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Con Men and Their Enablers: The Anatomy of Confidence Games

INTRODUCTION

“Confidence games” (or “cons”), a distinctive species of fraudulent conduct, are schemes intended to further voluntary exchanges that are not mutually beneficial. They benefit con operators (“con men”) at the expense of their victims (the “marks”). Cons have numerous varieties that constantly evolve, but all cons build on two key elements: the acquisition of the mark’s trust—for which the schemes are known as “confidence games”—and the bait—an attractive reward that lures and disarms the mark. The devious elegance of the art is in the exploitation of mechanisms that are critical to the functioning of markets and democratic processes: voluntary exchanges, autonomous decisionmaking, and trust. For the opportunistic use of elementary market mechanisms, it is difficult to set cons apart from ordinary market transactions and prove unlawfulness of alleged cons.

Classic types of confidence games include:

*Get-Rich-Quick Schemes.* Products and services offering impractical prescriptions for wealth in exchange for small fees.

*Gold-Brick Scams.* Sales of tangible objects for much more than their worth.
Gold Digging and Romance Scams. Personal interactions intending to gain the mark’s affection for the purpose of getting the mark’s money.

Humbuggery. The use of provocative public messages to draw public attention and create willingness to pay for provocations, entertainment, and illusions.

Payoff, Rag, and Wire Schemes. Ploys that draw marks to participate in unlawful activities, such as fixed gambling (the payoff), insider trading (the rag), and embezzlement (the wire), that are rigged against the marks.

Peter Funk. A mock auctioneer who inflates auction prices.

Ponzi Schemes. Investment enterprises that promise safe or very high returns and use deposits to pay customers who seek to redeem investments or cash their profits.

Pyramid and Multilevel Marketing Schemes. Business models that recruit members through promises of payments for enrolling others into the scheme.

Vanity Scams. Sales of supposedly lucrative affiliations, awards, and publication opportunities.

These cons and others are prevalent throughout the economy, operated by underworld crooks, marketers, salespersons, businesses, and politicians. History offers numerous examples of high-profile individuals who operated large-scale cons, such as circus pioneer P. T. Barnum, industrial titan Ivar Krueger, Wall Street financier Bernard Madoff, blood-testing company founder Elizabeth Holmes, and US president Donald Trump.

Many cons succeed by inducing judgment errors—chiefly, errors arising from imperfect information and cognitive biases. In popular culture and among professional con men, the human vulnerabilities that cons exploit are depicted as dishonesty, greed, and gullibility of the marks. Dishonesty, often represented by the expression “you can’t cheat an honest man,” refers to the willingness of marks to participate in unlawful acts, such as rigged gambling and
embezzlement. **Greed**, the desire to “get something for nothing,” is a shorthand expression of marks’ beliefs that too-good-to-be-true gains are realistic. **Gullibility** reflects beliefs that marks are “suckers” and “fools” for entering into costly voluntary exchanges. Judicial opinions occasionally echo these sentiments.

We study the anatomy of confidence games and examine why efforts to fight cons are controversial and often ineffective. We argue that lawmakers and courts should be mindful of the broad social costs of cons and, specifically, of how conning enterprises exploit factual and legal ambiguities. The present understanding of cons, however, is deficient. Formalistic protections of voluntary exchanges, often advanced by ideological beliefs, shield cons from prosecution and impede the development of measures that can curtail the effectiveness of confidence schemes.

We examine several key attributes of cons. First, we emphasize the flexible and evolving nature of cons that allows concealment of their deceptive character and circumvention of legal definitions.
Second, we compare the operations of con enterprises in the underworld with operations of con enterprises in the formal economy and democratic processes. Underworld cons, even sophisticated ones, are relatively limited in scale and scope and assumed to be unlawful. By contrast, participation in established social institutions often serves confidence schemes. It boosts credibility, permits greater reliance on third-party facilitators (“enablers”), accommodates scale and scope, and allows exploitation of legal ambiguities. Third, we discuss the significance of scale and complexity of cons, which often require cooperation among multiple actors and reliance on enablers. Finally, we discuss what legal measures may be used against cons.

THE GAME
We begin our inquiry by explaining how confidence games gained public recognition and inspired popular culture. We then discuss how the complexity of confidence schemes creates ambiguities that complicate efforts to fight the game.

Con Men Gain Public Recognition
Until the mid-nineteenth century, literary works, the press, and slang dictionaries used words like “swindle,” “grift,” and “diddling” to denote cheats and fraudulent schemes. In 1849, the New York Herald published a series of reports about an “accomplished swindler” who purportedly was known in New York as the “Confidence Man” (Braucher and Orbach 2015). The first report sketched the swindler’s signature technique:

*Arrest of the Confidence Man*—For the last few months a man has been travelling about the city, known as the “Confidence Man.” ... [H]e would go up to a perfect stranger in the street, and being a man of genteel appearance, would easily command an interview. Upon this interview he would say, after some little conversation, “have you confidence in me to trust your watch until tomorrow?” [T]he
stranger … supposing him to be some old acquaintance, not at the moment to be recollected, allows him to take the watch, thus placing “confidence” in the honesty of a stranger who walks off laughing. (New York Herald 1849, 2)

The Herald’s reports illustrated how swindlers use trust to advance schemes, and are credited with coining the term “confidence man,” although it is unclear whether the Herald coined a new phrase or adopted a term that underworld swindlers had already used. Subsequent works showed that con men had a professional argot and themselves used the terms “confidence man,” “confidence game,” and “con” (Matsell 1859; Maurer 1940, 1974). In 1867, Illinois adopted the first “confidence game statute,” which criminalized unsophisticated street cons. The statute provided that:

[E]very person who shall obtain, or attempt to obtain, from any other person or persons any money or property, by means or by the use of any false or bogus checks, or by any other means, instrument or device, commonly called the “confidence game,” shall be liable to indictment, and, on conviction, shall be punished by imprisonment in the state penitentiary for any term not less than one year nor more than ten years. (“An act to define and punish the crime commonly called the ‘confidence game,’” Illinois 1867)

The word “person” and the focus on the obtaining of money or property in fraudulent ways defined the narrow scope of the statute. In the 1860s, the word “person” referred only to “natural persons,” and courts were unwilling to impose criminal liability on corporations (Edgerton 1927). The statutory element of “obtain[ing] … money or property” also excluded the application of the statute to political cons. Over 20 states followed suit, passing statutes that criminalized street cons and largely neglected sophisticated cons.
Cons as a Line of Business

As noted at the outset, engagement in legitimate business or political activities does not exclude the possibility that a person (or an entity) operates confidence schemes. In many instances, companies that established their brand and reputation through lawful and productive business activities also engaged in cons. For example, Ivar Krueger’s global conglomerate, Kreuger & Toll, was a holding company that owned and operated successful industrial companies around the world. Kreuger, however, also used his company to operate an intricate network of financial schemes (Partnoy 2009). There are many other examples of executives who directed or approved misconduct, but organizational misconduct is rarely directed or approved by the senior management. Instead, organizational misconduct is typically the result of organizational culture, limited oversight, and performance goals (Mookherjee 2006).

The financial industry offers many examples of organizational misconduct by institutions that primarily provide services critical to the functioning of the economy. For example, credit cards are among the most important financial mechanisms in the modern economy. Credit card issuers, however, have persistently used exploitive practices. Responding to such practices, in 2009, Congress passed the Credit Card Accountability Responsibility and Disclosure Act (the “CARD Act”). To protect consumers, the CARD Act bans a large number of practices were common in the credit card industry. Similarly, securitized mortgages made home ownership a viable option for most US households. During the 2000s housing bubble, however, such mortgages were a platform for practices that can be characterized as confidence schemes and ultimately led to the Great Recession (FCIC 2010).

To be sure, market credibility neither excludes the possibility of engagement in cons nor suggests that credible individuals and institutions necessarily engage in cons. The point is different. The mechanisms of free markets are insufficient to prevent misconduct, including confidence schemes (Akerlof and Shiller 2015). Thus, regulatory regimes that factor in both the social costs of...
misconduct and the social costs of regulation tend to produce much better outcomes.

**The Cast: Expertise and Allocation of Labor**

Individual con men have inspired many books and movies. In reality, however, the operation of successful cons typically requires many tasks that are carried out by informed and uninformed participants, as well as enablers. The classic distinction between “short” and “big” cons illustrates the point. A “short con” is a relatively simple scheme in which the con man and the mark have a brief interaction and the “score”—the money taken from the mark—is limited to the amount that the mark has with him. A “big con” is more elaborate: the mark is induced to give money or other assets that are beyond what he has with him. Behind a short con, there may be a single operator acting alone. By contrast, a big con typically requires a diverse set of tasks that no single individual can carry out. For example, in *United States v. Blackmon* (1988), the Second Circuit described “the pigeon drop,” a big con operated by a team of con men who acted as bankers and IRS officials to persuade marks to withdraw money from their savings. The argot of underworld con men includes technical terms that illustrate how “con mobs” allocate tasks among their members:

*Fixer.* A “local man employed by grifters to fix the law,” namely, to buy cooperation from law enforcers, politicians, and others.

*Handler.* An “accomplice who plays a confidence game so that the mark sees him win.” In big cons, the handlers “are frequently professional confidence-men who dress and act [like] men high in the financial world.”

*Inside-man.* (1) In short cons, the person who “operates the game.” (2) In big cons, a “member of the con mob” who receives the mark from the outside-man. Big cons’ inside-men are “highly specialized workers” who have “a superb knowledge of psychology to keep the mark under control
during the days or weeks” when the mark is induced to use his resources to participate in the game.

Manager. A member of a con mob in a big con who is in charge of the staged scene.

Outside-man. A “member of the con mob who locates the mark” and delivers him to the inside-man.

(Maurer 1940, 1974)

The division of labor in underworld cons is similar to the organization of cons in the formal economy. For example, “fixers” often include lawyers, lobbyists, and politicians; “outside-men” include recruiters, promoters, and other marketing agents; “inside-men” are customer-relations agents and salespersons; “handlers” are advertising agents; and “managers” are executives.

Participants vs. Enablers
The scale and complexity of cons permit and sometimes even require services from independent third parties, such as bankers, lawyers, and accountants, whose cooperation is necessary for operational success. These third parties are thus known as “enablers.” Scale and complexity also permit compartmentalization of information among participants and facilitators. Hence individuals and organizations that serve complex cons are not always aware of the nature of the schemes they serve. Further, only rarely does available evidence conclusively prove whether and when players realized that their services contributed to unlawful schemes. History has shown over and over again that participants and enablers do not always understand that their work furthered unlawful schemes.

For example, Madoff’s investment company operated for several decades and employed hundreds of individuals, including Madoff’s family members. Investigations concluded that several long-term employees played crucial roles in Madoff’s Ponzi scheme, but it is doubtful that any of them fully understood the scheme (Lewis 2016). Madoff told investors that his company invested in securities
of public companies, but he instead deposited his clients’ funds in a JPMorgan account, which he used to pay clients who asked for their money. Every year, the “client relationship manager” at JPMorgan who maintained the bank’s relationship with Madoff certified that Madoff’s company complied with the relevant legal and regulatory requirements. There was no evidence that anyone at the bank consciously cooperated with Madoff’s scheme, although JPMorgan served as Madoff’s principal enabler (Norris 2014). In January 2014, JPMorgan agreed to pay $2.6 billion to settle criminal and civil charges that the bank failed to report suspicious activities in Madoff’s account.

In the case of Ivar Kreuger, the “Match King,” the investment bank Lee, Higginson & Co. was the principal enabler of an elaborate investment fraud. Kreuger operated a global industrial conglomerate, monopolized the supply of matches in most countries, and extended loans to European countries (Partnoy 2009; Shaplen 1960; Stoneman 1932). Lee, Higginson & Co., then a prominent bank, gave Kreuger access to financial markets and boosted his credibility. The directors of International Match Corp., Kreuger’s largest US subsidiary, were among the nation’s most prominent executives. Leading media outlets, such as the Economist, Forbes, Fortune, the New York Times, Time, and the Wall Street Journal, routinely glorified Krueger, although they recognized that his empire was veiled in mystery and that only Kreuger himself understood its operation. The implosion of Kreuger & Toll shook markets around the world. Postmortem studies of Kreuger’s empire concluded that while his close associates understood that they were advancing financial schemes, most firms and individuals who worked with Kreuger trusted him and did not realize that they were serving a massive confidence-game enterprise.

In 2015, Elizabeth Holmes was America’s richest self-made woman from her stakes in the company she founded, Theranos. She was often described as “the next Steve Jobs.” Holmes recruited powerful individuals to serve on the Theranos board of directors and successfully drew investors by touting a revolutionary blood-testing technology that never existed (see Forbes 2015; Kolhatkar and Chen 2015).
Theranos’s directors included former senators, leading executives, and other power stars, such as David Boies, Henry Kissinger, James Mattis, and George Shultz. In practice, the directors served as fixers and recruiters of a large scheme, although apparently unknowingly (Kolhatkar and Chen 2015; Carreyrou 2016).

Enron likewise employed the strategy of using highly qualified directors to facilitate a massive accounting scheme of which the directors were apparently unaware. In the aftermath of the Enron scandal, a jury found that Arthur Andersen, Enron’s auditor, violated a federal law by instructing its employees to destroy incriminating documents related to Enron’s accounting practices. The Supreme Court overruled the conviction, holding that the relevant statute required proof of “consciousness of wrongdoing” and that the jury instructions failed to convey this prerequisite (Arthur Andersen 2005).

As the examples illustrate, individuals and organizations that serve confidence schemes may be affiliated in various ways and may be unaware of the nature of the underlying cons. Such operational complexity raises the questions of whether and how the legal system should address various types of participation and facilitation. Many statutory and regulatory frameworks in the United States target gatekeepers—parties whose cooperation was critical to the success of an unlawful scheme—for failures to detect or report suspicious activities (Kraakman 1986). But, with the exception of gatekeepers that may have statutory duties, liability requires knowledge of the unlawful act and intent.

**POLICY DEBATES AND INDIRECT ENABLERS**

Con schemes have characteristics of both trade and fraud. Like trade, cons are voluntary exchanges, what most people call “deals.” And, like fraud, cons are voluntary exchanges induced by misleading representations. This ambiguity, in turn, complicates efforts to fight cons. Additionally, philosophical beliefs provide rationales for objections to such efforts. We identify two primary rationales: simplistic claims about the virtues of voluntary exchanges and about constitutional
rights of corporations. The use of these rationales to undermine regulation of exploitive practices, we argue, burdens society and empowers confidence games.

**The Virtues of Voluntary Exchanges**

At the heart of all controversies over the use of the legal system to reduce the costs of confidence games lies the question of whether the state should interfere in voluntary exchanges. Studies of Adam Smith’s *The Wealth of Nations* established the concept of “voluntary exchanges” as a stylized idea that symbolizes markets and freedom (Rand 1967; Friedman 1962). In Milton Friedman’s words, “Adam Smith’s key insight was that [all] parties to an exchange can benefit and that, so long as cooperation is strictly voluntary, no exchange will take place unless both parties do benefit” (Friedman and Friedman 1979, 1–2). This economic mantra was popular in the 1960s and 1970s and still decorates certain ideologies and beliefs. It is no longer compatible with mainstream economics. Today, the broad consensus among economists is that free markets tend to deliver what people want, but also serve economic enterprises that manipulate and distort judgment (Akerlof and Shiller 2015). The lingering influence of outdated economic ideas is one example of how financial interests in free markets sometimes sustain campaigns to manipulate and distort beliefs.

There is no disputing that voluntary exchanges do not necessarily result in welfare improvements: (1) imperfect information, bounded rationality, and other factors tend to compromise the quality of decision-making; (2) mutually beneficial exchanges may produce negative externalities, namely, harm to third parties that do not participate in the exchange; and (3) economic power and economic desperation sometimes force people into exchanges that they would not choose otherwise (Arrow 1969; Kahneman 2011; Sandel 2012; Konnikova 2016; Langenderfer and Shimp 2001). In textbooks, these impediments are often called “market failures.” Similar factors, as well as ideologies and opportunism, influence people’s views about confidence games and their regulation.
We do not discount concerns regarding the cost-effectiveness of regulation. The costs of regulatory measures, including false positives (condemnation of productive voluntary exchanges), may be meaningful. But so are the costs of regulatory inaction, including false negatives (tolerance of costly voluntary exchanges). We argue that the denunciation of the need for regulation is distinctively extreme and unreasonable.

Consider, for example, the Consumer Financial Protection Bureau (CFPB). In the wake of the Great Recession, the Dodd-Frank Act established the CFPB as an independent federal agency, consolidating in it federal consumer protection powers previously held by seven agencies. The CFPB’s stated purpose is to ensure that “all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive” (The Dodd-Frank Act § 1021). Proponents of the agency argue that the complexity of financial products warrants centralized administrative oversight to protect consumers. Opponents, however, argue that the CFPB burdens the financial sector, harms consumers, and stifles innovation. The agency’s proponents and opponents have a few things in common: both sides believe that the CFPB imposes restrictions on the design and offering of financial products, and each side believes that the other side’s approach harms consumers and the functioning of markets. The vast differences in views about the CFPB suggest that not all views about the agency are informed and free of biases.

The Expansion of Corporate Rights
Since the mid-1970s, the US Supreme Court has been persistently expanding corporate rights at the expense of individual rights (Winkler 2018; Coates 2015a, b; Epstein, Landes, and Posner 2013). Among scholars, there is broad agreement that the expansion of corporate rights largely serves powerful interest groups, contributes to wasteful rent seeking, and is inconsistent with the rule of law (Winkler 2018; Epstein, Landes, and Posner 2013; Coates 2015a, b;
Orbach 2015). This expansion protects dubious business practices and incentivizes the use of such practices. Here, we offer a few doctrinal developments that illustrate the expansion of corporate rights that, among other things, accommodate confidence schemes.

(1) The Commercial Speech Doctrine. “Commercial speech” is an “expression related solely to the economic interests of the speaker and its audience” (Central Hudson 1989). In 1976, the Supreme Court established the “commercial speech doctrine,” providing First Amendment protection to commercial speech (Virginia State Board of Pharmacy 1976). To explain its ruling, the Court wrote that “the free flow of commercial information is indispensable … to the proper allocation of resources in a free enterprise system … [and] indispensable to the formation of intelligent opinions as to how that system ought to be regulated.” This rationale rests on the highly simplistic premise that market forces necessarily induce companies to disclose material information and prevent them from using misleading speech. Although the Court recognized that “many of the problems in defining the boundary between deceptive and nondeceptive advertising remain to be resolved” (Bates 1977), it has not acted to resolve these problems or to reconcile them with its view of commercial speech. As a result, the standards of review that courts apply to commercial speech afford a generous protection to misleading advertising. For example, courts struck down regulatory actions requiring substantiation of health claims in advertising (POM Wonderful 2015) and regulatory actions requiring companies to include with their products warnings (R.J. Reynolds 2011) and disclosures (National Association of Manufacturers 2015).

(2) Citizens United and Corporate Speech. Under the theory that “[s]peech restrictions based on the identity of the speaker are all … a means to control content,” the Court in Citizens United (2010) held that the free speech clause of the First Amendment prohibits the government from restricting independent campaign spending by corporations, labor unions, and other associations. By thus authorizing corporations to spend unlimited funds on direct advocacy for or against
candidates, *Citizens United* permits corporations to influence enactment and enforcement of laws that govern their operations.

(3) **Individual Arbitration Clauses.** Standard form agreements frequently include arbitration clauses that require the parties to waive their rights to litigate disputes. Beginning in the 1990s, corporations also added to standard form agreements the requirement to waive class arbitration rights, which the Supreme Court upheld as lawful despite the prohibitive expense of individual arbitration (*American Express* 2013). Subsequently, class arbitration waivers became a fixture in companies’ standard form agreements. The practice circumvents the courts and bars individuals and small businesses from joining together in class-action lawsuits to fight exploitive and deceitful business practices.

(4) **Narrow Interpretation of Dodd-Frank’s Whistleblower Protections.** The Dodd-Frank Act includes several provisions intended to incentivize and protect whistleblowers. The statute defines a “whistleblower” as “any individual, or more individuals acting jointly, who provides information relating to a violation of [the federal securities laws] to the [SEC].” The Supreme Court interpreted the statute narrowly, holding that the Dodd-Frank antiretaliation protections apply only to those whistleblowers who report securities law violations to the SEC, and not to employees who report violations internally (*Digital Realty Trust, Inc., v. Somers* 2018). Whistleblowers are instrumental to the detection and prosecution of unlawful practices—including commercial confidence schemes—and narrow application of statutory whistleblower protections compromises the ability to fight such practices.

**PUBLIC POLICY PRESCRIPTIONS**

Confidence games are a form of opportunism, namely, “self-interest seeking with guile” (*Williamson 1975*). Like other forms of opportunism, confidence games have many guises that continuously evolve. As a result, legal rules cannot cost-effectively define the act. We argue that imperfect public policies may nonetheless be much better than inaction. We identify three classes of laws that directly and indirectly
regulate cons: (1) fraud laws that criminalize cons; (2) regulatory measures that undermine the profitability of cons by raising their operational costs and reducing enforcement costs; and (3) legal principles that intend to protect business activities that are similar to cons.

**Fraud Laws and Confidence-Game Statutes**

The legal meaning of “fraud” is the obtaining of money or property by false means. The term includes four key elements: (1) false representation; (2) intent to defraud, i.e., intent that the representation would induce another person to act; (3) reasonable reliance on the representation; and (4) damages resulting from reliance on the representation. The offense is recognized in common law (“common-law fraud”), as well as in numerous federal and state statutes (“statutory fraud”), including state “confidence-game statutes.”

Fraud laws provide important tools for the prosecution of confidence games, but their effectiveness is limited in three key ways. First, the acquisition of the mark’s trust reduces and may even replace the need for false representations. A trusting person may be willing to enter into a voluntary exchange with limited assurances. As a result, cons do not always produce enough evidence for successful prosecution as fraud. Second, proving intent is inherently difficult, especially since direct evidence of intent (i.e., evidence that proves intent without inference or presumption) is rarely available. In elaborate cons, it is particularly difficult to prove intent of various actors—participants and enablers—because of the division of labor and compartmentalization of information. Third, in hindsight, the mark’s willingness to trust representations often appears unreasonable. For example, in New York, “[r]easonable reliance entails a duty to investigate the legitimacy of an investment opportunity” (Crigger 2006; Zoltek Corp. v. Structural Polymer Group, 592 F.3d 893, 8th Cir. 2010).

To illustrate how commercial cons often escape legal definitions of fraud, consider diploma mills and vanity scams. Such schemes offer, for exorbitant fees, bundles of allegedly certified recognitions and products, such as courses, inclusion in biographical ref-
ference books, and plaques (see, e.g., FTC 2014, 2015; Brill 2015; Ezell and Bear 2012; Schemo 2009). They use recognizable and seemingly prestigious brands to boost credibility. So long as these schemes deliver something that is worth more than nothing and do not promise something that they do not deliver, it is quite difficult to prove that they constitute unlawful fraud (see, e.g., Christian College of Church of Inner Power, 346 N.Y.S.2d 482 [Sup. Ct. 1973]). The rise and fall of Trump University is a textbook example of such cons (Shireman 2018; Brill 2015; Makaeff v. Trump University 2013). The industry of biographical reference directories offers another example. Founded in 1899, Marquis Who’s Who in America (WWIA) created the industry of biographical directories in the United States. For several decades, WWIA was “indispensable to libraries, businessmen and working newsmen” (Time Magazine 1954) and served as the nation’s index of success and fame. Marquis registered several trademarks and successfully sued other companies that used its brand “Who’s Who.” By the 1970s, however, Marquis abandoned standards of prestige for the business model of aggressive solicitation of nominations and dubious selection criteria. Like its competitors, Marquis’s revenues in recent decades come primarily from listed individuals who want hard copies of the honor. The company’s representations are vague enough to avoid fraud charges.

Confidence game statutes were designed to capture cons that had escaped general fraud laws by focusing on the fraudulent acquisition of confidence rather than fraudulent exchange. For their legislative logic, the statutes applied primarily to underworld cons. As interpreted by courts, the confidence game offense applies to situations where a person acquires another person’s confidence by false pretenses or false promises for a subsequent betrayal to obtain money or property from the victim. The offense, however, is inconsistent with the spirit of criminal law. The defendant’s state of mind is typically a core element of criminal offenses and must be proven. Confidence game statutes took a different approach, permitting inference of fraudulent intent from the operational characteristics of the scheme (Atwell 1955; Crowley 1959). Con men challenged the
constitutionality of confidence game statutes, arguing that the statutes were unconstitutionally vague because (1) the term “confidence game” lacked any definition of the proscribed conduct, and (2) the presumption about the accused’s state of mind criminalized lawful speech. Courts rejected these claims, reasoning that the “nature and character” of confidence games were “well understood” (Morton 1868; People v. Farrar 1983). Seven states—Arizona, Colorado, Illinois, New Jersey, New York, Oklahoma, and Utah—and the District of Columbia still have confidence game statutes on their books, but even in these jurisdictions the confidence game offense is rarely invoked. Instead, confidence games are prosecuted today as violations of general fraud laws and regulatory measures that target specific types of cons.

In sum, the evidentiary requirements of fraud laws set thresholds that allow many cons to escape conviction. Lawmakers and courts can probably cost-effectively improve the legal standards of fraud to better capture confidence schemes. For example, when analyzing alleged cons, a broader interpretation of the element of “reasonable reliance” is warranted. The narrow interpretation that some courts use implies that the exploitation of judgment errors is lawful.

**Indirect Regulation of Cons**
Federal and state laws supplement fraud laws with a variety of indirect regulatory measures that intend to raise the operational costs of fraudulent activities and reduce enforcement costs. Examples of such indirect measures include:

*Consumer advocacy.* Publicly funded systems that use a variety of tools to educate and warn consumers about dubious business practices and street cons. Such advocacy includes the work of consumer protection agencies, such as the Federal Trade Commission and CFPB.

*Disclosure requirements.* Standards for material information that companies must provide to investors and customers, including standards for accessible presentations of information.
Gatekeeping rules. Statutory and regulatory standards that require market gatekeepers, such as bankers, lawyers, and accountants, to certify that their clients comply with relevant laws and regulations, as well as report suspicious activities.

Leniency programs. Government policies that, through sentencing guidelines, incentivize compliance with laws and regulations and withdrawal from unlawful activities. Liability standards for officers and directors may also function in a similar fashion. Indirect measures of this kind are the primary motivation for the adoption of compliance programs.

Whistleblowing laws. Statutory and regulatory standards that intend to incentivize reporting about wrongdoing or, at the very least, protect whistleblowers.

Constitutional and other protections of the press may also hinder cons. Freedom of the press has always been understood as essential to democratic societies, including to efforts to battle deceptive and fraudulent practices. News outlets identify the characteristics of cons, educate the public about how confidence games operate, expose small and large cons, and persistently contribute to the understanding of con schemes and their evolution. Today, this indirect measure is undermined by politicians in the United States and around the world who attack the “fake news” and “dishonest press” to discredit unfavorable reports. This strategy harms democratic institutions and weakens their ability to fight deceptive and fraudulent practices.

Indirect regulation imposes costs on businesses and enforcement agencies, and these costs should not be ignored or discounted. Indeed, the social costs of regulatory zeal may be greater than the social costs of inaction. But the social costs of inaction should not be ignored or discounted either. For this reason, the choices that lawmakers and regulatory agencies face are not between the two extremes of excessive regulation and inaction. Rather, they are about
what measures may cost-effectively reduce the social costs of corporate wrongdoing.

Caveat Emptor and Puffery

The judge-made doctrines of caveat emptor and puffery are legal defenses intended to protect voluntary exchanges that are similar to cons. The caveat emptor maxim (“let the buyer beware”) provides that, under certain conditions, a seller is not liable to a buyer for unfavorable consequences arising from a transaction in property. The three key conditions are (1) absence of express or implicit warranty, (2) absence of fraud, and (3) an opportunity to inspect the property that the buyer used or waived. The puffery defense, in turn, protects sellers and advertisers from liability for grossly exaggerated claims that no reasonable buyer would believe was true.

Both defenses consist of intricate sets of doctrines. Their depiction as legal principles mostly describes their general functions but does not convey the complexity of their applications. Judicial decisions concerning the applications of caveat emptor and puffery are not always—and some would say are rarely—coherent and consistent. It is indeed easy to identify and criticize the disarray caused by the intricacy of legal standards related to the applications of caveat emptor and puffery. But it would be misleading to argue that simple, formalistic rules would better serve society and the rule of law. The development of these doctrines, we argue, could benefit from improved understanding of the anatomy of cons.

Political Cons

The democratic process, like markets, relies on voluntary exchanges that are not always mutually beneficial. And politicians, like businesses, sometimes use confidence-game methods. Unlike market confidence games, political confidence games are intended to gain votes and secure campaign funding. Voters, thus, sometimes feel that politicians gain their trust with false promises.
President Trump’s frequent use of lies and exaggerations, zero-sum transactional philosophy, aggressive self-promotion, and disdain for the rule of law sparked public debates over political confidence games. Trump’s political allies and critics have both described him as a con man. Famously, Mitt Romney delivered a speech in March 2016 in which he argued that “[t]here’s plenty of evidence that Mr. Trump is a con man” (New York Times 2016). We do not analyze claims that the president is a con man but instead examine some of Trump’s signature techniques.

There is no controversy to the assertion that President Trump frequently lies and makes factually misleading statements. Trump’s supporters and surrogates recognize that he regularly uses “hyperbolic claims,” “alternative facts,” and “incorrect factual statements” (see, e.g., Davis and Jamerson 2018; Rago 2015). His critics agree. Throughout his career in the public eye, as a businessperson, media personality, political commentator, and politician, Mr. Trump was “famous for his exaggerations,” promotion of conspiracy theories, and ethically challenged practices (see, e.g., Kamat 2018; Eichenwald 2016; Berzon 2016). He has persistently made a “seemingly endless stream of exaggerations, evidence-free accusations, implausible denials and other falsehoods” (Wall Street Journal 2017; see also, e.g., Baker 2017; Davis and Haberman 2018; Taibbi 2017; LA Times 2017a, 2017b; Economist 2016.). Mr. Trump has promoted various conspiracy theories, including the propositions that President Obama was born in Kenya and wiretapped his phones; that Muslims celebrated the September 11 terrorist attacks; that his “enemies and haters” falsely accuse him of lewd conduct; and that organs of the “deep state” wage a vicious “witch hunt” against him. To discredit unflattering media reports, Trump advanced conspiratorial claims that the “mainstream media” is “dishonest,” “unfair,” and produces predominantly “fake news.” Among many claims, Trump accused the press, “Fake News media” in his words, of being the “enemy of the American People” and the “Country’s biggest enemy.” Consistent with his approach to facts and falsehood, Trump credited himself for coining the term “fake news”
(see, e.g., Coll 2017; Chen 2017.) Mr. Trump is also one of the most vocal critics of crony capitalism and the political “swamp,” although his business record and administration epitomize the phenomena.

In his best-selling book, *The Art of the Deal*, Trump rationalizes his use of factually troubled statements and allegations:

*I play to people’s fantasies.* People may not always think big themselves, but they can still get very excited by those who do. That’s why *a little hyperbole never hurts.* *People want to believe that something is the biggest and the greatest and the most spectacular.*

*I call it truthful hyperbole.* It’s an innocent form of exaggeration—and a very effective form of promotion. ... But when people treat me badly or unfairly or try to take advantage of me, my general attitude, all my life, has been to fight back very hard. (Trump and Schwartz 1987, 57–59, emphasis added)

Asked about his use of exaggerated statements in a 2007 deposition, Trump insisted that “everybody” does so and that, in his use of exaggerations, he is “not different from a politician running for office” (Frangos 2009).

**Figure 2.** President Trump’s 2018 New Year wishes tweet.
Trump’s self-professed philosophy of life and deals is a textbook depiction of cons: the use of leverage and deceit to gain trust and advance zero-sum deals, in which there are “winners” and “losers.” Trump’s obsessive efforts to establish himself as a “winner” and others as “losers” are consistent with con mentality—pride in the genius of the con man and ridicule of the “fools” and “suckers.” Symbolically, perhaps, Trump’s frequent use of the expression “believe me” is similar to the original confidence man’s use of the word “confidence.” It is indeed difficult to ignore the striking similarities between Trump’s autobiographic books and traditional “confession” works of professional con men, such as P. T. Barnum’s *The Art of Money Getting* and Frank Abagnale’s *The Art of the Steal*.

In sum, to the extent the press reports and Trump’s own reflections correctly represent his approach to truthfulness, falsehood, and deals, this president’s modus operandi falls squarely within the common meaning of cons. The political and public endorsement of
an individual known for evidence-free claims, false allegations, and hyperbolic exaggerations demonstrates how people often directly and indirectly enable confidence schemes (see, e.g., Ballhaus 2018; Marantz 2018; Ellison 2017; Toobin 2017; Egan 2017).

CONCLUSION
Confidence games are an ancient social phenomenon, an opportunistic exploitation of judgment errors to advance voluntary exchanges that are not mutually beneficial. The game has many varieties and is here to stay. Society cannot eradicate confidence games, but laws, policies, and ethical norms may reduce their social costs.

We conclude our inquiry into the anatomy of confidence games with a cautionary lesson: the present understanding of confidence games, as reflected in our legal system, political debates, and the literature, is impaired and must be improved. In the United States, however, influential threads of ideologies and opportunism spread doubts over the prevalence of cons and society’s capacity to use laws and regulations to reduce the costs of confidence schemes. These forces erode the rule of law, normalize and empower exploitive practices, and threaten democratic institutions.

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