

Humbug: Toward a Legal History

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INTRODUCTION

“Fraud is infinite.”¹ So wrote Lord Hardwicke to Lord Kames in a 1759 letter, opining that courts of equity could not “lay down rules, how far they would go, and no farther” without finding their jurisdiction “cramped, and perpetually eluded by new schemes, which the fertility of man’s invention would contrive.”² The words of this jurist acquired increasing currency in an era of dizzying commercial development, finding their way into nineteenth-century American as well as English legal discourse. They passed from Joseph Story’s *Commentaries on Equity Jurisprudence* into the decisional law of several states,³ which was recapitulated in treatises such as Melville Bigelow’s *The Law of Fraud*, perpetuating the notion that the law had to remain open-ended if fraudsters were to be brought to

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1. JOSEPH PARKES, *Correspondence of Lord Hardwicke and Lord Kames on the Principles of Equity*, in A HISTORY OF THE COURT OF CHANCERY; WITH PRACTICAL REMARKS 501, 508 (1828).

2. *Id.*

3. 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE: AS ADMINISTERED IN ENGLAND AND AMERICA (1836).

justice.⁴ “Fraud is kaleidoscopic, infinite,” a Missouri judge confirmed in a 1913 opinion, embellishing only slightly as he reiterated the conventional judicial wisdom that “a hard and fast definition” was neither possible nor desirable as a matter of law.⁵ Without relieving the buyer of the requirement to beware, he maintained that “there is a boundary that may not be crossed” by sellers, though he deliberately declined to say where it was: “[F]raud-feasors[] would like nothing half so well as for courts to say they would go thus far, and no further in its pursuit.”⁶

P. T. Barnum inadvertently illustrated this point in *The Humbugs of the World*, his sprawling treatise/exposé of “the tricks of the trade” comprising this “universal science.”⁷ Mimicking (if not mocking) the learned professors of his day, he began with a disquisition on definitions, one that made no mention of Hardwicke or any other legal authority, but instead consulted the dictionary of “Doctor Webster.”⁸ There Barnum found humbug defined as “imposition under fair pretences” when used as a noun, and as “to deceive; to impose upon” when deployed as a verb. “With all due deference,” he took exception to this entry because it might be read to comprehend unlawful as well as lawful forms of misrepresentation.⁹ Transparently seeking to clear humbug of any implication of wrongdoing (not least because his name had become synonymous with it),¹⁰ Barnum suggested the term was most commonly understood to exclude “crimes and arrant swindles.”¹¹ He observed that a respectable-looking man who gained the confidence of another in order

4. MELVILLE M. BIGELOW, *THE LAW OF FRAUD AND THE PROCEDURE PERTAINING TO THE REDRESS THEREOF* (1877).

5. *Stonemets v. Head*, 154 S.W. 108, 114 (Mo. 1913).

6. *Id.* at 113-14.

7. P.T. BARNUM, *THE HUMBUGS OF THE WORLD*, at vii (1866).

8. *Id.* at 7.

9. *Id.*

10. BLUFORD ADAMS, *E. PLURIBUS BARNUM: THE GREAT SHOWMAN AND THE MAKING OF U.S. POPULAR CULTURE* (1997); BARNUM, *supra* note 7, at 7; JAMES W. COOK, *THE ARTS OF DECEPTION: PLAYING WITH FRAUD IN THE AGE OF BARNUM* (2001); NEIL HARRIS, *HUMBUG: THE ART OF P.T. BARNUM* (1973).

11. BARNUM, *supra* note 7, at 1.

to pass a spurious draft or bank note was “justly called a ‘forger,’ or a ‘counterfeiter;’ and if arrested, he is punished as such; but nobody thinks of calling him a ‘humbug.’”¹² A humbug did not impose with the intent to injure and he might well be “an honest, upright man”¹³—a philanthropist, even, if he shared the showman’s benevolent aim of improving the minds and morals of his audience under the cover of entertainment.¹⁴

Despite, or perhaps because of, these professions of good faith, Barnum is often associated with the ethos of caveat emptor. In biographies and broader cultural studies, he is often taken to exemplify the creative deceptions enabled and validated by the era’s “increasingly market-friendly law.”¹⁵ A number of the new histories of capitalism, most notably Jane Kamensky’s *The Exchange Artist* and Stephen Mihm’s *A Nation of Counterfeiters*, have reinforced this rendering of the legal landscape, leaving the impression that police and prosecutors were overmatched by a wily class of money-makers, who took full advantage of the ambiguous borderlands “between capitalist enterprise and criminal mischief.” The law and its enforcers most often figure as flouted authorities in these accounts, uncoordinated and ill-equipped to meet the challenges posed by the confidence man in his various guises.¹⁶ Although there is surely some truth to these characterizations, they are too often uncritically based upon popular literature ambivalently chronicling “the rogues and their rogueries” and the published confessions/boasts of the swindlers themselves. Put differently, the appearances of legal laxity drawn from these sources are deceiving. Casting the evidentiary net to encompass trial records, statute books, treatises, appellate opinions and trial records as well as

12. *Id.* at 7.

13. *Id.* at 10.

14. See COOK, *supra* note 10, at 22-23; HARRIS, *supra* note 10, at 214-31.

15. COOK, *supra* note 10, at 114.

16. JANE KAMENSKY, *THE EXCHANGE ARTIST: A TALE OF HIGH-FLYING SPECULATION AND AMERICA’S FIRST BANKING COLLAPSE* (2008); STEPHEN MIHM, *A NATION OF COUNTERFEITERS: CAPITALISTS, CON MEN, AND THE MAKING OF THE UNITED STATES* 106 (2007).

trade journals, newspapers, novels, and other cultural forms, this Paper is part of a broader investigation into the modes of regulation—public and private, formal and informal, federal, state, and local—that Americans deployed as they reckoned with the problem of deceit over the course of the long nineteenth century. Rightly apprehended, Barnum was an integral part of this endeavor. In attempting to write humbug out of the law of fraud, the showman was certainly playing with its indeterminacy. But he was also invested in establishing himself as a legitimate sort of imposter, the purveyor of a valuable and edifying form of amusement.¹⁷ *The Humbugs of the World* was, in a sense, the homage he paid to *The Law of Fraud*. Upon closer inspection, it becomes clear that the play in the law was often a source of its strength because it enabled public and private prosecutors to keep pace with and sometimes make like the malefactors they endeavored to bring to justice. Although there is no gainsaying the institutional limitations that hampered such enforcement efforts, which were surely rendered peculiarly challenging in a culture that valorized entrepreneurial ingenuity and preached the virtue of looking sharp, the evidence on this score hardly warrants the conclusion that the enterprises of capitalists and criminals were practically indistinguishable in this burgeoning market society. Operating in the shadow of a legal system that distributed regulatory powers to a widening network of municipal, state, and federal officials; relying all the while upon the vigilance of private citizens and the popular press as well as the self-policing of a host of trade associations; Americans tested the meaning of the law of fraud daily, whether they knew it or not.¹⁸

17. See COOK, *supra* note 10, at 260-62; HARRIS, *supra* note 10, at 215-31.

18. On the obsessive concern about fraud and imposture within the middle-class culture of the nineteenth century, see, for example, ELAINE S. ABELSON, *WHEN LADIES GO A-THIEVING: MIDDLE-CLASS SHOPLIFTERS IN THE VICTORIAN DEPARTMENT STORE* (1989); COOK, *supra* note 10; KATHLEEN DE GRAVE, *SWINDLER, SPY, REBEL: THE CONFIDENCE WOMAN IN NINETEENTH-CENTURY AMERICA* (1995); ANN FABIAN, *CARD SHARPS, DREAM BOOKS, & BUCKET SHOPS: GAMBLING IN 19TH-CENTURY AMERICA* (1990); KAREN HALTTUNEN, *CONFIDENCE MEN AND PAINTED LADIES: A STUDY OF MIDDLE-CLASS CULTURE IN AMERICA, 1830-1870* (1982); JOHN KASSON, *RUDENESS AND CIVILITY: MANNERS IN*

The contours of this normative universe can be reconstructed most readily and effectively by retracing the steps of the shifty characters who did not get away, but who were placed on trial along with their impostures in courtrooms and the popular press that represented these events to an ever more expansive, transatlantic audience. In what follows, I focus on a single criminal case: the sensational forgery trial of Charles B. Huntington, a Wall Street broker who was tried and convicted of this offense in 1856, illustrating how and why it ought to be taken as a critical juncture in fraud's intellectual history as David Hollinger has defined the focal point of the field: the historical acts "of people who 'made history' by arguing."¹⁹ The judge, lawyers, witnesses, and newsmen who participated in this legal spectacle may be taken to fit this description and they have left behind a rich documentary basis for reflecting more generally upon the problematics of writing a legal history of humbug, ultimately going to show that capturing fraud was a funny business in Barnum's America.²⁰

NINETEENTH-CENTURY URBAN AMERICA (1990); JACKSON LEARS, *FABLES OF ABUNDANCE: A CULTURAL HISTORY OF ADVERTISING IN AMERICA* (1994); R. LAURENCE MOORE, *IN SEARCH OF WHITE CROWS: SPIRITUALISM, PARAPSYCHOLOGY, AND AMERICAN CULTURE* (1977). Although some attention has been drawn to the regulation of fraud, see MICHAEL PETTIT, *THE SCIENCE OF DECEPTION: PSYCHOLOGY AND COMMERCE IN AMERICA* (2013); RICHARD WHITE, *RAILROADED: THE TRANSCONTINENTALS AND THE MAKING OF MODERN AMERICA* (2011). Only recently has law been made a central focus. See Edward J. Balleisen, *Private Cops on the Fraud Beat: The Limits of Self-Regulation, 1895-1932*, 83 *BUS. HIST. REV.* 113, 128-32, 144-48 (2009); Robert E. Mensel, "A Diddle at Brobdingnag": *Confidence and Caveat Emptor During the Market Revolution*, 38 *U. MEM. L. REV.* 97, 117-27 (2007). For valuable doctrinal studies, see KIM LANE SCHEPPELE, *LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW* (1982); Paula Dalley, *The Law of Deceit, 1790-1860: Continuity Amidst Change*, 39 *AM. J. LEGAL HIST.* 405 (1995).

19. David A. Hollinger, "What is Our 'Canon'? How American Intellectual Historians Debate the Core of their Field," 9 *MOD. INTELL. HIST.* 185, 187 (2012).

20. See, e.g., *id.* Law remains a relatively understudied aspect of studies of the intellectual life of the United States and the same may be said of the newest histories of capitalism; while scholars writing in this vein insist that capitalism be understood as a "knowledge economy" as well as a mode of production, they have yet to accord systematic attention to the role of legal institutions, practices, and professionals in the capitalist transformation of the nineteenth

I. THE CRIME OF FORGERY

The arrest of Charles B. Huntington on the charge of forgery in early October 1856 quickly became the talk of the town. It was said to be “the chief theme of conversation, not only in Wall street, among the bulls and bears, but among all classes of the community,” both within and far beyond the city, owing in no small part to an entrepreneurial press. Indeed, his arrest touched off something of a media circus, as reporters rivaled each other in their daily disclosures about “The Great Wall Street Forgery Case.” Although the initial charge against this Wall Street broker was based upon a single note for \$6500, readers were assured this was but a small specimen of the hundreds of thousands of dollars of “spurious paper” he had put into circulation.

Presuming the guilt of “HUNTINGTON THE FORGER,” newspapers reconstructed this criminal’s biography, painting a portrait of creative self-destruction, of a villain as hapless as he was audacious, his capacity for self-delusion proving infectious, as it seemed to inspire others to confide in him. Although the accused was an unknown quantity when he set up shop in a basement Wall Street office in 1847, possessing neither friends nor capital, he nonetheless managed to obtain sizable loans rather readily from the most “responsible” and “respectable” of firms. Offering a combination of forged and genuine notes as collateral, he endeavored to redeem them before their maturity so as to “conceal the fraudulent *modus operandi* by which he effected his designs.” Huntington’s success was not easily attributed to his skill and circumspection. Many of the forged notes Huntington passed contained signatures that “did not even pretend to be imitations” and he spent the money he had made by living extravagantly in plain sight. Indeed, Huntington was the most conspicuous of consumers, famously addicted to the finest cigars, fastest horses, and prettiest women that money could buy; he was also well-known for hosting ostentatious parties at one of

century. See generally CAPITALISM TAKES COMMAND: THE SOCIAL TRANSFORMATION OF NINETEENTH-CENTURY AMERICA (Michael Zakim & Gary J. Kornblith eds., 2012).

two ridiculously over-furnished houses he leased in lower Manhattan to provide separate living spaces for his family and a lady friend who was not his wife. Therein lay the puzzle for many a newsman and presumably his readers as well: why did it take so long for this unabashed double-dealer to be apprehended as such?²¹

The perplexity only deepened as the case was set for trial. Huntington retained the services of the veteran trial attorney James Brady, and maintained an air of nonchalance in the meantime, enjoying the “sumptuous fare” his fashionable wife dutifully brought every evening to his well-appointed cell at the Tombs. Huntington’s reticence on the advice of counsel excited debate about whether a financier (or, for that matter, a lawyer) could be distinguished from a fraudster. The editor of the *New York Daily News* strenuously argued against any sweeping generalizations and insisted that “the exposure of such reckless rogues” as Huntington “need excite no alarm of uneasiness as to the rectitude of the commercial community” because he was “a mere vulgar forger” whose “operations were confined solely to his own use.” Truly great swindlers were said to be few and far between, constituting “mere specks upon the sun” who “ought to be looked upon with surprise on account of their rarity” and taken as negative examples, for they were sure to be “regarded as poor sneaks when detected, and very soon forgotten when they received the sentence which is sure, sooner or later, to be pronounced upon them.”²²

This complacency was echoed in the financial press but it was far from dominant in the public sphere. The daily dispatches of the *New York Herald* were more representative of the pretrial publicity in treating Huntington’s “unbounded extravagance” as a distressing sign of the times. His “career” was likened in these pages to “a display of fireworks—brilliant, but evanescent,” effectively “throwing a great deal of light on the operations

21. See *The Great Wall Street Forgery Case*, FARMER’S CABINET, Oct. 30, 1856, at 3; *The New York Forgeries*, AUGUSTA CHRON., Oct. 17, 1856, at 2.

22. *Splendid Roguery*, N.Y. TIMES, Oct. 27, 1856 at 4; cf. *The Recent Frauds in Wall Street*, J. COMMERCE, reprinted in CHARLESTON MERCURY, Oct. 15, 1856.

of men of money in Wall Street and the neighborhood” and portending the moral and financial downfall of the nation as a whole. “In this age of fast living,” went the repeated refrain, “there is no time to regard social morality or look beneath the surface to find out whether our reputed millionaires and famous financiers have any solid foundation for their pretensions.” This willful blindness enabled a man like Huntington to set up “his shingle anew” in New York City even after he was captured and indicted on a forgery charge in Washington D.C. “with all due publicity.” If anything, Huntington’s brush with the law seemed to enhance his credit-worthiness within the financial world, winning him the “unlimited confidence of his brother sharpers.” It was lamentably the norm among members of this “codfish aristocracy” to discount bills suspected to be forgeries at usurious rates, thus implicating them “morally, if not legally” in Huntington’s crime. “This, perhaps, is the cause which deters some of the negotiators from stepping forward as prosecutors,” conjectured one reporter, “although there are others doubtless who object simply to appear in the character of dupes.” Those who had accepted Huntington’s bogus notes as security were regrettably but predictably more concerned with avoiding guilt or embarrassment by association than bringing this “vulgar” forger to justice.²³

Hours before Huntington was to be tried in a Manhattan courtroom on the first of twenty-seven indictments in mid-December, “the swarm of curiosity seekers had overflowed into the corridor, and dripping down the stairs, had formed a large human note of interrogation.” This attested to the trial’s status as “a case of public interest,” observed District Attorney A. Oakey Hall in his opening argument, which he began by simply reading the indictment and offering some etymological musings about another crime, one that had taken place in the realm of ideas:

23. See *The Cause of Financial Revolutions*, N.Y. HERALD, Oct. 18, 1856, at 4; *The Huntington Forgeries*, N.Y. HERALD, Oct. 25, 1856, at 4; see also *Forgeries*, FARMER’S CABINET, Nov. 11, 1856, at 2 (reprinting excerpts from a *New York Herald* article).

Now it is very singular, and something which eminently challenges the attention of the legal scholar, to know when and how and why the encyclopedia of criminal law robbed the dictionary of honest labor of the word FORGERY. You will not be able to find why and wherefore that the spendthrift sitting at his desk in secret—in self-imposed exile from the social community—alone with his crimes and his vices, should do that according to the nomenclature of the law, which the arm of honest labor does as it strikes upon the anvil—forge—forgery! And yet through many years it has come down to us to mean that worst, that meanest, that most despicable of all commercial lies which a man can tell, or which a man can make,—a black lie and a white lie at the same time.²⁴

This was an ingenious rhetorical move, shoring up a producerism ethos that likely resonated with the twelve men empanelled to hear the case, drawn as they were from the middling classes of the burgeoning market society.²⁵ It was also a point well taken from an etymological standpoint: *forgery* does indeed have a long and tangled linguistic association with *fraud* and its ilk. Historians of Anglo-American law who have had recourse to encyclopedias and dictionaries as well as other forms of evidence have since traced out these linguistic connections, identifying the Renaissance as the era in which the concept of forgery was first “abstracted from the concrete world” of iron forgers and “appl[ie]d to the mind’s creative faculties.”²⁶

24. JAMES A. BRADY & JOHN A. BRYAN, TRIAL OF CHARLES B. HUNTINGTON FOR FORGERY: PRINCIPAL DEFENCE: INSANITY 24 (1857). American law writers commonly drew this connection, many quoting Coke: “To forge . . . is metaphorically taken from the smith, who beateth upon his anvil, and forgeth what fashion or shape he will. The offence is called *crimen falsi*, and the offender *falsarius*; and the Latin word to forge is *falsare* or *fabricare*. And this is properly taken when the act is done in the name of another person.” James Wilson, *Lectures on Law*, reprinted in 3 THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 52 (Lorenzo Press 1804).

25. The published trial record includes a transcript of the empaneling of the jury and a list of the names, occupations, and addresses of those selected; the foreman was identified as an umbrella and parasol manufacturer, two others as dry goods merchants, and the remaining men as follows: commission merchant, soap maker, boot and shoe maker, umbrella manufacturer, wig-maker, liquor store merchant, music teacher, broker, and sash and blind maker. BRADY & BRYAN, *supra* note 24, at 20.

26. IAN HAYWOOD, THE ART AND POLITICS OF FORGERY 6 (1987).

Used in this sense, the word connoted a fabrication that was at once “imitative and original” and yet not necessarily fraudulent or designed to deceive. Though often carrying with it the dual signification of licit and illicit production, it could also refer to the work of God, He being the “forgere of alle thingus.”²⁷ The early modern period witnessed a “hardening of the metaphor,” however, as the figure of the forger increasingly came to be identified with a “producer of false documents,” a development reflected and reinforced by statutory enactments periodically expanding the range of private as well as public instruments and records subject to legal regulation and ratcheting up the criminal penalties attaching to the forgery of them.²⁸

At common law, the crime of forgery was defined as “the fraudulent making or altering of a writing to the prejudice of another man’s right” and the severity of punishment turned upon the nature of the document that had been falsified.²⁹ Whereas the making of a false royal charter and the counterfeiting of the king’s money or seal were both considered capital offenses, the forgery of deeds, wills, and other private documents was punishable by lesser penalties, ranging from fines and the pillory to mutilation, outlawry, and imprisonment. This hierarchy of wrongdoing was likewise observed in statutory provisions enacted in the later medieval and early modern period. The more important written documents came to be in the world of commerce, the more members of Parliament felt moved to strengthen the legal deterrents against forgery and extend them to financial instruments. Intended to serve as both a shaming device and a means of publicizing the offender’s betrayal, this penalty scheme armed judges with a flexible

27. ALFRED HIATT, *THE MAKING OF MEDIEVAL FORGERIES: FALSE DOCUMENTS IN FIFTEENTH-CENTURY ENGLAND* 28 (2004).

28. *Id.* See generally Randall McGowen, *From Pillory to Gallows: The Punishment of Forgery in the Age of Financial Revolution*, 165 *PAST & PRESENT* 107 (1999) [hereinafter McGowen, *From Pillory to Gallows*].

29. Randall McGowen, *Making the ‘Bloody Code’? Forgery Legislation in Eighteenth-Century England*, in *LAW, CRIME AND ENGLISH SOCIETY, 1660–1830*, at 117, 121 (Norma Landau, ed., 2002).

means of combatting new forms of deceit enabled by changing modes of economic activity.³⁰

Such provisions nonetheless pale in comparison to the legislative attention drawn to the problem of forgery over the course of the long eighteenth century, a period that saw the addition of hundreds of new forgery provisions to the books, many inflicting the penalty of death.³¹ Long cast as the key exemplars of England's "bloody code," this explosion of legislation has come to be understood as part of the nation's monetary policy, registering growing concern about abuses of trust among private parties. "The crime of forgery is so enormous in itself, and so destructive of the mercantile interest," prosecutors repeatedly argued, "that it ought to be discouraged in a trading nation, beyond almost any other crime."³² This way of thinking about—if not exactly on behalf of—the commercial class was codified in a sweeping 1729 statute that rendered the forgery of "any deed, will, testament, bond, writing obligatory, bill of exchange, promissory note for payment of money, indorsement or assignment of any bill of exchange, or promissory note for the payment of goods" a capital offense, one that was rarely pardoned.³³

30. See HIATT, *supra* note 27, at 26-27; McGowen, *From Pillory to Gallows*, *supra* note 28, at 121-23. On the "reinvention" of money in England at the end of the seventeenth century, see CHRISTINE DESAN, MAKING MONEY: COIN, CURRENCY, AND THE COMING OF CAPITALISM 11-12 (2014).

31. See generally Carl Wennerlind, *The Death Penalty as Monetary Policy: The Practice of Punishment of Monetary Crime, 1690-1830*, 36 HIST. POL. ECON. 131 (2004).

32. McGowen, *From Pillory to Gallows*, *supra* note 28, at 136.

33. V. A. C. GATTRELL, THE HANGING TREE: EXECUTION AND THE ENGLISH PEOPLE, 1770-1868 (1996); McGowen, *From Pillory to Gallows*, *supra* note 27, at 128, 136; Wennerlind, *supra* note 31, at 131; cf. PETER LINEBAUGH, THE LONDON HANGED: CRIME AND CIVIL SOCIETY IN THE EIGHTEENTH CENTURY (1992). It has been estimated that one out of every three forgers was executed in the last quarter of the eighteenth century, as compared with less than one half of those convicted of burglary and highway robbery. See CLIVE EMSLEY, CRIME AND SOCIETY IN ENGLAND, 1750-1900 (1996). On the cultural representations of forgers, see LINCOLN B. FALLER, TURNED TO ACCOUNT: THE FORMS AND FUNCTIONS OF CRIMINAL BIOGRAPHY IN LATE SEVENTEENTH- AND EARLY EIGHTEENTH-CENTURY ENGLAND 192 (1987).

Yet the severity of this new wave of statutes undermined their efficacy. As they were invoked, attention was redirected from the offense to the offender in popular discourse, exciting sympathy from the reading public. This was in no small part owing to the social identity of those who were tried and convicted of this crime, for they were typically drawn from the middling classes and seemed to have succumbed to the temptation of forgery in a moment of weakness brought on by financial failure and an anxious desire to provide for their family and preserve their respectable status.³⁴ Although sentencing judges tended to treat the status of offenders as an aggravating factor, others saw them as products of their environment, symptomatic of “an overheated City culture that robbed people of their social moorings” and led them to “confuse the illusion with the real substance won by hard work and scrupulous conduct.” Journalists and pamphleteers put these ideas into circulation, accentuating the elements of misfortune that conspired against the condemned criminals and mourning the lost potential: “Mr. Smith had [t]alents, and a [g]enius, that might not only have secured him from the [t]emptations of [w]ant, but that, if properly applied, and accompanied with [i]ndustry, [h]onesty, and [a]pplication, might have rendered him a useful [m]ember of [s]ociety, and enabled him to live in [a]ffluence.”³⁵

The moral ambiguity of such portraits reflected and reinforced critiques of England’s capital laws. As early as 1765, Blackstone was identifying the “multitude of sanguinary laws” lately passed by Parliament as indicative of a national “distemper,” deeming it to be “a kind of quackery in government . . . to apply the same universal remedy, the *ultimum supplicium*, to every case of difficulty.”³⁶ Drawing strength from such professional

34. See, e.g., Randall McGowen, *Forgery Discovered: Or the Perils of Circulation in Eighteenth-Century England*, 1 ANGELAKI, no. 2, 1996, at 113-18.

35. See DONNA T. ANDREW & RANDALL MCGOWEN, *THE PERREAUS AND MRS. DODD: FORGERY AND BETRAYAL IN EIGHTEENTH-CENTURY LONDON* (2001); Randall McGowen, *Forgers and Forgery: Severity and Social Identity in Eighteenth-Century England*, in *MORAL PANICS, THE MEDIA AND THE LAW IN EARLY MODERN ENGLAND 157* (David Lemmings and Claire Walker eds., 2009).

36. 4 WILLIAM BLACKSTONE, *COMMENTARIES* *17.

misgivings, as well as those expressed in the popular press, reformers singled out the capital sanctions for forgery as especially misguided innovations of an incompetent legislature that were “anachronistic and out of line with the habits and sensibilities of the people,” rendering them especially difficult to enforce without arbitrariness and great expense.³⁷ Appearing far more concerned about the brutalizing effects of the scaffold on the lower classes who witnessed the hangings of forgers than the offense itself, they advocated more “enlightened” principles of proportionality and sought to institute a new disciplinary regime that governed by sympathy and self-interest rather than example and terror, a regime built on the psychological premise that “compassion begets confidence.” Successfully mobilizing public opinion by means of a petition campaign that boasted the signatures of hundreds of bankers, merchants, and other “practical” men, they ultimately secured the repeal of most of the capital forgery statutes in 1830, marking a significant juncture in the transition from “the gallows to the prison”³⁸ in the history of punishment.³⁹

Across the Atlantic, Americans had grown accustomed to improvising where matters of currency and law enforcement were concerned. By the time of the Revolution many had developed a strong aversion to centralized governmental control of monetary policy and an even greater abhorrence of sanguinary punishments. Specie-starved, American colonists placed their faith in paper

37. Phil Handler, *Forgery and the End of the 'Bloody Code' in Early Nineteenth-Century England*, 48 *HIST. J.* 683, 686 (2005).

38. Randall McGowen, *The Body and Punishment in Eighteenth-Century England*, 59 *J. MOD. HIST.* 651, 678 (1987) [hereinafter McGowen, *The Body of Punishment*].

39. See GATTRELL, *supra* note 33; Randall McGowen, *A Powerful Sympathy: Terror, the Prison, and Humanitarian Reform in Early Nineteenth-Century Britain*, 25 *J. BRIT. STUD.* 312, 312-14 (1986); Randall McGowen, *Managing the Gallows: The Bank of England and the Death Penalty, 1797-1821*, 25 *LAW & HIST. REV.* 241 (2007); McGowen, *The Body of Punishment*, *supra* note 38, at 674-78; cf. Douglas Hay, *Property, Authority, and the Criminal Law*, in *ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND* 17-63 (Douglas Hay et al. eds., 1975) (examining the increase in death penalty statutes).

money out of necessity; provincial legislatures began issuing bills of credit from the end of the seventeenth century forward with the intent of stimulating trade, as well as the knowledge that they were enabling fraud, given the dizzying array of notes and coins that were in circulation by the 1740s. Efforts on the part of imperial authorities to put an end to the colonies' emissions of paper currency in the second half of the century were arguably most effective in fomenting political rebellion. All the while, full-fledged counterfeiters proliferated, organizing into gangs and plying their trade with relative ease since it was fairly easy to break out of jail and flee to another colony to begin anew. The penalties attaching to the crime varied from a fine to death across jurisdictions that were either unable or disinclined to coordinate with one another.⁴⁰ Offenders who were caught and tried faced ambivalent juries who tended to regard them with varying mixtures of anger and admiration, some regarding their property offenses as conferring a public benefit of sorts, insofar as it increased the money supply.⁴¹ Fighting a losing battle against such outlaws in 1773, New York Assemblyman Phillip Schuyler proposed that a new run of bills be issued with imagery designed to deter such activity:

an eye in a cloud, a cart and coffins, three felons on a gallows, a weeping father and mother, with several small children, a burning pit, human figures being forced into it by fiends, a label with the words "Let the name of a Money Maker rot," and such other additions as the commissioners might think proper.⁴²

The deterrent effect of these paper threats may well be doubted, given the proliferation of fake notes in this period, some even announcing their illicit status by way of obvious errors, with telling misspellings like "COUUTERFEIT."⁴³

40. See KENNETH SCOTT, COUNTERFEITING IN COLONIAL AMERICA 9-10 (1957); Steven C. Bullock, *A Mumper Among the Gentle: Tom Bell, Colonial Confidence Man*, 55 WM. & MARY Q. 231, 231-58 (1998).

41. See SCOTT, *supra* note 40, at 11.

42. *Id.*

43. KAMENSKY, *supra* note 16; MIHM, *supra* note 16, at 41; SCOTT, *supra* note 40, at 6-7.

The moneymakers who may have posed the greatest danger to the American colonies were those who were working for the British government during the Revolutionary War. Seizing the main chance as the Continental Congress and individual colonies emitted ever more currency to fund their war efforts, John Bull took to counterfeiting, thereby perpetrating a form of economic warfare which contributed significantly to the depreciation of the wartime paper money known as “continentals,” a word that became synonymous with worthlessness over the course of this imperial conflict.⁴⁴

This experience crucially shaped the way newly liberated Americans thought about paper currency and its counterfeits. Reflecting a hard-money bias, the framers of the Constitution prohibited states from emitting “bills of credit” and making “anything but Gold or Silver Coin a Tender in Payment of Debts,” which fostered the growth of state-chartered banks of varying degrees of reputability, some being stringently regulated by requirements as to species reserves, and others allowed to issue notes with abandon. They were joined by the Bank of the United States, authorized by Congress in 1791, though the charter was allowed to expire in 1811 amid lingering doubts about its constitutionality sown by opponents of federal attempts to control the money supply. At the same time, not only state but also state-chartered banks were instituted, catering to “most every special interest or class”—tradesmen, farmers, artisans, among others—and the notes they issued were famously easy to counterfeit.⁴⁵ This prompted a new coalition of bankers and legislators, with the support of President James Madison, to secure the chartering of the Second Bank of the United States in 1816, arguing that it would protect the people from forgers as well as irresponsible bank managers in the several states—in other words, from “*legal* and illegal counterfeiters of money.” Yet precisely because the notes of the Second Bank promised to provide a uniform national currency, which would circulate at par across the land, they became the

44. See SCOTT, *supra* note 40, at 253-63.

45. See MIHM, *supra* note 16, at 41-43, 74.

prime target of counterfeiters who were not easily combatted, particularly as President Andrew Jackson rose to power and took aim at the “monster,” joining forces with a new generation of renegade bankers who resented federal control, together bringing about its demise by 1834.⁴⁶

Jackson’s removal of federal deposits and subsequent actions to eradicate the “paper system” of banking—animated by what his opponents called the “Gold Humbug”—resulted in financial chaos, as state banks grew exponentially, so that there were nearly six hundred such entities in operation by 1837, a crisis point in the nation’s economy, inaugurating a period of panic and depression of unprecedented proportions that inspired the creation of a new form of currency—“shinplasters”—that were printed in fractions of dollars by individuals and businesses desperate to find a way forward amidst the rubble of failed banks and their now valueless notes. Although these were emphatically not authorized by any state, the liberty to make money was soon given a sort of legal cover with the enactment of “free banking laws” in a number of states, including New York, which allowed anyone who could raise a specified amount of capital to incorporate as a note-issuing bank. Thus the “Bank Wars” of Jacksonian America stand as illustrations of “the strange yet revealing intermingling of counterfeiting, capitalism, and democratic politics” on Mihm’s account, signaling “a growing tolerance for illicit money-making of all kinds” and ushering in a period in which “a new generation of criminal capitalists could operate with impunity.”⁴⁷

In no place was this truer than antebellum New York City. Or so Mihm suggests in his remarkable reconstruction of the criminal underworld of forgers and passers of bogus currency who almost always managed to stay a step ahead of policemen in this burgeoning urban center.⁴⁸ “Confronted with crumbling categories,” Mihm observes, “many shopkeepers, merchants, retailers, and other money

46. *Id.* at 110-11, 132, 144.

47. *Id.* at 155.

48. *Id.* at 95, 102, 149-56.

handlers abandoned the quest for certainty, substituting in its place a corrupt pragmatism” and adopting the “informal credo” that a “well-crafted imitation on a reputable bank” was better than “a genuine issue of a bad bank.” Yet his rendering of the “counterfeit economy” that flourished in this era is largely based upon the surviving court records of criminal trials, which raises questions about whether this period did indeed witness the “obliteration” of “the divide between the counterfeit and the real.” Although some attention is drawn to the governing statutes, their application in the common run of cases is not systematically explored. The reader is instead left with the impression that the law’s enforcers were simply overmatched by a wily counterfeiting class, whose members made accomplices of almost everyone else by the middle decades of the nineteenth century. While drawing attention to privately produced “counterfeit detectors,” which were published by self-appointed (and self-interested) “arbiter[s] of authenticity” and designed to protect merchants against imposition, Mihm does not explore the decisional law produced by those with the legal authority to apprehend and punish perpetrators of fraud.⁴⁹ To be sure, police forces, jails, and other institutional mechanisms for redressing financial crimes were skeletal when measured by today’s standards, or even those that prevailed in the aftermath of the Civil War. But in focusing on those who evaded or openly defied the law, Mihm does not fully capture the complex public and private modes of regulating moneymaking in the period before the federal issuance of Greenbacks and creation of the Secret Service which fundamentally changed the stakes of counterfeiting.⁵⁰

Returning to the antebellum courtroom where Huntington was called to account for his forgery, for his utterance of “a black lie and a white lie at the same time,” enables us to see that the permissiveness of the law has been significantly overstated.⁵¹ To be sure, revolutionary American statesmen endeavored to reduce the sanctions

49. *Id.* at 210-58.

50. See BRADY & BRYAN, *supra* note 24, at 24.

51. *See id.*

attaching to this crime, a move intended to express “the special character of justice in the fledgling American republics.”⁵² Indeed, the earliest state constitutions articulated “enlightened” ideals of proportionality understood to entail revision of the sanguinary laws of their English ancestors. “No wise legislature will affix the same punishment to crimes of theft, forgery, and the like, which they do to those of murder and treason,” pronounced the New Hampshire Constitution of 1784, averring that “where the same undistinguishing severity is exerted against all offenses the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do those of the lightest dye.”⁵³ Yet such sentiments were not immediately operationalized in criminal codes and the removal of the capital sanction hardly signaled the dawning of an era of toleration for forgers. To the contrary, the reformers were primarily concerned with putting an end to the public exhibitions of “counterfeit contrition” staged whenever such wrongdoers were about to be hanged and working instead to inspire more genuine forms of repentance within the confines of penitentiaries.⁵⁴ Federal and state criminal codes contained extensive provisions delineating various classes of crime—including counterfeiting, debasing the coinage, passing bad coins, forging public securities, bank notes, and others sorts of financial instruments—and they also prescribed norms of economic behavior, more than a few retaining prohibitions of usury, though this was mainly enforced by means of civil sanctions. Criminal penalties prescribed for forgery and counterfeiting (words often

52. JOHN D. BESSLER, *CRUEL AND UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS' EIGHTH AMENDMENT* (2012); STEVEN WILF, *LAW'S IMAGINED REPUBLIC: POPULAR POLITICS AND CRIMINAL JUSTICE IN REVOLUTIONARY AMERICA* 148 (2010).

53. WILF, *supra* note 52, at 146-48.

54. See MELVILLE BIGELOW, *A TREATISE ON THE LAW OF FRAUD* (1888); LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 73-74, 111 (1993); LOUIS P. MASUR, *RITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776-1865*, at 82 (1989); Kathryn Preyer, *Crime, the Criminal Law and Reform in Post-Revolutionary Virginia*, 1 *LAW & HIST. REV.* 53, 59-73 (1983).

treated as synonymous) ranged from death (under federal law) to prison terms (the typical range being from three to twenty years) to fines. Judges and jurists gave meaning to these statutory provisions in elaborately written opinions and treatises that underscored the infinitude of fraud, complicating any effort to reconstruct historically what constituted the law of case.⁵⁵

In refusing to state any hard and fast rule, the expositors of the law of fraud effectively took their operations under cover. As problematic as they acknowledged this to be in a political culture that placed such a high premium on the clarity and comprehensiveness of their criminal codes, antebellum American lawmakers acknowledged that they would have to be as cunning as moneymakers if they were to succeed in capturing them.⁵⁶

This is not, however, to suggest that the law on the books did not matter. To the contrary, it provides an essential starting point for making sense of Huntington's ultimate fate. The indictment was based upon Section 33 of New York's Criminal Code, which had been revised several years before his trial to read:

Every person who, with intent to injure or defraud, shall falsely make, alter, forge or counterfeit, (1) [a]ny instrument or writing, being, or purporting to be . . . (2) . . . the act of another, by which any pecuniary demand or obligation shall be, or shall purport to

55. See, e.g., OLIVER LORENZO BARBOUR, *A TREATISE ON THE CRIMINAL LAW OF THE STATE OF NEW YORK; AND UPON THE JURISDICTION, DUTY, AND AUTHORITY OF JUSTICES OF THE PEACE, AND INCIDENTALLY, OF THE POWER AND DUTY OF SHERIFFS, CONSTABLES, & IN CRIMINAL CASES* (2d ed. 1852); TIMOTHY WALKER, *Introduction to AMERICAN LAW: DESIGNED AS A FIRST BOOK FOR STUDENTS* 142-51, 406-08, 476-77, 480-81, 484-86 (1837); 2 FRANCIS WHARTON, *A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES* 1-66, 242-85, 470-73 (1868). In antebellum New York, the legal rate of interest was set at 7% (other states ranged from 6%–8%) and usurious contracts were unenforceable (other states imposed financial penalties, some legislating forfeiture of the principal, some that of the interest, others setting the penalty at two or three times the usury). See HOWARD BODENHORN, *A HISTORY OF BANKING IN ANTEBELLUM AMERICA: FINANCIAL MARKETS AND ECONOMIC DEVELOPMENT IN AN ERA OF NATION-BUILDING* 147 (2000).

56. See JAMES WILLARD HURST, *A LEGAL HISTORY OF MONEY IN THE UNITED STATES, 1774–1970*, at 151-72 (1973). *But see* Roy Kreitner, *Legal History of Money*, 8 *ANN. REV. SOC. SCI.* 415, 417-18 (2012).

be, created, increased, discharged . . . [b]y which false making, forging, altering or counterfeiting, any person may be affected, bound, or in any way injured in his person and property . . . shall be adjudged guilty of forgery in the third degree.⁵⁷

This offense carried with it a maximum sentence of five years in prison. In the revisers' notes they remarked that "the offense of passing counterfeit bills is perhaps the most frequent of any presented to our criminal courts" and further observed that it typically involved

two very distinct classes of offenders; one, consisting of the actual bold forger or his associate; the other, consisting of the duped and ignorant citizen, who, although suspicious of a bill that he has received, yet gets rid of it, on the first opportunity. The latter, though highly criminal, is not of the same deep depravity of the former.

This perceived difference in the degree of culpability was most clearly registered in "the reluctance of juries to convict in the latter case, and thus expose such persons to the very severe penalties of the law." Accordingly, the revisers had carefully crafted a lesser offense for possessing or uttering any forged or counterfeit instrument that had been *innocently* acquired, for which the maximum prison sentence was two years, this being deemed to be better "proportioned to the actual guilt."⁵⁸

Yet none of the other note brokers with whom Huntington dealt were prosecuted under this section, nor was the foolishness of his victims in taking his notes of any legal significance in the estimation of the district attorney; the duped men were likened to "the theologian [who] sometimes hugs the false to his bosom, and rejects the true because ignorant of it." They were not to be blamed for trusting the defendant, for confidence was "the very life and essence of commerce" and they had no choice but to believe what they were told; in doing so, they were "merely obeying every dictate of charity—not to judge others lest we should be judged ourselves." Placing Huntington's crimes on par

57. 2 THE REVISED STATUTES OF THE STATE OF NEW YORK, Part IV, Ch. I, tit. 3, art. 3, § 33(1)-(2) (Packard & Van Benthuyzen 1836).

58. BARBOUR, *supra* note 55, at 111.

with the most violent of offenses—“[t]his man has stabbed at the commercial reputation of men you and I have an interest in. He has inflicted a blow on the people of New York”—the threat to the moral integrity of “this great commercial metropolis” was localized in him. Glossing over evidence that his notes were clumsy fakes, Hall endeavored to persuade the jurors that the prisoner was as devious as he was depraved, operating in accordance with “the most wide awake and shrewd method” and animated by “a sort of moral insanity that seemed to have seized him.”⁵⁹

This would prove to be an unfortunate choice of words. For the defense team, headed by the virtuoso trial attorney James T. Brady, agreed that their client was morally insane, documenting a life history of destructive behavior and business failure that supported this medical hypothesis, which was made the basis of their argument for acquittal. They did so over Huntington’s manifest objection, uttered in open court: “A splendid farce this! A capital joke by gad!” Most news editors immediately echoed his sentiments, generously heaping ridicule on this suspect means of dodging criminal responsibility. To claim that the tendency to develop and advance “ridiculous schemes to get rich without labor” was “a token of insanity” was to argue for the legal irresponsibility of men like P. T. Barnum (whose operations were wilder than anything Huntington had ever dreamed up) and embolden knaves everywhere to “make such a dash at crime as to astonish the world and attract its admiration, so that, if money not buy a release, the very boldness of the crime will acquit the ground of insanity.”⁶⁰

II. COUNTERFEITING INSANITY

When Huntington’s lawyers dropped the bombshell of the insanity defense in courtroom, District Attorney Hall must have felt like the joke was on him. While he likely lived to regret this rhetorical move, Hall had chosen words that were quite commonly used to describe the Mammon-

59. BRADY & BRYAN, *supra* note 24, at 30-31.

60. *Id.* at 110; see *A New Kind of Madness*, DAILY CLEV. HERALD, Dec. 23, 1856.

worshipping commercial classes, underscoring just how crazed they could be made by their own cupidity. The diagnosis of moral insanity was first introduced into the cultural lexicon by late eighteenth century “mad doctors” who sought to widen the legal category of insanity so as to comprehend non-intellectual forms of mental illness. Seasoned criminal defense attorneys like Brady were alive to the ways that this “medical jurisprudence” of insanity could be deployed upon behalf of their clients.⁶¹ Yet in deploying the plea of *moral* insanity, Brady and his co-counsel, John A. Bryan were engaged in something of a pioneering move, as this doctrine was not much used outside of the context of homicide cases, where it was rarely successful. This strategy was all the more dicey because it tended to provoke skeptical reactions, not only on the part of prosecutors, judges, jurors, and the general public, but also increasingly within the field of mental medicine, invariably inviting all manner of slippery slope arguments. The commentary offered in connection with the *Huntington* case by the editor of *The American Journal of Insanity* may be taken as a representative example:

It is not always easy to account for the schemes and conduct of a villain, because villainy is not the normal state of men, although it may seem to be fast getting to be so. If it is to be palliated by scientific excuses of moral insanity, or other dubious apologies for misconduct and crime, the period is not far off when each particular offense against social law and order will have its particular form of insanity, real or simulated, presented as a plea to ward off punishment, and when the whole vocabulary of the dead languages will be in requisition to provide a nomenclature adapted to the multifarious iniquities to which men are prone.⁶²

By the defense attorneys’ own admission, the insanity plea was something of a last-ditch effort, entertained only after the prosecution had rested and Huntington could not be persuaded by Brady to throw himself on the mercy of the court, instead maintaining with an oddly calm assurance that “he had done nothing for which he ought to be

61. *Bibliographical: The Case of Huntington*, 14 AM. J. INSANITY 110, 110-15 (1857).

62. *Id.* at 114.

punished, and . . . he was sure he would be acquitted.” In their puzzlement and frustration, his counselors suddenly recalled a remark the injured party, William Harbeck, had made to the investigating magistrate, intimating “he thought Huntington was crazy,” which prompted them to seek out the expert opinions of “two of the most eminent in the medical profession.” The doctors’ personal inspection and diagnosis of the mental condition of the accused convinced the defense that Huntington’s “reckless and incautious habit of forgery” was indeed the product of an “insane impulse,” Bryan analogizing the plea they were offering to that made by the Prince of Denmark:

Was’t Hamlet wrong’d Laertes? Never Hamlet:

If Hamlet from himself be ta’en away,

And when he’s not himself does wrong Laertes,

Then Hamlet does it not: Hamlet denies it.

Who does it then? His madness. If’t be so,

Hamlet is of the faction that is wrong’d;

His madness is poor Hamlet’s enemy.⁶³

In taking this particular leaf from Shakespeare, Bryan was guilty of a gaff at least as serious as Hall’s, for he unwittingly played into the hands of his opponents, who were already primed to charge the defense with feigning insanity. They gleefully alluded to warring readings of Hamlet’s state of mind in the realm of literary criticism, suggesting that many critics adjudged him “a simulated lunatic.” Unsurprisingly, the prosecutors favored this interpretation as applied to a fictional prince as well as the defendant, hastening to add that the “antic disposition” was put on in the case at bar for the purpose of *covering* rather than detecting a crime—“the greatest known in a commercial community.” Sounding more than a little like the newsmen competing to sell papers, Hall puffed his side

63. BRADY & BRYAN, *supra* note 24, at 106-07.

of the story, promising to rival not only his opponents' account, but the works of the great playwright as well: "You may pile your book-cases with novels and dramas, but you will never find them as interesting as the transactions that pass before you in this courtroom. It is a little story, but a comprehensive one."⁶⁴

In view of all this showmanship, these lawyers might be fairly assimilated to the class of American confidence men, as they traded on the ambiguity of rules and were prone to hyperbole and exaggeration, especially when they professed to be speaking in earnest. Yet upon closer inspection, even the most theatrical of trials may disclose a great deal about the laws that conditioned and gave meaning to the money-making activities men pursued on the light and dark sides of Wall Street. Though there were surely gray areas and many cases of clear wrongdoing that never made it to court, their significance cannot be fully appreciated unless they are considered in relation to the statute books and treatises which set out the elements of crimes of confidence in a hierarchical order, conveying a carefully delineated and amazingly detailed moral scheme so far as culpability was concerned. Such sources crucially shaped the kinds of narratives the counselors told, offering jurors two distinct ways of accounting for Huntington's forgeries as a matter of their state's criminal law. And they were even more consequential in shaping the judgment ultimately rendered, one that landed the defendant in Sing-Sing and left his finances shrouded in mystery.

Working within the constraints of the applicable statute, opposing counselors offered dramatically divergent storylines, rooted in diametrically opposed assessments of Huntington's capacity to do evil. Whereas the prosecution's argument was presented in the form of a depravity narrative that straightforwardly took the defendant's actions to have been motivated by greed, the defense told a tale of mental illness, authenticated by putative experts whose testimony was supplemented by works of medical jurisprudence, from which the counselors quoted at length. Accordingly, we find Hall dwelling on the deliberate

64. *Id.*

fashioning of the forgeries on the part of Huntington as evidence of his criminal intent as well as the danger he presented to all legitimate business dealings while Brady instead focused attention on the crudity of his notes, with the implication that the brokers who claimed to be his victims were either manipulating him or behaving in such a careless way as to be justly punished by the financial losses they had suffered. At bottom, it was a question of which was more laughable: Huntington's forgeries or the defense of moral insanity.

The hundreds of pages of testimony found between the elaborate opening and closing arguments of the attorneys provided the material for assembling dueling biographies of the defendant, leaving jurors to decide whether or not the next chapter of his life—and perhaps the last, given what his attorneys described as his “delicate constitution, and highly nervous and sensitive temperament”—would be set in state prison. The defense played up the haplessness of their client and rooted his apparent disregard for the laws of God and man in a hereditary defect, contending that he descended from a long line of mental defectives, rendering him incapable of being the “mercenary forger” the prosecution made him out to be. They contended that Harbeck and his associates were the prime movers behind the scenes, these men being motivated “not so much from a feeling of revenge, as it is from a desire to shield themselves from suspicion of complicity in these forgeries, while they at the same time put this defendant out of the way.”⁶⁵ Displaying an impressive command of the medico-legal literature on moral insanity, Brady contended that Huntington presented a textbook case, clearly being unable to form the intent to injure required to convict him of the crime of forgery. “You will find,” he maintained, “that the *animus furandi*, as the lawyers express it, was no more an element of these offenses than we find in the lad, who covets and partakes, over a garden wall, some tempting fruit which does not belong to him.” Jurors could thus rest assured that allowing this man “to go forth to the community again” presented no threat to public safety.

65. *Id.* at 90, 97.

Indeed Bryan slyly insinuated that the defendant's example might operate as a form of law enforcement:

Gentlemen, remember that should he be acquitted he will go forth advertised. If he had a placard placed upon his breast and another upon his back displaying in broad letters the words, "Insane Forger," he could not be more thoroughly advertised than he will be by this trial. There will be no possibility of his doing any further mischief of this kind for his hand is palsied by the notoriety of his case. But if the community of money-lenders will not be on their guard now, we must believe that the Almighty has purposely made them in his wrath, as insane and deluded as Charles B. Huntington; and that Charles B. Huntington will again become, what we think he has been already, a humble instrument in the hands of Providence, to take from them their ill-gotten gains.⁶⁶

While they maintained that the defendant's insanity plea refuted itself, Hall and his co-counsel, William Curtis Noyes, nonetheless labored to distinguish the defendant's felonious way to wealth from the mindless pursuits of madmen as well as the legitimate moneymaking ventures of (most) Wall Street traders. Maintaining that Huntington's life story was that of "a criminal," and not "an unfortunate," Noyes mercilessly attacked the pretenses of the supposed medical experts, who could not possibly have determined the state of the defendant's mind upon the basis of a few short visits, likely orchestrated after the accused had been coached to play the part of a fool. In building their case upon such shaky testimony, he advised the jurors, the defense was "making a draft upon your credulity" which Noyes could not believe they would answer with anything other than a guilty verdict. And so he simply but forcefully urged them to prevent villainy from becoming normal by convicting Huntington. "Whilst we cannot change the current of human nature, while legislators in vain may endeavor to coerce human nature," Noyes submitted:

[W]e may at last restrain and correct vice by maintaining the character of this great metropolis, and keeping it in that proper check which is the aim of all law. . . . And although strangers may sneer at this city, which we may proudly call a metropolis, and designate it the modern Sodom and Gomorrah, if it is ever to be

66. *Id.* at 98, 110.

saved I believe it will be redeemed because there may be found in it twelve righteous men, and they will be those who sit from day to day in the jury box of the criminal courts.⁶⁷

At the conclusion of these proceedings, the presiding judge, Elisha Capron, issued a fairly mechanical charge. While he studiously avoided any commentary on the facts of the matter, his remarks did betray a decided distaste for the ways of Wall Street, albeit balanced out by a commitment to the rule of law and pronounced doubts about moral insanity as an excusing condition. Providing instructions that conformed to the strictures of the *McNaughten* test of criminal responsibility, Capron impressed upon jurors that it was theirs to decide whether this disease had obliterated the defendant's capacity to know the difference between right and wrong. If it had, Huntington was to be "promptly restored to his family and to society," but if it had not, "the interests of the whole commercial world require that he be certainly and speedily punished." Less than four hours later, they returned with a guilty verdict, which prompted the defendant to visibly sink into his chair, though according to reports "his self-possession immediately returned, and did not again desert him." Days away from a planned retirement from office, Capron immediately moved into the sentencing phase of the trial. By the court's order, Huntington was to be confined for the maximum term authorized under the statute, four years and ten months, in the famously impregnable Sing Sing Prison.⁶⁸

III. "CRIME CONTAGIOUS"

"Thus has terminated one of the most remarkable trials of the day," reported the *Springfield Republican* as reprinted in *St. Alban's Messenger* on January 15, 1857, "and contrary to general expectation, a New York court has decreed the punishment of a magnificent swindler." While the verdict concerned only one of "hundreds of forgeries committed by the defendant," this report of a report conveyed the expectation that "the other [indictments] will

67. *Id.* at 31, 375.

68. *Id.* at 440-53.

not be pressed, the ends of justice being fully served, it is believed, by the result of this case.” Other newspaper reports were downright exultant in their renderings of the outcome of this trial. “A great and good thing in behalf of justice, public morality, individual honesty and the safety of society has been achieved in the conviction and sentence of Huntington, the forger and swindler, to the utmost penalty of the law,” gloried the self-consciously self-righteous *New York Herald*, in an editorial worth quoting at length:

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

The editor adjudged the defense was “worse than useless” to the defendant, opining that he would have been far better served had his counselors pursued “a legal line of defence . . . to wit: the mitigation plea—that the forgeries complained of were not in reality perfected, and were not forgeries in the ordinary sense of the word, but financial experiments of a ‘confidence man,’ of a bold and dashing, and singularly romantic and successful character.” Without pausing to reflect upon the ethical standards the *Herald* was effectively advancing—not least by publicizing this advice—the paper took its leave of the matter of Huntington the Forger with its expression of “the hope that his case gives quietus to this insolent dodge of ‘moral insanity.’”⁶⁹

69. *The Conviction of Huntington*, N.Y. HERALD, Jan. 1, 1857, at 4, reprinted in RICHMOND WHIG, Jan. 2, 1857, at 4; *The Huntington Trial*, SPRINGFIELD REPUBLICAN (n.d.), reprinted in ST. ALBAN’S MESSENGER, Jan. 15, 1857.

This hope was not to be realized, in no small part because papers like the *Herald* continued to milk such trials for all they were worth, arguably rendering them responsible for turning these legal events into the sorts of spectacles that the editors purported to deplore. The penny presses were even more obsessed with the subject of crime, devoting considerable space to all manner of deviant behavior, from petty thieving to murders most foul. Their practices excited the concern of more “respectable” news outlets, who ran stories about “those newspapers which labor most earnestly to give the earliest and the fullest details of crime,” repeating a long-standing worry about the potential of news stories of vice to breed more of the same. Appearing under the headline “CRIME CONTAGIOUS,” one 1858 editorial published by the *Boston Recorder* tallied the social costs of such journalistic conventions:

Multitudes have been led into crime by reading the details of our police gazettes, and other sickening receptacles of abomination, who, but for this mental contamination, would have lived and died honored, respected, and beloved. . . . Woe to the man that inhales it; woe to the individual who becomes contaminated with its poisonous exhalations; woe to him who studies the literature of our criminal courts, and makes police reports a portion of his daily mental food. . . . Who ever saw a minute report of a cunning fraud, an accomplished act of villainy, forgery, theft, embezzlement, that was not immediately followed by a multitude of similar cases, excited by reading the description in our public journals?⁷⁰

Sounding not a little like the agonized writings of earlier criminal law reformers, as they observed the effects of public hangings, this editorial concluded that crime stories threatened to turn offenders like “Huntington, the forger” into “heroes of the hour.” Yet thankfully a prescription was near at hand, on this analysis, the paper enlisting “public opinion” as well as other newsmen in the task of improving the mental environment, envisioning a kind of virtuous cycle. “This avidity for the recital of the monstrous and the horrible in crime,” it was suggested,

70. *Crime Contagious*, CHARLESTON COURIER, Mar. 24, 1858, reprinted in BOS. RECORDER, Sept. 16, 1858.

should be checked by a wholesome restriction by the public opinion upon the press, and not fostered, nourished, maddened by such printed histories of horrors. . . . Present as seldom as possible to the public gaze the sickening accounts of the morbidly insane, the abandoned and the corrupt, and the mania of crime will be diminished according.⁷¹

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

71. *Id.*

recommended him to mercy” and the presiding judge accordingly suspended judgment, prompting Scatchard to “exit from the [c]ourt majestically.” What became of him thereafter is difficult to piece together, though there are hints that his real name was James B. Cross and that this was neither his first nor his last forgery. He surfaced again in the popular press in 1867 upon being arrested in New York and taken to Chicago to stand trial on another forgery charge, by which time he had earned the reputation of “a prodigy in his way.” What he had done this time is not clear from the surviving newspaper accounts, though the last published story on the matter promised more: “It is said that one-half of this queer transaction is not yet known, and that some singular developments will be made on the examination, which will take place at an early day.” The reading public may have been left in suspense about what became of Scatchard/Cross, but it is more than possible that they read about him again without even knowing it, given the elusive nature of the subject. Like the title character in *The Confidence Man*, this imposter may have gone on to con again, proving the truth of the last words of Melville’s disquietingly amusing novel: “Something further may follow of this Masquerade.”⁷²

Huntington the forger was not so fortunate, so far as we know. Upon release from Sing Sing in 1862, several of his creditors obtained a judgment against him and an order of arrest was granted, which landed him in the Westchester County Jail. Although he petitioned for discharge under New York’s insolvency law, the court sustained the objection of his creditors, who insisted that Huntington’s status as an unpardoned felon rendered him incompetent to make the necessary affidavit. “Out of the frying pan and into the fire,” read the last news report of his whereabouts. Of course, something further might have followed in his case as well. But from the standpoint of legal history, what

72. *Arrest of a Noted Forger*, HARRISBURG PATRIOT, May 3, 1867, at 2; *Items*, N.Y. EVENING POST, May 3, 1867, at 2; *Scatchard*, NEW LONDON CHRON., July 10, 1857, at 2; *The Alleged Pardon-Forger*, N.Y. DAILY TRIB., Apr. 20, 1857, at 6; see also HERMAN MELVILLE, *THE CONFIDENCE-MAN: HIS MASQUERADE* (Elizabeth S. Foster ed., Hendricks House, Inc. 1954) (1857).

matters most is that he did not simply get away with his crimes. While lawyers and showman both had their reasons for playing with the boundaries of fraud, accounts of the blurriness of this line have been greatly exaggerated. Attending more closely to the cases of those brought to justice will shed important light on the defining features of white and black lies in Barnum's America.