"A Diddle at the Brobdingnag:" Confidence and Caveat Emptor During the Market Revolution

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1. The quoted phrase is from EDGAR ALLAN POE, Diddling Considered as One of the Exact Sciences, in SIXTY-SEVEN TALES, at 388 (Gramercy Books 1985). As he used the term, a diddle was a swindle. Brobdingnag was the land of the giants visited by Lemuel Gulliver in Jonathan Swift's Gulliver's Travels. Poe used the misspelling "Brobdingnag" in the several versions I have seen. The term "diddle" was first used to name a type of medieval dance. Its use in the present context is derived directly from the name Jereny Diddler, a character in an obscure English play, Raising the Wind, by John Kenney, dated approximately 1803. The character supported himself by petty larceny and swindles. WILLIAM E. LENZ, FAST TALK & FLUSH TIMES: THE CONFIDENCE MAN AS A LITERARY CONVENTION 62 (Univ. of Mo. Press 1985). His name became the verb "to diddle." Id. During the nineteenth century, the words "swindle" and "diddle," and the noun phrase "confidence game," did not give their names to common law or statutory crimes. Chase v. Whitlock, 3 Hill 139, 139 (N.Y. Sup. Ct. 1842); Stevenson v. Hayden, 2 Mass. 406, 406-08 (1807).

2. Associate Professor of Law, The Charleston School of Law, Charleston, South Carolina, B.A. Wesleyan University, J.D. University of Pennsylvania, M.A., Ph.D. Rutgers University. The author would like to thank Paul Clemens, Ann Fabian, Brian J. Gilligan, Katherine Landess, Jackson Learns, James Livingston, Juliet Moringello, Loren Prescott, Jr., Sheila Scheuerman, Joye Shileds, and Cecile Zitelli for their thoughtful comments and generous assistance.
What constitutes the essence, the nare, the principle of diddling is, in fact, peculiar to the class of creatures that wear coats and pantaloons. A crow thieves, a fox cheats, a weasel outwits; a man diddles. To diddle is his destiny. 3

Confidence is the indispensable basis of all sorts of business transactions. Without it, commerce between man and man, as between country and country, would, like a watch, run down and stop. 4

I. Introduction

The antebellum American merchant was caught up in the conflict between confidence 5 and caveat emptor, between the need

3. Poe, supra note 1, at 388.
5. “Confidence” had many distinct but related definitions in dictionaries widely used during the period. Nathan Bailey defined it as “1. Firm belief in another’s integrity or veracity. 2. Boldness, assurance, presumption. 3. Reliance. Society is built on trust, and trust upon confidence of one another’s integrity. 4. Trust in one’s own abilities or fortune; security, opposed to dejection or timidity. . . . 8. That which causes boldness or security.” Nathan Bailey, A New Universal Etymological Dictionary (1772). Noah Webster defined “confidence” as: “1. A trusting reliance; an assurance of mind or firm belief in the integrity, stability, or veracity of another, or in the truth and reality of a fact.” Noah Webster, An American Dictionary of the English Language (rev. ed., 1856). He provided the following examples of standard usage: “Mutual confidence is the basis of social happiness,” and “I place confidence in a statement, or in an official report.” Id. Webster defined “credit” as:
Reputation derived from the confidence of others; That which procures or is entitled to belief; testimony; authority derived from one’s character or from the confidence of others; in commerce, trust; transfer of goods in confidence of future payment; the notes or bills which are issued by the public, or by corporations or individuals, which circulate on the confi-
to trust in order to do business, and the fear that he did so almost entirely at his own peril, with little protection from the law. Caveat emptor erased all visible and tangible distinctions between the merchant and the confidence man. This was a change from an earlier period of strict regulation of markets in England and America, but expectations based on the earlier rules did not quickly disappear. The upshot was a sense of dislocation and instability, sometimes tragic and sometimes comic, expressed in legal literature and non-legal literature during the antebellum period.

Historians and literary critics have treated the confidence man as a type, a comic and marginal figure, more significant as a metaphorical foil than as an historical actor. Their concern has been with the antebellum confidence man as a rootless itinerant, often at the frontier, or as a petty street swindler. The attention paid to the comic character of the confidence man, while certainly justified, has obscured the more significant confidence man who was the alter ego of the mainstream antebellum merchant.

Just as cultural historians and literary critics have neglected legal literature in their consideration of the confidence man, so also have legal historians neglected business literature and the leading fictional representations of the antebellum period. As the legal historian Robert W. Gordon has noted, the “mandarin materials” of the law, judicial opinions, legal treatises, and statutes, “are among the richest artifacts of a society’s legal consciousness.” Even so, they do not provide a complete picture of any society’s legal consciousness, and certainly not that of American society in the antebellum period.

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6. See Poe, supra note 1 and The Arrest, supra note 4 for examples of street swindlers. For the classic example of swindlers at the frontier, see Melville, supra note 4.


This article is based in part on the assumption, articulated by the cultural historian Stephen Kern, "that any generalization about the thinking of an age is the more persuasive the greater the conceptual distance between the sources on which it is based." It provides a broad review of a variety of literature, legal and non-legal, produced during the antebellum period, or widely read at that time. The broader range of literature considered herein reveals that confidence was a central organizing principle in the antebellum market economy as well as in the habits of thought dominating American culture in the first half of the century. It was beset by contradictions and limitations, however, some of which came to life as the confidence man in the literary imagination of the period, and as the confidence man of merchants' nightmares.

This article begins with a review of the origins of the legal rule of caveat emptor. Part II considers "confidence" as a concept that, despite its amorphousness, nevertheless served as the adhesive that sometimes held the antebellum market together. Part III discusses the effect of the law on confidence in goods, in pretenses, and in persons, all against the background of caveat emptor. Finally, Part IV describes and analyzes the manner in which the legal and cultural conflict between confidence and caveat emptor was addressed in non-legal literature, from the journals of quotidian business life to the classic works of Poe and Melville. The article concludes by suggesting that the conflict between the imperatives of confidence and caveat emptor, together with the cover provided by the new, essentially religious definition of mercantile fidelity, led to a redefinition of confidence, such that the confidence man of the early antebellum period became the new merchant of the later antebellum period.

II. CAVEAT EMPTOR

In the young United States, the first half of the nineteenth century saw important changes in the manner in which merchants dealt with one another in the marketplace. The period has come to

be known as the Market Revolution.\textsuperscript{10} It was characterized by changes in the law governing contracts,\textsuperscript{11} improvements in transportation that increased the volume of business conducted among strangers within the states,\textsuperscript{12} a shortage of circulating currency that contributed to a vast expansion of credit,\textsuperscript{13} and a market-wide lack

\textit{10.} CHARLES SELLERS, THE \textit{MARKET REVOLUTION: JACkSONIAN AMERICA, 1815-1846} (Oxford Univ. Press 1991) is the leading text on the rise of the market economy in this period.


of information on the reliability and creditworthiness of merchants.14

One change in contract law that influenced the tenor of the period was the rise of the doctrine of caveat emptor. Roughly intended to mean "let the buyer beware," the doctrine had a range of meanings in antebellum law, and a broader meaning in antebellum culture. In part, caveat emptor stood for the rejection of common law warranties in the sales of goods between merchants. At common law before the rise of caveat emptor, a seller was deemed to warrant the quality of his goods, as well as his title to them, whether or not he made express commitments to do so.15 Under the new doctrine of caveat emptor, however, the law no longer imposed such warranties on merchants.16 With respect to sales of goods, the new rule was that a merchant selling goods with latent defects known to him would not be liable to the buyer unless he made an intentional effort to hide the defects or made statements

14. The problem of insufficient information about one's customers and suppliers was solved only in part, and haltingly. Dun, Barlow & Company, the predecessor of Dun & Bradstreet, was founded in 1841. SCOTT A. SANDAGE, BORN LOSERS: A HISTORY OF FAILURE IN AMERICA 112-52 (Harvard Univ. Press 2005). It struggled to impose order on broad categories of economic reliability and financial strength until it became the dominant source of credit information since the 1870s. Id. Dun and its competitors defended libel lawsuits brought against them as a cost of doing business, and they paid numerous libel judgments. Id. Although the courts gradually made it more difficult for plaintiffs to prevail over the mercantile agencies, their work was not protected by any special legal privilege, despite the obvious commercial usefulness of the information they provided. See, e.g., Beardsley v. Tappan, 2 F. Cas. 1187, No. 1189 (C.C.S.D.N.Y. 1867), rev'd on other grounds, 77 U.S. 427 (1870); Xiques v. Bradstreet Co., 24 N.Y.S. 48 (Gen. Term 1893); Woodruff v. Bradstreet Co., 22 N.E. 354 (N.Y. 1889); Sunderlin v. Bradstreet, 46 N.Y. 188 (1871). But see Newbold v. J.M. Bradstreet & Son, 57 Md. 38 (1881); Hessel v. Bradstreet Co., 21 A. 659 (Pa. 1891). Nevertheless, as Sandage has explained, the commodification of the commercial character of merchants became, to some extent, centralized in and systemized by such credit agencies. SANDAGE, supra, at ch. 4. Confidence became not a matter of personal relationships but a matter of commodified information, often obtained in secret. Id.


16. Id.
denying their existence. A merchant selling goods with a latent defect unknown to him would not be liable to his buyer absent an express warranty. These rules represented a change from traditional English local law, and from Continental rules codified in the French Commercial Code of 1807.

Caveat emptor also had a broader and quite unsettling effect within merchant culture. Its increasingly frequent application gave rise to a sense among members of the literate classes that fraud, lying, and cheating had come to characterize, not merely to afflict, the market. These activities were hardly new, but had previously been controlled more vigorously by the law. To paraphrase Poe, the market, and the entire commercial system of the new economy, was a swindle in the land of the giants.

There is some controversy among scholars about the rise of the doctrine of caveat emptor. This academic controversy has been implicitly based on the assumption that there was a clear rule that developed at a certain time at common law. In fact, lawyers and judges of the eighteenth and nineteenth centuries were as unsure of the doctrine's origin and scope as are modern scholars. This uncertainty is itself an historical artifact of previously ignored significance. For if judges were uncertain about the scope of the obligation running from seller to buyer in an ordinary sale of goods, surely merchants were equally uncertain; and such uncertainty, as we will see, was unsettling.

20. THE CODE NAPOLEON, Title VI, § II (Bryant Barrett trans., London 1811). See also infra note 43.
21. See supra note 1.
23. For a discussion of the uncertainty about common law rules applicable to merchants' sales, see infra text accompanying notes 53–83.
24. See infra Section IV.
In the most thoroughly researched article on the origins of caveat emptor, the leading scholar on the topic, Professor Walton Hamilton, concluded that it was not an ancient doctrine of the common law, but a later invention of the English royal courts. Hamilton demonstrates that, in the older courts of "manor and baron, of leet and tolsey," the rule was "a fair price, an honest measure, and a quality good after the fashion of the day." Although the phrase "caveat emptor" first appeared in legal literature in 1534, it did not become the dominant common law rule of contract interpretation until the early nineteenth century. Even then, as we will see, it was hardly monolithic.

English local law had regulated the market quite strictly from the fifteenth century to the late eighteenth century. From the Tudor to the early Hanoverian periods, English market towns, where all lawful trade took place, regulated both the provenance and quality of the goods sold therein. Buyers' titles to goods purchased in open market, or "market overt," were protected, in

26. Id. at 1142.
27. Id.
28. Id. at 1164 n.206.
29. Id. at 1176–82; see also Horwitz, supra note 11, at 945–46; Gardner & Kuehl, supra note 22. Professor Horwitz argued that the doctrine of caveat emptor was one of a number of changes in contract law at the dawn of the nineteenth century, all intended to advance commercial interests at the expense of consumers. Horwitz, supra note 11, at 947. Professor Simpson launched a vigorous attack on the "Horwitz Thesis," based primarily on the thinness of Professor Horwitz's research and the "dubious assumptions" on which Horwitz relied in the absence of evidence. Simpson, supra note 22, at 535, 600–01. Simpson asserts that the history of contract law in the period is "a complex, confused story . . . ." Id. at 600. Hamilton would surely have agreed, and noted that, whatever rules the earlier cases purported to apply, "[i]t is not until near the end of the eighteenth century that cases in point come along in sufficient volume to give meaning to general rules of law." Hamilton, supra note 15, at 1169.
30. See infra text accompanying notes 52–59.
33. Id. at 226–27; see also Hamilton, supra note 15, at 1146–53.
most circumstances, even against the claims of the true owner. The conduct of the skilled trades was regulated both by the trade guilds and by the towns. The sale of goods in private places was prohibited. Quality and price were regulated, and price reflected quality.

The law concerned itself directly with "a fair price, full measure, and good workmanship" in every market transaction. Many towns required that goods for export to other places be inspected in order to protect the commercial reputation of the town. This was done not only to protect the buyer, but also to protect the community and honor the church and the craft. Swindlers were punished by public humiliation and banishment from the market for a time. Legal actions against swindlers were brought "in the name of the Commonalty." One upshot of all this regulation was that, in transactions between individual merchants, a "sound" or premium market price charged for goods was held to imply a warranty that the goods were "sound," or merchantable. This meant that the goods were of the quality reasonably to be expected based upon that price.

35. Id. at 1148-49.
36. Id.
37. Id. at 1150.
38. Id. at 1149.
39. Id. at 1152.
40. Id. at 1153.
41. Id. at 1142, 1158.
42. Id. The same rule was followed in French law of the period. The French Commercial Code of 1807 followed the Roman law and provided as follows:

The vendor is bound to warranty by reason of concealed defects in the thing sold which render it unfit for the use to which it is destined, or which diminish such use so far, that the buyer would not have purchased it, or would have given a less price, had he known.
The vendor is not held for the apparent faults and of which the buyer might have convinced himself. He is held for concealed faults, even where he did not know them, unless he has stipulated that he shall not be bound to any warranty.
The traditional English rule of seller responsibility for defects in goods crossed the Atlantic with English colonists. As the legal historian William J. Novak has decisively established, local governments in colonial North America and in the United States during the early nineteenth century regulated the local economy, including the quality of goods in their markets, quite strictly. Commerce was regulated throughout this period under the theory that a well-regulated society demanded public control of commerce and trade to the same extent that it demanded public regulation of health and morals. The primary means of enforcement was inspection by state or municipal authorities. The sanctions they imposed were fines or forfeitures for false measures or unmerchantable goods.

Novak’s important insights require some elaboration. For example, he ignores the fact that, by the early nineteenth century, the purpose of such regulation was not primarily to protect local purchasers. In many states, the purpose of such statutes was to protect the state’s reputation in foreign markets. For example, the purpose of the New York statute regulating the packaging of flour and meal was “to prevent those articles being brought into disrepute in foreign markets.” Local regulation of the economy, however extensive, did not always inure to the benefit of the local pur-

The Code Napoleon, Book III, Title VI. Sec. II, subsec. 1641–43, 335 (Bryant Barrett trans., London, 1811).

Thus, continental jurists imposed a warranty of quality on sellers, and allowed buyers wronged by sellers of poor quality goods to recover or withhold a portion of the purchase price, or rescind the transaction. Id.; see also Hamilton, supra note 15, at 1142, 1158.


46. NOVAK, supra note 45, at 84.

47. Id. at 89–90.

48. Id.

chaser of regulated goods.50 Purchasers in local markets could sometimes rely on such regulations to protect their interests, but in many instances they could not.51 Predictability in such transactions was little more than a wish; it was certainly not a reality.

Modern legal historians have perhaps fallen into a trap. They appear to have assumed there was some consistency and order to the rise of the doctrine of caveat emptor in the U.S. and the U.K., and they have strained to discern it. Professor Simpson has come closest to the truth in suggesting that there was no such consistency, and that the development of the law was complex and chaotic.52 In fact, judges and commentators in both countries were often simply unsure of the source and content of the prevailing rules, even as late as the 1830s.53 Lacking a truly comprehensive digest or encyclopedia, lacking access to the full scope of reported opinions, and often relying on incomplete and erroneous reports of leading cases, treatise and opinion writers often took wildly varying positions on the nature of the legal doctrine at the time.54 What Professor Hamilton55 and Professor Horwitz56 both characterize as judicial resistance to the transition to caveat emptor was partly resistance, and partly mere confusion.57

For example, two treatises published in the early 1790s took opposite positions on the currency of the rule of caveat emptor. In the published version of his Vinerian Lectures, which he had begun delivering at Oxford in 1777, Richard Wooddeson asserted:

In the English law relating to this subject, a very unconscientious maxim seems long to have prevailed, which was expressed or alluded to by the words, "caveat emptor," signifying that it was the business of the buyer to be upon his guard, and that

51. See supra note 43.
52. Simpson, supra note 22, at 600.
53. See text accompanying notes 52–57.
54. See text accompanying notes 52–57.
56. Horwitz, supra note 11, at 932–36.
57. Id. at 944–45, 950–51; Hamilton, supra note 15, at 1186.
he must abide the loss of an imprudent purchase, unless the goodness and soundness of the things sold was warranted by the seller. This doctrine, I presume, obtained from a view of discouraging a multiplicity of frivolous litigations. However it is now exploded, and a more reasonable principle has succeeded, that a fair price implies a warranty, and that a man is not supposed, in the contract of sale, to part with his money without expecting an adequate compensation.\textsuperscript{58}

Caveat emptor was already dead in Woodeson’s estimation. On the other hand, in a treatise published within a year of the publication of Woodeson’s lectures, John Fonblanche stated unequivocally that “the general rule of the common law of England is caveat emptor.”\textsuperscript{59}

In fact, the rule of the common law was in a state of confusion. Woodeson perceived a trend in England precisely the opposite of that perceived by Professor Hamilton centuries later, and a rule diametrically opposed to that perceived by his contemporary, Fonblanche. The confusion among English commentators was not resolved even as late as 1835, when an English barrister writing under the pseudonym “Caveat Emptor,” in a hilarious volume entitled The Adventures of a Gentleman in Search of a Horse, referred to the law of sales warranties as “a difficult and insulated subject of frequent occurrence at Nisi Prius” and complained about the “very conflicting authorities” on the subject.\textsuperscript{60} The common law was no more certain in the states. In 1821, in the course of a long discussion of the history of the doctrine of caveat emptor, Abraham Nott, a justice on the South Carolina Constitutional Court of Appeals, characterized the common law on that subject from the late eighteenth century to his own time as “unsettled and fluctuating.”\textsuperscript{61}

\textsuperscript{58} Woodeson, supra note 34, at 415.
\textsuperscript{59} John Fonblanche, A Treatise of Equity 109 (1793).
The English judges were confused, too. As late as 1802, when King’s Bench applied caveat emptor to a sale of hops in *Parkinson v. Lee*, the judges understood the question to be one of first impression. Mr. Justice Grose stated: “This is a case of considerable consequence; because the rule laid down in this case must extend to all other cases of sales, not governed by particular usages of trade in this respect.” Grose and his bench-mate, Mr. Justice Lawrence, then looked to the trade in horses for a general rule. This is particularly remarkable, as the horse trade was widely pilloried as a haven for swindlers.

Grose recognized that the old rule, that a sound price warranted a sound horse, had been rejected earlier by Lord Mansfield. Lawrence provided the reason: “The instances are familiar in the case of horses. It is known that they have secret maladies, which cannot be discovered by the usual trials and inspection of the horse; therefore the seller requires a warranty of soundness, in order to guard against latent defects.” The justices recognized that hops were subject to a known latent defect which was undiscoverable for a portion of their market life, and therefore the rule for horses should apply to hops. But Grose had already noted that the decision would apply to all goods except those to which a particular usage of trade applied. Thus the rule of caveat emptor was borrowed from a trade known as a haven for swindlers, and turned into a default rule to be applied to all trade.

This reading of *Parkinson* is further supported by the opinion of Mr. Justice Le Blanc. He sat on the appellate panel despite having tried the case, and joined in the adoption of the new rule despite having instructed the jury to the contrary at trial. His brief opinion deserves to be quoted in full because it sheds so much light on the court’s thinking and on the state of the law at the time of the ruling:

63. *Id.*
64. *Id.*
65. See CAVEAT EMPTOR, supra note 60.
67. *Id.*
68. *Id.* at 321.
69. Compare *id.* at 315–17 (jury charge) *with id.* at 324 (opinion on appeal).
The inclination of my mind at the trial was, that the jury should find for the plaintiff; because the drawing of fresh samples, or the inspection of the commodity itself in bulk, would have afforded no information to the buyer, as to the latent defect which afterwards appeared: and therefore it occurred to me that as there was no want of prudence on the part of the buyer, and the defect was of such a nature that no inspection of the thing could have led to a discovery of it, the law would on that account raise an implied undertaking on the part of the seller, that it was a merchantable commodity, such as it appeared then to be. But upon further consideration, as the same rule which applies to other cases must govern this; and as in the only instances in which the same question has come directly in judgment, namely, in sales of horses, it has been considered that without a warranty of soundness by the seller, or fraud on his part, the buyer must stand to all losses arising from the latent defects; and as I see no ground for distinguishing between this case and those; and no instance has been produced in which a contrary rule has been laid down in respect of any other commodity; I therefore concur with my brothers.  

American courts struggled with the sound price rule in the early years of the republic. It was clearly in force in Connecticut as late as 1796, in North Carolina as late as 1799, and in South Carolina as late as 1819. It was rejected in New York in 1804, in the landmark case of Seixas v. Woods, in which the court characterized the rule of Parkinson v. Lee as well-settled and supported by tradition. In fact, James Kent, then a judge of New York's state supreme court, indicated that, were the question one of first

70. Id. at 324.
impression ("res integra to our law"), he would have been inclined to follow Wooddeson and the civil law.\textsuperscript{73}

Kent apparently believed the rule of Parkinson reflected a long tradition that the judges who decided Parkinson did not see. Kent cited Chandelor v. Lopus, a case Professor Hamilton has shown to have been reported some seventy five years after it was decided, in poor and unreliable fashion.\textsuperscript{74} Kent also relied upon a case cited in Parkinson, arising from a sale of a horse,\textsuperscript{75} as well as another case, not cited in Parkinson, also arising from a sale of a horse.\textsuperscript{76} Kent completely missed the point of the Parkinson court's extension of the rules of horse trading to traffic in other goods. Thus the history of Parkinson and Seixas suggests that the doctrine of caveat emptor arose in Anglo-American common law as much by misapprehension as by deliberation. The inference to be drawn from the English and American cases is that the adoption of the doctrine of caveat emptor among common law jurisdictions was haphazard and uncertain.

III. CONFIDENCE AND THE CONFIDENCE MAN

Caveat emptor arose as a principle of contract law at the same time that the amorphous concept of confidence appeared in American commercial culture. Confidence was the adhesive that held the market together in the antebellum United States. It was discussed endlessly in the opinions of leading commercial courts, in testimony before Congress, in commercial magazines, and even in popular literature. The New York Supreme Court, the leading commercial court of the antebellum period, observed that confidence was "essential to commerce and useful to all classes."\textsuperscript{77} According to Chief Justice John Savage, "[T]hat confidence upon which what is called the usual course of trade materially rests," was necessary to preserve "[t]he security of commercial transac-

\textsuperscript{73} Id.
\textsuperscript{74} Hamilton, supra note 15, at 1166.
\textsuperscript{75} See Parkinson v. Lee, (1802) 2 East 314, 318, 322 (K.B.) (citing Stewart v. Wilkins, Doug. 20); Seixas, 2 Cai. at 53 (citing Stewart v. Wilkins, Doug. 20).
\textsuperscript{76} See Seixas, 2 Cai. at 53–54 (citing Springwell v. Allen, Aley 91).
\textsuperscript{77} Smedes v. The Bank of Utica, 20 Johns. 372, 380 (N.Y. Sup. Ct. 1823); see also supra note 14.
tions.” Daniel Webster said in Congress that “[c]redit and confidence have been the life of our system, and powerfully productive causes of all our prosperity.” Charles Francis Adams wrote, “There can be no credit where there is no confidence in one another.”

Yet the same confidence that held the economy together seemed to contradict the emerging principle of caveat emptor. Merchants were caught between their need to trust those with whom they did business, and the inconsistent but troubling admonitions of the law that they should trust at their peril. There was, on the one hand, a culture of trust among merchants, and on the other, skepticism and a need to verify, if possible, the fidelity of the other. That conflict found its apotheosis in William Thompson, a swindler christened by the New York Herald as the “Confidence Man.” Thompson dressed as a prosperous merchant, approached those similarly dressed, and asked that they have confidence in him to lend him their watches, or sometimes cash, until the next day. Many men did so, but to their regret. Thompson’s swindle gave later swindles their curious name: confidence games. With that use, confidence became a contronym, one of those odd words that means both itself and its opposite, thereby capturing the ambiguity

80. Charles Francis Adams, The Principles of Credit, 2 HUNT’S MERCHANT’S MAG., Mar. 1851, at 188. Charles Francis Adams (1807–1886) was the son of President John Quincy Adams and grandson of President John Adams. At the time he wrote the article in which this statement appears he was ending a term as a Massachusetts state senator. He later served as the U.S. Ambassador to the Court of St. James (Great Britain) during the Lincoln and Johnson administrations. MARTIN DUBERMAN, CHARLES FRANCIS ADAMS, 1807–1886 (Stanford Univ. Press 1968).
81. The Arrest, supra note 4. For a comprehensive treatment of the Thompson incident, see Bergmann, supra note 4, at 560–67.
82. The Arrest, supra note 4.
83. See id.
84. Bergmann, supra note 4, at 560–67.
of a market that institutionalized both trust and distrust. In this sense, antebellum merchants were caught between confidence and confidence.

A. Confidence in Goods

Under the old rules of sound pricing and branding, confidence in goods was linked first to confidence in the merchant who sold them, and second to confidence in the law. Simply by selling a product bearing a certain brand, or by charging a certain price, a vendor implicitly warranted that the product was of the quality commonly associated with the brand, or worth the price demanded. Under those rules, the fidelity of merchant and product were effectively merged. If the product were defective or inferior, the merchant’s fidelity to others would be deemed similarly defective or inferior until he made the transaction right. If he refused to do so, the law would impose a remedy. A defective or bogus product could be returned by the purchaser for a refund, or a suit could be brought for the difference between price and value.

Courts justified the sound price rule with paean to fidelity and fairness. According to the South Carolina high court, “all imaginable fairness must be required in commerce . . . especially where custom and convenience do not authorize a perfect inspection of every package.” The South Carolina court professed its intention to be “severely just” in applying the sound price rule as a rule of mercantile morality.

85. For another example of a word that means both itself and its opposite, consider the word “sanction.” The homonyms “raise” and “raze” have a nearly similar relationship. For a discussion of this phenomenon, see Sigmund Freud, The Antithetical Sense of Primal Words, in S. Freud, Character and Culture (Collier Books 1963) 44–50.

86. For a discussion of branding, see NOVAK, supra note 45.


88. See cases cited supra note 87.

89. See cases cited supra note 87.

90. Missroon, 11 S.C.L. (2 Nott & McC.) at 78.

91. Id.

92. Id.
Chief Justice Isaac Parker of the Supreme Judicial Court of Massachusetts expressed a plainly moral rationale for the doctrine of caveat venditor in a sale by sample:

Among fair dealers there could be no question but the vendor intended to represent that the article sold was like the sample exhibited; and it would be to be lamented, if the law should refuse its aid to the party who had been deceived in a purchase so made.

The objection is, that no action upon a warranty can be maintained . . . unless there be a false affirmation respecting the quality of the article. If such were the law, it would very much embarrass the operations of trade, which are frequently carried on to a large amount by samples of the articles bought and sold.93

Similarly, in condemning as unlawful the conduct of a seller's agent in a complex transaction, Chief Justice Thomas Ruffin of North Carolina wrote that it was:

[O]pen to the general objection of its tendency to impair the faith of distant correspondents in mercantile integrity, and to tarnish the character for fair and honourable dealing which distinguishes our merchants as a class. On the strength of that faith and character, men now entrust to each other, adventures for immense amounts, with a sense of perfect security.94

It was not only a sound price that warranted a sound product. Branding also served in common understanding at the time as

93. Bradford v. Manly, 13 Mass. (1 Tyng) 139, 143 (1816) (rejecting the authority of Chandelor v. Lopus, and dismissing as inapposite, without discussion, Parkinson v. Lee); see also Morrill v. Wallace, 9 N.H. 111, 113 (1837) (rejecting Chandelor v. Lopus as immoral, and noting, "There are many cases to be found in the books upon the subject of warranty, and it is not matter of astonishment if all of them cannot well be reconciled.").
an indication of quality. Juries frequently ruled in favor of disappointed purchasers of unsound goods in circumstances that made it clear the jurors associated brands with quality. For example, in Bailey v. Nickols, the high court in Connecticut upheld a jury verdict for a purchaser, holding that the fact that the goods in question had been inspected and branded with the inspector’s seal implied a warranty of soundness running from the seller to the buyer. The court held that “the defendant, by selling his beef for cargo beef [of sufficient quality for export] and asking and receiving a sound price for it, did warrant it to be such as the law described, under the denomination of cargo beef, and that it was sound and good.” Defendant was liable to the purchaser on the warranty, although he was unaware that the beef had spoiled. Jury verdicts to the same effect were entered in Pennsylvania in Kirk v. Nice, in New York in Wright v. Hart, and in Maryland in Hyatt v. Boyle.

The same association between branding and quality is apparent in the popular literature of the period. Poe’s The Man That Was Used Up illustrated the point that quality was defined by provenance and hence by branding. It was the story of Brevet Brigadier General John A.B.C. Smith. Smith, a man of temporary rank and generic name, derived his entire identity from the parts of which he was assembled. General Smith had suffered severe injuries during his courageous service in a recent Indian war, and had lost most of his body parts. The splendid parts he had purchased both composed his new physical self and defined his character. The story reaches its denouement when the narrator witnesses the

96. Id.
97. Id.
98. Id. at 408.
99. Id.
100. Id. at 409.
101. 2 Watts 367 (Pa. 1834).
102. 18 Wend. 449 (N.Y. Sup. Ct. 1837), aff’d Hart v. Wright, 17 Wend. 267 (N.Y. Sup. Ct. 1837).
103. 5 G. & J. 110 (Md. 1833).
105. Id. at 197–98.
General being dressed, indeed, being assembled, by his manservant. In one of the earliest and most comical illustrations of consumer culture in American literature, General Smith's manservant assembled the General using the best cork leg manufactured by Thomas, the best arm by Bishop, the shoulders by Pettitt, the best bosom by Ducrow, the wig ("such a capital scratch") from De L'Orme, the teeth by Parmly ("high prices, but excellent work"), and of course, the eyes by Dr. Williams ("you can't imagine how well I see with the eyes of his make"). General Smith's identity was created by the parts of himself he had purchased, the quality of which was indicated by their provenance.

In the early cases decided under the sound price and branding rules, law and morality were coextensive. But as the doctrine of caveat emptor spread haltingly within common law jurisdictions, law and morality diverged. At the same time, because the rise of caveat emptor was uneven, sometimes within the same jurisdiction, uncertainty arose as to the precise nature of sellers' obligations and buyers' rights.

In 1831, the justices of the Supreme Court of Pennsylvania confessed their uncertainty about the state of the common law on the issue of sellers' obligations to purchasers. In a case involving a sale of paint that turned out to have dirt mixed in it, Justice Molton C. Rogers reviewed cases reported by the English courts of Nisi Prius and concluded that they reflected no coherent rule: "My own experience, and the examination which I have given this question has not increased my veneration, for cases ruled at Nisi Prius. Those on warranty are numerous, and I believe, I may venture to say, cannot all be reconciled."

In the same case, Chief Justice John Bannister Gibson lamented what he believed was an abandonment of the common law rule of caveat emptor, and after a review of a number of cases, wrote with evident dismay, "From the decisions to which I allude, I am unable to extract a single principle of general application."

106. Id.
107. Id.
109. Id.
110. Id. at 27.
An unidentified commentator writing in the *American Jurist and Law Magazine* made the same point:

There is no little diversity of authority in our decisions; and, we believe, some discrepancy of opinion among our speculative jurists upon the question. Some decisions seem to be founded upon the strict rule of the English common law; some upon the nice equity of the civil or Roman code: whilst others rest apparently on both, and therefore in fact upon neither.\(^\text{111}\)

Problems arising from uncertainty as to the governing rules were exacerbated by the sheer volume of fraud in the market. This apparently pressed hard upon the courts. Complaining about the weight of such litigation, common law judges felt a need to reduce their dockets. Justice Esek Cowen of the Supreme Court of New York wrote in 1837:

There may be a moral beauty in the Roman law, which commends it to our adoption. There is no doubt that it is a more complete protection against the secret frauds of the vendor; but it lies with the legislature to adopt it. Such a measure would, at best, unsettle inveterate habits of business, and introduce a vast amount of litigation.\(^\text{112}\)

\(^{111}\) The Rule, supra note 18.

\(^{112}\) Hart v. Wright, 17 Wend. 267, 273 (N.Y. Sup. Ct. 1837). This text was quoted with approval by the Court of Errors in Wright v. Hart. 18 Wend. 449, 462–63 (N.Y. Sup. Ct. 1837), affg Hart v. Wright, 17 Wend. 267 (N.Y. Sup. Ct. 1837). Whether framed as frauds or breaches of warranty, the range of such cases was as broad as one might imagine in a market expanding at so fast a pace. They arose from causes as diverse as adulterated or poor quality consumer products, unsound horses and slaves, and real property with hidden liens. See, e.g., Osgood v. Lewis, 2 H. & G. 495 (Md. 1829) (quality of sperm whale oil for heating); Chilton v. Jones, 4 H. & J. 62 (Md. 1815) (evaluating soundness of slaves); Hastings v. Lovering, 19 Mass. (2 Pick.) 214 (1824) (quality of heating oil); Bacon v. Bronson, 7 Johns. Ch. 194 (N.Y. Ch. 1823) (real estate subject to liens enforceable but not readily discoverable); Everton’s Ex’rs v. Miles, 6 Johns. 138 (N.Y. Sup. Ct. 1810) (the soundness of a horse); Torris v. Long, 1
Justice Cowen acknowledged that the two chief and related antagonists of the sound price rule were the sheer volume of fraud in the market, and the burden the on courts that they were already bearing in dealing with such fraud. This reflected many judges’ concern for their dockets, which were overflowing with commercial cases. Even in quiet South Carolina, the judges complained loudly:

The principle which has been so long established in this state, that a sound price implies a warranty of soundness of property, has been found in practice to open the field of litigation to such a boundless extent, that it seems to become our duty to endeavor to define its limits with some more precision than heretofore, and to set some bounds to the mischief which is likely to flow from it... That the principle adopted by our courts, that soundness of property shall be implied from the soundness of price, may not be theoretically, and perhaps morally correct, I am not prepared to say. But it has been found, by experience, to be too refined for practical purposes, and furnishes a pretext in every case of a bad bargain to set aside the contract under a pretense of some defect in the property...

... I feel no disposition on my part, to add to the accumulated weight of business under which we are already tottering; imponere Pelio ossam, atque os-soe frondosum envolvere olympum.

N.C. (Tay,) 111 (Super. Ct. of Law & Eq. 1799) (soundness of a horse); Allison v. Tyson, 24 Tenn. (5 Hum.) 449 (1844) (the warranty of gentleness of a riding horse).
113. Hart, 17 Wend. at 273–74.
114. Id.
115. Smith v. M’Call, 12 S.C.L. (1 McCord) 220, 222–25 (S.C. Const. 1821). The Latin phrase is a corrupted version of a line in Virgil’s Georgics, I, 281. The reference is to the ancient Giants who, during a war with the Roman gods, tore Mt. Pelion out of the ground, stacked it on Mt. Ossa, and tried to climb into the home of the gods on Mt. Olympus. In context, Judge Nott was complaining about the pile of work facing the judges, as if it were a mountain.
Lacking a system of local commercial courts, as the English had prior to the consolidation of the royal courts, the more centralized judicial systems of the American states simply could not keep up with the volume of litigation generated under the sound price rule, and the expectations it created among merchants. Problems of uncertainty as well as problems of overcrowded dockets could both be solved by the unambiguous embrace of caveat emptor. Slowly but perceptibly, the courts marched in that direction.

One manifestation of the rise of caveat emptor was the abandonment of the rule that branding, and hence provenance, warranted the quality of goods. This abandonment defied the common understanding and often led to reversals of judgments based on jury verdicts for purchasers. For example, in Hyatt v. Boyle, the defendant purchased kegs of tobacco branded as Parkin's Crooked Brand, "a favorite brand, and always considered remarkably fine." The plaintiff sued for the purchase price, which the defendant refused to pay on the grounds that the tobacco was unsound and unmerchantable. At trial, the defendant prevailed before the jury. On appeal, defense counsel argued that the brand was a favorite in the market and that to sell under it was, in effect, to warrant that the tobacco was "fine and merchantable." Plaintiff's counsel argued, and the court agreed that as between the parties to the sale, the brand was for identification purposes only so that representations concerning the brand were not warranties of quality as a matter of law. To rule otherwise would be to violate the rule of caveat emptor.

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stacked on a mountain. The phrase "pile Pelion on Ossa" has also come to mean to add difficulty to difficulty, as in "piling on." E. COBHAM BREWER, Ossa, in DICTIONARY OF PHRASE AND FABLE (1894). Special thanks to Brian J. Gilligan for his help with the reference and the translation.

117. Id. at 112.
118. Id.
119. Id. at 113.
120. Id.
121. Id. at 119.
122. Id.
Similarly, in *Kirk v. Nice*, the plaintiff bought a large quantity of iron branded as “Centre county metal,” and paid the highest price. Clearly the purchaser and the jury understood the provenance and the price to be indicia of quality. However, the Supreme Court of Pennsylvania rejected that argument, ruling that the term would be recognized only as an indication of geographical provenance, with no associated warranty of quality.

*Wright v. Hart* involved flour manufactured by the E.S. Beach Company. The plaintiff-buyer purchased from a broker a large quantity of flour so branded, paying the “highest market price for the best flour,” as he had done several times before. The plaintiff equated the label, “E.S.B. Flour,” with a badge of quality, as did the jury, which gave a verdict in the plaintiff’s favor. Nine of the twenty-four judges agreed with the jury, implicitly holding that provenance and price ought to give rise to a warranty of quality. They accepted price, and specific indicia of provenance, as the jury had, as warranties of quality implicitly made by the seller. However, the majority of the court disagreed, ruling that liability would be imposed on a seller only if the seller had known of some defect in the goods that made them unmarketable. Price guaranteed nothing. Provenance guaranteed nothing. Only those merchants with fraudulent intent—with knowledge of the defects in the product and the intent to deceive the buyer—in other words, only the confidence men among merchants ought to be regulated by the law. These fifteen judges imposed responsibility not according to the quality of the product, but according to the frame of mind in which the sale was made. Intent to deceive provided the necessary, culpable state of mind.

124. *Id.* at 368.
125. *Id.* at 370–71.
128. *Id.* at 450, 455.
129. *Id.* at 455.
130. *Id.*
131. *Id.* at 462, 465.
132. *Id.*
Those who still clung to the notion that morality ought to be embodied in the law would have been comforted to know that one of the judges in the majority conceded that “[t]here may be a moral beauty in the [rule of caveat venditor], which commends it to our adoption. There is no doubt that it is a more complete protection against the secret frauds of the vendor.”\textsuperscript{133} But morality was rejected in favor of caveat emptor. The primary reason for its rejection was that it would “unsettle inveterate habits of business and introduce a vast amount of litigation.”\textsuperscript{134} It appears that fraud was an “inveterate habit[ ] of business.”\textsuperscript{135} The narrow scope of the court’s ruling removed the actual condition of the product from the heart of the legal issue and placed the emphasis on the merchant. Reliance shifted from the price and the product to the man and the private world of his mind, in which ordinarily, only he could know whether he had acted with fidelity.\textsuperscript{136}

\textbf{B. Confidence in Pretenses and Persons}

In order to understand how one might have confidence in a pretense, one must recognize that the word did not always denote the counterfeit, the false, or the bogus. One meaning of the word, which persisted in use into the nineteenth century, was simply a claim or a right.\textsuperscript{137} Thus in \textit{People v. Haynes},\textsuperscript{138} Judge John L. Wendell, the reporter, summarized one issue in the case as: “Were the several pretenses laid in the indictment, or one or more of the material pretenses, false?”\textsuperscript{139} Judge Samuel Nelson evinced a similar understanding of the meaning of the word, rejecting the argument that to complete the crime, “the false pretenses must be the sole and only inducement to the credit . . . because the pre-

\begin{footnotes}
\footnotetext{133}{Hart v. Wright, 17 Wend. 267, 273 (N.Y. Sup. Ct. 1837).}
\footnotetext{134}{Id.}
\footnotetext{135}{Id.}
\footnotetext{136}{Purchasers were protected only if sellers gave express warranties of quality. Whether statements made at the time of sale constituted such warranties was largely left to the jury, based on the facts of each case. \textit{Id}.}
\footnotetext{137}{\textit{Oxford English Dictionary}, “pretence,” definition number one (1971).}
\footnotetext{138}{11 Wend. 557 (N.Y. Sup. Ct. 1834), \textit{rev’d}, 14 Wend. 546 (N.Y. 1835).}
\footnotetext{139}{\textit{Id.} at 560–61.}
\end{footnotes}
tenses which were true undoubtedly had some influence." Pretenses were not inherently true or false; they stood for persons, and might be trusted or distrusted in the same ways.

Pretenses were more than statements of claims or assertions of rights. The meaning of the term extended to a symbol of such a claim or right, a thing "real and visible—as a ring, a key, or a writing; and even a writing would not suffice, except it was in the name of another, or so framed as to afford more credit than the mere assertion of the party defrauding." A pretense was a thing that carried with it symbolically the obligation, and hence the credit, reputation, and confidence-worthiness of a person other than the bearer. Both avatar and fetish, a pretense used in this way was intended to extend to the bearer a third party's confidence in the person represented by, and whose power was incorporated in, the pretense. The most common pretenses in use in the antebellum period were notes of corporations, banks, and even individuals, which answered the purpose of currency in that period.

The link between pretense and personhood is illustrated by the case of Gerritt Gates, the treasurer of the Dutch Reformed Church in Albany, New York, from 1826 to 1833. He regularly committed frauds against the church by preparing promissory notes as security for loans made to the church, and then by taking the money for his own purposes. By kiting the notes he avoided detection for years. Finally, he became bold enough to induce Dr. John Ludlow, president of the church council, unwittingly to endorse a promissory note payable by Dr. Ludlow personally. Gates then negotiated the note. He was caught when the purchaser of the note presented it to Dr. Ludlow for payment.

140. *Id.* at 567–68.
144. *Id.*
145. *Id.* at 169.
146. Gates, 13 Wend. at 313.
147. *Id.* at 314.
148. *Id.* at 316.
Gates was convicted of obtaining property by false pretenses in the Albany Court of General Sessions.\(^{149}\)

Despite the obvious nature of Gates’ swindle, his conviction was reversed on appeal, and he escaped criminal sanction.\(^{150}\) Because Gates had made no false statement when he duped Ludlow into signing the note, he could be convicted only if he had used another type of false pretense to get Ludlow’s signature.\(^{151}\) Gates had used a document, together with the endorser’s confidence in him, to obtain the endorsement on the same document.\(^{152}\) The court held that the statute was limited to cases in which one document was used to obtain a signature on another document.\(^{153}\) The document signed by the victim could not also serve as the false token. This was so, according to the Court, because “[the document signed by the victim] was no writing at all, because it

\(^{149}\) Id. at 319.

\(^{150}\) Id. at 324. The statute under which Gates was charged provided as follows:

Every person who, with intent to cheat or defraud another, shall designedly, by color of any false token or writing or by any other false pretense, obtain the signature of any person to any written instrument, or obtain from any person any money, personal property or valuable thing, upon conviction thereof, shall be punished.

Id. at 317–18.

This statute was intended to change the common law, under which private frauds and confidence games were not indictable, but subject only to civil sanctions. Id. at 319. The statute developed piecemeal, each piece dealing with a new type of fraud not previously within the sanction of the criminal law. Id. The first version criminalized deceits accomplished by use of false tokens or counterfeit letters in the name of another. Id. Although the Statute was amended to criminalize the use of any false pretense, not limited to the use of a false token, it did not apply to the taking by false pretenses of incorporeal property. Id. Then it was amended to criminalize takings of incorporeal property, such as the value represented by bank notes and bills of exchange. Id. Finally, it was again amended in 1830 to include obtaining by false pretense the signature of another on a written instrument. Id. at 320; see also Albany Dutch Church v. Vedder, 14 Wend. 165 (N.Y. Sup. Ct. 1835). The Vedder case arose from a claim by the church against Gates’ sureties. Many of the details of Gates’ swindles appear there. The church recovered from the sureties five thousand of the twenty thousand dollars Gates had swindled. Id. at 319.

\(^{151}\) Gates, 13 Wend. at 319.

\(^{152}\) Id. at 320–21.

\(^{153}\) Id.
did not purport to be the act of any person.”

Gates’ “pretense” was not in fact a pretense because it did not stand in the place of or invoke another person. Whether the pretense was bogus or legitimate was not the point. Gates, who was charged with a crime of false pretenses, had not used a pretense to commit the crime. For that reason, and because the indictment did not clearly state “how the false instrument or pretenses operated to effect the fraud,” Gates could not be convicted.

While the Gates case concerned the meaning and effect of tokens as pretenses, the case of Charles Haynes concerned the effect of persons as pretenses. In People v. Haynes, Charles Haynes, a desperately insolvent Boston merchant, bought goods on credit in New York City. Haynes knew he was in debt over seventy thousand dollars and expressly misrepresented his financial condition in order to prevent the goods he had purchased on credit from being reclaimed by the vendor from the shipping company. He was charged with obtaining goods by false pretenses, specifically by making statements to his seller “falsely representing himself to be in a situation in which he is not.” Haynes represented himself to be solvent, and worth approximately ten thousand dollars. Each such representation was a pretense, a claim that a certain state of fact existed. Each turned out to be false. The high court in New York ruled that title to the goods had passed to the buyer before the false pretenses were used to deceive the seller, and so the defendant had not committed a crime. The Haynes decision gave merchants more reason to doubt that the law would protect them from confidence men.

Haynes’ violation of his vendor’s confidence arose from his representations concerning his own creditworthiness. Personal assurances of that sort, important as they were, were based upon the fidelity of only one man, the purchaser. Representations concerning the creditworthiness of another carried more economic

154. Id. at 321.
155. Id. at 322.
156. People v. Haynes, 14 Wend. 546 (N.Y. 1835).
157. Id. at 563.
158. Id. at 550, 565.
159. Id. at 566.
160. Id. at 565.
161. Id.
weight and cultural cargo because they incorporated the fidelity of, and confidence in, two men. They inspired greater confidence than mere self-representation. Thus misrepresentations concerning the creditworthiness of another were particularly threatening to confidence in the market. Violations fell within the broader category of "false representation of character."\textsuperscript{162}

Such cases appeared in New York beginning in 1808.\textsuperscript{163} Ebenezer Brown was a small merchant in Albany, New York, in the first decade of the nineteenth century.\textsuperscript{164} He was reputed to own land valued at four thousand dollars, and to have a large amount of money owed him by reliable debtors.\textsuperscript{165} His creditors had "full and perfect confidence" in him.\textsuperscript{166} It had not always been so. When Brown first arrived in Albany, he "was embarrassed to obtain credit."\textsuperscript{167} As a result, a merchant named Center required Brown to execute a bond payable to Center, with a warrant of attorney, for two thousand dollars.\textsuperscript{168} This gave Center an immediate claim on any of Brown's goods in the event of late payment.\textsuperscript{169} Even so, Brown paid his debts for many years, and his associates came to have "full and perfect confidence as well in the integrity as solvency of Brown."\textsuperscript{170}

That all changed when Brown bought goods valued at six hundred dollars from another merchant named Ward.\textsuperscript{171} Ward did

\begin{footnotes}
\textsuperscript{162} Rumsey v. Lovell, Ant. N.P. Cas. 17, 17 (N.Y. Sup. Ct. 1808).
\textsuperscript{163} See, e.g., Ward v. Center, 3 Johns. 271 (N.Y. Sup. Ct. 1808). In Ward, the court relied on Pasley v. Freeman, 3 T.R. 51 (Ct. Com. Pl. 1789), in which the English court held that a false representation of the creditworthiness of another, made with knowledge of the falsity, was a basis for liability for a third party's losses consequent upon the representation. \textit{Id.}
\textsuperscript{164} Ward, 3 Johns. at 272.
\textsuperscript{165} \textit{Id.} at 274.
\textsuperscript{166} \textit{Id.} at 281.
\textsuperscript{167} \textit{Id.} at 272.
\textsuperscript{168} A warrant of attorney was similar to a modern confession of judgment. A confession of judgment is an agreement to allow another to enter a judgment against oneself, upon the occurrence or nonoccurrence of an event, such as the making of a payment. \textsc{Black's Law Dictionary} 293 (7th ed. 1999).
\textsuperscript{169} Ward, 3 Johns. at 281.
\textsuperscript{170} \textit{Id.}
\textsuperscript{171} \textit{Id.} at 271.
\end{footnotes}
not know Brown and so obtained a credit reference from Center. The reference was not made in writing and as a result the case was framed as an action for deceit. Ward’s confidence in Center allegedly led him to rely upon Center’s confidence in Brown. It seems, however, that Center failed to mention the bond and warrant of the attorney he held from Brown. Brown later surprised all his creditors by disappearing, leaving both Center and Ward unpaid. Center then executed the warrant he held and took Brown’s goods, including those Brown had purchased from Ward. Ward promptly sued Center for “falsely recommend[ing] a man who was good for nothing . . .” Witness after witness testified that “their confidence in him [Brown] was unshaken until he absconded.” Nevertheless, Center’s failure to disclose the bond and warrant was deemed by the jury to have been a breach of Ward’s confidence. Apparently Center’s successful collection of the debt Brown owed him, with goods that had originated with Ward, was accepted as evidence of Center’s intent. As Judge William Van Ness noted for the court, “It is certainly a circumstance of some weight, that the defendant concealed the fact of his having in his possession the bond and warrant of attorney.” The role of this fact in the court’s reasoning was not made clear in the opinion, and so the basis of the judgment remained in doubt. It was not clear whether the mere existence of the warrant was the basis for the judgment, or whether it was based on Center’s actual collection of his debt. Even so, Center was required to pay Ward’s losses.

In Upton v. Vail, Vail sold goods to Upton’s debtor, on Upton’s parol recommendation. Upton then executed on the

172. Id.
173. Id.
174. Id.
175. Id. at 275.
176. Id at 274.
177. Id. at 272–73.
178. Id. at 273.
179. Id. at 272–75.
180. Id. at 275.
181. Id. at 282.
182. Id. at 283.
184. Id. at 181.
debt due him, and took the goods sold by Vail before Vail was paid.\textsuperscript{185} Upton was so confident in his right to do so that he confessed it in open court,\textsuperscript{186} asserting that he "had a right to do so, and would do it again."\textsuperscript{187} Clarifying Ward, the Supreme Court of New York held that, as a matter of justice and of law, "if the recommendation was made in bad faith, and with knowledge that [the debtor] was insolvent, in this case you are bound to indemnify the creditor."\textsuperscript{188} It seemed that the referor’s mere knowledge of the insolvency of the debtor was a sufficient basis for judgment, regardless of the referor’s later execution against the debtor’s goods. Upton was liable for deceit and was forced to pay.\textsuperscript{189}

\begin{footnotesize}
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\item \textit{Id.}
\item \textit{Id. at 202.}
\item \textit{Id. at 181.}
\item \textit{Id. at 184.}
\item \textit{Id.} Merchants who asked for a credit reference faced another legal hazard in this period. Common law defamation rules made it hazardous to say anything that would reduce confidence in another merchant. Pasley v. Freeman, 3 T.R. 51 (Ct. Com. Pl. 1789). This legal influence has been largely ignored by historians. The law in England placed a man at severe risk of a defamation suit if he so much as hesitated to recommend another’s creditworthiness. The \textit{Pasley} court stated the rule in these words, which must have terrified loose-tongued merchants: "for if a man, who is asked a question respecting another’s responsibility, hesitate, or is silent, he blasts the character of the tradesman; and if he say that he is insolvent, he may not be able to prove it." \textit{Id. at 60.} The legal remedies for diminishing or destroying confidence in a merchant were harsher than those for falsely inducing it, because the latter was sanctionable only when done with fraudulent intent, but the former was sanctionable regardless of intent as long as the statements made were untrue. This strict liability highlights both the importance and the fragility of confidence in the antebellum market. \textit{See Thomas Starkie, The Law of Slander, Libel, Scandalum Magnatum, and False Rumor, with Notes and References to American Decisions by Thomas Huntington} (Fred B. Rothman & Co., ed. 1997) (1832).

The New York courts squarely held that to say or write that a mechanic or merchant was incompetent, insolvent, or otherwise unworthy of credit was defamatory. This was one of the categories of defamation \textit{per se}, for which a plaintiff would be required to prove merely that the words had been spoken in order to recover. The plaintiff was not required to prove the falsehood of the statement. The defendant had the burden of proving that the statement was true. That was the only means by which a defendant could find exoneration. \textit{Starkie, supra}, at 413. It was not defamatory \textit{per se} to state that a person was a swindler, because swindling, by that name, was not indictable. The supreme court held in 1829 that "[a]ny words which in common acceptation imply a want
\end{enumerate}
\end{footnotesize}
Ward and Upton were civil cases for deceit, and so there was no discussion of pretenses under the statute. Even so, pretenses were surely involved in each case, specifically the pretense or claim that the man whose credit was recommended was capable of paying his debts.

The widely-cited case of Addington v. Allen was based on a more elaborate type of pretense, a letter of confidence. The case arose in 1825 after George W. Baker, a miserably unsuccessful Erie County merchant, fell into a debt of approximately twenty-two hundred dollars to Samuel Addington. Addington was a successful Oneida County merchant and attorney, and was also Baker’s uncle. Addington was aware that Baker’s business was sure to fail, and Addington would never recover what Baker owed him. He decided to send Baker to New York City to buy as much as he could on credit. Addington would then execute a judgment against Baker and seize the goods, thereby collecting on his debt. What Addington insisted was “a fair business transaction” was determined later by the courts to be a swindle and a fraud. Even so, the court struggled to find a way to sanction him.

On November 1, 1825, Addington wrote a letter to Ebenezer Wilson, a merchant in New York City with whom Addington had a good business relationship, and who had confidence in Addington. This letter of confidence identified Baker, the bearer, as an Erie county merchant, and an acquaintance of Addington’s. It stated that Addington had just then purchased 327 barrels of beef from Baker, thereby falsely implying that

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191. Id. at 377.
192. Id. at 378.
193. Id.
194. Id.
195. Id.
196. Id. at 393.
197. Id. at 381.
198. Id. at 376.
Baker had or would have money from Addington soon. In fact, Addington had taken the beef in partial discharge of Baker’s debt. The letter stated that Baker had conducted business in many of the larger commercial centers in northwestern New York. As the Court of Errors noted, “This letter was admirably adapted to inspire confidence, and yet to avoid responsibility. . . . I hesitate not to say that it would, with most men, and men too of sagacity and discernment, have inspired confidence, and would have been about as effectual in giving credit as an express recommendation.” The court appeared to recognize that Addington’s tactic was specifically intended to avoid the rule in Upton.

Addington knew full well that Wilson did not trade in goods of the type sought by Baker, but he closed his letter with a request that Wilson help Baker make purchases in New York City. Thus, Wilson was not the target of the swindle, but a pawn in its execution.

Addington advised his nephew “to go to New-York and get what goods he could” on credit. Baker purchased about four thousand dollars of goods in New York, about half of which came from the plaintiff, Joseph Allen. There is no reason to distinguish Allen from other sellers of goods in New York City. Such merchants needed to move the goods they held, perhaps on credit, from others. They might have had goods backed up at the city’s busy port, waiting for delivery to showrooms in the commercial district. Engaged in a necessarily “rapid commerce,” many merchants dispensed with the “minute caution” necessary to protect themselves from swindles. Many relied instead on confidence as a matter of necessity. Nevertheless, Allen was sufficiently cautious that he inquired of Wilson concerning the safety of trusting Baker, and was informed that Wilson would trust Baker, on the

199. Id. at 377.
200. Id. at 378; Allen v. Addington, 7 Wend. 9, 23 (N.Y. Sup. Ct. 1831).
201. Addington, 11 Wend. at 392.
202. Id.
203. Id. at 386.
204. Id. at 390.
205. Id. at 377.
206. Lord, supra note 17, at 277.
207. Id.
basis of Addington’s letter. In the words of Allen’s declaration, "the plaintiff, confiding in the representation of the defendant and Wilson, at the instance of the defendant, sold and delivered goods of the value of $2000, upon credit to Baker...."

Concerned that Baker’s creditors in Albany might seize the goods when Baker passed through that city, Addington lent Baker another thousand dollars. Baker made partial payments to his creditors in Albany, and then carried the goods back to Erie County. Addington executed his judgments and recovered what Baker had owed him. Little was left for Baker’s other creditors, and nothing for Allen. As a result, Allen sued Addington for deceit. The jury awarded Allen over twenty-five hundred dollars, which included his actual losses, interest, and punitive damages.

The issues on appeal resembled those in the Gates case. The first was whether Addington had committed any wrong against Allen for which the law provided a remedy. The issue arose because Addington wrote his letter to Wilson, not to the plaintiff Allen. Addington’s attorneys argued that the rule of law derived from the earlier cases could be stated as follows:

To render a party liable for deceit, such means must be used as are likely to impose upon a person of ordinary prudence and circumspection—to throw him off his guard on a point where he might reasonably place confidence in the representation made. . . .

208. Addington, 11 Wend. at 377.
209. This is the equivalent of a modern complaint in a civil action. See id. at 375.
210. Id. at 377.
211. Id. at 378, 390.
212. Id.
213. Id. at 379, 390–91.
214. Id. at 378–79.
216. Addington, 11 Wend at 380.
217. Id. at 374.
218. Id. at 383.
The damage must be the natural consequence of the wrongful act imputed to the defendant.\textsuperscript{219}

Plaintiff’s attorneys were content to recite the facts and invoke “the plainest principles of natural justice and universal jurisprudence . . .”\textsuperscript{220} They asserted that it was not necessary to prove that Addington intended to swindle Allen in particular, but that it was sufficient merely to prove a general intent to defraud someone, and that this general intent led to the fraud suffered by Allen.\textsuperscript{221}

In the Supreme Court of Judicature, New York’s intermediate appellate court, Chief Justice John Savage undertook a painstaking review of precedents from England and New York, and concluded that the rule of law governing commercial conduct was essentially the rule contended for by plaintiff’s attorneys: “If a person intending to defraud somebody gives a general recommendation of credit to an insolvent person, any one who sustains damage by reason of such recommendation, is entitled to an action for such damage, grounded upon the fraud.”\textsuperscript{222} In other words, the court would be empowered to enter judgment against Addington if the facts alleged had actually occurred. That raised the second issue, which was the sufficiency of the evidence to establish or prove the cause of action. The deceit lay not so much in what was set forth in the letter, much of which was true, but in what was not set forth. Baker’s enormous debts were not mentioned, nor were the judgments Addington held against Baker.\textsuperscript{223} The fact that Baker had never had any capital, except that provided by Addington, was not revealed, nor was Addington’s advice to Baker that he “purchase all the goods he could on credit, because . . . in that way [Addington] expected to get his pay . . .”\textsuperscript{224}

After reviewing all of the evidence, the Chief Justice noted the importance of credit in the cash or confidence economy: “A man with money in his pocket would need no aid in the city of New-York to find the goods he wanted; but if his object was to

\textsuperscript{219} Allen, 7 Wend. at 9, 15–16.
\textsuperscript{220} Id. at 16–17.
\textsuperscript{221} Id.
\textsuperscript{222} Id. at 22.
\textsuperscript{223} Id. at 23.
\textsuperscript{224} Id. at 22–23.
purchase on credit, then aid was very important." Because the aid was Addington's fraudulent recommendation of creditworthiness and the confidence it inspired, the judgment against Addington was affirmed.

The Court for the Correction of Errors reversed both lower courts. Chancellor Reuben Walworth accepted all of the facts as set forth in the lower court's opinion, and went so far as to state that "the goods in this case were obtained by actual fraud ..." He summarized the dispositive facts as follows:

The letter written by the defendant, although artfully drawn, was undoubtedly intended to convey an impression to the mind of Wilson that Baker was a merchant of fair standing and worthy of credit, who was going to New-York to buy goods in the ordinary way of business. ... [H]e intended to obtain the goods of the New-York merchants for the fraudulent purpose of subjecting them to executions which might be issued on the defendant's judgments ...

Despite this damning evaluation of Addington's conduct, the judgment against him could not be affirmed. This was so in part, because the declaration by which Allen initiated the lawsuit had not been properly drafted so as to empower the court to enter judgment. The Chancellor summarized his reasons for finding it insufficient:

[T]he plaintiff has wholly omitted to state, except by inference, in what manner Wilson was induced by the defendant to assist Baker to obtain the goods

225. Id. at 25.
226. Id. at 24–26.
228. Addington, 11 Wend. at 382.
229. Id. at 383.
230. Id. at 386.
on credit; and *it only appears by implication*, that
the assistance which Wilson was induced to render,
and did render, was by recommending him as wor-
thy of credit.231

Chancellor Walworth closed his lengthy opinion with his regrets at
the obvious inequity of the outcome: "I regret that it is not in my
power to sustain the recovery in this case, as it appears from the
bill of exceptions that a most gross fraud has been practiced upon
the plaintiff . . . "232

The same judicial perspective that favored caveat emptor as
a limit on buyers' protections against fraud animated the *Addi-
ton* and *Haynes* decisions. In each of those cases the court found
reasons to limit vendors' protections against fraud. The culture of
mercantile accountability present in the early century, and reflected
in the sound price and branding rules, was slowly replaced with a
culture of mercantile impunity. One unintended consequence of
this legal change was that honest merchants received less protec-
tion from the law, and confidence men implicitly received more.
The lawful conduct of a merchant came increasingly to resemble
the conduct of a confidence man.

The doctrine of caveat emptor spread throughout common
law jurisdictions during the first half of the nineteenth century, but
it did so haltingly and unevenly. Consequently, the courts' uncer-
tainty as to the applicability of the doctrine in particular jurisdi-
cions inflicted similar uncertainty upon merchants, as we shall see
in the next section. This necessarily decreased confidence among
merchants in their trading partners and sharpened their sense of
vulnerability in the marketplace.

To the extent caveat emptor governed mercantile transac-
tions, it effectively detached mercantile fidelity from product
quality, breaching the link between man and product that had animated
both the common law and the civil law. The implied merger of the
fidelity of man and product was rejected. Vendor and product
were separated in the eyes of the law. Neither price nor branding
warranted quality as they had previously, and as they continued to
do in the public imagination.

231. *Id.*
232. *Id.* at 387.
Confidence in pretenses was necessarily reduced when pretenses were narrowly defined, as in Gates. Such confidence was further reduced by the stringent requirements of pleading and proof of the pretenses’ effect on its victims, as in Haynes and Addington. An actor in the market was judged no longer by the quality of his goods or his fidelity to his agreements to pay, but by the quality of his intentions or the particular thoughts of his victim. The locus of fidelity was driven inward into the privileged precincts of the mind, as were the consequences of its betrayal. This effectively shifted the commercial burdens arising from defective and bogus products from the vendor to the purchaser, and, as a practical matter, made proof of the purchaser’s case more difficult. Suffering because the law provided little effective protection for their reliance on the fidelity of others, yet compelled by their own internal imperatives to fulfill the duty of their calling, merchants danced with the same devil they were required to avoid.

IV. CONFIDENCE AND CAVEAT EMPTOR IN NON-LEGAL LITERATURE

The tension between confidence and caveat emptor appears in the non-legal literature of the period in the forms of comedy and tragedy. All such literature served as a cautionary tale. The comic literature of the confidence man has received ample consideration from literary critics and cultural historians. To the discussion of the comic I will add only a brief mention of Poe’s essay, Diddling Considered as One of the Exact Sciences. With his customary relentlessness and brilliancy, Poe draws a parallel between smaller,
street level diddles, and the larger diddles that characterized the capitalist market economy, the “diddle at Brobdingnag.”

Poe describes eleven “modern instances” of diddles, five of which involve diddler pretending to be persons they were not. Another is a change scam: a diddle involving a purchase seemingly paid for with a bank note of too large denomination, requiring change. The diddler, after making a purchase for one dollar, claimed to have only a five dollar note, which was at home. He arranged for the seller’s messenger to deliver the goods to the diddler’s wife, with change for a five, at a fictional address. He then intercepted the boy, taking the package and the four dollars in change, and sent him to the diddler’s fictional wife. This resembles the diddle in the later case of Commonwealth v. Hulbert, in which the defendant Grove Hulbert used a bogus ten dollar note drawn on a non-existent bank to obtain a forty pound cheese valued at four dollars, together with six dollars of notes and coin, which was the change from his ten dollars. Hulbert was convicted of obtaining goods by false pretenses, and his conviction was affirmed on appeal.

Poe’s perspective was decidedly comic, and to that extent reflected the bulk of the confidence man literature to which modern critics have given their attention. And while the precise psy-

239. Id.
240. Id. The first, third, fifth, ninth, and last all involve the pretense of being someone else, in which that other person’s identity becomes the pretense.
241. Id. at 190.
242. Id.
243. Id.
244. Id.
245. 53 Mass. (12 Met.) 446 (1847).
246. Id. at 446–47.
247. Id. at 449.
248. In most discussions of confidence-based swindles the confidence man is, first of all, a man. For a brief discussion of confidence women, see LORI LANDAY, MADCAPS, SCREWBALLS, & CON WOMEN: THE TRICKSTER IN AMERICAN CULTURE 22–24, 32–46 (Univ. of Pa. Press 1998). In the leading discussion of the literary confidence man, Gary Lindberg has described him as an embodiment of the contradictions “between our ideals and our conduct.” GARY LINDBERG, THE CONFIDENCE MAN IN AMERICAN LITERATURE 3 (London, Oxford Univ. Press 1982). More than a mere “swindler who practices on the confidence or trust of the credulous person,” he was “an amalgam of possibili-
chological economy of the comic is far beyond the scope of this article, it is in itself amusing to note that another of Poe’s diddles appears, in substantially identical form, in Sigmund Freud’s *Jokes and Their Relation to the Unconscious.* 249 Poe’s version was as follows:

Rather a small, but still a scientific diddle is this. The diddler approaches the bar of a tavern, and demands a couple of twists of tobacco. These are handed to him, when, having slightly examined them, he says: “I don’t much like this tobacco. Here, take it back, and give me a glass of brandy and water in its place.” The brandy and soda [sic] is furnished and imbibed, and the diddler makes his

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way to the door. But the voice of the tavern-keeper
arrests him. "I believe, sir, you have forgotten to
pay for your brandy and water." "Pay for my brandy
and water! — didn't I give you the tobacco for the
brandy and water? What more would you have?"
"But sir, if you please, I don't remember that you
paid me for the tobacco." "What do you mean by
that, you scoundrel" — "Didn't I give you back your
tobacco? Isn't that your tobacco lying there? Do
you expect me to pay for what I did not take?" "But
sir," says the publican, now rather at a loss what to
say, "but sir—" "But me no buts sir," interrupts the
diddler, apparently in very high dudgeon, and
slamming the door after him, as he makes his es-
cape - "But me no buts, sir, and one of your tricks
upon travelers."

Freud's pithier version is as follows:

A gentleman entered a pastry-cook's shop and or-
dered a cake; but he soon brought it back, and asked
for a glass of liqueur instead. He drank it and began
to leave without having paid. The proprietor de-
tained him. "What do you want?" asked the cus-
tomer. -- "You've not paid for the liqueur," -- "But I
gave you the cake in exchange for it." "You didn't
pay for that either." -- "But I hadn't eaten it."

Poe went beyond the details of petty swindles and claimed
ddling as the essence of human nature. In a parody of Plato's
pathetic definition of Man as a biped without feathers, Poe defined
Man as "an animal that diddles." "Had Plato but hit upon this, he
would have been spared the affront of the picked chicken." Poe
knew that man must be both; for the diddler to diddle, he required
a chicken to be picked. But man in his fullest development is the

250. Poe, supra note 1, at 392.
251. Freud, supra note 249.
252. Poe, supra note 1, at 388.
“animal that diddles,” and the big cities with their sprawling markets were “a diddle at Brobdingnag.”

Diddling, as a fundamental characteristic of human nature, was for Poe a matter fit for philosophers and novelists. It was the stuff of jurisprudence and economics, too. Poe set up a comic contrast between “the two great Jeremys,” Jeremy Bentham, the British jurist and economist, and Jeremy Diddler, a fictional character who lent his name to swindles. The dour Bentham, a stuffed shirt who personified both the law and the principles of the dismal science, was “a great man in a small way.” His antithesis, the joyful and free-spirited Diddler, was “a great man in a great way.” Bentham restricted and constrained the riotous human nature that Diddler fully actualized.

Poe’s diddler was a parody of the antebellum merchant. His characteristics included “minuteness, interest, perseverance, ingenuity, audacity, nonchalance, originality, impertinence, and grin,” many of which also characterized the merchant. Yet the confidence man carried no burden of mercantile fidelity. He was its antithesis. In fact, in order to be an upstanding merchant, one strove to avoid being a confidence man. The confidence man served as a comic counterpoint. To be a decent member of the merchant class, one would avoid those things a confidence man would do. As Poe described him:

Your diddler is impertinent. He swaggerers. He sets his arms a-kimbo. He thrusts his hands in his trousers’ pockets. He sneers in your face. He treads on your corns. 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.

The authors of the business literature of the antebellum period did not take such a lighthearted approach to the problems of

253. Id.
254. Id.
255. Id.
256. Id.
257. Id.
258. Id. at 389.
confidence and the confidence man. Their discussions of confidence, fidelity, and good faith were earnest and sometimes frantic, lacking any element of comedy. In a lecture entitled “The Legal Protection of Good Faith,” published in 1839, Daniel Lord, Jr. extolled the virtues of mercantile fidelity as loudly as he proclaimed the dearth of legal protection it might find in American courts. “In a community of merchants,” he said, “good faith hardly admits of eulogy.” He further noted:

It is from absolute necessity rather than from considerations of utility merely, that a commercial society makes good faith a cardinal virtue; indeed, it goes farther, it considers it so indispensable as to treat it as a military people do courage, deeming its want the deepest disgrace, while its possession is but an ordinary merit.

Why, then, would good faith not be protected by the law? Lord had no explanation. His argument simply collapsed into notions of morality.

Lord depended upon the fidelity of individual merchants for protection of something absolutely necessary to commercial society. His idea of good faith was comprised largely of those “moral virtues” which he linked directly to the divine. Examining the law governing various sorts of contracts of sale, he found that, with few exceptions, the buyer had no redress with respect to issues of quality. He recommended that a buyer “look specially and exclusively to him with whom he deals.” According to Lord, a buyer “should purchase his knowledge by his misfortune.” He acknowledged the harshness of the rule of caveat emptor, and the “natural equity, that one who pays a fair price should have a fair article.”

259. Lord, supra note 17.
260. Id.
261. Id.
262. Id.
263. Id. at 233.
264. Id. at 232.
265. Id. at 233.
266. Id.
sion in the content of the legal rule, blaming it on "distinctions which learned judges and unlearned jurors have united in draw-
ing."267 For merchants, safety lay in assuming that, with respect to
the quality of goods, the measure of goods, and the creditworthi-
ness of purchasers, the law provided no protection.268 They were
left to "the protection chiefly of individual vigilance, and the sound
operation of an honest public sentiment."269 Public opinion and
scorn for the confidence man were the only reliable protections
available to the merchant, according to Lord.270

The same business journal that published Lord's anxieties
also published a lecture entitled "On the Moral and Intellectual
Culture of American Merchants," by the Reverend George Putnam
of Boston.271 Putnam offered a remedy for mercantile anxiety
based entirely on religious morality. It is hardly surprising that
jittery merchants should have turned to the original source of their
capitalist "spirit," Protestant religion, for such consoling nostrums
as it might offer.272 Nor is it surprising that such guidance should

267. Id.
268. Id.
269. Id. at 239.
270. Id. at 240.
271. Reverend George Putnam, Lecture to the Mercantile Association of
Boston on the Moral and Intellectual Culture of American Merchants, 8 HUNT'S
MERCHANT MAG., April 1843, at 301.
272. MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF
CAPITALISM (Talcott Parsons trans., Dover Publications 2003) (1920). Much of
our understanding of modern economic history arises from Max Weber's nar-
rative of the emergence of a productive and rationalized market which provided a
forum for increased productive labor of all types. This arose from the remnants
of Calvinism, according to Weber, and provided an alternative to non-rational
and less productive traditional labor patterns, and to the chaos of pre-market
feudal duties and inexact barter systems. This enormously useful shorthand
nevertheless obscures important points. First, the use of the term implicitly
underestimates the rationality of earlier systems and overestimates the rational-
ity of the antebellum market. Second, the term "rationalize" has been taken
perhaps too literally, at least as applied to antebellum American law. The role of
antebellum law was not precisely to "rationalize" the market. It was not to im-
pose any formal or strictly logical rationality on market practices, or on the pat-
terns of thought enabled and released by the market. That was not the plan. It is
fair to say that the law redeemed the market from some patterns of thought ident-
ified with earlier, allegedly more primitive systems of exchange. In some small
way, the law imposed a greater level of predictability on the market. Perhaps
be framed specifically as exhortations to adherence to a high moral standard of mercantile fidelity. Confidence was, to a great extent, reliance on mercantile fidelity.

The turn to religion in the face of uncertain legal protection led to the conflation of religious and economic imperatives and to a sacralization of mercantile obligation. It led to the sacralization of contract. The language of the sacred, as used to describe contracts, was not entirely new, but it was invoked with a plaintive intensity in both legal and non-legal literature in this period. In the novel Undercurrents of Wall Street: A Romance of Business, Richard Kimball’s claying tale of antebellum boom and bust, the narrator proclaims: “How little do the majority of the world understand the sensitiveness of the merchant as to his credit, of his keen appreciation of the sacredness of a business obligation . . . .” A half-century later, Oliver Wendell Holmes, Jr. noted this attitude and ridiculed it: “the so called primary rights and duties [of contract] are invested with a mystic significance beyond what can be assigned and explained.” Holmes was correct in his observation. The obligations of contract, and the credit and confidence to which they were linked, were things of mystical significance, sacred and magical in the minds of antebellum merchants, yet given uncertain protection by the law.

The Reverend Putnam spoke in unambiguously religious terms on the virtues of fidelity in matters of business. In a frantic tone he expressed his advice to his listeners:

Do not rely upon usage as the safe rule of moral action. You have within you a higher, plainer rule.

Follow that—your sense of absolute right; follow

"systemization" would serve as a better shorthand than “rationalization” for the effect the law imposed on the antebellum market. For more information, see EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (W.D. Halls trans, The Free Press 1984) (1893), especially Book III, Chapter 1.


that—it is simple, intelligible, and never misleads. I do not know what are the laws and usages of trade, but I do know that there are such things as right and wrong, truth and falsehood; and I do know that the ways of man can never supersede, or rightfully annul, the laws of God. Devote yourselves, with unswerving allegiance, to the right and the true. By all that is noble in the spirit and high in the hopes of youth, follow these in the largest and smallest matters, even to the very letter of the law of your conscience and your Maker. 276

Adherence to the mere “morality of the law and the tolerated usage of trade” were not enough. 277 These were disparagingly consigned to the category of “unworthy, however customary artifice.” The choice of the word “artifice” is telling. Satan was commonly referred to as an “artificer” of various undesirable events and frauds. 278 He had also attempted to annul the laws of God. Putnam sought to warn his audience away from such presumption: “The ways of man can never supersede, or rightfully annul, the laws of God.” 279 For Reverend Putnam, anyone who fell short of his standard of absolute fidelity was a confidence man, and perhaps a devil.

To say that . . . the policy of business cannot be made to square with strict rectitude, is heathenish; nay, I do injustice to respectable heathenism—it is devilish! It is mounting mammon upon the throne of the world; high up, palpably and avowedly above the living God; and declaring that here we owe allegiance, and here we do and must, and will, pay our worship. Do not believe the doctrine . . . If that must be your creed, tacit or open, then I warn you to flee from the city and the haunts of traffic [i.e., com-

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276. Putnam, supra note 271, at 308 (emphasis added).
277. Id. at 307.
278. See, e.g., JOHN MILTON, PARADISE LOST, bk. IV, l. 121 (1667); see also Putnam, supra note 271, at 308, referring to the “tricks and artifices” of fraudulent business practices.
279. Putnam, supra note 271, at 308.
merce] as from the fires of Sodom or the gates of hell.280

The standard of fidelity advocated by Putnam as a matter of mercantile morality was a substitute for protections not then enforced as a matter of law. Putnam knew this and dismissed the “morality of the law” as “unworthy.”281 By focusing their attention on religious morality, Putnam and his audience facilitated the law’s withdrawal of the protections it had earlier afforded. The unintended and ironic consequence of the flight to religious morality was to facilitate the separation of law and morality, and the substitution of an internal standard of intent for an external standard of quality and performance.

Putnam and many others believed that the source of temptation, the serpent in the garden of mercantile rectitude, was credit. “[C]redit brings with it its own peculiar moral dangers,” he warned.282 The dangers were that a merchant might breach his sacred obligation to pay, or that, in order to get the means with which to pay Peter, he might defraud Paul. The Reverend G. W. Burnap raised similar concerns in a lecture delivered at The Mechanics’ Lyceum in Baltimore.283 Burnap claimed that the causes of the protracted depression following the Panic of 1837 included “the abuse of credit,”285 and “a low state of public morals.”286 The latter was illustrated by the spread of gambling and by the proliferation of dramshops which provided a man with the “means of transforming himself from an idler into a sot....”287

While Burnap condemned alcohol and games of chance unambiguously,288 his condemnation of credit was more nuanced.289

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280. Id.
281. Id. at 307.
282. Id. at 310.
284. For an explanation of the Panic of 1837, its causes, and its consequences, see McGrane, supra note 13, at 1–42. See also Peter L. Rousseau, Jacksonian Monetary Policy, Specie Flows, and the Panic of 1837, 62 J. ECON. HIST. 457 (2002).
286. Id. at 500.
287. Id. at 500, 502.
288. Id. at 497–98.
He recognized that in a largely agrarian economy “[t]he returns for a large proportion of human labor are only annual,” and must therefore be undertaken on the basis of confidence. But the same confidence and credit that were “essential to business . . . may easily be carried to excess.” This, in turn, he blamed on extravagance, ignorance, and immorality, completing the circle of his argument with implicit acknowledgment of what his colleague Putnam called “the treacherous despotism of mammon.”

If, as Putnam, Burnap, and many others believed, the overextension of credit had been the cause of the Panic of 1837, then it was credit that drove otherwise upright merchants to “all manner of concealment and evasions.” This concealment encompassed the quality of products sold and the fidelity of promises to pay. Credit-pressed merchants sometimes increased revenue by selling fraudulent products or by taking goods without payment. In such circumstances, a merchant of less than perfect fidelity “must take this confiding man’s money, and that industrious woman’s earnings,” until he has “utterly demoralized himself” and lies “broken alike in fortune and character”—until he has become a confidence man. As Putnam explained, stories of otherwise respectable merchants falling into the immorality and infidelity of the confidence man were “a reality [that] every man throughout the land has seen . . . .”

Credit seduced even virtuous merchants, and insolvency terrified them. Each threatened a merchant’s status in business as well as his status in the eyes of his God. One would not go too far to say that abuses of credit, and the concomitant abuses of confi-

289. _Id._ at 497.
290. _Id._
291. _Id._ at 498.
293. _See supra_ note 284.
295. _See, e.g._, Bradford v. Manly, 13 Mass. 139 (1816) (arising from a sale of barrels of paint containing a substantial amount of dirt).
296. _See, e.g._, People v. Haynes, 14 Wend. 546 (N.Y. Sup. Ct. 1835) (arising from defendant merchant’s failure to pay for goods purchased on credit).
298. _Id._
dence, were the instruments of Satan. Ordinary merchants feared the temptations of the infernal Confidence Man and feared becoming confidence men themselves.

Charles Francis Adams recognized a source of moral danger specifically in the magical thinking about credit that afflicted the antebellum market. In a lecture delivered in 1840, he observed that, to some, credit seemed to have a power independent of human agency: “It is too much the tendency of the present age, to consider credit as wholly responsible for effects, the origin of which is really to be seen in trade.” To those same persons, credit seemed miraculously sui generis. Adams marveled that “the idea has been very generally entertained, that it is possible to make credit survive the destruction of its principal elements.”

He complained that

[T]here are not a few honest and well-disposed citizens . . . who . . . have almost convinced themselves that there is a substantive existence in credit remaining even when separated from capital, and after promises made cease to be performed or even relied upon. The consequence has been a tendency to disregard the safe proportion which credit should always bear to capital, and entirely to overlook the indispensable necessity of literally performing contracts.

For Adams this was tantamount to credit annihilating itself without disappearing, or eliminating its original form and taking on another, both new and contradictory to the original. It was a metaphysical impossibility.

Yet even Adams, who saw the error of his contemporaries’ apparent belief, strayed into it himself. Credit was personified in his address, just as it was in the magical thinking of others. He attributed to it a meta-human agency and, in a curious synecdoche, offered “her” as the symbol of New York, America, and the market economy. “She” was one of “the great agents in nature;” “she has

299. Adams, supra note 80, at 208.
300. Id. at 204.
301. Id. at 196–97.
had the freest play” during the prior half century to facilitate industrial expansion; “she has concentrated the powers of all the producing classes;” “she has stepped in to inspire the navigator with confidence;” and she has wrought an “almost magical transformation” of Manhattan Island. Here he was not describing the views of others, but views he claimed to hold as his own.

Adams’s magical thinking is further illustrated by his choice of a verse from Dryden’s *Annus Mirabilis*, with which he closed his oration:

Now like a maiden queen she will behold,
From her high turrets, hourly suitors come –
The East with incense, and the West with gold,
Will stand like suppliants to receive her doom.

The ambiguous identity of the female protagonist in these verses, and the evocative and ambiguous “doom,” are richly suggestive of the magical thinking informing both religious and economic imagery in late antebellum discussions of credit and merchant fidelity. The queen here might be New York, or America, or credit herself, or perhaps, in the tradition of the infernal shape-shifter, all three.

Credit here is a seductress, transgressing and encouraging transgression by always-aspiring and sometimes desperate merchants. Perhaps she is Eve, contemplating the temptation of Adam(s). The suppliants await her “doom,” invoking a meaning of the word outdated even in Dryden’s time, which meant edicts, or

302. *Id.* at 209.
303. *Id.* at 210. The poem was itself an exercise in wishful and magical thinking. Dryden wrote *Annus Mirabilis* in reaction to the disastrous 1666 fire in London, which destroyed much of the city. Coming soon after the Restoration of Charles II to the throne, an event which provoked great anxiety among the British merchant class and within the recent memory of the Civil War, the fire crystallized British bourgeois anxieties much as the Panic of 1837 crystallized American bourgeois anxieties. Surely that is why Adams chose this verse, number 297 of Dryden’s lengthy poem, as the conclusion of his lecture. *See generally Michael McKeon, Politics and Poetry in Restoration England: The Case of Dryden’s Annus Mirabilis* (Harvard Univ. Press 1975).
judgments. But doom must also have invoked in Adams' audience memories of the financial doom suffered by many of their number during the recent Panic, and for the more educated among them it might also have invoked the idea of a personified but indifferent fate. Even for Charles Francis Adams, there was no escape from magical thinking about credit.

Adams might be forgiven for waxing ecstatic about credit and confidence on the grounds of the poetic license available even to authors of non-fiction. He nearly matched, in the extravagance of his language, some of the great writers of antebellum fiction. But it would have been difficult for Adams, in non-fiction, to have equaled the extravagance and inscrutability, in fiction, of Herman Melville's baffling novel, *The Confidence Man: His Masquerade*.

Melville's novel captured the uncertainty and ambivalence surrounding confidence in the antebellum period. And it is no coincidence that Melville chose a religious metaphor to illustrate this ambivalence. Nothing was as it seemed, and perdition was the price of being fooled. Melville illustrated the religious angst reflected in sermons like those of Putnam and Burnap, as well as the economic angst reflected in the work of Lord and Adams. Melville's novel exploited the literary trope of the shape-shifter, both to invoke its Biblical meaning and to illustrate the tenuousness of economic and personal identity.

On the ship Fidele, on April Fool's Day, Melville's ultimate confidence man went to work. Even the most basic evidence of human identity and character were unreliable, warned the Confidence Man: "You can conclude nothing absolute from the human form . . . ." Melville turned the tables on merchants who had turned to religion to buttress their besieged confidence. For Melville, confidence was not the adhesive holding merchant culture together, it was the instrument of Satan, by which he stole men's souls.

The trope of the Devil as shape-shifter appeared first in Christian literature in Genesis, in which Satan appears in the shape

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304. OXFORD ENGLISH DICTIONARY (1971) (citing definitions 1 and 2 of "doom").
305. Id. (citing definition 4).
306. MELVILLE, supra note 4, at 1.
307. Id. at 193.
of a serpent to beguile Eve, causing Adam and Eve to be evicted from the Garden of Eden.\textsuperscript{308} Satan also changes shape several times in Milton's Paradise Lost, a text with which Melville was surely familiar.\textsuperscript{309} Satan appears as a cherub in order to deceive the archangel Uriel into revealing the way to Earth,\textsuperscript{310} as a corrom- rant in order to spy on Adam and Eve,\textsuperscript{311} in the shapes of various animals in order to travel through the Garden of Eden,\textsuperscript{312} and as a serpent, as in Genesis.\textsuperscript{313}

The trope was not uncommon in antebellum literature. It appeared in 1839 in a short story in Hunt's Merchant Magazine. The protagonist of that story, himself a storyteller, spoke in narrative voices borrowed from the characters he described. "[H]e would seem at times the artless Scotch lassie, the Yorkshire lout, the rude sailor, the querulous beldame, and the blundering Irishman, &c. changing from one to another with a chameleon-like facility," prior to working his own swindle.\textsuperscript{314} Melville's Confidence Man was more industrious, adopting a series of identities, each working toward the ultimate swindle. His first incarnation, a deaf-mute, wastes little time in revealing his ploy. "Charity thin-keth no evil," he wrote on a small slate.\textsuperscript{315} Later he wrote "Charity believeth all things."\textsuperscript{316} In these quotes Melville put the words of Saint Paul\textsuperscript{317} on the slate of Satan, thus introducing the paradox that provided the theme of the novel.

The swindles worked by Melville's Confidence Man in his various incarnations reflect common swindles, or diddles, seen in antebellum culture. Melville's deaf-mute resembles the defendant in the New York case of People v. Clough,\textsuperscript{318} who also masquer-
aded as a deaf-mute, but for the less ambitious purpose of collecting alms. Melville takes the tactic, not unheard of in ante-bellum culture, and turns it into a metaphor for larger issues of redemption and perdition. His Confidence Man attacks those who protect themselves from the risks of confidence, such as the barber, whose sign states bluntly: “No trust.”

The barber is a threat to the Confidence Man’s principal tactic, which is to exploit confidence. The Confidence Man sells patent medicines, such as the Samaritan Pain-Dissuader and the Omni-Balsamic Reinvigorator, which, in a brilliant anticipation of the ultimate fraudulent bromides, medicinal placebos, work on the basis of confidence. In a diddle reminiscent of that of the first Confidence Man, William Thompson, Melville’s character swindles a stranger by means of his own appearance as a man of means and fidelity, together with a formal contract prepared by the Confidence Man and signed by his victim. In a pitch commonly made by stock swindlers, he sells shares of stock in The Black Rapids Coal Company, at a discount available only, so he says, as a result of a temporary downturn in the market and previous subscribers’ appalling lack of confidence.

ized his conduct as being of “a very dark moral grade,” it held that it did not constitute a crime.

319. MELVILLE, supra note 4, at 3.
320. Id. at 67–75.
321. Id. at 192–204; see The Arrest, supra note 4.
322. MELVILLE, supra note 4, at 39–42. Here, Melville might have been referring to the great Parker Vein Coal Company stock swindle of 1853. The Company was a Maryland corporation headquartered in New York City. Its charter was repeatedly amended to increase its capital stock. This caused the stock to be in great demand in the market, as it was widely believed to indicate that the company was successful and well managed. Ultimately, the Maryland Legislature amended the charter to allow capital stock not to exceed three million dollars, divided into shares of one hundred dollars par value. The great demand for the stock, coupled with the fact that the business was actually failing, inspired Otis P. Jewett, the vice president of the corporation, to begin issuing and selling bogus stock certificates. These were printed on the same form as legitimate certificates. They bore the actual signature of Hippolyte Maly, the corporation’s president. In a period of a few months, Jewett had issued twelve million dollars of bogus stock certificates which were indistinguishable from legitimate certificates. This “diddle at Brobdignag” led to no fewer than thirteen reported cases decided by the state courts of Maryland and New York, and litigation which spanned twenty years. A close reading of these cases indicates
Melville's novel, though comic in part, offered a darker and more complex vision of market culture than Poe had offered. Some of Melville's reviewers reacted to the comic aspect: "One of the indigenous characters who has figured long in our journals, courts and cities, is 'the Confidence Man;' his doings form one of the staples of villainy, and an element in the romance of roguery." Others failed to see the romance and humor. A literal-minded reviewer for the Burlington Free Press wrote, perhaps hopefully, that "[t]he world is not made up of cheats and their victims." Evert A. Duyckinck, Melville's friend and Poe's editor, wrote that "[i]t is a good thing, and speaks well for human nature, that, at this late day, in spite of all the hardening of civilization and all the warning of newspapers, men can be swindled."

Whether from a charming ingenuousness or a dangerous naiveté, some people continued to trust others. Indeed, it was a good thing. In an era of boom and bust and declining legal protection, were it not for the confidence that made swindles possible, as Melville, Daniel Lord, Chief Justice Thomas Ruffin, and Charles Francis Adams had all warned, "commerce between man and man . . . would, like a watch, run down and stop."

Melville's novel captured the desperate uncertainty of the merchant's plight in the antebellum market. Appearances could not be trusted; identities were changeable and uncertain; the law was unreliable. Confidence in the right person would lead to success and metaphorical redemption. Confidence in the Confidence Man would lead to failure and metaphorical perdition. In the era of caveat emptor, the law made little distinction between them. As Melville would likely have known, the pressure to extend confi-

that, as in Melville, supra note 4, at 227, many of the plaintiffs who were swindled by Jewett and Mali paid less than par value for their stock certificates, apparently without asking why shares in such demand should be discounted. See Wells v. Jewett, 11 How. 242 (N.Y. Sup. Ct. 1855); People ex rel. Jenkins v. Parker Vein Coal Co., 10 How. 543 (N.Y. Sup. Ct. 1854).

323. Boston Evening Transcript, in MELVILLE, supra note 4, at 271.
325. Literary World, in MELVILLE, supra note 4, at 227.
326. See supra text accompanying note 94.
327. See supra text accompanying notes 299–305.
328. MELVILLE, supra note 4. The analogy to a watch may have been a reference to the "original" confidence man, William Thompson.
idence and credit came from more than one direction in the antebellum market. As the historian Scott Sandage has demonstrated, success for an antebellum merchant depended upon a continual expansion and increase of one’s business. Each effort to expand exposed the merchant to the risk of new confidence men. Each new entrepreneurial adventure landed the antebellum merchant on the deck of the Fidele.

V. CONCLUSION

Antebellum merchants were caught between the devil of confidence and the deep blue sea of caveat emptor. Early common law rules, such as the sound price rule and branding rules, protected a merchant’s confidence in goods and in persons. The abandonment of these rules proceeded not in a discernible wave of change, but unevenly and unpredictably in common law jurisdictions. This in itself exacerbated the unpredictability of the market because it left merchants uncertain as to their remedies when confidence was betrayed. As caveat emptor arose, the need for confidence in one’s trading partners increased. The boom and bust economy of the antebellum period, the insufficient quantity of circulating currency, and the lack of reliable information about others in the market left merchants with little option but to do business on the basis of confidence. Yet this confidence was threatened by the absence of legal remedies for its breach.

By the latter part of the antebellum period, judges who believed that courts were overwhelmed with commercial litigation embraced caveat emptor as a palliative for their dockets. This required the judges to abandon the superior morality of the civil law and embrace the amorality of caveat emptor. They did so by shifting the focus from the condition of the product and the fact of payment or non-payment to the intent of the merchant. The fidelity of the merchant was thus separated from the quality of his product and the negotiability of his paper. Substance was separated from intent, thus limiting the legal regulation of exchange

329. SANDAGE, supra note 14.
330. See supra Part II.
331. See supra Part II.
332. See supra text accompanying notes 113–15.
and imposing a difficult burden of proof on the confidence man’s victims. The difficulties of proof in turn reduced the likelihood that the aggrieved would seek legal redress. Confidence in goods, persons, and pretenses became harder to enforce through legal process.

In the face of the withdrawal of legal protection many merchants turned to religion and religious notions of morality to buttress their confidence in themselves and their fellow merchants. This turn to religion had the unintended consequence of facilitating the withdrawal of legal protection for confidence. Confidence became a private matter between individual merchants. Like the turn to intent as the measure of mercantile fidelity, the turn to religion drove the merchant further into the privileged precincts of the mind. Caveat emptor erased all visible and tangible distinctions between the merchant and the confidence man.

The business literature of the period reflected the tension and uncertainty of the merchant’s experience. The plaintive, desperate, and even superstitious tones of market commentators reflected their struggle to maintain good faith and confidence in others and to preserve others’ confidence in them. Judges, lawyers, and merchants knew that the Confidence Man was not the itinerant peddler, dressed in motley and dancing into town to defraud. Instead, he was the alter ego of the merchant. Every upright merchant feared today that circumstance would tempt him to become a confidence man tomorrow. With the rise of caveat emptor, only morality and concerns about reputation could sanction merchant conduct.

The Confidence Man was more than a literary creation and more than a marginal character. He was the alter ego of the merchant himself. He was the person merchants feared to meet in the market. The better angels of their nature feared to become him, and the devils of their nature wished to become him. The term “confidence,” with its dual and contradictory meanings, described at once what was most feared and most desired by merchants in the exploding antebellum marketplace who could not avoid dancing the “diddle at Brobdingnag.”

333. See supra Part IV.
334. See supra Part IV.
335. See supra text accompanying notes 294–304.