120.

122. *Dr. Hines “Turned Up” Again*, BATON ROUGE DAILY ADVOCATE, June 14, 1859, at 2.

123. *Dr. Hines*, PHIL. INQ., June. 22, 1840, at 2 (summarizing the reports about Hines arrest); *Doctor David Theodosius Hines*, *supra* note 118 (referring to the sentencing).

124. *The Celebrated Dr. Hines*, BATON-ROUGE GAZETTE, Feb. 21, 1852, at 2.

125. *LIFE, ADVENTURES & OPINIONS*, *supra* note 119; DAVID T. HINES, *LIFE AND ADVENTURES OF DR. DAVID T. HINES (1852)* [hereinafter *LIFE AND ADVENTURES*].

was well known, especially to people close to Bennett. The book recounts the rise to greatness of a swindler. Being famous, Hines writes: "I suppose my life, or a part of it, is published by this time. I know it will sell like mint juleps."<sup>126</sup> The publication of his letters in the *Herald* would "honor [Bennett's] disinterestedness."<sup>127</sup> Hines even brags that "even the wide circulation of the *Herald* will not place my narrative within the reach of every city and hamlet which witnessed my performance."<sup>128</sup> He claims that "[t]he spirit of prophecy is upon" him and that, taking into account the direction of society, the value of his skills is on the rise: "If there ever was an era especially favorable to the exercise of my peculiar talents, it is this."<sup>129</sup> His prophecy depicts a decaying society. He "take[s] it for granted[] that, before many days, the laws will give [a person] a carte blanche to blow on whom [he] please[s], . . . and afford [him] an equal privilege of showing how excellently [he] can write . . . the signatures of [his] neighbors."<sup>130</sup> The book reads like a clever satire and some have questioned whether Hines himself wrote it. It is undisputed though that the book established Hines's image as a notorious swindler. It was an effective platform for using the story of a swindler to deliver ideas and opinions to the public.

Hines's career after 1852 is somewhat related to our analysis. Upon release from prison, Hines told journalists that "in his youthful years he had erred,"<sup>131</sup> but he returned to swindling quickly.<sup>132</sup> His 1852 autobiography rationalizes his choices and conduct. It even argues that Hines had a passionate affair with Ellen Jewett,<sup>133</sup> the New York prostitute whose murder and murder trial shook the nation in 1836.<sup>134</sup> Hines dismisses accusations against the alleged murderer, Richard Robertson, writing that "Robertson was tried for the deed, but my mind pointed to a person in New York, more popular in life than Robertson."<sup>135</sup> Bennett played a key role in the coverage of the murder trial. A few months after his release from prison, in November 1852, Hines was convicted of stealing mail and was sentenced to six months imprisonment with hard labor and required to pay a \$100 fine and prosecution costs. Unable to pay the fine and costs, he remained in prison for another two

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126. *Id.* at 193.

127. *Id.* at 193-94.

128. *Id.* at 194.

129. LIFE, ADVENTURES & OPINIONS, *supra* note 125, at 19.

130. *Id.* at 20.

131. *The Celebrated Dr. Hines*, *supra* note 124.

132. *Mr. David T. Hines and His Old Pranks*, RICHMOND ENQUIRER, Apr. 7, 1852, at 6; *Dr. Hines*, WOODVILLE REPUBLICAN, May 27, 1852, at 1.

133. LIFE AND ADVENTURES, *supra* note 125, at 47-50.

134. See SKETCH OF THE LIFE OF MISS ELLEN JEWETT (1836); PATRICIA CLINE COHEN, THE MURDER OF HELEN JEWETT (2006). Cohen does not mention Hines in her otherwise excellent book.

135. LIFE AND ADVENTURES, *supra* note 125, at 50.

months until President Franklin Pierce pardoned him.<sup>136</sup> He continued committing petty crimes, going in and out of prison until his death in 1864.

### C. Dr. James Alexander Houston

#### 1. *The Biography of a Forgotten Genius*

In his article, *The Original Confidence Man*, Johannes Bergmann interpreted the *Knickerbocker's* reference to "Dr. Houston." He wrote: "George Houston was a close associate of James Gordon Bennett from the founding of the *Herald* until Houston's death in 1849, some time after the satire was published."<sup>137</sup> This is the most elaborate discussion of the person behind the Confidence Man that we could locate. It is rather partial and imprecise. We now correct the record.

James Alexander Houston was born in Ireland in 1819, immigrated to America in 1839, and died in 1849. (See Figure 3.) He gained the reputation of a "celebrity" reporter for his work as the first Senate Reporter.<sup>138</sup> When Houston died on September 17, 1849, he was known as "one of the principal contributors of the columns of the *New York Herald*."<sup>139</sup> The *Herald's* obituary stated that "[f]or talent and ability, either as reporter or editor, [Dr. Houston] had few equals and no superior."

<sup>140</sup>

Houston died unexpectedly shortly before Tompson's trial. The direct cause of death was "hæmorrhagia from the lungs,"<sup>141</sup> a term that was used to describe any form of bleeding into the lungs that could arise from myriad causes. He was not a healthy person and apparently suffered from depression. Physicians used terms like "nervous," "excitable," "irritable," and "depression" to describe his mental health.<sup>142</sup>

Tompson was a close friend of the *Herald's* publisher, James Gordon Bennett, whom he met shortly after his arrival in America.<sup>143</sup> Houston's editorials and articles for the *Herald* were unsigned, but he also served as the editor of the *New York Lancet*, which he founded with Bennett, served as a congressional reporter for the *Washington Union*, wrote satirical columns and commentaries for the abolitionist newspaper the *National Era*, published and edited the *United States Reporter*, and occasionally

136. *U.S. Marshal—Release of "Dr." Hines*, CHARLESTON COURIER, July 15, 1853, at 2.

137. Bergmann, *supra* note 15, at 566.

138. *Dr. Houston's Senate Reports*, SUN (BALTIMORE), Dec. 17, 1847, at 2.

139. *Death of Dr. James A. Houston*, 41 BOSTON MED. & SURG. J. 162 (1849).

140. *Death of Dr. Houston*, N.Y. HERALD, Sept. 18, 1849, at 2.

141. *Hæmorrhagia from the Lungs*, *supra* note 146.

142. *Death of Dr. Houston*, *supra* note 140; *Hæmorrhagia from the Lungs*, *Id.* at 315-16.

143. See, e.g., James Smith the Younger, *New York Letter*, NEW ERA, June 17, 1847, at 1 (writing about Bennett).

wrote letters to the editors of leading newspapers and periodicals.<sup>144</sup> Houston was a prolific and passionate intellectual and was admired by his peers, as well as in literary and medical circles.

Upon his death, the New York Press Club adopted a special resolution praising Houston for being a leader in the profession.<sup>145</sup> The *Boston Medical and Surgical Journal*, the predecessor of the *New England Journal of Medicine*, published a lengthy obituary and a detailed report of his post-mortem examination.<sup>146</sup> The *Knickerbocker's* editor, Lewis Gaylord Clark, wrote in his *Editor's Table*:

We deeply regret to record the death of Dr. Houston, the accomplished congressional reporter, and late one of the assistant editors of the '*Herald*' daily journal. It seems but yesterday that he was sitting by our side in the sanctum. He was a gentleman of education and refinement, and of rare talents . . . [H]is reputation is without stain. He will be widely lamented.<sup>147</sup>

The *National Era* wrote that Dr. Houston "was well known throughout the United States as an accomplished reporter, and his contributions to the press indicated a mind of rich endowments, capable of signal achievements in literature, had his time been less occupied with his duties as a professional reporter."<sup>148</sup> Many other daily newspapers published short obituaries describing Houston as "the famous reporter and one of the principal editors of the *Herald*."<sup>149</sup>

Houston was thus an exceptionally gifted individual, a celebrated reporter and a senior editor at the *Herald* when the articles about the Confidence Man were published. His columns for the *National Era*, published under the pseudonym "John Smith the Younger," illustrate some of his talents. Houston wrote for the *National Era* satirical columns, typically organized in series, as well as commentaries. His favorite themes were politics, sketches of political characters, social decay, morality, journalism, and literature. His most popular series of sketches, *Portraits for the People*, was "very extensively read, and much admired."<sup>150</sup> These sketches conceptualized political characters through satirical stories. For example, he described the "extraordinary operations" of the "Man who Pulls the Ropes," who "makes his influence felt," "rewards disloyalty with gifts, clothing falsehood with honor and dignity; and, . . . comes upon the

144. See, e.g., James A. Houston, *Dr. Castle's Case of Epilepsy*, 37 BOSTON MED. & SURG. J. 279 (1847).

145. *James Alexander Houston*, *supra* note 139, at 149; *Monument to the Memory of the Late Dr. James A. Houston*, BOSTON HERALD, Oct. 9, 1849, at 4 (providing the language of the resolution).

146. *Death of Dr. James A. Houston*, *supra* note 139; A. C. Castle, *Hæmorrhagia from the Lungs: Treatment, Death, and Post-Mortem Examination in the Case of the Late Dr. James E. Houston*, 41 BOSTON MED. & SURG. J. 314 (1849).

147. *Editor's Table*, 34 KNICKERBOCKER 355, 364 (1849).

148. *Dr. Houston*, NATIONAL ERA, Oct., 4, 1849, at 2.

149. See, e.g., *City Intelligence*, BROOKLYN DAILY EAGLE, Sept. 18, 1848, at 1.

150. *Dr. Houston*, *supra* note 148.

poor official like an armed man.”<sup>151</sup> The conceptualization of the Confidence Man in its style and language is remarkably similar to Houston’s sketches.

Some of the images, metaphors, and ideas that Houston used for his criticism of social decay also appeared in the *Herald’s* editorial about the Confidence Man.<sup>152</sup> He portrayed bankers as “operators,” described the “palaces” they lived in with their wives and daughters, and criticized their morality.<sup>153</sup> His fictional banker, Christian Shylock, was a confidence man and offered “[t]he security of the word of an honest man” when he took a loan, but was unwilling to accept such a security when he was asked to extend a loan.<sup>154</sup> Reading Houston’s columns in the *National Era* leaves little doubt that he also wrote the *Herald’s* editorial. Considering Houston’s broad recognition, the *Knickerbocker’s* editor probably knew, not merely “suspected,” that the author of “*The Confidence-Man of Society*” was Dr. Houston.<sup>155</sup>

Houston also frequently wrote book reviews for the *National Era*. In May 1847, the *New Era* published a lengthy and positive review of *Omoo*,<sup>156</sup> Herman Melville’s second book. Additionally, Houston in his column, *Literary Gossip*, wrote that the book had “met with a very rapid success.”<sup>157</sup> He praised the book, although commented that “it is not equal to *Typee*,” Melville’s first book, and added that, in his opinion, Melville stood “in the very first rank of American writers . . . [and] writes powerfully and well.”<sup>158</sup> Much of the research about the “original confidence man” focused on the inspiration of Melville’s novel *The Confidence-Man: His Masquerade*.<sup>159</sup> These studies find great similarity between the story of the Confidence Man and a character in Melville’s book. They also show that Melville was in New York City “during the entire episode of the ‘Confidence Man’ affair”<sup>160</sup> and argue that he must have been aware of Thompson’s story. All these conclusions are well established. Houston’s book review, however, received no attention.<sup>161</sup> It is quite clear that, during the summer of 1849 while Melville was in New York, people in literary circles paid attention to the coverage of the

151. James Smith the Younger, *The “Man Who Pulls the Ropes,”* NEW ERA, Feb. 25, 1847, at 1.

152. See *supra* Section II.A.2.

153. See, e.g., James Smith the Younger, *The Financial Circles*, NEW ERA, Sept. 20, 1847, at 3; James Smith the Younger, *Rambling Epistles From New York*, NATIONAL ERA, Oct. 12, 1848, at 1.

154. *The Financial Circles*, *id.*

155. See *supra* note 48 and accompanying text. For Clark and his influence, see T. B. Thorpe, *Lewis Gaylord Clark*, HARPER’S NEW MONTHLY MAG., Mar. 1874, at 587.

156. *Adventures in the South Sea*, NEW ERA, May 27, 1849, at 2.

157. John Smith the Younger, *Literary Gossip*, NEW ERA, May 27, 1849, at 3.

158. John Smith the Younger, *Literary Gossip*, NEW ERA, May 27, 1849, at 3.

159. See, e.g., Bergmann, *supra* note 15; Michael S. Reynolds, *The Prototype for Melville’s Confidence-Man*, 86 PMLA 1009 (1971); Smith, *supra* note 15.

160. Reynolds, *supra* note 156, at 1010.

161. See, e.g., ROBERT K. WALLACE, DOUGLASS AND MELVILLE: ANCHORED TOGETHER IN NEIGHBORLY STYLE 69 (2005) (noting that Houston’s review was overlooked by Melville scholars).

Confidence Man. It is also quite clear that the story of the Confidence Man was rather known for another decade or so. Melville was undoubtedly aware of Houston's book review. We submit that, like other people in literary circles, Melville knew or at least suspected that Houston was the author of "*The Confidence-Man of Society*."

We could not locate conclusive evidence showing that Houston wrote the *Herald* articles or that one person wrote all the articles. Our inquiry, however, leads to the conclusion that Houston wrote the editorial and probably wrote the other articles. Specifically, the conceptualization of the Confidence Man in the arrest report appears like one of Houston's sketches.

## 2. Potentially Relevant Anecdotes

Houston was an extraordinary person in many ways. We provide three additional anecdotes related to his life and personality to demonstrate his capacity and possible thinking about scamming.

*An Alleged Impostor.* In 1894, the *Phonographic Magazine* published a short biography of Houston stating that Houston was "a student of medicine at Glasgow University, Scotland, and . . . graduated therefrom with the degree of Doctor of Medicine."<sup>162</sup> Yet, though he used the title, Houston was not a doctor. The members of the medical establishment in New York accused Houston of being a "quack and impostor,"<sup>163</sup> namely, some kind of a "confidence man." In July 1842, the Recording Secretary of the Medical Society of New York certified Houston as a practicing physician, relying on documents that Houston showed him. Members of the Society publicly attacked the "pretender" and argued that his credentials were nothing more than "certain tickets of attendance on Lectures, delivered in the University of Glasgow."<sup>164</sup> Houston attacked the establishment in the press taking advantage of his access to the *Herald*, the most influential New York newspaper. Ultimately, however, he had to acknowledge that he did not hold any diploma.<sup>165</sup> Members of the Medical Society pointed out that Houston kept using the "honorable title" even though he was compelled to admit that he merely held a certificate obtained by showing dubious credentials.

Although many physicians considered Houston an impostor, he was well regarded by others.<sup>166</sup> In 1842, when he and Bennett founded the *New York Lancet*, the *Boston Medical and Surgical Journal*, the first and most established medical journal in the United States, reported favorably about

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162. *James Alexander Houston*, *supra* note 139, at 147.

163. *The New York Lancet and Its Editor*, N.Y. DAILY TRIB., Sept. 12, 1842, at 1. The *Tribune* was the *Herald's* primary rival and its report emphasizes, possibly with some exaggeration, Houston's flaws.

164. *Id.*

165. *Id.*

166. *See, e.g., Death of Dr. James A. Houston*, *supra* note 139.

its new competitor and wrote that Houston “certainly gives abundant evidence of an active mind, and we doubt not that time will show him to be a bright star in the western medical hemisphere.”<sup>167</sup>

*A Recognized Leading Reporter.* Houston learned stenography from his father.<sup>168</sup> After joining the *Herald*, he conceived the idea of using his skill to report Congressional debates.<sup>169</sup> In 1846, with the encouragement of Bennett, he moved to Washington, where he started reporting for the *Washington Union*. He quickly proved himself and was regarded as “the best stenographic reporter in the United States[,] one of the best in the world.”<sup>170</sup> In February 1847, Houston offended several Congressmen by reporting that they regularly used the exclamation “bah!” in debates.<sup>171</sup> He was accused of publishing a “false and scandalous report of the proceedings of this House” and a few Representatives called to bar him from reporting such proceedings.<sup>172</sup> Houston published an apology, noting that in “using the exclamation ‘Bah!’ [he] sought to express, with much accuracy as possible, the ‘expressions of dissatisfactions’ which . . . were very frequently heard in the House.”<sup>173</sup> He “humbly” stated though that “sometimes [it is] difficult to catch the precise form of the exclamations occasionally heard in the House.”<sup>174</sup> His humor and professionalism persuaded the majority in the House to vote against the allegations against him. A few weeks later, Houston was appointed to serve as the official reporter to the U.S. Senate and, for this purpose, he founded the *United States Reporter*.<sup>175</sup> In this position, Houston “stood at the head of his profession.”<sup>176</sup> The reporting from the Senate turned out to be too demanding for one individual. In 1848, Houston returned to New York.

*Advertising Quack.* Several quack medicine makers used Houston’s name to promote their products. It is difficult to believe that Dr. Houston was willing to associate his name with these confidence men. Yet, considering his contribution to the understanding of con men, the use of his name by con men to promote their game is somewhat interesting. These three anecdotes do not link Houston directly to the story of the Confidence Man. However, they reflect on his credibility and possibly his thinking about scamming.

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167. *New York Lancet*, 25 BOSTON MED. & SURG. 418 (1842).

168. *James Alexander Houston*, *supra* note 139, at 151.

169. *Dr. Houston*, *supra* note 148.

170. *James Alexander Houston*, *supra* note 139, at 150-51.

171. James A. Houston, *The Union Congressional Reports*, WASH. UNION, Feb. 8, 1847, at 2; *Congressional*, WASH. UNION, Feb. 10, 1847, at 1.

172. CONG. GLOBE, 29th Cong., 2d Session 359-60 (1847).

173. Houston, *supra* note 168.

174. *Id.*

175. JAMES L. HARRISON, 100 GPO YEARS, 1861-1961 13 (2010).

176. *Death of Dr. James A. Houston*, *supra* note 139.

#### *D. Thompson, the Original Confidence Man*

Little is known about Samuel Thompson, the original Confidence Man. The literature typically depicts him as a skillful swindler. Thompson, however, was an unsuccessful burglar and a small-time swindler.

Born in 1821, supposedly to a family of “the highest respectability,”<sup>177</sup> Samuel Thompson was “a good-looking man, of affable and gentlemanly bearing . . . who would nowhere be taken for a rogue by the common observer.”<sup>178</sup> He used many aliases—William Thompson, Samuel Thompson, James Thompson, Samuel Thomas, Samuel Powel, Samuel Williams, Williams Evans, Samuel Willis, William Davis, and William Brown.<sup>179</sup> In the literature he mostly appears as “William Thompson,” the name used in the *Herald’s* arrest report.<sup>180</sup> He was tried and imprisoned as “Samuel Thompson,”<sup>181</sup> but the authorities could never verify his birth name.<sup>182</sup> Thompson was “five feet seven inches high, well made, with dark hair, gray eyes, large mouth, good teeth, broad face, strong square chin, and dark complexion.”<sup>183</sup> The *National Police Gazette* reported that, to his neighbors in New York City, Thompson was known as “a highly respectable man.”<sup>184</sup> He was married, lived with his wife and allegedly “was a constant visitor at church, own[ed] a house in the upper part of the city, pa[id] taxes, [and] . . . performed jury duty.”<sup>185</sup> This report is not entirely consistent with the record. Thompson clearly had a misleading physical appearance but he was not established in New York as a respectable person. He was indeed married and lived with his wife, but he was mostly known as an unsuccessful burglar. He did not live in New York City between his arrest in 1841 and late 1848, operated and lived in downtown New York, and interacted with small-time crooks. The press and the authorities could never confirm his real name. It is hard to believe that such a person, or his family, were particularly “respectable” in New York.

177. *Death of the Original Confidence Man*, N.Y. TRIB., Oct. 30, 1856, at 7; see also *The “Confidence” Man*, NAT’L POLICE GAZETTE, July 28, 1849, at 2 (referring to Thompson’s age); *Death of the Original Confidence Man*, FRANK LESLIE’S ILLUSTRATED NEWSPAPER, Nov. 15, 1856, at 368 (noting that the Confidence Man was “most respectably connected”); *The Original Confidence Man—Subject to the Blues*, N.Y. HERALD, Sept. 11, 1856, at 8 (referring to Thompson’s age).

178. Nelson Sizer, *L. N. Folwer’s Visit to the Tombs*, 11 AM. PHRENOLOGICAL J. & MISCELLANY 316, 317 (1849).

179. See, e.g., *City News*, SPECTATOR, Aug. 8, 1849, at 1; *The Confidence Man and His Crimes*, supra note 63; *The “Confidence” Man*, supra note 177; *The Original Confidence Man in Town*, ALBANY EVE. J., Apr. 28, 1855, at 2.

180. *Arrest of the Confidence Man*, N.Y. HERALD, July 8, 1849, at 2.

181. See, e.g., *Smith v. People*, 1 Parker Cr. Cas. 317 (N.Y. 1851) (discussing Thompson’s indictment, sentencing, and bail); *Corruption of Authorities*, NAT’L POLICE GAZETTE, Aug. 2, 1849, at 2. *Court of General Sessions*, N.Y. HERALD, Oct. 9, 1849, at 1; *Court of General Sessions*, N.Y. HERALD, Oct. 10, 1849.

182. *More About the Confidence Man*, ALBANY EVE. J., Mar. 19, 1852, at 2.

183. *The “Confidence” Man*, supra note 177.

184. *The Confidence Man and His Crimes*, supra note 63.

185. *Id.*

In September 1849, a month before Thompson's trial, Lorenzo Niles Fowler, a leading phrenologist, examined Thompson in prison.<sup>186</sup> Nelson Sizer, one of Fowler's associates, wrote a report about this examination that the *American Phrenological Journal & Miscellany* published. Sizer's report describes Thompson as the "celebrated Confidence Man."<sup>187</sup> Thompson's phrenological evaluation was as follows:

He is a very independent man—relies on himself—is bold and courageous—not timid, but venturesome. He is a lady's [sic] man, and can insinuate himself into their good graces, or gain the confidence of any person, by his urbanity of manners and oily tongue. He has a restless love of variety and novelty, and a traveling, wandering disposition. He is not cruel or revengeful. He has much caution, tact, management, and power to conceal; can suit himself to circumstances; is capable to plan and carry out schemes; is seldom at a loss for means to accomplish ends; is artful, plausible, and insinuating. He has a strong desire to make money, and will plan and speculate to get it. He knows who to take, and how to take them. He reads men intuitively, judges of character very closely, and is able to use them to his own advantage. He has fine conversational power—can talk with remarkable ease and pertinency. Conscience does not trouble him much—can justify himself in his motives and actions. Great tact and self-confidence are strong features of his mind, and a tendency to licentiousness a besetting sin.<sup>188</sup>

Phrenology, once considered a science, assumed that a person's personality traits could be read from bumps and fissures in the skull. Fowler's report though not scientific is consistent with other reports about Thompson's confident conduct. Thompson was released from prison in July 1852 and returned to the confidence game and property crimes.<sup>189</sup> His last arrest was in April 1855 in Albany.<sup>190</sup> In court, "he appeared very much affected and shed . . . tears of sorrow. He protested against having intended to commit any crime."<sup>191</sup> "Respectable physicians" testified that Thompson was sick and partially insane, suffering from "depression of the spirits, and that he had on several occasions attempted to commit suicide."<sup>192</sup> He was convicted and sentenced for two years in state prison.<sup>193</sup> A few weeks after his conviction, October 1856, Thompson died

186. See Sizer, *supra* note 178, at 317.

187. *Id.* at 316.

188. *Id.* at 317.

189. *The Confidence Man*, N.Y. TIMES, July 9, 1852, at 3 (reporting about the release of the Confidence Man).

190. *The Original Confidence Man in Town*, *supra* note 179; *The Original Confidence Man in Quod*, N.Y. EVE. POST, Apr. 30, 1855, at 1.

191. *The Original Confidence Man in Town*, *id.*

192. *The Original Confidence Man—Subject to the Blues*, *supra* note 177.

193. *Id.*

in prison.<sup>194</sup>

### E. Poe's Scientific Scammer

Literary circles identified the Confidence Man as a “new species of the Jeremy Diddler,”<sup>195</sup> the protagonist of James Kenney’s popular 1803 farce, *Raising the Wind*, that Edgar Allan Poe developed in his essay, *Diddling*.<sup>196</sup> Thompson’s publicized traits, such as grin, audacity, nonchalance, and originality, were characteristics that Poe described in *Diddling*.

Poe explored the traits of Jeremy Diddler through the descriptions of common scams. The popularity of the character of Jeremy Diddler contributed to the perception of scammers and confidence men in the nineteenth century.

*Diddling* opens with a reference to “two Jeremys”: Jeremy Bentham who “wrote a Jeremiad about usury . . . and was a great man in a small way” and Jeremy Diddle who was “a *great* man . . . in the very greatest of ways.”<sup>197</sup> Bentham’s controversial book, *Defence of Usury*, was a powerful attack on usury laws published in four editions between 1787 and 1818.<sup>198</sup> The concept of usury, in Bentham’s thinking, was an application of his “principle of utility.”<sup>199</sup> For Poe, usury symbolized financial exploitation though he tried to distinguish between diddlers and bankers. Poe argued that diddlers operate only on a small scale: “Should [the diddler] ever be tempted into magnificent speculation, he then, at once, loses his distinctive features, and becomes what we term ‘financier.’ This latter word conveys the diddling idea in every respect except that of magnitude. A diddler may thus be regarded as a banker.”<sup>200</sup> Poe, therefore, believed that the scale merely defines the species of the scammer.

Poe’s biography is relevant to the understanding of his portrayal of scamming. Poe lived in the shadow of debts, often fleeing collectors.<sup>201</sup> His professional skills and choices mostly worsened his financial problems. Poe dedicated his life to literary writing and wrote nonfiction works, such as *Diddling*, only to supplement his income from poetry. He considered these works “literary commodities.”<sup>202</sup> *Diddling* was written

194. *Death of the Original Confidence Man*, N.Y. TRIB., Oct. 30, 1856, at 7.

195. *Supra* notes 69-72 and accompanying text.

196. Poe, *Raising the Wind*, *supra* note 2; Burton R. Pollin, *Poe's "Diddling": The Source of the Title and Tale*, 2 S. LITERARY J. 106 (1969).

197. POE, *supra* note 2, at 267.

198. JEREMY BENTHAM, *DEFENCE OF USURY* (4th ed. 1818).

199. JEREMY BENTHAM, *INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 1-2 (1789); JEREMY BENTHAM, *THE RATIONALE OF REWARD* (1825).

200. POE, *supra* note 2, at 268.

201. ARTHUR HOBSON QUINN, *EDGAR ALLAN POE: A CRITICAL BIOGRAPHY*, 97-117 (1997); Terence Whalen, *Edgar Allan Poe and the Horrid Laws of Political Economy*, 44 AM. Q. 381 (1992).

202. Whalen, *supra* note 201, at 384; Terence Whalen, *Poe's "Diddling" and the Depression: Notes on the Sources of Swindling*, 23 STUD. AM. FICTION 197 (1995).

for fee as an “urban guide” of the kind that was rather popular in the 1840s.<sup>203</sup> Poe was quite influenced by the Panic of 1837, which was one of the worst financial crises in the history of the United States and followed the implosion of a speculative lending bubble.<sup>204</sup> In December 1842, shortly before publishing *Diddling*, Poe filed for bankruptcy. In his era, lenders and creditors were perceived as scammers.

Perhaps because of the comparison to lending, perhaps because the writing of *Diddling* was a financial compromise in Poe’s mind, or perhaps for both reasons (or others), Poe identified only calculated scammers who utilize information and analysis for their schemes. Poe did not consider other types of scammers. *Diddling*, according to Poe, is a “compound, of which the ingredients are minuteness, interest, perseverance, ingenuity, audacity, *nonchalance*, originality, impertinence, and *grin*.”<sup>205</sup>

(a) *Minuteness*. The “diddler is minute. His operations are upon a small scale [as already discussed].”<sup>206</sup>

(b) *Interest*. The “diddler is guided by self-interest.”<sup>207</sup>

(c) *Perseverance*. The “diddler perseveres. He is not readily discouraged. Should even the banks break, he cares nothing about it.”<sup>208</sup>

(d) *Ingenuity*. The “diddler is ingenious. He has constructiveness large. He understands plot.”<sup>209</sup>

(e) *Audacity*. The “diddler is audacious. He is a bold man.”<sup>210</sup>

(f) *Nonchalance*. The “diddler is nonchalant. He is not at all nervous. He never had any nerves. He is never seduced into a flurry. . . . He is cool—cool as a cucumber.”<sup>211</sup>

(g) *Originality*. The “diddler is original—conscientiously so. His thoughts are his own. . . . A stale trick is his aversion. He would return a purse . . . upon discovering that he had obtained it by an unoriginal diddle.”<sup>212</sup>

(h) *Impertinence*. The “diddler is impertinent. He swaggers . . . . He sneers in your face . . . . He eats your dinner, he drinks your wine, he borrows your money, he pulls your nose, he kicks your poodle, and he kisses your wife.”<sup>213</sup>

(i) *Grin*. The “*true* diddler winds up all with a grin. But this nobody sees but himself. He grins when his daily work is done. . . . This is no

203. See *supra* notes 84-98 and accompanying text.

204. See REGINALD C. MCGRANE, *THE PANIC OF 1837* (1924); Samuel Rezneck, *The Social History of an American Depression, 1837-1843*, 40 AM. HIST. REV. 662 (1935).

205. POE, *supra* note 2, at 268.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 268-69.

212. *Id.* at 269.

213. *Id.*

hypothesis. It is a matter of course. . . . [A] diddle would be *no* diddle without a grin.”<sup>214</sup>

*Diddling* offers eleven sketches of urban swindlers to illustrate these ingredients. The technique supposedly suggests that, because scam stories demonstrate certain patterns of scammers, all scammers follow such patterns. Poe’s anecdotes, however, do not support his characterization of scammers. Specifically, Poe’s sketches describe scams that were very common in the first half of the nineteenth century. They even imply that diddlers have *modus operandi*. The most distinctive characteristic of scams is their *lack* of originality: most scammers follow specific patterns and fail to change their methods. In the same spirit, Poe’s assumptions regarding the mental state of scammers were too strong. Only a class of scammers consciously enjoy the game. The others often believe in their own game. Poe undoubtedly believed that scammers burdened society and tried to characterize their patterns, but he conflated his aversion of scammers with realistic scams. If we accept his depiction of scammers as hyper-calculated creatures, very few “true diddlers” would ever be identified, brought to justice, and convicted. Most scammers and scams are much less conspicuous than those Poe described.

Properly understood, *Diddling* is a collection of sketches whose writing was heavily influenced by three factors: (1) economic circumstances that affected the author and his era, (2) the author’s beliefs, and (3) the author’s premise that humans (scammers) can be hyper-calculated. Similar biases also appear in the literature that discount the plausibility of scams.

### III. THE ELEMENTS OF SCAMS

Our inquiry into the introduction of the confidence man shows how the mechanisms of scamming may be misunderstood. We utilize this study to emphasize several key elements of scams.

#### A. Scammers and Fools

Scamming—the exploitation of trust for profit—is possible because many types of mistakes and imperfect decisions are predictable. There will always be people who will entrust their gold watches to scammers, invest in pyramid schemes, purchase quack medicines, take subprime mortgages, pay upfront fees to “Spanish Prisoner” and Nigerian scammers, and lose money in other confidence games. Scammers capitalize on such mistakes. The targeting of mistakes, in turn, often complicates the design of counter legal strategies.

In the past, there were doubts regarding the ability of market participants to profitably exploit consumers’ mistakes and imperfect

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214. *Id.*

decisions.<sup>215</sup> Modern economics, however, rejects this skepticism, which primarily serves anti-regulation sentiments.<sup>216</sup> Vast literature explains and documents how suboptimal decisions of consumers can and are used for profit.<sup>217</sup> The story of the Confidence Man demonstrates how even a clumsy scammer may succeed with simple tricks. Thompson had certain skills but he gained from the poor decision-making capacity of his marks.

Our analysis also emphasizes the imperfect nature of scammers. The depictions of scammers hyper-calculated creatures are not realistic. Although scammers can cause harm and distress to their victims, they often harm themselves. Scammers often stick to identifiable *modi operandi*, adopt unsustainable schemes, brag about their accomplishments, and take other actions that assist law enforcers.

Consider the Ladies' Deposit Company ("LDC"), a pyramid scheme that Sarah E. Howe operated in Boston between 1876 and 1880.<sup>218</sup> Studying LDC in 1881, the *Atlantic Monthly* maintained that "not every swindle . . . deserves a chronicle [but] the Ladies' Deposit possesse[d] almost every feature of interest which can characterize a fraud: it was successful on a large scale; it chose its victims in an original way; it was managed with much adroitness in many of its details; and yet in the total it was one of the most barefaced and preposterous cheats that ever presumed upon the credulity of an intelligent people."<sup>219</sup> Mrs. Howe practically operated a private bank, which she marketed as "a charitable institution for single ladies, old and young."<sup>220</sup> She received deposits that were no "less than two hundred dollars [and no] more than one thousand [dollars]" and guaranteed its investors "interest at the rate of \$8.00 on a hundred per

215. See generally Herbert Hovenkamp, *Rationality in Law & Economics*, 60 GEO. WASH. L. REV. 293 (1992) (describing the doubts in the traditional law and economics literature). See also Lynn A. Stout, *The Investor Confidence Game*, 68 BROOKLYN L. REV. 407 (2002) (criticizing the rational expectations model in securities law); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988) (attempting to defend formalism by challenging the argument that law is political).

216. See generally Orbach, *supra* note 6.

217. See, e.g., BLAIR STEWART, AN ANALYSIS OF SPECULATIVE TRADING IN GRAIN FUTURES (1949); Rajesh K. Aggarwal & Guojun Wu, *Stock Market Manipulations*, 79 J. BUS. 1915 (2006); Oren Bar-Gill, SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS (2012); Markus K. Brunnermeier & Lasse Heje Pedersen, *Predatory Trading*, 60 J. FIN. 1825 (2005); John Y. Campbell, *Household Finance*, 61 J. FIN. 1553 (2006); Stephano DellaVigna, *Psychology and Economics: Evidence from the Field*, 47 J. ECON. LIT. 315 (2009); Xavier Gabaix & David Laibson, *Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets*, 121 Q. J. ECON. 505 (2006); Robert A. Jarrow, *Market Manipulation, Bubbles, Corners, and Short-Squeezes*, 27 J. FIN. QUANTITATIVE ANAL. 311 (1992); Ginger Zhe Jin & Phillip Leslie, *The Effect of Information on Product Quality: Evidence from Restaurant Hygiene Grade Cards*, 118 Q. J. ECON. 409 (2003); Christopher Mayer et al., *The Rise in Mortgage Defaults*, 23 J. ECON. PERSP. 27 (2009); Ran Spiegler, *The Market for Quacks*, 73 REV. ECON. STUD. 1113 (2006).

218. See Henry A. Clapp, *Sympathetic Banking*, ATLANTIC MONTHLY, July 1881, at 121; M. A. Dodge, *The Gentlemen's Contribution to the Ladies' Deposit*, ATLANTIC MONTHLY, July 1881, at 111; *A South-Sea Bubble in Boston*, HARPER'S WEEKLY, Nov. 6, 1880, at 770.

219. Clapp, *supra* note 222, at 121-22.

220. *Id.* at 123.

month [to be] paid every three months in advance.”<sup>221</sup> LDC inevitably collapsed, leaving its investors with considerable losses. An inquiry into Mrs. Howe’s past discovered that before LDC, her behavior was known to be “queer,” taking “extraordinary shapes,” causing some to believe that she was “an insane person.”<sup>222</sup> She was a confidence woman with many faces. Among other things, Howe did business as a fortune-teller, “female physician,” and clairvoyant.<sup>223</sup> Still before LDC, her interactions with the legal system included several convictions for “a very elaborate set of frauds.”<sup>224</sup> All of the reported frauds were confidence games. In October 1880, Mrs. Howe was arrested and was sentenced to five years in prison. Upon her release, she set up a new pyramid scheme that did not last long.<sup>225</sup> She was arrested again and was sentenced for another three years in prison.<sup>226</sup> Several commentators pointed out that Mrs. Howe was punished despite her troubled personality, but a good number of “gentlemen” were aware of her enterprises, benefitted from them, and were not held accountable for facilitating or accommodating her scheme.<sup>227</sup> In retrospect, Mrs. Howe’s scheme appears quite implausible but so do all Ponzi schemes and policies of financial institutions that feed financial bubbles.<sup>228</sup>

Consider now the caveat emptor rule. Caveat emptor may apply in situations where one transacting party consciously profits from information that other transacting parties do not have. The rule appeared in the sixteenth century but acquired its defined meaning only during the nineteenth century.<sup>229</sup> In his classic study of the doctrine, Walton Hamilton observed that in the nineteenth century “judges discover[ed] that caveat emptor sharpened wits, taught self-reliance, made a man—an economic man—out of the buyer, and served well its two masters, business and justice.”<sup>230</sup> The rule, therefore, reflects a belief that people have the ability to cope with scammers. For example, in *Laidlaw v. Organ*,<sup>231</sup> the parties entered into an agreement for future delivery of tobacco. The agreement price reflected material information that was known to the defendant (the buyer) but not to the plaintiff (the seller): Britain was about to lift the embargo on Southern U.S. ports that had kept

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221. *Id.*

222. *Id.* at 130.

223. *Id.* at 131.

224. *Id.*

225. See *Mrs. Howe a Fugitive*, N.Y. TIMES, Apr. 15, 1887, at 1; *Mrs. Howe’s “Bank” Again*, N.Y. TIMES, Apr. 16, 1887, at 4.

226. *Death of “Woman’s Bank” Mrs. Howe*, CHI. DAILY TRIB., Jan. 21, 1892, at 1.

227. See Clapp, *supra* note 218; Dodge, *supra* note 218.

228. See FIN. CRISIS INQUIRY COMM’N, THE FINANCIAL CRISIS INQUIRY REPORT: FINANCIAL REPORT ON THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES (2011).

229. Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1930).

230. *Id.* at 1186.

231. 15 U.S. 178 (1817).

tobacco prices down. Was the defendant a scammer? Introducing the caveat emptor rule, Chief Justice Marshall held that the defendant “was not bound to communicate” the private information he possessed.<sup>232</sup> The logic, the Chief Justice explained, is that “[i]t would be difficult to circumscribe the contrary doctrine within proper limits, where the means of intelligence are equally accessible to both parties.”<sup>233</sup>

A contemporary example of exploitation of human limitations for profit is the common practice, used in many industries, of obscuring the true cost of a service with add-on pricing schemes.<sup>234</sup> For example, airlines use several sets of add-on fees—for early boarding, premium seating, baggage, ticket changes, unaccompanied minors, in-flight food, and Internet services—to conceal the true price and to erode consumers’ ability to shop for the lowest total fare.<sup>235</sup> Similarly, hotels and resorts conceal their costs by hiding many fees.<sup>236</sup> In the financial sector, the phenomenon of concealing the true price is common and add-on pricing is a common practice.<sup>237</sup> For example, between 2012 and 2015, several large financial institutions paid collectively over two billion dollars in settlements to resolve allegations regarding the legality of the sales of credit card add-on products.<sup>238</sup> The practice involved pressuring customers into buying additional products when they activated the cards or otherwise communicated with the companies over the phone.

Another example from the financial sector is “swipe fees” (also known as “merchant discount fees”), payments that vendors make for each credit or debit card transaction.<sup>239</sup> These fees are nontransparent to consumers

232. *Id.* at 178.

233. *Id.*

234. See Gabaix & Laibson, *supra* note 217; Scott McCartney, *Find the Hidden Fees in This Picture*, WALL ST. J., March 13, 2014, at D1.

235. See Transparency of Airline Ancillary Fees and Other Consumer Protection Issues, 79 Fed. Reg. 57489 (Sept. 25, 2014) (proposed rule); Daniel Michaels, *Extra Airline Fees: A Growth Market*, WALL ST. J., May, 31, 2011, at B3; Christine Negroni, *Cashing In Before Taking Off*, N.Y. TIMES, Feb. 28, 2012, at B8; Jad Mouawad, *The Frills Are Few, The Fees Are Not*, N.Y. TIMES, June 1, 2013, at B1.

236. See, e.g., Jad McCartney, *Paying for the Pool: Hotels Are Piling On Fees*, WALL ST. J., June, 2009, at D1.

237. See, e.g., Vickie Elmer, *A Hidden Fee Is Set to Rise*, N.Y. TIMES, March 4, 2012, at RE4; Laura Stover, *Uncovering the Hidden Fees in Retirement Plans*, WALL ST. J., Feb. 25, 2013, at R5. See also Maria Armental, *Former ConvergEx Executive Charged*, WALL ST. J., Aug. 8, 2014 (reporting on a scheme involving hidden fees).

238. See Matthias Rieker et al., *Capital One Dealt Fine to Pitch to Customers*, WALL ST. J., July 19, 2012 at C1 (\$210 million settlement); Andrew R. Johnson & Andrea Tadema, *Discover to Make Refunds to Settle Probe of Credit-Protection Products*, WALL ST. J., Sept. 22, 2012, at B2 (\$214 million settlement); Alan Ziebl & Robin Sidel, *AmEx to Pay \$76 Million in Card ‘Add-On’ Settlement*, WALL ST. J., Dec. 26, 2013, at C3; Alan Ziebl, *BoFA Settles Card Probe for \$772 million*, WALL ST. J., Apr. 10, 2014, at C3; AnnaMaria Andriotis & Christina Rexrode, *Citigroup Settles Over Card Fees For \$770 Million*, WALL ST. J., July 22, 2015, at C2. See also Robin Sidel & Alan Ziebl, *Regulators Scrutinize Auto Lenders*, WALL ST. J., May 3, 2013, at A1.

239. See *United States v. Am. Exp. Co.*, No. 10-CV-4496 NGG RER, 2015 WL 728563 (E.D.N.Y. Feb. 19, 2015).

239. *United States v. Am. Exp. Co.*, No. 10-CV-4496 NGG RER, 2015 WL 728563 (E.D.N.Y. Feb. 19, 2015).

who choose the form of payment and can be quite considerable. American Express, MasterCard, and Visa used to maintain rules that concealed their swipe fees and prohibited merchants from encouraging consumers to use lower-cost payment methods when making purchases. Specifically, the rules prohibited merchants from offering discounts or other incentives to consumers in order to encourage them to choose less-costly payment methods. Visa and MasterCard even colluded to fix their swipe fees.<sup>240</sup>

Add-on pricing schemes, swipe fees, and other strategies that obscure the actual price demonstrate how businesses can utilize bounded rationality for profit. Consumers often know that there is a difference between the stated price and actual cost, but it is difficult for them to evaluate the difference. The more bounded rational they are, the more they discount that difference. These strategies profoundly differ from the gold watch scam of the original confidence man and other types of crude scams. Strategies that obscure prices are often pricing methods of legitimate businesses and presented as ordinary measures of third-degree price discrimination,<sup>241</sup> which may even constitute the industry standard. Further, explicit consumer preferences often contribute to the development of such schemes. This may happen, for example, when the scheme responds to the demand to unbundle the components of a product or service. The economics of unbundled products, however, is often too complex for many consumers.<sup>242</sup>

### B. Time

Nineteenth-century swindlers took advantage of social changes, primarily the transition of people from the country to the city.<sup>243</sup> Scammers often use time to trap people in situations where they are likely to make mistakes.<sup>244</sup> Common examples of such schemes include (1) actual and perceived need to make an immediate decision (time pressure), (2) changes in society and the economy that require people to make adjustments,<sup>245</sup> and (3) aging that impairs cognitive capacities.<sup>246</sup>

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240. In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, 986 F.Supp.2d 207 (E.D. N.Y. 2013); Shelly Banjo, *Wal-Mart Accuses Visa of Charging High 'Swipe Fees'*, WALL ST. J., March 28, 2014, at B3.

240. United States v. Am. Exp. Co., No. 10-CV-4496 NGG RER, 2015 WL 728563 (E.D.N.Y. Feb. 19, 2015).

241. "Third-degree price discrimination" means charging different rates to different consumer groups. Such pricing can enhance welfare.

242. See, e.g., Gabaix & Laibson, *supra* note 217; Neil Irwin, *If Cable TV Charged Like the Airline*, N.Y. TIMES, Jan. 7, 2015.

243. See *supra* notes 84-98 and accompanying text.

244. See Clayton Marsh, *Stealing Time: Poe's Confidence Men and the "Rush of the Age,"* 77 AM. LIT. 259 (2005); POE, *supra* note 2, at 271-72 (describing a scam utilizing time pressure).

245. See *supra* Part II.B.2; In Poe's work, *Diddling* was a metaphor describing problems associated with urbanizing society and an emerging capitalistic economy. See Pollin, *supra* note 107. It was a repeat theme in his writing. See Marsh, *supra* note 247.

246. See, e.g., Sumit Agarwal et al., *The Age of Reason: Financial Decisions Over the Life Cycle and Implications for Regulation*, 2009 BROOKINGS PAPERS ON ECON. ACTIVITY 51 (2009).

One of the often-overlooked elements in the sketch of the Confidence Man is the symbolic function of watches.<sup>247</sup> In the mid-nineteenth century, clocks and watches, representing improvements in time measuring technologies, were a source of anxiety for many people. In his influential book *American Nervousness*, the neurologist George Beard explained the anxiety:

The perfection of clocks and the invention of watches have something to do with modern nervousness, since they compel us to be on time, and excite the habit of looking to see the exact moment, so as not to be late for trains or appointments.

A nervous man cannot take out his watch and look at it when the time for an appointment or train is near, without affecting his pulse, and the affect on that pulse . . . [is] correlated to a loss to the nervous system.<sup>248</sup>

From the perspective of the swindler, this nervousness is an opportunity.

Several practices of credit card companies that were legal before the enactment of the Credit CARD Act illustrate the contemporary use of time in scams:<sup>249</sup> retroactive increases of interest rates and fees applicable to outstanding balances, unilateral changes of the terms governing the repayment of outstanding balances, double-cycle billing,<sup>250</sup> and others. The add-on practices of the credit card companies, used after the enactment of the Credit CARD Act, also trapped customers in situations of pressure, when they activated cards or were communicating with a financial institution.<sup>251</sup>

### C. Scale, Complexity, and Confidence

Poe distinguished between small-scale scamming conducted by diddlers and large-scale scamming conducted by “financiers.”<sup>252</sup> Houston used this distinction in his editorial, *The Confidence Man on a Large Scale*.<sup>253</sup> The editorial criticizes society for its fascination with individual swindlers and oversight of institutional scammers.

The perception that the scale of scammers is adversely related to their legal risk is common but not entirely precise. Scale, as Bernard Madoff

247. See Marsh, *supra* note 244.

248. GEORGE M. BEARD, *AMERICAN NERVOUSNESS: ITS CAUSES AND CONSEQUENCES* 103-04 (1881).

249. The Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734.

250. Double-cycle billing occurs when a cardholder with no previous balance does not pay the entire balance of a new purchase by the payment due date, then—on the next periodic billing statement—the issuer computes interest on the original balance of the purchase. For example if the cardholder makes a \$1000 purchase and pays off \$950 in the first month, under double-cycle billing, she would be charged interest on the \$1000 in the next month.

251. See *supra* note 238 and accompanying text.

252. See *supra* note 200 and accompanying text.

253. See *supra* Part II.A.2.

learned, may also influence punishment considerations.<sup>254</sup> The perception supposedly suggests that business size may offer strengths that could influence the application of law. While it is uncontroversial that wealth and capital influence law,<sup>255</sup> very often scale and complexity are conflated.

Small-scale scams, such as those of the Confidence Man, tend to be crude and unsophisticated, whereas large-scale scams are sometimes nuanced and integrated in lawful business operation. The complexity of large-scale schemes makes the proof of their illegality considerably costlier than that of small-scale scams.

To illustrate, consider scams in commodities markets.<sup>256</sup> In commodities markets, financial institutions, such as JPMorgan and Goldman Sachs, used to act in several capacities: they stored, traded in, and distributed commodities, as well as traded in future markets of these commodities. A financial institution that acquired enough warehouses could have the capacity to manipulate prices in several markets. After the Great Recession, this was a common phenomenon.<sup>257</sup> The analysis of the practice, however, turned out to be complicated because most activities were lawful. By comparison, it is much simpler to analyze the gold-watch scam of the original confidence man and, equally important, to explain it to a jury.

Scale also emphasizes the most complicated element of confidence: the potential opportunism created in any fiduciary relationship, namely, the agency problem. The classic confidence man is a stranger, but a person or institution may also take advantage of confidence that is established in a relationship or created by some duty. In theory, fiduciary duties intend to protect people from such scams, but those duties are known as “the most elusive concepts in Anglo-American law.”<sup>258</sup> The actual application of fiduciary duties, especially under Delaware law,<sup>259</sup> creates opportunities for scamming where a sensible person should have expectations to have confidence in an agent.<sup>260</sup> There is no need for scale to have this element of confidence: every agent can betray the confidence of her principal.

254. See Amir Efrati & Robert Frank, *'Evil' Madoff Gets 150 Years in Epic Fraud*, WALL ST. J., June 30, 2009, at A1.

255. See, e.g., *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868 (2009); *Citizens United v. Fed. Election Comm'n.*, 558 U.S. 310 (2010); Barak Orbach, *Invisible Lawmaking*, 79 U. CHI. L. REV. DIALOGUE 1 (2012).

256. For early reports of the schemes see Tatyana Shumsky & Andrea Hotter, *Wall Street Eyed in Metal Squeeze*, WALL ST. J., June 17, 2011, at C1; and Pratima Desai et al., *Goldman's New Money Machine: Warehouses*, REUTERS (July 2011), <http://www.reuters.com/article/2011/07/29/us-lme-warehousing-idUSTRE76R3YZ20110729>.

257. See Wall Street Bank Involvement with Physical Commodities: Hearings Before the Permanent Subcomm. of the Comm. on Homeland Sec. & Governmental Affairs, 113th Cong. (2014).

258. Deborah A. Demott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 879 (1988); Austin W. Scott, *The Fiduciary Principle*, 37 CAL. L. REV. 539 (1949).

259. See, e.g., *In re Citigroup Inc. Shareholder Derivative Litigation*, 964 A.2d 106 (2009) (holding that Citigroup directors did not breach their fiduciary duties during the housing bubble).

260. See PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW (Andrew S. Gold & Paul B. Miller eds., 2014).

However, scale obscures the duties and provides greater scamming opportunities.

#### *D. Intent, Knowledge and Industry Standards*

The Confidence Man allegedly left the scene “laughing.” Edgar Allan Poe believed that a “*true* diddler winds up all with a grin.”<sup>261</sup> He believed that scammers were hyper-calculated, interested in the game itself and would “return a purse . . . upon discovering that [it was] obtained . . . by an unoriginal diddle.”<sup>262</sup> The “grin” element—or more precisely, knowledge—is critical for legal purposes because scamming is not an offense of strict liability.<sup>263</sup> To prove unlawful scamming, plaintiffs typically must show that the defendant possessed a certain degree of knowledge. This burden, in turn, is often satisfied with express boldness of scammers, whose scams are straightforward, such as that of the original confidence man. The “boldness” is perceived as knowledge. But not all scammers are obvious and transparent. It could be difficult to satisfy the knowledge requirement when the scams are even slightly complex. For example, in *United States v. Newman*,<sup>264</sup> the Second Circuit reshaped the law of insider trading, holding that to sustain an insider trading conviction against a tippee, the government must prove that the tippee knew that a company insider had disclosed confidential information *and* did so in exchange for a personal benefit in violation of a fiduciary duty. Thus, *Newman* effectively shields tippees who receive confidential information from a third party rather than from the insider directly. This ruling protects a tippee who is comfortable with the information but not fully aware of the insider’s benefit.<sup>265</sup> Such interpretations of “knowledge” (or “grin”) requirements make it quite difficult to hold scammers liable, even when the scam is rather plain.

Thus, the “grin” requirement practically serves scammers. In reality, scammers pursue profit opportunities and their precise understanding of their schemes is not always clear. Often, the confirmation bias and other cognitive biases cause confidence men to believe in their own games and act without conscious intent to engage in a “scam.”<sup>266</sup> For example, during the housing bubble of the 2000s, all major U.S. financial institutions operated in mortgage markets securitizing, selling, and marketing risky mortgages.<sup>267</sup> In the aftermath of the crisis, it was quite

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261. POE, *supra* note 2, at 269.

262. *Id.*

263. See, e.g., *Belmont v. MB Inv. Partners, Inc.*, 708 F.3d 470 (3d Cir. 2013); *United States v. Philip Morris USA Inc.*, 566 F.3d 1095 (D.C. Cir. 2009).

264. *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014).

265. See Christopher M. Matthews, *Ruling Puts Dent in Insider Probes*, WALL ST. J., DEC. 11, 2014, at A1; James Stewart, *Delving Into Morass of Insider Trading*, N.Y. TIMES, Dec. 20, at B1.

266. See generally Raymond Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCH. 175 (1998) (explaining the confirmation bias).

267. See FIN CRISIS INQUIRY COMM’N, *supra* note 232.

difficult to prove that their directors and officers were aware of the implications of those risky mortgages.<sup>268</sup> The effect of knowledge and intent requirements is sometimes willful blindness.<sup>269</sup>

To illustrate the impact of complexity on the inference of knowledge, consider first Mrs. Howe, the mastermind and chief operator of the Ladies' Deposit Company. Howe, as mentioned, was a confidence woman with a troubled personality. Promising a return of 8% per month, Howe probably did not understand the implausibility of her own scheme. She was tried and convicted for her actions, but it is hard to argue that her plan was rational. By contrast, the "gentlemen" who benefited from LDC and were never investigated for their actions were probably much more rational and informed. Stated differently, Howe was assumed to be informed because of the boldness of her scam although there are good reasons to question her rationality.

Consider now bread pricing at the turn of the nineteenth century.<sup>270</sup> During much of the nineteenth century, Americans bought a 16-ounce loaf of bread for 5¢. At the end of the century, costs of inputs went up. Bakers could raise the price of a loaf by 1¢, the smallest denomination of the currency, and face public outrage for a price increase of 20%. Instead, they took a more moderate approach and started selling smaller loaves, without disclosing the exact size of the loaf. The public felt deceived upon learning about the "short-weight bread."<sup>271</sup> (See Figure 4.) Localities acted to address this perceived scam.<sup>272</sup> Many bakers, however, considered the short-weight bread merely as an adjustment to the changing input costs, not a scam. In the words of the president of the Chicago baker trade association:

We don't want to deceive the people, and we don't. We don't sell a pound of bread. We sell a 5 cents worth of bread, and we give as good quality as we can and as much of it as we can for 5 cents. People don't buy bread by weight. They buy it by 5 cents worth. . . . [I]f a sixteen ounce standard is fixed by law, up goes the price to 6 cents, and the people won't stand for it.<sup>273</sup>

It may be that bakers believed that the sale of short-weight bread was a reasonable quantity adjustment, not a deception. Considering the public

268. See, e.g., *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106 (Del. Ch. 2009) (absolving the board of Citigroup of liability for its failure to identify red flags). Cf. *In re Citigroup Inc. Sec. Litig.*, 753 F. Supp. 2d 206 (S.D.N.Y. 2010); *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369 (S.D.N.Y. 2013) (imposing liability on Citigroup for marketing financial products intending to benefit from the recession).

269. Under Delaware law, firms must install reasonable risk management systems but "director liability based on the duty of oversight is possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment." *Citigroup*, 964 A.2d at 125.

270. See BARAK ORBACH, REGULATION: WHY AND HOW THE STATE REGULATES, 740-45 (2012).

271. *Id.*

272. See, e.g., *Schmidinger v. Chicago*, 226 U.S. 578 (1913).

273. *16 Ounces, 6 Cents; Say City Bakers*, CHI. DAILY TRIBUNE, Dec. 11, 1907, at 9.

beliefs and views at the time—that 5¢ buys a 16-ounce loaf of bread—the short-weight bread was a scam. Bakers, including the Chicago baker trade association, also actively opposed laws requiring them to disclose the size of each loaf, sell standardized loaves to simplify pricing, keep scales available to their customers, and abide by other regulatory measures intended to resolve the informational problem.<sup>274</sup> For all practical purposes, the intent of those bakers, their understanding of their actions, and “grin” do not change the substance of the scheme: bakers throughout the United States were deceiving customers.

The debate over the short-weight bread was in essence a controversy over industry standards. The 16-ounce loaf of bread for 5¢ was an equilibrium standard that the industry sought to change. The change of the reference price was complicated: because the smallest denomination of the currency was 1 cent, bakers could not raise the price of a 16-ounce loaf of bread by less than 20%. The industry, therefore, tried to secure for its members the flexibility of adjusting the size of the loaves. The new standard, however, created scam opportunities. Under such conditions, when the industry standards allow sellers to conceal information from consumers or to provide them with confusing information, then compliance with the standards may not satisfy legal requirements for intent to scam or knowledge of scamming. Yet, consumers were scammed.

The determination that industry standards intend to benefit the trade by obscuring prices and costs tends to be rather challenging. This phenomenon, however, is rather common.<sup>275</sup> One example of the phenomenon that was already discussed is add-on pricing schemes.<sup>276</sup> Another example is the packaging of a product to make the consumer believe that she receives more than she actually does.<sup>277</sup> The practice has several names and is similar to the short-weight bread. Federal and state laws use the term “nonfunctional slack fill” to outlaw the practice.<sup>278</sup> The term intends to describe nonfunctional or empty space that creates an illusion about the actual volume of a product that a package contains. In

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274. *Schmidinger*, 226 U.S. 578.

275. See, Gabaix & Laibson, *supra* notes 234-242 and accompanying text; Douglas W. Allen & Yoram Barzel, *The Evolution of Criminal Law and Police During the Pre-Modern Era*, 27 J. L. ECON. & ORG. 540 (2009).

276. *Id.*

277. See Henry Gilgoff, *FDA's Fight Against Slack Fill*, L.A. TIMES, June 21, 1973, at K18; Gerald Gold, *FDA's New Target: Air in Food Packages*, N.Y. TIMES, July 14, 1973, at 21; Sarena Ng, *'Desheeting' Shrinks Rolls, Plumps Margins*, WALL ST. J., July 25, 2013, at B1; Paul Ziobro, *Same Package, Same Price, Less Product*, WALL ST. J., June 12, 2015, at B1.

278. The Fair Packaging and Labeling Act, Pub. L. No. 89-755, 80 Stat. 1296 (1966) authorized the Secretary of Health and Human Services to promulgate rules regulating package size, statements concerning sale prices, and non-functional slack fill. See, e.g., 21 C.F.R. § 100.100 (prohibiting the use of “misleading containers”). See also Cal. Bus. & Prof. Code § 12606 (defining “slack fill” as “the difference between the actual capacity of a container and the volume of product contained therein.”); *Waldman v. New Chapter, Inc.*, 714 F.Supp.2d 398 (E.D.N.Y. 2010) (discussing the legality of the practice in New York); *Hendricks v. Starkist Co.*, 30 F.Supp.3d 917 (N.D.CA. 2014) (discussing the legality of the practice in California).

the personal care industry, it is called “desheeting”—reducing the number of sheets of toilet paper or tissues in a package without a corresponding reduction in the retail price.<sup>279</sup> In the food industry it is called “weight out.”<sup>280</sup> Yet, in lawsuits against manufacturers that use the practice, consumers refer to it as “fraud” and other similar terms. Practically, for the reasons discussed above, it is often difficult to prove “nonfunctional slack fill” when the industry standard of packaging changes.<sup>281</sup>

#### IV. CONCLUSION

The 1849 intersection of the lives of two young men resulted in the introduction of the term “confidence man” and the concept of scam as “confidence game.” In July 1849, Alexander James Houston wrote for the *New York Herald* about the arrest of the “Confidence Man,” an unimpressive swindler whose name was apparently Samuel Thompson. Houston did not sign his articles, yet newspapers around the country reprinted them. Two months later, Houston died at age 30. Thompson died in 1856 at age 35, a few months before Herman Melville released his novel *The Confidence-Man: His Masquerade*, which was inspired by Houston’s reports. Numerous books and articles cite the *Herald’s* articles about the Confidence Man, often crediting the *Herald* for coining the term “confidence man” to describe Thompson. We argue that Houston wrote the story of Thompson as a sketch intending to illustrate introduced concept he had in mind. We also argue that the perception of Thompson as a talented scammer reflects broad misunderstanding of the elements of scams.

Scams, or confidence games, are schemes in which one party acquires and abuses the trust of another party. The original confidence man acquired the “confidence” of strangers, making them feel that it was improper not to trust people like him. In the modern economy, the functioning of many institutions rests on some trust. However, when one person trusts another and subsequently feels deceived it is often unclear that illegal scamming occurred. In many settings, it is difficult to distinguish between permissible conduct and impermissible scamming. Yet, we argue that a nuanced understanding of the nature of confidence games could considerably contribute to policies intending to reduce the social costs of scamming.

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279. Ng, *supra* note 277.

280. *Id.*

281. See, e.g., J. H. Chaloud, *Product Weight and Fill Control*, 19 BUS. LAWYER 177 (1963).

### **BURTON'S THEATRE.**

Dress Circle and Parquette, 50 cents; Family Circle or  
Second Tier, 25 cents.

**T**HIS (Monday) (EVENING), July 23d, will be played  
the Comedietta, called

**FAINT HEART NEVER WON FAIR LADY.**

King Charles II. . Miss J Hill | Roy Comes . . . Clarke

Duchess Torrenuevada . . . . Miss Wallack

To be followed by the new Farce of

**THE CONFIDENCE MAN.**

Brass . . . . . Brougham | Mr Polyanthos Poodle . Burton

Elisa . . . . . Miss Hill

To conclude with the favorite Burlesque, called

**DON GIOVANNI.**

Don Giovanni . . Miss Taylor | Loprello . . . . . J Dann

Donna Anna . . . . . Miss Brougham

Special Notice—Alteration of time—Curtain will rise  
in future at a  $\frac{1}{4}$  to 8 o'clock—Doors open at  $\frac{1}{4}$  past 7.—  
Checks not transferable. No orders admitted.

Strangers and visitors are informed that Tickets for  
this Theatre are to be obtained at all the principal Hotels:

*Figure 1. The Burton's Theatre Introducing the Confidence Man, NEW YORK EVENING POST (New York, July 23, 1849) (also published in other New York daily papers).*

## Mr. Jonathan Parks,

**WHO** tarried some time in this place, in July last, disturbing moral tacts and exhibiting an optical show, is requested to inform me of his place of residence, *and-so-forth*, on or before the first of February next ; otherwise I shell be under the necessity of disclosing some circumstances of the utmost importance to him, and not altogether unimportant to the public.

**W. D. BELL.**

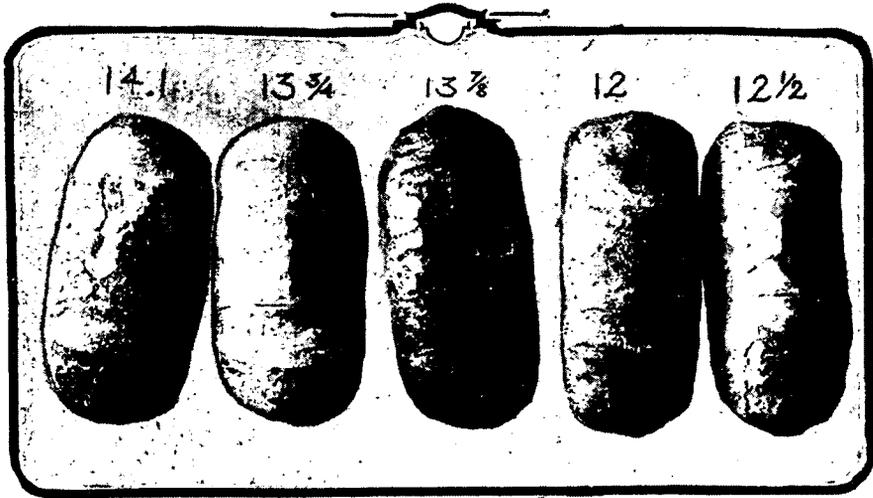
Hagers Town, Md. Jan. 5.

*Figure 2.* HAGERS TOWN TORCH LIGHT AND PUBLIC ADVERTISER (Hagerstown, Md., Jan. 6, 1818) (also published in many other daily newspapers around the country).



JAMES ALEXANDER HOUSTON.

*Figure 3.* James Alexander Houston, PHONOGRAPHIC MAG. 150 (Cincinnati, Ohio, May 15, 1894).



*Figure 4. Short-Weight Bread, SAN FRANCISCO CALL (San Francisco, Cal., Aug. 13, 1910).*