

ABSTRACT

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**SO AS TO COMPASS THE
INTEREST: ARTISAN
DRAMATURGY, COPYRIGHT
REFORM, AND THE THEATRICAL
INSURGENCY OF 1856**

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In 1856, a change in American copyright law finally gave playwrights control over performances of their work. That change was the culmination of decades of concerted and sustained efforts by a small number of playwrights and their political allies, men who embraced a theatrical aesthetic at odds with antebellum American production practices.

I argue that previous scholarship has underestimated the importance of the 1856 law to the development of American theatre. Using a series of case studies, I propose that antebellum theatrical production was guided by a system of *artisan dramaturgy*. Key to this formulation is the concept of *bespoke playwrighting*: those who composed antebellum performance texts were more wrights than writers, handicraftsmen and women whose medium was the manuscript rather than the printed

text. They drew freely from an extensive public domain created and protected by American copyright law. Published and unpublished plays, novels, songs, poems, current events – all were raw materials for the antebellum dramatist, to be combined, recontextualized, and reimagined. The system of artisan dramaturgy encouraged plays tailored to particular actors, companies, and audiences.

These practices, among others, vexed playwrights who resented subjecting their plays to the messy, collaborative undertaking of antebellum American playmaking. I explore how their vision for the theatre drew on a particular understanding of natural rights, one that led them to see copyright as the most effective way to alter the economic conditions of playwriting. I document the largely unexplored legislative history of their efforts, which ultimately interposed statutory law into an art form that had been regulated almost entirely by the common law.

The 1856 legislation accelerated a process that would ultimately alter the balance of power among the various theatrical collaborators in favor of the playwright, driving greater and greater synergy between dramatic text and performance and ultimately allowing playwrights to supplant the primacy of the actor or manager in shaping performances. By so doing, it also significantly reduced the vibrancy, flexibility, and innovation that had characterized the antebellum American theatre.

SO AS TO COMPASS THE INTEREST: ARTISAN DRAMATURGY,
COPYRIGHT REFORM, AND THE THEATRICAL INSURGENCY OF 1856

By

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Dedication

To my parents, who encouraged me to “be cool, stay in school.”

Table of Contents

Acknowledgements	ii
Dedication	iv
Table of Contents	v
Overture.....	1
Exposition. Dam'me, Joe!; or, Manuscripts and Printed Texts on the Antebellum Stage.....	8
Second Movement. Attending to the Audiences.....	19
Intermezzo. A Note on Structure	30
Coda. Coming Attractions	31
Barbarians All!; or, The Artisan Dramaturgy of the Antebellum Stage.....	37
Chapter 1	37
Act I. Tyler's Cuckoo-Like Contrast	38
I.i. Thoughts Enough: Foreign and Domestic Sources for Adaptation	48
Act II. Like Conquerors!; or, Emulative Originality	59
II.i. <i>Otho's</i> Originality.....	62
Chapter 2	79
Act III. What's in a Name? Whigs and Democrats; or No Politics to Love!	83
III.i. Partisanship Pruned!; or, The Wisdom of Burton	90
III.ii. Upon the Furor of the Moment!; or, Audiences Take the Stage	94
III.iii. The Haunted, Hasty Repertory.....	98
Act IV. Where Wemyss Went Wrong; or, The Dangers of Figuration in <i>The Quaker City</i>	106
IV.i. Mr. Bastido, Accomplished Libertine.....	109
IV.ii. The Melodramatic Media and the Triumph of Virtue	114
IV.iii. Lippard's Devious Designs.....	126
IV.iv. Characters, Figures, and a Toothless Drunkard	131
“So as to Compass the Interest”; or, The Campaign for Copyright Reform, 1835-1856. A Drama in 5 Acts.....	141
Chapter 3	141
Dramatis Personae	141
The Insurgent Playwrights.....	141
Their Political Co-Conspirators.....	142
Inveterate Villains	142
Supernumeraries.....	143
Prologue.....	144
Act I: “Throwing Stones at the Angels”; or, The Proprietary Aesthetics of the Insurgents of 1856 (in which appears a hippopotamus)	159
Act I.i. Vapid in Perusal!; or, In and Out of the Closet.....	165

Act I.ii. Beef-eating Pugilists	173
Act I.iii. Malignant Planets of the Stage!	177
Chapter 4	184
Act II: A Most Enlightening and Expository Act, Addressing a Statute, an Act of a Different Sort, a Story-ed Ruling, &c.....	184
II.i. Anne’s Statute and the Invention of Copyright	184
II.ii. Wheaton Battles Peters.....	188
II.iii. Bulwer’s Law and the Genesis of Dramatic Property	198
Act III: Like Silk from a Spider’s Bowels; or, A New Species of Property	200
III.i. By the Sweat of the Brain	201
III.ii. A Sort of Idiotic Monster; or, The Dangers of Foreign Filth.....	210
Chapter 5	218
Act IV: Left on the Table.....	218
IV.i. Falling on Their Knees?!; or, The First Push for International Copyright Reform.....	221
IV.ii. “This peculiar province”: The First Attempts at Legislative Action	228
IV.iii. Radically Depraved Principles!; or, Charles J. Ingersoll and the Sweeping Reforms of 1844.....	234
A Short Interlude Relating the Lamentable Tale of Daniel Webster. Featuring a Violent, Democratic, Anti-British Squall, Got-Up with the Most Assiduous Attention to Detail and Effect	243
Act V: Success!.....	247
V.i. Chandler Enters the Lists!	248
V.ii. A Bird Mentors a Boker	252
V.iii. [<i>Exit Chandler, Pursued by a Nativist.</i>].....	257
V.iv. [<i>Enter Brewster.</i>].....	259
Epilogue	265
Works Cited.....	277
Newspapers, magazines, and journals	277
Manuscript Collections and Government Records	278
Primary Sources	279
Secondary Sources	287

Overture

On a cold October night in 1844, a performing raccoon nearly caused a riot at the Chesnut Street Theatre in Philadelphia.¹ The evening's main piece, a tragedy called *The Patrician's Daughter*, went off without incident.² The trouble started mid-way through the after-piece, *Bone Squash Diavolo*, a starring vehicle for the "father" of American minstrelsy, Thomas "Daddy" Rice. At one point, a character sauntered onstage with a "fat live Coon"; its appearance electrified portions of the audience, some applauding and cheering the animal, others hissing and groaning their discontent. While the poor raccoon was quickly removed from the stage, the uproar continued, growing so loud that the performers were compelled to stop the show. Rice took the stage in an attempt to calm the audience, assuring them that the raccoon was simply a relic: the play had been written a decade earlier, and there was no contemporary political inference to be made from its presence. This explanation seemed to mollify a portion of the crowd, but supporters of the raccoon, unwilling to let their cherished mascot be driven from the stage in ignominy, demanded loudly that

¹ The Philadelphia correspondent for the *New York Tribune* reported that "during the last two days, the weather has been cold and cloudy," bringing heavy frosts (November 1, 1844). Details for the following account may be found in the November 1, 1844, editions of the *New York Tribune*, the Philadelphia *Spirit of the Times*, and the Philadelphia *Public Ledger*. All quotations are from the *Public Ledger* account. The theatre at 605 Chestnut Street was, as were most eighteenth- and nineteenth-century theatres, known by a variety of names. The most common were "Chestnut Street" and "Chesnut Street"; I will use whichever was the preferred spelling of the theatre's name in the period under consideration.

² For a comprehensive chronicle of theatrical productions in Philadelphia between 1835 and 1855, see Arthur Herman Wilson, *History of the Philadelphia Theatre, 1835 to 1855* (Philadelphia: University of Philadelphia Press, 1935). The Chesnut's bill that evening may be found on page 306, which records the production as *Otello* (as does the advertisement printed in the *Public Ledger* of October 31st). The *Spirit of the Times*, however, indicates Rice was to perform both "the Grand SHAKESPEAREAN OPERA OF OTELLO" and "the successful OPERA OF BONE SQUASH" (October 31, 1844).

it return. As the atmosphere grew increasingly heated, women in the lower tier of boxes left the theatre, sensing a situation on the brink of violence.

Rice darted offstage to retrieve the prompter's copy of his *Bone Squash Diavolo* manuscript, attempting to prove that the raccoon was called for in the text, but his evidence did nothing to stem the continued din of groans and hisses. Calls to "bring back that coon" and counter-calls of "no, keep it away...down with the coon" prevented a resumption of the performance. Rice then hit upon what he hoped would be a workable compromise – the raccoon would return for a brief curtain-call. The animal's handler quickly made his way to center stage with the creature perched on his shoulders, paused ever-so-briefly, and made his way off. A man in the pit proposed "three cheers for the democratic chicken-cock," a call that was quickly answered by his partisans. Before events could get further out of hand, Rice rallied his performers and skipped to the liveliest part of the show, which proceeded without further incident. When the curtain finally fell on a relieved Rice, the audience tumbled out onto the street. Some crowed like roosters as they re-hashed the events of the evening, their animated conversation taking physical form in the chilly night air.

This incident richly illustrates the dynamic interplay between audiences and performers on the antebellum American stage, as well as the way performances were intimately bound to the conditions of their production.³ More importantly, it is a telling demonstration of the role of the dramatic script in early American theatre. As

³ The raccoon was commonly used as semiotic shorthand for one of the founders and most important leaders of the American Whig Party, Henry Clay, who was the Whig candidate for president in the following day's election. The "chicken-cock," whose crows rang forth as a response to the gauntlet hurled down by the Whiggish raccoon's appearance, was a favorite symbol of the Democrats. This incident will be further explored in chapter 2.

with most of the plays written for performance before the Civil War, *Bone Squash Diavolo* existed solely in handwritten manuscripts and actors' sides; it would not be published until 1874.⁴ The dialogue and directions inscribed on such manuscripts were means to an end, intended as aids in one step of a process designed to transcend the limitations of a physical artifact. In the words of Gerald Rabkin, such manuscripts exhibit a "provisional authority," and are intended "to be used and discarded as [their] textuality is corporealized in performance."⁵ The fragility and provisionality of these documents is reflected in their impotence to sway an audience, as Rice discovered while attempting to mitigate the damage caused by a hapless raccoon.⁶

⁴ A "side" is an abridged version of the script containing a single character's dialogue (along with a handful of cue words preceding each speech). For an overview of the lineage of Rice's most famous songs and plays, including *Bone Squash Diavolo*, see the introduction to W. T. Lhamon, Jr., *Jump Jim Crow: Lost Plays, Lyrics, and Street Prose of the First Atlantic Popular Culture* (Cambridge: Harvard University Press, 2003), 1-92.

⁵ Gerald Rabkin, "Is There a Text on This Stage?: Theatre/Authorship/Interpretation," *Performing Arts Journal* 9, no. 2/3 (1985), 150.

⁶ There were certainly instances where such an appeal was more successful in placating an audience. When actor and manager Sol Smith was in Mobile performing *A Roland for an Oliver*, he heard hisses after delivering the line "My family are all mad, and I believe I shall soon be in the *family way* myself!" (The anecdote is recounted in Sol Smith, *Theatrical Management in the West and South for Thirty Years: Interspersed with Anecdotal Sketches* (New York: Harper & Bros, 1868), 120.) Before the following day's performance, Smith learned of a plan to hiss him off the stage. A smattering of hisses did greet his first appearance in the night's main piece, *Mock Duke*, though they failed to disrupt the performance. At one point, however, a call from the second tier rang out: "Now, boys, give it to him!" Forced to stop the play by the sibilant storm, Smith walked offstage, wiped off his makeup, and donned a large cloak to protect himself from any inbound missiles (audiences in the period were accustomed to expressing their discontent by hurling whatever happened to be handy, or brought for the purpose, towards offensive actors and unlucky members of the orchestra). Bravely facing the audience, he inquired as to his supposed offense. He was shocked to learn it was his reference to being "in the family way" the previous evening, which the audience had taken to be an inappropriate interpolation of Smith's own design. He explained that it was a part of the script, which was roundly denied by the audience.

Smith called for the prompter to bring out his book, and asked a justice of the peace, Ben Wilkins, to confirm what was in the script. "Wilkins took the book and knelt down to the footlights; then, laying the book on the stage, very deliberately took out and put on his spectacles, took up the book with a look of triumph, evidently with the full belief that *the passage was not there*." After more than a minute had passed in increasingly tense silence, Wilkins closed the book, put away his

This intimate relationship between the words carefully selected and transcribed onto the handwritten precursors of a performance, their role in rehearsal, the (sometimes different) words eventually spoken by actors onstage, and the ways those words were repeated and revised night after night profoundly shaped antebellum performance practices. Many of those words found their way onto managers' shelves. Page upon page of delicate foolscap paper, crossed and re-crossed by the quills of authors and managers and actors who scratched ink into words pregnant with passion and poetry and pain, hand-bound into manuscripts, lining the walls. Gathering dust, yellowing, waiting. Those fortunate enough to find their way into the permeable antebellum repertory would be rekindled in performance; others would kindle literal fires, their words blackening into one last period, punctuating the end to an unfortunate theatre's biography. So many words. It took only two, however, to fundamentally undermine that practice and turn the course of American theatre. Two words, scrawled on a single piece of paper, in 1856: Franklin Pierce.

On August 18th of that year, seventeen pieces of legislation recently passed by Congress were delivered to President Pierce's desk. Such a flurry was typical on the final day of a Congressional session, though the last minute legislating was unable to accomplish all the nation's business. Indeed, the House had been in the middle of a

glasses, and stood to face the audience. "By G—d, gentlemen, we are wrong, and Old Sol is right." The announcement was greeted with applause, and the performance continued.

While in this case the text was able to mollify the audience, what is most important is that the responsibility for determining both the meaning and the outlines of the dramatic event belonged to the actors, the audience, and the specific conditions of each performance. It was not latent in the text itself, and certainly not in the absent person of the author, whose authority over what appeared onstage was, much to the frustration of some writers, often nonexistent.

vote to extend the session by several hours so as to address pending legislation when the clock struck noon, and the body automatically adjourned *sine die*.⁷

In addition to addressing the bills on his desk, Pierce drafted a proclamation calling for a special session to begin on August 21st, as Congress had neglected to appropriate money for the army. Among those bills were a series of appropriations funding various departments of the government for the following year, an authorization to survey the southern boundary of the Kansas Territory, and an act allowing United States citizens to claim ownership of newly-discovered islands containing guano deposits.⁸ One of the last bills Pierce signed established the “Copyright of Dramatic Compositions,” which granted “the author or proprietor of any dramatic composition, designed or suited for public representation... along with the sole right to print and publish the said composition, the sole right also to act, perform, or represent the same” (*Statutes*, 138-139). This provision – the first to extend copyright protection to an activity beyond replicating copies of a text – was the culmination of a coordinated campaign by playwrights and politicians that had begun in the mid-1830s.

A variety of factors motivated the men who worked for that change in the law. Some, like Robert M. Bird and Dion Boucicault, wanted to increase the ability of playwrights to profit from their work. Prior to 1856, any theatre company could take a

⁷ U.S. Congress, *Congressional Globe*, 34th Congress, 1st session, 2241.

⁸ *Statutes at Large and Treaties of the United States of America from December 3, 1855, to March 3, 1859* (Boston: Little, Brown and Company, 1859), 11:v-vi, <http://books.google.com/books?id=ARluAAAIAAJ&printsec=frontcover> [accessed January 23, 2014].

published play and perform it with no obligation to compensate its author. Furthermore, by explicitly stating that its provisions did not apply to foreign works, United States copyright law implicitly encouraged the free reprinting and use of overseas literature and plays, which created a ready pool of free material that competed with the works of native authors. Others, such as George H. Boker, were primarily interested in protecting their verse plays from the eager pens of theatre managers and actors, for whom extensive cutting and revising were part of the normal production process. Regardless of their motivations, these men shared a theatrical aesthetic fundamentally at odds with the nature and practices of antebellum American theatrical production, particularly the relationship between antecedent texts and the performances they inspired.

Prior to passage of the 1856 bill, United States copyright law created and protected an extensive public domain from which theatre artists could draw inspiration (and verbatim material). Published and unpublished plays, novels, songs, poems, current events – all were raw materials for the antebellum dramatist, to be combined, recontextualized, and reimagined. Over the next forty years, however, a series of important court cases based on the 1856 legislation outlined, then expanded, a growing field of “intellectual property” protected by precedent, and ultimately statute. With each new copyright registered after August 18, 1856, the body of work protected from (or denied to) the adaptive processes of the old dramaturgy grew; appropriation was increasingly replaced by licensing. Interposing statutory law into an art form that had been regulated almost entirely by the common law (if at all), the 1856 legislation set in motion a process that would ultimately help alter the balance of

power among the various theatrical collaborators in favor of the playwright. While the 1856 law did not fundamentally change the nature of American theatre overnight, it succeeded in altering the trajectory of its development, driving greater and greater synergy between dramatic text and performance and ultimately allowing playwrights to supplant the primacy of the actor or manager in shaping performances. In so doing, it also significantly reduced the vibrancy, flexibility, and innovation that had characterized the antebellum American theatre.

This study argues that previous scholarship has underestimated the importance of the 1856 law to the development of American theatre. By reexamining antebellum American production practices, I explain how the dominant theatrical aesthetic that existed, in some fashion, from the reemergence of theatrical performance after the Revolutionary War was incompatible with the vision shared by the playwrights who agitated for copyright reform. I explore the ways that their vision drew on a particular understanding of natural rights that led these playwrights to see copyright as the most effective tool to change a system that continually vexed them. Finally, I document the legislative history of attempts to insert protections for dramatists into the copyright law. This largely unexplored narrative involves some of the period's most prominent (and anthologized) playwrights, among them Bird, Boker, Boucicault, and Robert T. Conrad. It also involves some of the most important political leaders of the middle decades of the nineteenth century, including Daniel Webster, Henry Clay, and William Henry Seward. Their efforts, at times coordinated, shared an overarching objective: to grant playwrights greater control over how their work was manifested in performance.

Exposition. Dam' me, Joe!; or, Manuscripts and Printed Texts on the Antebellum Stage

The status of a physical play text in the antebellum playhouse was profoundly ambivalent, by turns sacrosanct or a bothersome distraction. A new manuscript that held promise in a manager's eyes, for example, soon met a pen far less gentle than its author's. Delicate, looping letters and carefully aligned lines of dialogue were slashed by the brusque "z" of a prompter or manager excising a speech, a scene, a character. Clean margins began to fill with annotations setting cues for music or effects, or noting breaks in the action that might accommodate a dance or a song. A crude choreograph tracing the movements of actors who had yet to be assigned their roles joined these cues, composed of cryptic scatterings of symbols and letters, such as "X" for a cross, or "PS" and "OP" to indicate direction. These latter – opposite prompter (OP) and prompter side (PS) – oriented actors' movements relative to a single point just off to the right of the stage where the prompter's table sat.

From his post, the prompter would ring for the curtain, dispatch the call boy to retrieve actors from the green room, control the intensity of the gas jets, and, perhaps most importantly, trace with his finger the dialogue of the play, ready at an instant's notice to whisper forgotten lines. It was the prompter who controlled the most authoritative version of the text – the promptbook – a "clean" copy made from the messy palimpsest of the revised manuscript. In addition to the remainder of the author's dialogue, it contained the peritextual instructions that determined how that dialogue would become a performance. Before such a performance could happen, however, the promptbook would be atomized into as many parts as there were characters. These highly-abridged offspring each contained a single character's

dialogue, and were copied, either by the prompter or the actor as part of the memorization process, onto tall sheets of foolscap paper divided in half lengthwise to create two columns.⁹ These sides constituted the building blocks of a production, and were assembled in whatever time was allotted for rehearsal.

From the original author's standpoint, the indignity of these revisions and divisions was often only the beginning of the humbling process that transformed a manuscript into a play script. In her autobiography, actress and playwright Anna Cora Mowatt records her experiences with her first play, *Fashion; or, Life in New York*. Her initial meeting with Edmund Simpson, manager of New York's Park Theatre, passed in a "state of agreeable bewilderment," as she acquiesced to his "laying down of dramatic law" without complaint, still half-believing she might be dreaming.¹⁰ Her attendance at the production's penultimate rehearsal also resembled a dream, though a "very sober one" (206). Exhausted looking actors bundled up in heavy coats and "shocking bad hats" shambled about a stage barely illuminated by a single jet of gas from the footlights, beside which sat a "palefaced prompter with the manuscript of *Fashion* in his hand" (ibid.). The actors, too, carried and constantly referenced their cribbed versions of the script. Their demeanor led Mowatt to fear she "had made a

⁹ Each sheet was a "length," generally containing between forty and forty-four lines of dialogue, and the size of a part was measured by the number of "lengths" it spanned. Twenty lengths constituted a sizable part. See William Dunlap, *History of the American Theatre* (London: Richard Bentley, 1833), 1:189-190; David George Schaal, "Rehearsal-Direction Practices and Actor-Director Relationships in the American Theatre from the Hallams to Actors' Equity" (PhD diss., University of Illinois, 1956), 53n52; and Tiffany Stern, *Rehearsal from Shakespeare to Sheridan* (Oxford: Oxford University Press, 2000), 253n61.

¹⁰ Anna Cora Mowatt, *Autobiography of an Actress; or Eight Years on the Stage* (Boston: Ticknor, Reed, and Fields, 1854), 204, <http://archive.org/stream/autobiographyof00ritc#page/n5/mode/2up> [accessed January 23, 2014].

mistake, and unconsciously written a tragedy” (Mowatt, 206). At the following evening’s opening performance, however, the theatre was “flooded with light, [and] the gay decorations, the finely-painted drop curtain, the boxes filled with beautiful women, the dense crowd in the pit and galleries, the inspiring music, — all seemed the effect of some Scottish *glamour* rather than a reality” (206-207). Reality returned the following afternoon, however, when she attended the customary cutting session that followed any new piece’s first performance:

Mr. Barry [the stage manager] arranged the “cuts,” requesting my approval in a manner which left me very little alternative. The principal actors were presented to me, and I made as many delicate hints concerning certain misinterpretations of the text as I dared venture upon. It was very evident that they singly and collectively entertained the opinion that an author never knew the true meaning of his own words. His suppositions to the contrary were mere hallucinations. (209)

Written by Mowatt, revised in preparation for production, and trimmed in response to that production, the script finally “passed on to the manager’s shelves,” finding a home alongside the rest of the manuscripts that composed the company’s repertory.

Printed texts, however, could be treated quite differently. James N. Barker timed the publication of his new play *The Indian Princess; or, La Belle Sauvage* to coincide with its first performance, at which he sold printed copies of the work.¹¹ While no record of the outcome exists, other experiments involving the collision of printed and performed versions of a play often ended poorly. When Mordecai M. Noah premiered *The Grecian Captive*, “a gag was hit upon of a new character

¹¹ Jeffrey H. Richards, “Print, Manuscript, and Staged Performance: Dramatic Authorship and Text Circulation in the New Republic,” in *Cultural Narratives: Textuality and Performance in American Culture before 1900*, ed. Sandra M. Gustafson and Caroline F. Sloat (Notre Dame: University of Notre Dame Press, 2010), 93n1.

altogether.”¹² It was not until he was onstage that lead actor Joe Cowell discovered the nature of this “gag” when another member of the cast used the occasion of a scripted hug to whisper in Cowell’s ear “Dam’ me, Joe, look at the books.”¹³ Noah, without informing his actors, had distributed a free copy of his just-published play to everyone in attendance. “I am not easily embarrassed,” Cowell explains, “but this annoyed me exceedingly. If I had not been the principal victim in the business – for I was on the stage nearly the whole of the piece – I could have enjoyed the anxiety of the audience endeavouring to find out where we were” (ibid.). Recalls Noah: “Figure to yourself a thousand people each with a book of the play in hand – imagine the turning over a thousand leaves simultaneously, the buzz and fluttering it produced, and you will readily believe that the actors entirely forgot their parts” (quoted in Dunlap, *History*, 2:323).¹⁴ When Mowatt’s *Armand* was performed in London, copies of the text were sold at the door, to similar effect.¹⁵ And actress and author Olive Logan relates that her father, after agreeing to substitute for an ill actor and commit a lengthy part to memory in less than two hours, was so discomfited by the sight of an

¹² Noah’s letter describing the incident is reprinted in William Dunlap’s *History of the American Theatre* (London: Richard Bentley, 1833), 2:323.

¹³ Joe Cowell, *Thirty Years Passed among the Players in England and America: Interspersed with Anecdotes and Reminiscences of a Variety of Persons, Directly or Indirectly Connected with the Drama During the Theatrical Life of Joe Cowell, Comedian* (New York: Harper and Brothers, 1844), 64, <http://books.google.com/books?id=qqUVAAAAYAAJ&printsec=frontcover> [accessed January 23, 2014].

¹⁴ Cowell relates that the fluttering pages disturbed the non-human cast members as well: “In the last scene, Phillips, half frightened to death, came on *wriggling*, on the back of a real elephant; and an unexpected hydraulic experiment he introduced – I mean the elephant – to the great astonishment and discomfiture of the musicians, closed the performance amid the shouts of the audience” (64).

¹⁵ Montrose Moses, *The American Dramatist*, 1925 reprint (New York: Benjamin Blom, Inc., 1964), 105.

audience member following along in his text that he barely made it through the rest of the scene; he sent someone to talk to the gentleman, who obligingly set the play aside, allowing her father to finish the performance without missing another word.¹⁶



This brief discussion of manuscripts and printed texts in the playhouse speaks to the centrality of the former in antebellum American theatre. The production, revision, and annotation of play scripts ensured an intimate relationship between the various theatrical collaborators and the written materials that informed the production process, while the mechanical replication of printed plays was largely irrelevant to antebellum theatrical production practices.¹⁷ Publication rarely preceded performance for new works, and even when there was an existing, printed text that could serve as the basis for a promptbook – as with one of the case studies in chapter 1 – it was generally more efficient for a prompter or copyist to create lengths for each role than

¹⁶ Olive Logan, *Behind the Footlights and Behind the Scenes: A Book about "The Show Business" in all its Branches: from Puppet Shows to Grand Opera: From Mountebanks to Menageries; from Learned Pigs to Lecturers; from Burlesque Blondes to Actors and Actresses: with Some Observations and Reflections (Original and Reflected) on Morality and Immorality in Amusements: Thus Exhibiting the "Show World" As Seen from Within, Through the Eyes of the Former Actress, As Well As from Without, Through the Eyes of the Present Lecturer and Author* (Philadelphia: Parmelee, 1870), 59-60, <http://books.google.com/books?id=hi8LAAAIAAJ&printsec=frontcover&vq=ralph> [accessed January 23, 2014]. David Paul Brown also distributed copies of *Sertorius, or the Roman Patriot* to his friends at a Chestnut Street Theatre production in 1830, who "sat in the front rows and made the actors nervous by turning the pages" (Arthur Hobson Quinn, *History of the American Drama: From the Beginning to the Civil War*, 2nd ed. (New York: Appleton-Century-Crofts, Inc., 1943), 249).

¹⁷ According to the *Oxford English Dictionary*, this sort of intimacy is inherent in the etymology of the word "script" itself. A shortening of "manuscript" (from the Latin *manuscriptum*), it was used originally for "documents which derived evidential value from being written by a particular person (e.g. a confession, a note of hand, a charter)." It was only with the invention of the printing press that the necessity of distinguishing between types of written materials led "manuscript" to be used primarily to refer to the mode of a text's production.

to purchase every actor a copy of the complete text. In short, antebellum American theatre was a theatre of and by manuscripts.

Of course, this reliance on handwritten materials was hardly unique to America, or even to the period. In England and continental Europe production practices continued to rely on manuscripts throughout the nineteenth century. While there was a market for printed play texts in England, it was one that, following the introduction of mass publication techniques in the 1820s (including the use of steam-driven machine presses, cheap paper, and stereotyping), tended to focus on small-format “acting editions” intended both for popular readership and amateur productions rather than for use in the commercial theatres.¹⁸ In America, the market was much smaller, and it was not until after the Civil War that the popularity of amateur theatricals drove a significant expansion in play publishing, an industry that was soon dominated by a partnership between the New York publisher Samuel French and the British actor and publisher Thomas Lacy.

This study, however, is less interested in the *distinctive* characteristics of antebellum theatre production than in its *distinguishing* characteristics, and proceeds from a conviction that a focus on the former often effaces the latter. It supplements the valuable scholarship that has been produced on early American theatre by approaching the subject on what I see as its own terms, and is informed by my observation that much of the previous scholarship has framed its subject by emphasizing what the form developed *from* and *into*, rather than what it *was*. In

¹⁸ John Russell Stephens explores this market and its evolution throughout the century in *The Profession of the Playwright: British Theatre 1800-1900* (New York: Cambridge University Press, 1992).

Drama, Theatre, and Identity in the American New Republic, for example, Jeffrey H. Richards excavates the origins of the early American theatre, arguing it initially resembled an attenuated version of a British original, one that developed *away* from an antecedent tradition while planting seeds that would germinate later, a process he likens to searching “for national needles in a (British) haystack.”¹⁹ Other scholars have taken up the origins of the “American” elements unearthed by Richards and traced them across time, illuminating the development of particular character types, themes, and modes of playwriting, all the while emphasizing that the form was constantly in a process of becoming, of moving *towards* something recognizably “American.” Rosemarie Bank’s *Theatre Culture in America*, for example, follows the development and interaction of several archetypal American characters throughout the middle decades of the nineteenth century, while Jeffrey Mason, in *Melodrama and the Myth of America*, explores how the theatre both drew from and shaped an array of mythic origin stories that effaced certain identities and valorized others. And Marc Robinson, in *The American Play*, approaches the nineteenth century as a vehicle “to learn something about the American playwright’s growing pains on the road to modernism.”²⁰ Of course, most projects combine these two orientations (*from* and *to*); I am interested in looking *at*, and in trying to understand the form *as form*, as a mode of production, rather than a derivative vehicle for the stars, texts, and genres that it

¹⁹ Jeffrey H. Richards, “Politics, Playhouse, and Repertoire in Philadelphia, 1808,” *Theatre Survey* 46, no. 2 (November 2005), 199.

²⁰ Marc Robinson, *The American Play: 1787-2000* (New Haven: Yale University Press, 2009), 72.

produced. Such an understanding is essential in order to assess the ramifications of the 1856 copyright revision.

Again, while this is not a comparative study between American and British theatrical production, there are two crucial differences that bear mentioning. During the period of this study (and for several decades beyond), there is no American analogue to the center-periphery dynamic of the British stage. It was in London's prestigious patent theatres that new playwrights hoped to premiere their work, and it was the hope of performing in those theatres that inspired actors working their way up through the provincial touring circuits. London was the publishing capital, as well. While New York was arguably the most important by 1830, it was only one of several theatrical hubs scattered along the eastern seaboard, and managers and performers freely circulated throughout stock companies in Boston, New York, Philadelphia, Baltimore, and Charleston. Touring British and American stars visited them all, as well as an increasingly expansive constellation of regional theatres that stretched south to New Orleans, and as far west as California by mid-century. The nature of theatrical production in America permitted few companies to survive to adolescence, and the list of managers who sustained a stable company in a single location long enough to make significant money is only slightly longer than the list of managers who ended their lives (nearly) impoverished.²¹ Nowhere during this period was there

²¹ As a writer for *Brother Jonathan* noted in 1842, "it is a curious fact that in the whole annals of the stage, there are not more than a dozen instances of managers achieving fortunes or even competence by their profession" (2, 12:324).

The most important secondary sources informing my understanding of American management practices include Weldon B. Durham's *American Theatre Companies, 1749-1887* (New York: Greenwood Press, 1986); Ruth Harsha McKenzie, "Organization, Production, and Management at the Chestnut Street Theatre, Philadelphia from 1791 to 1820" (PhD diss., Stanford University, 1952); and Schaal. The most valuable primary sources include Logan; Smith; William B. Wood, *Personal*

a single center towards which American actors and managers gravitated, which contributes to the mode of production I discuss in chapters 1 and 2.

The second key distinction between Britain and the United States relates to the role of the Lord Chamberlain in the former. Playwrights who wanted to be produced in London had existed under a system of prior censorship stretching back to Sir Edmund Tylney's expansion of the duties of the Master of the Revels in the late sixteenth century. Any play to be performed in London required a license, which established a relatively stable and authoritative copy of the script that could not be substantially deviated from in performance. The near-continuous revision of scripts that I describe in the following chapters would have been untenable under a similar system.

This study proceeds from several assumptions. First, it acknowledges that the history of Western theatre is an accumulation of antecedents. By its very nature, the form endures by appropriating and building on what has come before. Renaissance playwrights drew on extant Roman comedies and Greek tragedies, as well as the criticism of Aristotle and Horace. The French theatre frequented by the court of Charles II during its exile informed the bawdy exuberance of the Restoration. Even *Hernani*, which incensed a vocal (though ultimately impotent) portion of its Parisian

Recollections of the Stage, Embracing Notices of Actors, Authors, and Auditors, During a Period of Forty Years (Philadelphia: Henry Carey Baird, 1855), http://books.google.com/books/about/Personal_recollections_of_the_stage.html?id=cMoHyK6OmjgC [accessed January 23, 2014]; Francis Courtney Wemyss, *Twenty-Six Years in the Life of an Actor and Manager. Interspersed with Sketches, Anecdotes and Opinions of the Professional Merits of the Most Celebrated Actors and Actresses of Our Day* (New York: Burgess, Stringer & Co., 1846); and Noah Miller Ludlow, *Dramatic Life As I Found It; A Record of Personal Experience; with an Account of the Rise and Progress of the Drama in the West and South, with Anecdotes and Biographical Sketches of the Principal Actors and Actresses Who Have at Times Appeared Upon the Stage in the Mississippi Valley*, repr. (Bronx: B. Blom, 1966).

audience, was written as a reaction to the perceived stultification of a form that it pivoted from, rather than invented anew. There is significant value in the body of existing scholarship that has traced those chains of influence in the American theatre, but this study relies on that work, rather than extending it. I should note, however, that I also share Gary A. Richardson's belief that it can be difficult, and at times counterproductive, to generalize overarching narratives from specific, causal connections visible at the local level. As he concludes, a study of the relationship between audiences and theatrical production prior to 1865 reveals that "what emerges is less a narrative thread of steady progression than a tapestry with first one and then another element calling for the attention of historians and critics."²²

Second, it is informed by a conviction that key aspects of previous criteria for defining "American" theatre – particularly nationalism, unique character types, and emergent performance genres such as minstrelsy – constitute a continuum upon which any number of points of change may be graphed. Plotting and defending such points can be immensely productive when it comes to advancing the scholarship, but it often demands a reductive approach that parses and segments a practice that I believe persisted relatively unchanged throughout much of the nineteenth century. For example, Richards and S. E. Wilmer suggest that plays and playwrights from the first few decades of the American theatre were unusually partisan, certainly by later

²² Gary A. Richardson, "Plays and Playwrights: 1800-1865," in *The Cambridge History of American Theatre, Volume One: Beginnings to 1870*, ed. Don B. Wilmeth and Christopher Bigsby (New York: Cambridge University Press, 1998), 256.

standards, and more than willing to address contentious political issues.²³ Bruce McConachie posits the dominance of a paternalistic model of theatrical management that exerted significant, though waning, influence over the theatre in the first three decades of the nineteenth century.²⁴ Walter J. Meserve perceives “heralds of promise” in the years associated with Andrew Jackson and his ideological successors, and he chronicles the failure of both plays and playwriting practices that “might have flung America into the whirlwind of world theatre with considerable effect.”²⁵ And in his sweeping study of American audiences, Richard Butsch pinpoints the mid-1840s and 1850s as crucial in the “re-gendering” of theatre audiences; this process was part of a broader realignment reflecting the increasing responsibility women took for their families’ financial decisions and their growing eagerness to participate in formerly male-dominated forms of entertainment and consumption.²⁶

These periodizations are all useful in revealing and exploring particular facets of the antebellum American theatre. Yet the mode of dramaturgy I propose in the following chapters remained constant throughout, and both enabled and encouraged these and other developments. In a sense, this project is a step backwards, an opportunity for me to widen my focus to encompass a more expansive field than that

²³ See Richards, “Politics, Playhouse, and Repertoire”; and S. E. Wilmer, “Partisan Theatre in the Early Years of the United States,” *Theatre Survey* 40, no. 2 (November 1999).

²⁴ See Bruce A. McConachie, “William B. Wood and the ‘Pathos of Paternalism,’” *Theatre Survey* 28, no. 1 (May 1987); and McConachie, *Melodramatic Formations: American Theatre and Society, 1820-1870* (Iowa City: University of Iowa Press, 1992), 1-64.

²⁵ Walter J. Meserve, *Heralds of Promise: The Drama of the American People in the Age of Jackson, 1829-1849* (Westport: Greenwood Press, 1986), 16.

²⁶ Richard Butsch, *The Making of American Audiences: From Stage to Television, 1750-1990* (New York: Cambridge University Press, 2000), 65-70.

adopted by recent scholars. Yet by taking such a birds-eye view of antebellum American theatre, I also probe beneath those moments of change identified by previous studies to provide a deeper understanding of the system that produced them.

Ultimately, I argue that system was profoundly influenced by the concept and conditions of copyright – which provided a ready supply of raw material from other forms of fiction and from overseas – as well as a regulatory environment that encouraged rather than restricted development. Copyright law prior to 1856 imparted a tremendous energy and inertia to the theatre, though, significantly, not a direction, which may be one reason Richardson’s tapestry metaphor is so apt. It certainly helps explain why many antebellum critics and playwrights were continually frustrated that a “native” tradition had yet to emerge, and irked that their prescriptions for the stage (which will be dealt with in chapter 3) were constantly ignored. Among those critics and playwrights was a group of men who saw a change in the law as essential to the success of their theatrical aesthetic. In order to understand the motivations of writers like Bird, Boker, and Boucicault, one must understand the nature of the form they encountered, as they were reacting to specific, and defining, elements of antebellum theatrical practice.

Second Movement. Attending to the Audiences

In their efforts to expand our understanding of the theatre in early America, recent scholars have at times downplayed (or disregarded) the exigencies and idiosyncrasies of production. They have also accorded an unwarranted preeminence and authority to play texts and the individuals named on their title pages (or, less frequently, on the playbill), certainly when it comes to parsing the significance,

contours, appeal, and social ramifications of the theatrical event. There are at least two reasons why this may be the case. The first, and perhaps most important, is the result of a sustained commitment to interdisciplinarity that has led historians to venture ever further outside the walls of the playhouse in order to expand our understanding of early American theatre. The second inheres in the very nature of the modern academic enterprise itself, which engenders and enforces a particular relationship between author and text. This relationship is the product not only of scholarly traditions developed in the twentieth century (particularly the creation of theatre departments in American universities) but of a legal framework mediating the relationship between authors, readers, and their works arising from copyright legislation crafted and amended in the nineteenth.

The origins of the interdisciplinary impulse in theatre history date to at least 1968, which marks the beginning of what has become one of the dominant modes of approaching nineteenth-century theatre. With his publication of *Melodrama Unveiled: American Theatre and Culture, 1800-1850*, David Grimsted proposed and demonstrated the value of cultural history to theatre studies. His follow-up essay in *Educational Theatre Journal* entitled “An Idea of Theatre: An Informal Plea” succinctly summarizes that approach. He quotes Alfred North Whitehead’s observation that “in each period, there is a general form of the forms of thought,” structures that underpin the “intellectual strife of an age,” but whose “first principles [are] almost too obvious to need expression.”²⁷ Grimsted believes it is these “forms of

²⁷ Quoted in David Grimsted, “An Idea of Theatre History: An Informal Plea,” *Educational Theater Journal* 26, no. 4 (December 1974), 426.

thought” that “are what the cultural historian – and the theatrical historian who views his task broadly – should attempt to reveal,” a task that he pursues in *Melodrama Unveiled* (“An Idea,” 426).²⁸ One of that work’s most important contributions is the rescue of the eponymous genre from an American tradition of critical denigration and neglect stretching back to the first German and French melodramas translated by William Dunlap in the 1780s. Grimsted argues that critics who assess the quality of nineteenth-century dramatic literature in light of eighteenth-century rationalism or twentieth-century modernism miss the primary function of the theatre, which he argues should be viewed as an “emotionally valid attempt to dramatize an era’s faith” (*Melodrama Unveiled*, x).²⁹ Grimsted persuasively demonstrates how the principal characteristics of melodrama reflected and reinforced broader social and political movements in American culture.

Subsequent scholars have built on Grimsted’s solid groundwork, expanding the scope of their inquiries to explore the ways ideology and politics have intersected with theatrical performance. McConachie’s *Melodramatic Formations: American Theatre and Society, 1820-1870*, for example, frequently favors ideologically-

²⁸ Despite its age, Grimsted’s study is still the definitive work on antebellum American popular theatre, combining meticulous research with insightful analysis. Crucially, his literary analysis of more than 250 extant scripts is paired with a detailed discussion of the mechanics of theatrical production. Conclusions reached in that text form the basis for arguments made in nearly every subsequent monograph on the subject. These include Meserve’s *Heralds of Promise*; McConachie’s *Melodramatic Formations*; Mason’s *Melodrama and the Myth of America*; Peter Brook’s *The Melodramatic Imagination: Balzac, Henry James, Melodrama, and the Mode of Excess*; Rosemarie K. Bank’s *Theatre Culture in America, 1825-1860*; John W. Frick’s *Theatre, Culture and Temperance Reform in Nineteenth-Century America*; and Amy Hughes’ *Spectacles of Reform: Theatre and Activism in Nineteenth-Century America*.

²⁹ He continues by arguing that melodrama provided audiences the continual assurance that behind the “apparent monstrousness” of life was a certainty that a morally legible and consistent framework endured; that “personal happiness must directly flow from moral behavior was the melodrama’s categorical imperative” (225).

inflected interpretations of class characteristics over direct evidence of audience response in analyzing the interaction between performance genres and audiences, exchanges that generate “melodramatic formations” that mutually constitute and elaborate each other over time. Jeffrey D. Mason’s work ultimately resorts to traditional textual analysis that juxtaposes play texts with other cultural formations to reveal the ways ideology becomes myth.³⁰ Rosemarie K. Bank’s *Theatre Culture in America, 1825-1860* is primarily interested in the social context of the theatre, rather than its actual practice.³¹ John W. Frick’s *Theatre, Culture and Temperance Reform in Nineteenth-Century America* exhaustively documents connections between temperance (melo)dramas and the broader reform movements of the nineteenth century, though it, too, exhibits what I see as an increasing tendency to illuminate American theatre largely by looking at what surrounds it. Amy Hughes’ recent *Spectacles of Reform: Theatre and Activism in Nineteenth-Century America* provides a refreshing return to the lived experiences of audiences, arguing that the spectacle and sensation of reform melodrama helped cultivate a particularly “*opsis*-centric”

³⁰ Mason’s fascinating introduction proposes that audiences be approached as essential players in an “intricate and reflexive exercise in cultural self-definition” and describes an intriguing interdisciplinary methodology that blends both literary and performance theory (Jeffrey D. Mason, *Melodrama and the Myth of America* (Bloomington: Indiana University Press, 1993), 2). Yet his turn to textual analysis seems to abandon an admittedly difficult undertaking too soon, and he writes that “I am conceding that an empirical study of theatrical interaction is virtually impossible. We must proceed theoretically, by establishing the probable grounds for the process of communication and understanding” (3). While his assessment of one of the core difficulties of theatre studies is certainly accurate, his prescription seems unproductive.

³¹ Banks defines three “spaces of representation” that she argues both constituted and contested one another: the village, the city, and the frontier. Ultimately, her attempt to herd an impressive array of poststructuralist theorists along what she acknowledges is the “winding road” she follows through antebellum American theatre culture reveals more culture than theatre.

series of “viewing practices – ways of seeing – that constituted, for them, a kind of visual literacy.”³²

The genesis and development of theatre studies as an academic discipline in America is also partly responsible for popular assumptions about the preeminence of the author and the text. Julia A. Walker succinctly describes these origins, a narrative she begins in 1914, a year when “dramatic character changed... which is to say that it became ‘dramatic’ as opposed to theatrical,” marking an epistemological break known thereafter as the text/performance split.³³ This process helped drive the disentangling of “performative modes of communication” from the literary, leading to separate disciplines “founded on an arbitrary distinction between words and the bodies that give them voice” (155). Susan Harris Smith describes the disciplinary turf battles that occurred in the years following this divergence, suggesting that

in the struggle to legitimate areas of study and to claim materials to be studied, the dramatic text was a critical component to Theatre departments. If it could be authoritatively argued that a play was only a script to be performed, the playwright and, by extension, the literary critic had less

³² Amy E. Hughes, *Spectacles of Reform: Theatre and Activism in Nineteenth-Century America* (Ann Arbor: University of Michigan Press, 2012), 155. Still, Hughes’ interpretations at times reveal more about her own views than those of her subjects, as when she makes the sweeping claim: “I assert that audiences appreciated the Ohio River scene, both in performance and in print and material culture, because it celebrated and endorsed the radical subjectivity seized by slaves who chose to flee” (103).

³³ Julia A. Walker, “Why Performance? Why Now? Textuality and the Rearticulation of Human Presence,” *Yale Journal of Criticism* 16, no. 1 (Spring 2003), 150. It was in 1914 that the influential German theatre historian Max Hermann called for separating the study of theatre from that of dramatic literature. In the United States, it was also the year an “insurgent faction” of the National Council of Teachers of English formed the National Association of Teachers of Speech (154). Finally, it also saw the inauguration of classes devoted to play production at four universities, as well as the establishment of the nation’s first department of drama at the Carnegie Institute of Technology.

Susan Harris Smith locates the origins of this moment earlier, arguing it began in the late-nineteenth century. See her chapter “Did She Jump or Was She Pushed? American Drama in the University Curriculum,” in Susan Harris Smith, *American Drama: The Bastard Art* (New York: Cambridge University Press, 1997), 114-158.

authority and consequently less power than the theatre historian or the director. (Smith, 118)³⁴

These factors have tended to push (or pull) scholars working in English departments towards analyses that privilege text over enactment.³⁵ When writing about the history of dramatic literature, such a methodology too often employs an anachronistic theatrical frame of reference, as experiences with contemporary theatre and performance provide few insights into the dramaturgy and production practices of different eras. When, as in the nineteenth century, those production practices were profoundly influential in determining the nature of the plays that were preserved, as I explore in this study, inattention to the conditions of production can lead to problematic readings of extant texts.

Scholars such as Richards, Smith, and Robinson (and, more recently, Peter Reed and Mathew Reborn) are increasingly engaging with and challenging insights provided by historians. Given their work intends to expand our understanding of early American theatre as a practice (as opposed to a purely literary record/tradition), it

³⁴ As she acknowledges, R. W. Vince views the situation somewhat differently: he suggests it was rather “the determination of literature departments to consider drama their responsibility [that] led to the anomaly of departments of theatre devoted almost exclusively to the practical training of actors, directors, and scene designers” (R[onald] W. Vince, “Theatre History as an Academic Discipline,” in *Interpreting the Theatrical Past: Essays in the Historiography of Performance*, ed. Thomas Postlewait and Bruce A. McConachie (Iowa City: University of Iowa Press, 1989), 8). This dynamic has been further complicated by the turn to performance studies in the 1990s, the rise of cognitive studies in the early 2000s, the continued erosion of state support to public universities that has driven the contraction or elimination of theatre departments across the country, and the increasing emphasis on “value” and employment potential in assessing the validity of a college degree.

³⁵ As Smith explains: “Because I primarily study the texts of dramatic literature rather than records of theatrical productions or performance histories, I turn to theatre histories only when they have some direct bearing on the matter....I feel strongly, however, that one great attraction of a play’s printed text is that it can serve two masters, the reader and the audience, and that the dissemination of a text through print and through critical reception is as vital to its survival as is a well-received production” (6).

seems appropriate to assess their use of historical evidence. Robinson's work demonstrates the potential challenges of approaching nineteenth-century theatrical performance through play texts. His study is a compelling attempt to construct a master-narrative for the development of American dramatic literature, though it frequently reveals less about theatrical performances than literary traditions, despite the author's avowed desire to illuminate both. To cite a single example, Robinson identifies a particular passage in William Dunlap's *The Voice of Nature*, an adaptation/translation of a French melodrama, as "one of the most unsettling passages in early American drama" (20). He quotes the actress playing the lead, Alzaira, who relates that her "female heart...revolts when'er I read the part...I am a mother – can I represent one who could steal the mother's best content?...O, no! – I cannot feel a part like this!...Yet I'll do my best,/To represent a being – *I detest*" (ibid., emphasis in original). Robinson's recapitulation, however, omits context that is key to interpreting the passage. The original reads:

So, ladies, if I play without due spirit,
You must not place it to my heart's demerit.
*I am a mother---can I represent
One who could steal the mother's best content;
Rob from the parent breast her darling bliss;---
O, no!---I cannot feel a part like this!*³⁶

Robinson reads the passage as a telling reflection of the disorientation he sees as the dominant mode of American theatre throughout much of the nineteenth century. Considering this passage in the context of performance, however, suggests a different

³⁶ William Dunlap, *The Voice of Nature, a Drama in Three Acts. Translated and Altered from a French Melo-Drame, Called, The Judgment of Solomon* (New York: David Longworth, 1803), 44, http://gateway.proquest.com/openurl?ctx_ver=Z39.88-2003&xri:pqi:res_ver=0.2&res_id=xri:ilcs-us&rft_id=xri:ilcs:ft:amdram:Z000615034:0 [accessed January 23, 2014]. Emphasis in original.

interpretation. The lines are in an epilogue, set off from the drama proper and embracing their own set of conventions and expectations. To the theatre historian, it is clearly part of a tradition of authors and actors stepping outside the world of their creations to thank an audience, beg its indulgence for potential faults, reference topical material, etc.³⁷ Robinson's reading reveals more about contemporary responses to nineteenth-century dramatic literature than the significance of such a passage for its contemporaneous audience.

In addition to this disciplinary privileging of textual analysis, twentieth-century expansions of copyright law and the nature of contemporary scholarly discourse have so fixed the notion of authorial supremacy and centrality that scholars often have a difficult time imagining a period when the figure of the author, at least as most understand it today, did not exist. Christine Haynes observes that, "in the last three or four decades, the Romantic image of the author has been deconstructed and historicized, in light of new theories and methods drawn from poststructuralism, New Historicism, the sociology of literature, and the history of the book."³⁸ Yet after surveying the recent literature in the field of authorship studies, Haynes concludes that "literary scholars and cultural historians have not entirely exorcised the Romantic figure of the author," and that much of their work has, in fact, served largely to "perpetuate the Romantic notion of genius it purports to critique" (ibid.).

³⁷ This practice can, of course, be traced back at least as far as the fifth century BCE, when Greek comic playwrights addressed their audiences directly; more proximally, Elizabethan theatre is rife with examples – such as the Chorus of *Henry V* or Puck in *A Midsummer Night's Dream* – of actors framing and commenting on the performance itself.

³⁸ Christine Haynes, "Reassessing 'Genius' in Studies of Authorship: The State of the Discipline," *Book History* 8 (2005), 288.

Contemporary copyright law seems to have further entrenched this authorial supremacy by establishing a regulatory framework vesting proprietary rights in the “original” creations of a scholar and his/her claims. No phenomena illustrates the paradoxical nature of copyright better than the academic enterprise itself, as no other creative activity relies so heavily on the careful appropriation, arrangement, and interpretation of work that is precisely *not* one’s own.³⁹ An author’s name on a scholarly text declares ownership over claims whose credibility depends on the rigorous and precise attribution of ownership to other claims; by documenting provenances and scaffolding lineages of prior arguments, our own contributions accrue significance and authority.

Over the course of the twentieth century, playwriting, too, has changed significantly through the mediation of copyright law. For the first time in history, the supremacy of the performer – challenged for a time in the seventeenth, eighteenth, and nineteenth centuries by the manager (who was typically him/herself a performer), and subsequently by the director – has given way to that of the playwright, who, by force of law, can dictate precisely what is said onstage, determine the gender or ethnicity of the performers who are cast, and even constrain the choices available to scenic and sound designers. Little wonder, then, that the copyright pages of extant antebellum play texts might, in the eyes of contemporary scholars, imbue their authors with an anachronistic authority and preeminence.

³⁹ Despite the copyright notice prefacing this work, it is amusing to think how little of what follows it actually falls under its protection. If the “piratical” practices of antebellum playwrights are the standard against which our work is measured, little separates us from them, save punctuation and footnotes.

It is also important to acknowledge that the term “playwright” is itself fraught, as its nineteenth-century meaning differs significantly from contemporary usage. Leon Jackson’s *The Business of Letters: Authorial Economies in Antebellum America* has been invaluable to my understanding of the relationships between authors, texts, and public consumption in the nineteenth century. Jackson makes significant interventions in the field of authorship studies, and his reexamination of William Charvat’s seminal work on literary professionalism in the eighteenth and nineteenth centuries proved especially useful for my project. Charvat, and the many subsequent scholars who relied on his findings, believed that a variety of factors rendered the possibility of a literary “professional” untenable in nineteenth-century America, and that the “literary security” necessary to sustain professional status never fully emerged until the start of the twentieth century.⁴⁰ Charvat’s definition of “professional” – “that it provides a living for the author, like any other job; that it is a main and prolonged, rather than intermittent or sporadic, resource for the writer; that it is produced with the hope of extended sale in the open market, like any article of commerce; and that it is written with reference to buyers’ tastes and reading habits” – is so restrictive that only James Fennimore Cooper qualifies as a “professional” prior to the 1850s (quoted in Jackson, 14). As Jackson points out, such a conclusion may align well with the Progressive historian’s wish to discern steady progress towards greater democratization, but renders the category of limited value; if nearly every writer in the first seventy-five years of the nation’s existence was an “amateur” –

⁴⁰ Leon Jackson, *The Business of Letters: Authorial Economies in Antebellum America* (Stanford, CA: Stanford University Press, 2008), 12.

typically a pejorative term encompassing everyone who was not a “professional” – the classification ceases to do much classifying. Rather, Jackson argues that amateurism and professionalism are not successive stages in a sequential development, but in fact only exist in relation to the other: “amateurism, we might say, was ‘invented’ by exponents of professionalism as its necessary conceptual Other, inasmuch as it helped define what professionalism *was* by reference to what it was *not*” (Jackson, 19).

Jackson proposes that authors working in the first half of the nineteenth century participated in multiple economies that cut across any notion of “professional” status, and that embraced a variety of categories of capital – social, cultural, economic, and symbolic. They were fundamentally *embedded*, a concept adopted and adapted from anthropologist Karl Polanyi. Embeddedness, as Jackson employs it, posits that these authorial economies “served not simply to convey goods and money from one party to another, but also, and at the same time, functioned to create and sustain powerful social bonds” (2). Jackson’s conception of antebellum authorship, therefore, is one where financial transactions between authors, between authors and printers, and between authors and editors are often less important than the other ties established, maintained, and violated through complex networks of bartering, gift exchange, circulating debts, and competitions.

While Jackson is not focused on playwrights, per se, his analysis is largely applicable (and he does cite the playwriting contests of the Jacksonian period when discussing the importance of literary competitions). No one who authored plays in antebellum America achieved what Charvat would label “professional” status. While

many were not writers by profession at all, those who were typically supported themselves (generally poorly) through a variety of genres of writing, and the most successful playwrights – the so-called “house dramatists” who wrote exclusively for particular theatres – also performed other roles for their companies, typically acting or stage managing. Ultimately, Jackson’s work was influential in my development of the concept of artisan dramaturgy, which I explore in the first two chapters of the project.

I should note that the nature of playwriting described above has influenced my selection and use of evidence. Specifically, with the exception of a single case study, I avoid analyzing play texts. As I discuss in chapters 1 and 2, extant dramatic texts are generally poor reflections of what audiences saw onstage, as antebellum production practices modified scripts freely and extensively, trimming and revising prior to production, in rehearsal, and even in performance. Precise recitation of a text was neither a goal of antebellum performers nor an expectation of antebellum audiences, and published play texts are far more valuable as evidence of the literary ambitions of authors than the dramatic compositions that ultimately took the stage. The one text I do analyze – James Heath’s *Whigs and Democrats* – is used primarily in juxtaposition with an extant promptbook that guided a particular production of the play, which provides valuable insights into the ways scripts were tailored for specific contexts and conditions.

Intermezzo. A Note on Structure

This project is structured to evoke the pattern of a typical nineteenth-century theatrical bill of fare. An overture of popular musical pieces typically began each

evening. Two main pieces, frequently interrupted by an incidental performance of some sort, comprised the bulk of the evening's entertainment. While the normal pairing of a serious/tragic piece and a farce has no easy analogue in this particular project, I have divided the study into two "plays" entitled "Barbarians All!; or, The Artisan Dramaturgy of the Antebellum Stage" (embracing chapters 1 and 2) and "'So as to Compass the Interest'; or, The Campaign for Copyright Reform, 1835-1856. A Drama in 5 Acts" (chapters 3-5). An "interlude" precedes the penultimate act of the second piece, which is then followed by an epilogue.

Coda. Coming Attractions

Chapters 1 and 2 use a series of case studies to explore the conditions of antebellum theatrical production that most influenced the playwrights who pushed for passage of the 1856 law. I argue those conditions constitute a system of *artisan dramaturgy*.⁴¹ Key to this formulation is the concept of *bespoke playwrighting*, spelled as such to emphasize that those who composed antebellum performance texts were more wrights than writers, handicraftsmen and women whose medium was the manuscript rather than the printed text. They were, in Raymond Williams' formulation, artisans themselves, in that they were engaged in the direct production of a commodity, one most commonly sold directly to a particular theatre.⁴² As with

⁴¹ While there are many different conceptions of what "dramaturgy" entails, I use the term here to mean "dramatic composition." More expansive than "dramatic writing," composition encompasses the construction of the dramatic script, the performance it spawns, and the mechanisms linking the two. While there are other aspects of production that could fall under the term dramaturgy, my interest is primarily on playwriting, acting, and the nature of a repertory system. All of these aspects involve resonances between extant material and the singular, never before/never again nature of performance.

⁴² In defining the artisanal system, Williams describes it as a "simple, early but in some areas persistent situation of the independent producer who offers his own work for direct sale....The producer is wholly dependent on the immediate market, but within its terms his work remains under

many artisans, the goods they produced were bespoke – not ready-made, but made to order for particular audiences and occasions, and suited to the talents of specific companies of performers. Bespoke plays were generally composed quickly, edited in what brief time was available for rehearsal, and revised after initial performances. They were often emulative, and were characterized by their free appropriation of other plays, popular novels, or the news.⁴³ In a context where playwriting as a profession was untenable, artisan dramaturgy provided unprecedented opportunities for individuals with no practical theatre experience to see their work professionally produced.

I also use “artisan” for its particular relevance to the rapid industrialization occurring in the middle decades of the 1800s. Some of the same causes and consequences of that industrialization influenced the development of the theatre. With the advent of the cylinder steam press and increasingly inexpensive means of printing, for example, the market for “pirated” literature exploded, and the draft created by proof sheets of new British novels flying across the Atlantic swept up many dramas in their wake, which profoundly shaped the market for native productions. The rise of the penny press and inexpensive journalism not only created new ways to consume news and entertainment but helped shaped the aesthetic criteria of readers and, by extension, audience members, which can be seen in the rise of *exposé* plays in the 1840s and the phenomenally successful “Mose” plays. The spread

his own direction” (Raymond Williams, *The Sociology of Culture* (New York: Schocken Books, 1982), 44-45).

⁴³ Emulation, a term whose eighteenth-century usage emphasized a competitive drive to surpass rather than simply replicate will be discussed in greater detail in chapter 1.

of the railroad also helped push the expansion of the theatre, and by mid-century made feasible a new model of theatrical production that would come to be increasingly important – circuits and touring shows. As standards of living improved and a middle class began to develop, potential audiences increased, driving competition between theatres and between the theatre and other forms of entertainment. This competition often involved the skills of the bespoke playwright, given the common practice of scooping rival productions, hastily working up a competing version of a piece, or travestyng another theatre’s newest play. Growing affluence, or at least competence, also established several new target audiences, particularly women, who influenced the development of the theatre.

Perhaps most importantly there are resonances with the alienation and displacement experienced by the American craftsman trying to find a place within a system that atomized the production sequence and distributed its steps to a variety of workers, and then to machines. The system of licensing inaugurated with the passage of the 1856 law set in motion (or at least accelerated) a process that increasingly attenuated the direct relationship between producer and commodity, between dramatic text and the specific circumstances of its production. The primary market for a play was no longer just a particular theatre, but a region, a circuit, a nation. The synergistic relationship between star performers and their vehicles, or between the work of a house playwright and his/her company, became less compelling than a play that could be performed by any competent stock company around the country.

It is the relationship with the American economy that also provides an end-point for this study. Theatrical management experienced a similar “industrialization”

that accelerated rapidly after the Civil War. As Vera Mowry Roberts notes, responsibilities formerly assumed by an actor-manager, “whose duties included play selection, casting, directing, designing, and looking after finances,” increasingly became “specialized and individualized,” and ultimately professionalized, over the second half of the nineteenth century.⁴⁴ After passage of the 1856 law, a playwright could simultaneously grant the rights to perform a play to various theatres across a rapidly expanding market, one that, in little more than a decade, would be transcontinental. Arthur Hobson Quinn also pinpoints 1860 as a pivotal year in the development of American theatre, as it coincides with Dion Boucicault’s introduction of the “traveling company with one play, an institution which changed the fundamental conceptions of the relation of the play to the company and that of the author to the producer and actor” (*History*, 387). It was in the 1850s that theatres shifted away from an extensive repertory to favor the “long run,” and more lavishly produced pieces that could draw audiences for dozens or even hundreds of performances also significantly reduced production opportunities for less established playwrights. Finally, the embedded nature of American publishing became increasingly attenuated by the end of the 1850s. As Jackson explains, author-publisher relations were increasingly predicated on impersonal financial exchanges: “Social relationships came to be replaced by commercialized and impersonal ones. The imperatives of the disembedded economy came to be enforced less by affect and reciprocity and more by contract and legal obligation. Modes of literary production

⁴⁴ Vera Mowry Roberts, “‘Lady-managers’ in Nineteenth-Century American Theatre,” in *The American Stage: Social and Economic Issues from the Colonial Period to the Present*, ed. Ron Engle and Tice L. Miller (New York: Cambridge University Press, 1993), 31.

became less personal and more mediated” (48). The changes in the market for new plays described above worked in tandem with shifts in the publishing industry to create ever larger, and less individual, markets for plays.

In chapter 3 (Act I) I explore the views of playwrights and critics whose theatrical aesthetic was often directly at odds with the priorities of the antebellum artisan dramaturgy. Playwrights like Bird, Boker, and Conrad strongly desired a theatre that would cater to the taste of a more refined and educated audience. They wanted a theatre that allowed authors to control not only who purchased their texts, but what could be done with those texts. In short, they sought a fundamentally different theatre, one guided by principles distinct enough as to constitute an almost revolutionary change to the existing order. Given this, and given the nature of their tactics, I refer to them as *insurgent playwrights*.

The contrast between their insurgent aesthetics and those of the dominant system is elegantly captured by Pierre Bourdieu’s distinction between “barbarous” and “pure taste.” As concisely summarized by Varun Begley, barbarous taste is “utilitarian and appropriative, strongly *interested* in the object’s content and its potential for educational, ethical, and pleasurable use.”⁴⁵ Bourdieu explains that barbarous taste appeals to those who “desire to enter into the game, identifying with the characters’ joys and sufferings, worrying about their fate, espousing their hopes and ideals, living their life,” which he argues is based “on a form of *investment*, a sort

⁴⁵ Varun Begley, “Objects of Realism: Bertolt Brecht, Roland Barthes, and Marsha Norman,” *Theatre Journal* 64, no. 3 (October 2012), 348-349. Emphasis in original.

of deliberate ‘naivety,’ ingenuousness, good-natured credulity.”⁴⁶ Barbarous audiences generally tolerate experimentation with form or purely “artistic effects only to the extent that they can be forgotten and do not get in the way of the substance of the work” (33). Pure taste, by contrast, is “disinterested and formalistic, downplaying the content of the cultural artifact in favor of its style, formal complexity, and relation to other works” (Begley, 348). The antebellum American theatre was quite successful at satisfying the barbarous tastes of its audiences, which is one of the reasons scholars have sometimes found it difficult to discern a distinctly American aesthetic in the first half of the nineteenth century.

In chapter 4 (Act II) I briefly explore the history of Anglo-American copyright and its evolution through statute and case law. I then investigate the arguments made by the insurgent playwrights, which were informed by a particular understanding of natural law and property rights that led them to view copyright as an effective tool to ensure the success of their theatrical aesthetic (Act III). Finally, I narrate the campaign waged by insurgent playwrights to establish greater control over performances of their texts (Acts IV-V). Pursuing a variety of tactics, they nevertheless shared a single, strategic goal, one they felt was best met by revisions to the copyright laws (both international and domestic). Their successful efforts to establish the legal existence of dramatic property had ramifications that extended far beyond the stage, and laid the groundwork for what would come to be known as “intellectual property.”

⁴⁶ Pierre Bourdieu, *Distinction: A Social Critique of the Judgement of Taste* (Cambridge: Harvard University Press, 1984), 33.

Barbarians All!; or, The Artisan Dramaturgy of the Antebellum Stage

Chapter 1

Bespoke: spec. of goods; ordered to be made, as distinguished from ready-made *adj.* and *n.*; also said of a tradesman who makes goods to order. Also *n.*, a bespoke article.

—*Oxford English Dictionary*

The evolution of a national form into which to transmute the new mines of national material could hardly have occurred to our few playwrights; had it done so, it would have appeared as the very height of aesthetic, academic affectation. Just as, at first, making for ourselves national songs, for the words proclaiming our independence of the enemy we borrowed the very tunes of that enemy, - just as Francis Key, but a few years before, had fitted his patriotic words to an old English drinking tune, - so in our stumbling efforts toward a native drama we laid, cuckoo-like, our eggs in foreign nests.

—Isaac Goldberg¹

According to the *Oxford English Dictionary*, the first recorded use of “bespoke” occurs in the autobiography of Charlotte Charke, the transvestite daughter of the famous eighteenth-century actor and playwright Colley Cibber. While Charke employs it variously to mean “referenced” and “spoken,” the primary usage of the term denotes something created for the purpose, designed to meet a particular need or for a specific buyer. This is certainly an apt characterization of the way many plays written in the antebellum United States made their way before audiences. This chapter is primarily focused on exploring the concept of bespoke playwrighting, a key component of artisan dramaturgy. Bespoke playwrights drew on an extensive theatrical public domain for source material, translating and adapting domestic and

¹ Isaac Goldberg, *Major Noah: American-Jewish Pioneer* (Philadelphia: Jewish Publication Society of America, 1936), 170.

foreign plays, novels, poems, and even songs for the stage. The prevalence of British drama in the American repertory, as well as the similarity between those dramas and the American works that sought to emulate them, has led scholars to dismiss much antebellum playwriting as unoriginal. I reveal that bespoke playwrights embraced a particular definition of “originality,” one that was absolutely compatible with extensive appropriation from extant sources.

Act I. Tyler’s Cuckoo-Like *Contrast*

The John Street Theatre was hardly an awe-inspiring venue for the premier of one of the most important American plays written before the turn of the twentieth century.² To be fair, there were no theatrical venues in 1787 that Americans of even a decade later would consider awe-inspiring. The construction of purpose-built performance spaces had been hindered by lingering hostility towards the theatre on the part of individuals whose religious or republican zeal found the form incompatible with the new nation’s aspirations. Further, theatrical artists, many of whom were British, encountered antipathy from those who perceived pernicious influences in an entertainment so closely associated with the erstwhile mother country. It was not until 1766 that the first permanent theatre was built on American soil – Philadelphia’s Southwark Theatre – followed a year later by the second – the John Street – modelled on its predecessor.³ The latter was situated on the north side of John Street, set back

² The claim is made in Jeffrey H. Richards, ed., *Early American Drama* (New York: Penguin Books, 1997), 4.

³ Durham claims the Southwark was “the first permanent theatre in America” and the John Street the second (12-13). As with so many theatrical “firsts,” unambiguous claims are difficult to sustain. Brooks McNamara records that there were more than seventy structures used as theatres between the construction of the first – in Williamsburg, Virginia, around 1716 – and the end of the eighteenth century. Philadelphia’s Southwark was used “for over half a century after its construction,” certainly making it the most durable of the early, purpose-built structures (Brooks McNamara, *The*

approximately sixty feet from the roadway, connected to it by a covered walkway made of rough wooden planks that kept theatregoers (relatively) safe from the weather. Just to the right was Broadway, from which John Street began, before meandering up Golden Hill – at one time the highest point on the tip of Manhattan, and the site of a bloody clash between New York residents and British troops several years after the theatre was built – and then darting “precipitously” down to the East River.⁴

According to William Dunlap, the theatre itself was an “unsightly object,” built of wood and painted red. Two-and-a half stories tall with a brick foundation, the squat, rectangular building sported a cupola at its peak that could be opened to provide ventilation when the weather turned warm. Despite this feature, it was, as were most of the playhouses constructed in the late eighteenth and early nineteenth centuries, nearly impossible to heat or cool effectively for most of the year, making theatres famously uncomfortable gathering places for all but a few months in the spring and fall (McNamara, 52). Clinging to one side was a shed housing the green and dressing rooms. It had been added after the British occupation of New York, an occupation that extended to the John Street Theatre itself. The troops had rechristened the playhouse the Theatre Royal and put it to far more frequent use than its previous occupants (in 1774 the Continental Congress had banned theatre, along with the

American Playhouse in the Eighteenth Century (Cambridge: Harvard University Press, 1969), 52). It is safe to say the John Street was the first significant playhouse built in New York City, and it survived for more than twenty years before the Park Street Theatre superseded it in 1797.

⁴ William Dunlap describes the John Street neighborhood in *History*, 1:77.

“exhibition of shows, plays, and other expensive diversions and entertainments”).⁵ Following the end of the Revolutionary War, the American Company, which had weathered the hostilities as best it could in Jamaica, returned to begin a series of short seasons in Philadelphia, New York, Baltimore, and Richmond. In early 1787, they arrived at the John Street Theatre for a four-month engagement, during which they produced Royall Tyler’s *The Contrast*.

Tyler was a young lawyer from Boston who had graduated with honors from Harvard, served in a single battle in the Revolutionary War, then returned to Harvard to study law. A man of modest means thanks to a family inheritance, Tyler had briefly courted Abigail “Nabby” Adams, daughter of John and Abigail Adams, to her father’s chagrin. While generally regarded as a “talented and charming member of Boston’s younger intellectual set,” Tyler had developed a reputation as a bit of a scamp, having been “rusticated” at Harvard for an accident involving the college president’s wig.⁶ And while studying law in Cambridge, Tyler was a member of a group of young men whose exuberance sometimes exceeded their discretion, as when they drunkenly processed around the city engaging in “horrid Profanity, riotous & Tumultuous Noises, & [the] breaking of Windows at College.”⁷ John Adams, then serving as the United States’ Minister to the Netherlands, heard rumors of these

⁵ Quoted in Heather S. Nathans, *Early American Theatre from the Revolution to Thomas Jefferson: Into the Hands of the People* (New York: Cambridge University Press, 2003), 37.

⁶ Daniel F. Havens, *The Columbian Muse of Comedy: The Development of a Native Tradition in Early American Social Comedy, 1787-1845* (Carbondale: Southern Illinois University Press, 1973), 9.

⁷ The quotation is from the records of the Cambridge College Faculty, quoted in G. Thomas Tanselle, *Royall Tyler* (Cambridge: Harvard University Press, 1967), 7.

escapades from family members; he confided to his wife that, while he preferred that his daughter marry a lawyer, “it must be a Lawyer who spends his Midnights as well as Evenings at his Age over his Books not at any Lady’s Fire Side” (quoted in Tanselle, 11). Such a monastic existence held little appeal to Tyler, and the relationship ended in 1785 once Nabby and her mother joined the rest of their family in Europe. Dejected and disillusioned at his prospects, Tyler welcomed the uprising of debt-strapped farmers known as Shay’s Rebellion as an opportunity to escape the drudgery of his Boston practice. He enlisted in the Massachusetts militia and was made a major. It was in this capacity, attempting to apprehend the remaining members of Shay’s group, that he first came to New York on March 12, 1787.

Tyler likely saw his first professional theatrical productions while in the city, though they were hardly his first experiences with the theatre. He had participated in amateur theatricals while a student at Harvard (though the practice was forbidden on pain of rustication or expulsion), and he had also seen amateur performances in Boston, hardly an easy undertaking in a city whose anti-theatrical legislation remained in place through the first years of the 1790s.⁸ While in New York, he would have had the opportunity to see the American Company perform *Much Ado about Nothing*, *Cymbeline*, *Richard III*, *The Clandestine Marriage*, *The Jealous Wife*, *She*

⁸ See Tanselle, 49-50, and Walter J. Meserve, *An Emerging Entertainment: The Drama of the American People to 1828* (Bloomington: Indiana University Press, 1977), 97. Prominent Bostonians had challenged these restrictions through defiant performances, legal maneuvers, and public relations efforts that saw the Vice President’s son, John Quincy Adams, writing letters branding the law “unconstitutional” and advocating resistance (John Quincy Adams, *Writings of John Quincy Adams*, ed. Worthington Chauncey Ford (New York: Macmillan Company, 1913), 129-130, <https://archive.org/details/writingsjohnquii02fordgoog> [accessed January 23, 2014]). They found that the death of their arch nemesis – John Hancock – in 1793 constituted a de facto repeal, given it marked the end of attempts to enforce the ban. The long agitation for the repeal of these laws in Boston and Philadelphia is discussed in detail in Nathans’s second chapter of *Early American Theatre*.

Stoops to Conquer, and, most importantly, two staples of their repertoire, Richard Brinsley Sheridan's *The School for Scandal* and John O'Keeffe's comic opera *The Poor Soldier* (Tanselle, 50). Within three weeks of the John Street Theatre's performance of *The School for Scandal*, Tyler's dramatic re-imagining of Sheridan's hit for an American audience was announced for April 16th.⁹ The advertisement, printed in the *Daily Advertiser* touted it as "a COMEDY of 5 acts, written by a CITIZEN of the United States, called The Contrast," and indicated it would be followed by the English burletta *Midas* (April 14, 1787).

The theatre's doors opened at 5:30pm, leaving audiences forty-five minutes to make their way to their seats before the curtain rose.¹⁰ The walkway from John Street was hung with lanterns to ward off the gathering dusk, and the sun had likely set by the time the orchestra finished its overture and Thomas Wignell, one of the company's favorite comic actors, began the prologue.¹¹ Written by "a gentleman of this city," it encouraged the audience to "exult, each patriot heart! – this night is shewn/A piece, which we may fairly call our own," and questioned "Why should our thoughts to distant countries roam,/When each refinement may be found at home?" (Tyler). Despite the "unskillfulness" of the prompter – whose responsibilities

⁹ In the preface to the first published edition of the play, Thomas Wignell notes that "it was written by one, who never critically studied the rules of the drama, and, indeed, had seen but few of the exhibitions of the stage; it was undertaken and finished in the course of three weeks" ([Royall Tyler], *The Contrast* (Philadelphia: Thomas Wignell, 1790), preface, http://gateway.proquest.com/openurl?ctx_ver=Z39.88-2003&xri:pqil:res_ver=0.2&res_id=xri:ilcs-us&rft_id=xri:ilcs:ft:amdram:Z000623497:0 [accessed January 23, 2014]). Hereafter "Tyler."

¹⁰ Curtain times, box office hours and locations, and performance days for the season may be found in the *Daily Advertiser* of February 2, 1787.

¹¹ The U.S. Naval Observatory records sunset at 6:36pm on April 16, 1787 ("Rise and Set for the Sun for 1787, New York, New York," U.S. Naval Observatory, http://aa.usno.navy.mil/data/docs/RS_OneYear.php [accessed January 23, 2014]).

included sitting just offstage and whispering lines to forgetful actors, as well as raising and lowering the curtain, one or both of which tasks this particular prompter apparently bungled – the “good” prologue was “very well-spoken” by Wignell, according to the *Daily Advertiser*’s critic (April 18, 1787). The same review records that Tyler’s piece – which establishes a series of contrasts juxtaposing the virtuous, patriotic figures (Colonel Manly, his ladylove Maria, and Jonathan) and the effete, superficial worshippers of all things British (Manly’s sister, Charlotte, and the dastardly Billy Dimple) – was well-received, earning “the unceasing plaudits of the audience” and having every promise, if “judiciously curtailed,” of continuing to be successful.

One scene, in particular, appealed to the critic (as well as to generations of theatre scholars). Near the middle of the play, the character played by Wignell – Jonathan, the rustic manservant of the piece’s ostensible hero, Colonel Manly – explains his activities the previous evening. Intending to see a “hocus pocus” man, Jonathan had been caught up in a “great crowd of folks going into a long entry that had lanterns over the door,” a description that most of those attending *The Contrast* would have recognized as a reference to the walkway they themselves had traversed earlier that evening (Tyler, 40). He found himself in a garret, overlooking

a power of topping folks, all sitting around in little cabins...and then there was such a squeaking with the fiddles, and such a tarnal blaze with the lights, my head was near turned. At last the people that sat near me set up such a hissing – hiss – like so many mad cats; and then they went thump, thump, thump...and stamp away, just like the nation. (33-34)

Then, to his astonishment, “they lifted up a great green cloth and let us look right into the next neighbour’s house” (34). One more theatrical in-joke remains before

Jonathan learns he had actually been at the playhouse. Describing his favorite inhabitant of the “neighbour’s house,” Jonathan observes he was a “cute fellow” with “red hair, and a little round plump face like mine, only not altogether so handsome. His name was – Darby; –That was his baptizing name; his other name I forgot. Oh! it was Wig–Wag–Wag-all, Darby Wag-all” (Tyler, 35). (Darby was the name of Wignell’s character in the popular farce *The Poor Soldier*.)

The play was successful enough for it to be repeated on the 18th, when it was advertised as appearing “with alterations,” and paired with *The Poor Soldier* itself. After two additional performances the following month, it travelled with the company to Baltimore and Philadelphia. The latter’s ban on theatrical entertainments was still in place, and would remain so until 1789, making a performance “impracticable”; thus Wignell announced a “reading” of *The Contrast* to take place at the City Tavern on December 20, 1787 (*Pennsylvania Packet, and Daily Advertiser*, December 8, 1787). Such tactics had been commonly used to skirt anti-theatrical legislation in both the young Republic and the colonies (and, indeed, had an established tradition in Britain dating back to creative performers’ attempts to evade the Puritan-imposed ban on theatre stretching between 1642 and the restoration of the monarchy in 1660). Not even Wignell’s plan to insert “musical, vocal and instrumental” pieces between each act raised the ire of the authorities, suggesting a relaxation in attitude that would permit the repeal of the ban in 1794.

Wignell had one more incentive for his listeners, however, announcing in the advertisement that, “as Major Tyler has favored Mr. Wignell with the right of Publishing his performance, he wishes to render this opportunity subservient to that

object” (*Pennsylvania Packet, and Daily Advertiser*, December 8, 1787). Each ticket would “entitle the bearer to a place in the list of subscribers, and to a copy of the Comedy when printed” (ibid.). It would be more than two years before Wignell raised the necessary funds, but by the time he had, President George Washington had signed into law the United States’ first copyright statute. The head of Philadelphia’s Free School of the Protestant Episcopal Church, John Barry, was the first to avail himself of its privileges, securing the rights to his *The Philadelphia Spelling Book* on June 9th.¹² Wignell was the second to do so, and on June 15th, “under an assignment of the copy-right” from the author, he registered *The Contrast*.

The originality of the material registered under that copyright has been qualified by scholars who have long noted the similarities between *The Contrast* and a variety of antecedent plays and forms. Don B. Wilmeth, for example, calls the play a “somewhat derivative effort,” and Meserve observes it is “imitative of the eighteenth-century British sentimental comedy.”¹³ In fact, Tyler himself makes no effort to conceal the resemblance between his work and other offerings at the John Street Theatre, particularly in the scene when Jonathan recounts his unwitting visit to the theatre. Jonathan’s struggle to recall the name of the “cute fellow,” which results in his identification of another character played by the actor Wignell, is, as Robinson

¹² *Federal Copyright Records 1790-1800* (Washington DC: Library of Congress, 1980), 1, <http://international.loc.gov/service/gdc/scd0001/2006/20067111001fe/20067111001fe.pdf> [accessed January 23, 2014].

¹³ Don B. Wilmeth, *Staging the Nation: Plays from the American Theater, 1787-1909* (Boston: Bedford Books, 1998), 2; Meserve, *Emerging*, 98. See also Don B. Wilmeth and Christopher Bigsby, eds., *The Cambridge History of American Theatre, Volume One: Beginnings to 1870* (Cambridge: Cambridge University Press, 1998), 8; and Peter A. Davis, “The Plays and Playwrights: Plays and Playwrights to 1800,” in Wilmeth and Bigsby, 244.

observes, a moment pregnant with metatheatrical significance. Noting that “the Jonathan complimenting Wignell was played by Wignell himself,” Robinson argues that, “as the frame breaks around Tyler’s play, and audiences attend instead to their own story, the cultural ambiguities and aesthetic challenges of all theatergoing – and theatre-making – in the new nation become clearer” (14). Robinson concludes that this dissolution creates a sense of disorientation, as “the characters’ – and our own – vertigo grows acute as more and more utterances spring from sources beyond the self” (16). Inundated with intertextual associations, “nothing makes sense, or even reaches the senses, without reference to something else” (ibid.).

I would disagree with Robinson that such moments are necessarily vertiginous; as Marvin Carlson demonstrates in *The Haunted Stage*, such intertextual associations are, in fact, fundamental to the dynamic engagement between performer and audience that distinguishes theatrical performance as an artistic form. Regardless, rather than Jonathan’s “Darby Wag-all” moment and the subsequent exposure of his naiveté, I am more interested in the question that Jonathan asks immediately upon recalling the little fellow’s name: “pray – do you know him?” (Tyler, 35). As Jonathan subsequently reexamines his experiences in light of the mistake, he recalls the ticket-seller’s pronouncement that what he had seen was “The School for Scandalization.” This moment is significant not simply because it unfolds the complicated relationship between a nascent American dramaturgy and the British pedigree of its raw materials, or that it allows the audience to read an ostensibly foreign form through American eyes, but that it so explicitly acknowledges and names the lineage.

The fact that Tyler makes no attempt to conceal the indebtedness of his dramatic structure and conventions to *The School for Scandal* suggests something beyond mere laziness or inexperience is at play. I would suggest that it is not so much “imitation” as *emulation*, a term whose eighteenth-century usage emphasized a competitive drive to surpass, rather than simply replicate. In his translation-*cum*-commentary on Enrico Caterino Davila’s history of religious conflicts in France, John Adams examines the concept of “emulation” at length, which he defines as “imitation and something more – a desire not only to equal or resemble, but to excel.”¹⁴ Leon Jackson explores the role emulation played in the early national period, describing it as “a form of intense competitiveness,” one that “connoted a complex psychology of ambition that was more than imitative and quite often less than respectful” (191). Noting its influence on early American novelists, Jackson cites the example of James Fenimore Cooper’s first novel, *Precaution*. Apparently, an English novel Cooper was reading to his wife so disgusted him that he threw it down, exclaiming “I can write you a better book than that, myself!” (quoted in Jackson, 195). Urged on by his wife, Cooper set out to write a story “in the style of the rejected volume”; what resulted was “a faux-English novel of manners...the product of a challenge to best another in competition, it both imitated the ‘style of the rejected volume’ yet sought to make it a ‘better book’” (195). Emulation helped Americans “mediate between a late neoclassical reverence for the past and a newly emergent Romantic emphasis on

¹⁴ [John Adams], *Discourses on Davila. A Series of Papers, or Political History. Written in the Year 1790 and then Published in the Gazette of the United States. By an American Citizen* (Boston: Russell and Cutler, 1805), 74, <http://books.google.com/books?id=9fASAAAIAAJ&printsec=frontcover> [accessed January 23, 2014].

originality,” and allowed them “to retain the forms and trappings of English culture while seeking to go beyond them” (Jackson, 192).

It is this dynamic that Tyler seems to be negotiating in his play, as he freely adopts recognizable elements of his source material, yet modifies the structure of Sheridan’s piece and creates a vehicle better suited to the nature of his commentary. Sentiment trumps satire in Tyler’s iteration, particularly in his choice of “noncomic, virtuous persons as hero and heroine” (Havens, 20). While retaining the two-brothers plotline of his inspiration, Tyler adjusts the “contrast” between the pairs of “brothers”; Sheridan’s juxtaposition of the “virtuous” Joseph and the profligate Charles becomes, in Tyler’s hands, a more sophisticated and relevant discussion of the contrast between countrymen. Their familial relationship is established by their joint citizenship, juxtaposing Colonel Manly’s stoic republican virtue and Billy Dimple’s “corrupt” and overweening love of all things British (23).¹⁵ In the following section, I explore the central role such adaptations and revisions played in the practice of bespoke playwrighting.

I.i. Thoughts Enough: Foreign and Domestic Sources for Adaptation

JINGLE (*Turning short to MRS. HODGKINSON.*). [I] pick up a good thought, Madam---strip it of the author’s language---dress it up in my own---wiredraw it a little for the advantage of weak judgments – and boldly claim the merit of originality.

MRS. HODGKINSON. But such thefts are easily detected, sir.

JINGLE. Aye, by one in a thousand---Madam *thinking* is no part of modern authorship---the ancients have left us thoughts enough---all we have to do

¹⁵ Tyler’s modifications to Sheridan’s piece are discussed in Havens, 16-28.

is hammer them well, and lay them on like modern plate, as thin as possible on any coarse material.¹⁶

Jingle's critique of playwriting is representative of a common metatheatrical trope that appeared in farces, prologues, and mock dialogues throughout the antebellum years (and, indeed, was part of a tradition stretching back to the Restoration and the Duke of Buckingham's *The Rehearsal*). Richard Brinsley Sheridan's popular afterpiece *The Critic*, for example, features the character of Sir Fretful Plagiary, whose plate gilding is laid on too thin to conceal his own coarse contributions.¹⁷ In the words of one of Plagiary's critics, "your bombast would be less intolerable, if the thoughts were ever suited to the expression; but the homeliness of the sentiment stares through the fantastic encumbrance of its fine language, like a clown in one of the new uniforms."¹⁸ And in Richard Penn Smith's prologue to a dramatization of James Fenimore Cooper's *The Red Rover*, a tongue-in-cheek retelling of the play's origins was ultimately performed by the very individuals involved: in the prologue, the *Red Rover*'s adapter, Samuel Chapman, plays an author hawking his manuscript to a Manager, played by the Chestnut Street Theatre's own manager Francis Courtney Wemyss. After discerning *The Red Rover*'s source

¹⁶ William Milns, *All in a Bustle: or the New House. A Comic Prelude Written for the Opening of the New Theatre in New-York* (New York: Literary Printing Office, 1798), 7, http://gateway.proquest.com/openurl?ctx_ver=Z39.88-2003&xri:pqil:res_ver=0.2&res_id=xri:ilcs-us&rft_id=xri:ilcs:ft:amdram:Z000618593:0 [accessed January 23, 2014].

¹⁷ In Philadelphia alone, *The Critic* was performed ten times between 1800 and 1835, and another twenty-five in the next fifteen years. See Reese D. James, *Old Drury of Philadelphia: A History of the Philadelphia Stage, 1800-1835* (Philadelphia: University of Pennsylvania Press, 1932), 653; and Wilson, 563.

¹⁸ Richard Brinsley Sheridan, *The Critic, or A Tragedy Rehearsed* (London: William Heinemann, 1905), 18, http://books.google.com/books/about/The_critic.html?id=0URMAAAAMAAJ [accessed January 23, 2014].

material, the Manager/Wemyss observes “A cunning rogue, the critics to confound/Here builds his fabric on another’s ground” (quoted in Wemyss, 151). As will be shown, playwrights were often unabashed in acknowledging their sources of inspiration, and – by detailing precisely what they adapted and how they recontextualized it – they ensured they did so, in William Dunlap’s words, “without forfeiting [their] claim to originality in the composition.”¹⁹ They saw themselves not as inept imitators of the immortal authors of the past, but as part of a tradition and a craft practiced by the greats themselves. As Isaac Harby observes in defending the stage:

The revilers of the ancients, forgot that Racine and Corneille and indeed the leaders of the French school, have drawn their spirit and their form, from the tragic writers of Attica – they forget that Moliere and even Shakespeare himself have plundered from Plautus and Terence – plundered, it must be confessed, not like robbers, but like conquerors.²⁰

In what follows, I briefly describe the extent and nature of that plundering before exploring how it constituted an emulative aesthetic practice, one largely defined and defended in prefaces to printed editions of play texts.



Perhaps more than any other characteristic, the prevalence and function of British plays in the early American repertory has led scholars to dismiss much

¹⁹ William Dunlap, *The Italian Father: A Comedy, in Five Acts* (New York: David Longworth, 1810), front matter, http://gateway.proquest.com/openurl/openurl?ctx_ver=Z39.88-2003&xri:pqil:res_ver=0.2&res_id=xri:ilcs-us&rft_id=xri:ilcs:ft:amdram:Z000614835:0 [accessed January 23, 2014].

²⁰ Isaac Harby, *A Selection from the Miscellaneous Writings of the Late Isaac Harby, Esq. to Which Is Prefixed, a Memoir of His Life, by Abraham Moise* (Charleston: Henry L. Pinckney and Abraham Moise, 1829), 257.

antebellum theatre as “mere hackwork”; “Anglophile, imitative, even servile”; or “not American at all.”²¹ This repertory, along with the nationalities of many antebellum managers and actors, leads McConachie to characterize one of Philadelphia’s most important theatres as “essentially a provincial outpost of the London stage” throughout the 1820s, a belief shared by Arthur Hornblow, who claims America had no dramatic literature “up to Forrest’s time.”²² Simon Williams extends Britain’s dominion even later, writing that “for the first century of its existence, the early American theatre was essentially an offshoot of the British theatre.”²³

James Fenimore Cooper argues, however, that “the authors, previously to the revolution, are common property, and it is quite idle to say that the American has not just as good a right to claim Milton, and Shakspeare [*sic*], and all the old masters of the language, for his countrymen, as an Englishman.”²⁴ Indeed, Cooper continues, Shakespeare is “the great author of America” (113). Much of the nineteenth-century American repertory bears this out, as Lawrence Levine convincingly shows in *Highbrow/Lowbrow: The Emergence of Cultural Hierarchy in America*. Philadelphia audiences in 1811-1812, for example, were treated to consecutive seasons in which

²¹ Robinson, 72; Richards, “Politics, Playhouse, and Repertoire,” 200; James C. Burge, *Lines of Business: Casting Practices and Policy in the American Theater, 1752-1899* (New York: Peter Lang, 1986), 97.

²² McConachie is describing the Chestnut Street Theatre. McConachie, “William B. Wood,” 2; Arthur Hornblow, *A History of the Theatre in America from Its Beginning to the Present Time* (Philadelphia: J. B. Lippincott, 1919), 48.

²³ Simon Williams, “European Actors and the Star System in the American Theatre, 1752-1870,” in Wilmeth and Bigsby, 304.

²⁴ James Fenimore Cooper, *Notions of the Americans: Picked up by A Travelling Bachelor* (Philadelphia: Carey, Lea, & Blanchard, 1838), 2:100, <https://openlibrary.org/books/OL20446380M> [accessed January 23, 2014].

exactly one-quarter (twenty-two of eighty-eight, and twenty-seven of 108) of the performances were devoted to nine of Shakespeare's plays.²⁵ Of the ten most performed pieces in Philadelphia, Charleston, and New Orleans between 1816 and 1831, four were Shakespeare's; the number one position was occupied by *Richard III* (Grimsted, *Melodrama Unveiled*, 252). In those same cities over the next twenty years the Bard again held four of the top ten slots, though Richard's throne had been usurped by Edward Bulwer-Lytton's *Lady of Lyons* (254). Plays from Continental Europe also drew well. In the 1799-1800 season, William Dunlap's most successful as a manager, the Park Street Theatre's ninety-four performances were "dominated by French and German plays – fifty-two of Kotzebue's melodramas alone," nearly all of them translated and adapted by Dunlap himself (Richardson, 265).

France was also a particularly rich source for antebellum dramatists. Mordecai M. Noah's first "regular attempt at dramatic composition" was *The Fortress of Sorento*, which includes a statement acknowledging that its principal characteristics are taken from the French opera of *Leonora*.²⁶ James N. Barker introduces his comedy *How to Try a Lover* by explaining that he was indebted to one of the novels of Pigault-Lebrun for the basic plot of his comedy.²⁷ And the first of Richard Penn

²⁵ They plays were *Macbeth*, *Richard III*, *King Lear*, *Hamlet*, *Othello*, *Romeo and Juliet*, *Merchant of Venice*, *Coriolanus*, and *Katherine and Petruchio* (Quinn, *History*, 162).

²⁶ Noah's characterization is described in his letter to Dunlap, printed in Dunlap, *History*, 2:320. M. M. Noah, *The Fortress of Sorento: A Petit Historical Drama, in Two Acts* (New York: David Longworth, 1808), front matter, http://gateway.proquest.com/openurl/openurl?ctx_ver=Z39.88-2003&xri:pqil:res_ver=0.2&res_id=xri:ilcs-us&rft_id=xri:ilcs:ft:amdram:Z000619157:0 [accessed January 23, 2014]. Another of Noah's plays, *Paul and Alexis, or the Orphans of the Rhine*, was adapted from Pixérécourt's *Le Pelerin Blanc ou les Orphelins du Hameau* (Quinn, *History*, 193).

²⁷ James Nelson Barker, *How to Try a Lover. A Comedy. In Three Acts* (New York: David Longworth, 1817), front matter, http://gateway.proquest.com/openurl/openurl?ctx_ver=Z39.88-

Smith's plays to be performed, *Quite Correct*, was based on British author Theodore Hook's adaptation of two French comedies (Quinn, *History*, 206). Smith's work demonstrates that foreign sources were valuable even when dealing with explicitly native themes: he turned directly to a French melodrama by Frédéric du Petit-Méré for portions of *The Eighth of January*, a hastily-written treatment of General Andrew Jackson's victory at the Battle of New Orleans produced shortly before Old Hickory's inauguration in 1829.²⁸

While he was the first American playwright to translate and adapt a significant number of European dramas, William Dunlap was hardly the last. Of the playwrights who relied heavily on translation, John Howard Payne was perhaps the most prolific. Something of a child prodigy, before the age of fifteen he had started one of the nation's first periodicals devoted to theatre criticism (the *Thespian Mirror*) and written a play that was performed at the Park Street Theatre (*Julia, or the Wanderer*).²⁹ His second play was an adaptation of Kotzebue's *Das Kind der Liebe* called *Lovers' Vows*. His immediate source was not the German text, however, but two other English translations, from which he pulled the most theatrically effective elements. This technique would become something of a hallmark for Payne, and is

http://gateway.proquest.com/openurl/openurl?ctx_ver=Z39.88-2003&xri:pqil:res_ver=0.2&res_id=xri:ilcs-us&rft_id=xri:ilcs:ft:amdram:Z000612471:0 [accessed January 23, 2014].

²⁸ Richard Penn Smith, *The Eighth of January, a Drama, in Three Acts* (Philadelphia: Neal & Mackenzie, 1829), preface, http://gateway.proquest.com/openurl/openurl?ctx_ver=Z39.88-2003&xri:pqil:res_ver=0.2&res_id=xri:ilcs-us&rft_id=xri:ilcs:ft:amdram:Z000622038:0 [accessed January 23, 2014]. In all, Smith drew on French sources for nearly half of his twenty plays (Quinn, *History*, 205-219).

²⁹ The *Thespian Mirror* was published between December 1805 and March 1806; *Julia, or the Wanderer* was performed February 7, 1806. See Quinn, *History*, 164-165.

best seen in one of his most successful plays, *Brutus; or, The Fall of Tarquin*. Surveying seven extant dramatic treatments of the story, only two of which had been performed, Payne wove elements from each into an effective whole; reflecting on this accomplishment, Quinn praises “the deftness and dramatic instinct with which the born playwright and actor combined plays which had either had little success on the stage or had even been denied representation into one of the most successful and long-lived tragedies of the nineteenth century.”³⁰

More than any other antebellum American dramatist, Payne’s career reveals the potential and pitfalls of this reliance on adaptation. His *Brutus* was first produced at London’s Drury Lane Theatre in 1818, as Payne, unhappy with the acting opportunities open to him, had left America five years earlier. He spent the next twenty-five years in England and France, where he wrote between fifty and sixty plays, many of them adaptations and translations. In the mid-eighteen-teens, he was sent to Paris by Drury Lane and told to forward back to England adaptations of the most successful new French dramas. For a time in the 1820s, he worked for the Covent Garden Theatre, which paid him both a salary (three-hundred guineas) and a commission on each play he translated (£50 each, £200 if the play were actually produced) (Quinn, *History*, 170). Managers in America established relationships with the London theatres and produced Payne’s translations in America within months of their premiers. By 1831, the *Boston Transcript* notes that there were, during any given season, an average of twenty-five Payne plays performed on Boston stages

³⁰ Quinn analyzes the connections between Payne’s source materials and his finished play in his *History*, 170-174.

(Quinn, *History*, 184). Payne made relatively little off his creations, however, and his attempt at management landed him in debtors' prison. Fittingly, he was able to write his way out when he translated two French manuscripts sent to him during his incarceration, one of which became *Thérèse*, which earned him enough to make good his debts (174-175).

Different forms of "translation" were also employed with English dramas. In 1828, James Hackett, who would make a career out of playing versions of the Yankee character, adapted George Colman's *Who Wants a Guinea?* into *Jonathan in England*, transforming Colman's Solomon Gundy – a "cockney maloprop" – into the New Hampshire Yankee Solomon Swap.³¹ Despite having flopped in an earlier British tour, Hackett tried again in 1832, bringing with him the Americanized comedy. While London audiences preferred their "Yankee" characters to be interpreted by British actors (particularly Charles Mathews), the opportunity to see an American performer embodying this most American of types held novelty appeal.³² Yet Hackett's choice was also risky: as with any new piece intended for the London stage, his script would have to be approved by the Examiner of Plays; in 1832, this was none other than George Colman, his source material's author. The prompt copy he submitted to Colman was literally a published 1808 edition of *Who Wants a Guinea?* so covered with penciled revisions, excisions, and additions that it was

³¹ Francis Hodge, "Yankee in England: James Henry Hackett and the Debut of American Comedy," *Quarterly Journal of Speech* 45, no. 4 (December 1959), 385.

³² Yankee characters on the London stage are treated in the second chapter of Maura L. Jortner, "Playing 'America' on Nineteenth-Century Stages; Or, Jonathan in England and Jonathan at Home" (PhD diss., University of Pittsburgh, 2005).

difficult to read.³³ While Colman noted Hackett's name was "most appropriate," given the American's treatment of his play, he nevertheless grudgingly approved it, which suggests how unremarkable such re-working was (quoted in Hodge, 383). Doubling-down on the potential insult to his English audiences, Hackett announced he would pair *Jonathan in England* with *The Militia Muster*.³⁴ Hackett based this short farce on a song from British actor Charles Mathews' *A Trip to America*, a travelogue whose treatment of Americans, in general, and Yankee figures, in particular, is far from charitable (Hodge, 387). His adaptations, while largely unsuccessful in London, proved phenomenally enduring on the other side of the Atlantic, where Hackett played Solomon Swap more than five-hundred times, helping make the play one of the most popular in America prior to 1850.³⁵

British and American novels were also a fertile source for dramatic inspiration, particularly the work of Cooper; of his first ten novels, all but two were adapted for the stage (only one by his own hand).³⁶ In 1828, for example, Philadelphia publishers Carey and Lea announced that *The Red Rover* was nearly

³³ The prompt copy is described in Jortner, 154n107.

³⁴ *The Militia Muster* is a condensed version of Hackett's *Down East, or the Village Gazette*. Jortner discusses the various iterations of *Down East* on 161-165.

³⁵ When the evening of its premier came, Hackett's production of *Jonathan in England* was waylaid by Bill Downton, one of the local actors who performed in it. In the words of a newspaper critic, Downton's vulgar, ad-libbed jokes were "so gross and disgusting" that "no modest woman could listen to them without feelings of shame and disgust" (quoted in Hodge, 387). In spite of this, Hackett managed to make it through the entirety of the main piece without being hissed offstage (a feat he had been unable to accomplish on his previous, disastrous English tour). The afterpiece, however, met with cries of "off, off." Nevertheless, Hackett continued his tour for seven months, earning the begrudging respect of London audiences for his comedic performances (Jortner, 174-175). For claims regarding the popularity of *Jonathan in England*, see Hodge, 390.

³⁶ Josephine Fishman's unpublished thesis chronicles these productions and analyzes changes made in adaptation in "The Dramatization of the Novels of James Fenimore Cooper" (Master's thesis, Stanford University, 1952).

ready for delivery. Wemyss, then stage manager of the Chesnut Street Theatre, mused that if “a copy of the novel could be procured, in advance of the publication, and a nautical drama, founded upon it, it would be productive, both of reputation and money” (150). Having assured the publishers that no one but the company members would see it, Wemyss managed to obtain a copy of the novel, and offered Samuel Chapman \$20 per performance if he would dramatize it. Chapman did so, and both men were quite pleased with the result: it played ten times that season, leading Wemyss to gush, somewhat hyperbolically, “never in any theatre, was a more successful piece produced” (ibid.)³⁷ Cooper’s *The Water Witch* was taken up by Richard Penn Smith two years later, and Smith’s adaptation “passed off with *éclat*, and then passed on to the manager’s shelves” (187).³⁸ This was the second adaptation of the novel, as Charles W. Taylor’s version opened in New York in March of that year (Meserve, *Heralds*, 15). Finally, in 1831, James S. Wallace crafted a third *Water Witch*, this one for the new Arch Street Theatre.³⁹

³⁷ It was also performed seventeen additional times at five different theatres in Philadelphia and New York through 1870 (Fishman, 83-84). It is unclear how many of those Chapman was paid for, but he almost certainly would have earned his commission on each of the performances in its first year, yielding the tidy sum of \$200. Chapman also adapted Cooper’s *The Wept of Wish-Ton-Wish* in 1830 (Charles Durang, John Durang, and Thompson Westcott, *History of the Philadelphia Stage between the Years 1749 and 1855* (S.l.: s.n., 1868), 274).

³⁸ Smith also adapted Cooper’s *The Bravo* under the title *The Venetian*, which was produced in 1849 (Quinn, *History*, 213).

³⁹ It opened on December 17, 1831, and had played eight times by month’s end. It reappeared the following month, playing on January 4th, 6th, and 12th; returned on February 22nd and 20th; and was brought back yet again on February 19 and December 23, 1833. These performance are recorded in a manuscript draft of the unpublished *History of the Arch St. Theatre Philadelphia*, written by Charles N. Mann, 1900, Rare Book Department, Free Library of Philadelphia. While it is labeled as “volume 1,” there is no indication subsequent volumes were completed.

Chapman's practice, particularly his reliance on novels as a source material, was common among house dramatists. One of the most successful of these playwrights was Louisa Medina, all of whose thirty-four known adaptations were based on novels. Several of her plays established some of the earliest records for lengthy runs, as well. Rosemarie K. Bank states that Medina's adaptation of Edward Bulwer-Lytton's *Pompeii* ran for twenty-nine performances in 1835 (with a single interruption), the longest run in New York to that time, and her 1836 adaptations of *Norman Leslie* and *Rienzi* each ran for twenty-five performances.⁴⁰ In his history of the New York theatre, Joseph N. Ireland describes her "great talent as a dramatist," praising Medina's "happy faculty of seizing the most prominent points of a story and putting them into a dramatic shape, and while she rarely mutilated the original plot, contrived to throw a deeper interest and effect over the whole."⁴¹ The *New-York Mirror* (April 28, 1838) observes that her "power of composition is said to be astonishingly rapid," and the fact that all thirty-four of her plays were written in the span of five years suggests that, had she not died suddenly at age twenty-five, she might well have surpassed Dion Boucicault's monumental oeuvre.⁴²

⁴⁰ Rosemarie Bank, "Theatre and Narrative Fiction in the Work of the Nineteenth-Century American Playwright Louisa Medina," *Theatre History Studies* 3 (1983), 61.

⁴¹ Joseph N. Ireland, *Records of the New York Stage from 1750 to 1860* (New York: T. H. Morrell, 1866), 2:89, <http://asp6new.alexanderstreet.com.proxy-um.researchport.umd.edu/atho/atho.detail.resources.aspx?docid=S10017131-D000007&output=full> [accessed January 23, 2014].

⁴² Montrose Moses claims Boucicault wrote more than four-hundred plays during his forty-nine year career (158). One of his biographers advances a more modest figure of "more than 200" (Richard Fawkes, *Dion Boucicault: A Biography* (London: Quartet Books, 1979), xv). The *Oxford Companion to American Theatre* puts the number between 120 and 150 (Gerald Bordman, ed., *The Oxford Companion to American Theatre* (New York: Oxford University Press, 1984), 97). Even using Moses' inflated number, Medina's pace was certainly on par with Boucicault's. The "astonishingly

The adaptation and appropriation displayed in *The Contrast*, as well as the examples discussed above, were not expeditious shortcuts demanded by the exigencies of artisan dramaturgy, but rather defining characteristics of a defended and quasi-theorized aesthetic tradition, and crucial to the practice of bespoke playwrighting. As Harby declared, if playwrights plundered the work of their predecessors, they did so “not like robbers, but like conquerors.” As I discuss in the following section, it was a practice marked by an emulative drive to “improve” on foreign materials by tailoring them for specific American audiences. As noted, antebellum copyright law not only permitted this practice, but explicitly protected it by statute, and plays were only one channel in a much larger flood of printed material crossing the Atlantic. It was part of a “culture of reprinting,” according to Meredith McGill’s *American Literature and the Culture of Reprinting, 1834-1853*, which its supporters defended by invoking the republican belief that informed participation in the body politic requires the widespread dissemination of knowledge.

Act II. Like Conquerors!; or, Emulative Originality

In his preface to the second edition of *Charles the Second*, Payne addresses misapprehensions regarding the authorship of his play, which has

been claimed by different persons in the public papers on the ground of their having produced translations of the French original, which has been performed at the minor theatres. In reply to this, I would observe that I have never seen any of these translations. My play was written last autumn at Paris. It was founded on a printed copy of “La Jeunesse de Henri V,” of which a number of editions have appeared. The incidents and situations are nearly the

rapid” pace at which bespoke playwrights worked is an important characteristic of the form, which will be addressed more fully in chapter 2 (Act III.iii).

same, but the dialogue differs *essentially* throughout, especially in the part of Captain Copp.⁴³

To Payne, his *Charles the Second* was as distinctive and unique a creation as each of the other translations he references.⁴⁴ For Payne and other antebellum dramatists, the mere fact of a play's being "founded on a copy" was absolutely compatible with its status as "a new thing," and did not, in and of itself, undermine claims to authorship or challenge the proprietary relationship between author and creation. What mattered was that the adaptation was *essentially* different. This section explores the emulative drive to exceed and surpass that inspired many bespoke playwrights. It examines how antebellum dramatists defined "essential" so as to allow them to trumpet their originality while simultaneously listing the (sometimes extensive) borrowings on which it relied. Finally, it discusses the relative merits of originality for antebellum playwrights and critics, and the reasons so many dramatists turned to external sources for inspiration.

The preface to John Neal's 1819 play *Otho* guides this discussion, as do the prefaces to other printed editions of plays (all of which were performed, with the exception of Neal's piece). I also draw on critical responses to those performances. It could be argued that the defense of originality these prefaces advance reveals not an underlying rationale or theory of playwrighting so much as anxiety over a potential

⁴³ John Howard Payne, *Charles the Second: Or, The Merry Monarch. A Comedy in Two Acts* (New York: William Taylor & Co., 1846), front matter, http://gateway.proquest.com/openurl?ctx_ver=Z39.88-2003&xri:pqil:res_ver=0.2&res_id=xri:ilcs-us&rft_id=xri:ilcs:ft:amdram:Z000619655:0 [accessed January 23, 2014]. Emphasis mine.

⁴⁴ Payne's skill in such undertakings was, according to Quinn, his "prime characteristic," and he was a master of "borrowing what would be theatrically effective, and reshaping it to make of it a new thing, and his ability in this direction amounted almost to genius" (*History*, 187).

breach of tradition or an attempt to rationalize a perceived deficiency. If, as I argue, the types of appropriation discussed here comprise an important and distinguishing feature of antebellum American theatrical production, why would playwrights bother to mention originality at all? It is important here to recall the distinction between the primary medium of the bespoke playwright – the manuscript – and the printed texts that circulated outside the theatres. By publishing their plays, these men (and, though in much smaller numbers, women) were not contributing to a *theatrical* tradition so much as seeking to project their creations into a *literary* one. In one sense, then, these texts hardly seem ideal evidence of the practice of bespoke playwrighting; regardless of their origins, they were ultimately preserved in and shaped by/for the conventions of a fundamentally different expressive form. In short, they were intended for readers, rather than viewers.

Yet they still have tremendous value (though not primarily as direct evidence of theatrical practice or audience taste, as they are sometimes treated by scholars of nineteenth-century American theatre). Several of the playwrights I discuss below were skilled in crafting dramas that were quite successful in performance, among them Noah, Smith, and, perhaps most prominently, Payne. In such cases, published texts are the precipitates of performances devised by individuals who understood American audiences and knew how to craft dramatically effective plays. The fact that several advertise they were “taken from the prompter’s book” suggests another purpose of publication, one further embodied in the stage directions that frequently augment the dialogue: they were, in effect, intended to translate something essential between the two mediums. Publishing was an attempt to mediate between the

immediacy of live performance and the material, textual artifacts that yet bore some trace of their genesis and development in what Herbert Blau has termed the “blooded thought.”⁴⁵ Part of that translation, I suggest, involved a desire to communicate to readers something of the process and theory of constructing plays. That they so often address at length the relationship between originality and source material suggests an awareness of the strictures and conventions of a printed medium regulated by copyright laws; they were, in effect, explaining that what might be infringement in a literary context was, in fact, an essential practice of the artisan dramaturgy and the creative process of the bespoke playwright.

II.i. *Otho*’s Originality

In the sprawling preface to his play *Otho: A Tragedy, in Five Acts*, John Neal discusses his influences at length, acknowledging “It is probable that I may be charged with imitating Maturin, in his *Bertram*; Lord Byron, in all his heroes, little and big; together with all the pirates, murderers, felons and knights of the modern school.”⁴⁶ This he freely admits, declaring that “so far as I am conscious of the imitation---I shall confess it:---not to disarm ---but to invite and provoke the censure of those who have manhood enough in their natures to feel indignant at imitation” (ibid.). Neal details each of his influences in an explicit, if circuitous, fashion, describing his reasons for adopting certain character traits, plot points, and poetic constructions. Yet he proceeds to apologize for a particular instance of imitation in

⁴⁵ Herbert Blau, *The Dubious Spectacle: Extremities of Theater, 1976-2000* (Minneapolis: University of Minnesota Press, 2002), 51.

⁴⁶ John Neal, *Otho: A Tragedy in Five Acts* (Boston: West, Richardson, and Lord, 1819), iv, <http://openlibrary.org/books/OL23446901M> [accessed January 23, 2014].

his play – his re-creation of a memorable passage from Byron’s dramatic poem *Manfred* – lamenting that “the resemblance will strike all I suppose, and as I feel ashamed of it---heartily ashamed of it, I take this opportunity to confess that, *that* I believe to be imitated” (v-vi, emphasis in original). Why this apparent ambivalence? Why Neal’s vacillation between claims to originality and expressions of shame for certain appropriations? The answers to these questions reveal important characteristics of the ways antebellum playwrights created “original” material from extant sources.⁴⁷

There are actually three relatively distinct classes of “imitation” at play for Neal, which might be thought of as the *general*, the *particular*, and the *presumptive*. The first consists of those Byronic and melodramatic types and tropes casually mentioned in Neal’s list of “pirates, murderers, felons and knights of the modern school.” As well, Neal acknowledges his plot structure is informed by his frequent theatergoing and echoes the structures of “the melo-dramas---the German Cabalistic--Romances---of the stage” (viii). It was this category that actor and playwright John Brougham, who made a career out of cleverly traducing popular tragedies and melodramas, refers to when he declares that his *The Dark Hour before Dawn*, “although constructed avowedly in imitation of the modern ‘French School,’ owes its origin to no play, novel, story, or any other more important source than the invention--such as it may be---of the individuals whose names are appended to it as THE

⁴⁷ I use Neal to frame my discussion not because he was an important playwright (he wrote a single play, likely never produced), or even one of the bespoke school. Rather, his lengthy preface provides a rich opportunity to explore a broader understanding of the role of originality in the work of the playwright that many contemporaneous writers shared.

AUTHORS.”⁴⁸ It was a sensitivity to this sort of imitation that led one contemporary to determine that, with regard to the playwriting of the day, “all was servile imitation or lifeless reproduction...[which has] either had a local or a personal adaptation, which precluded those general elements that were essential to strength and permanence.”⁴⁹ Before further addressing this category, which is the most revealing when it comes to understanding how antebellum critics and playwrights viewed originality, I will briefly discuss *particular* and *presumptive* imitation as Neal understood them.

It is in the character of Neal’s hero, Otho, that an instance of *particular* imitation is most evident. What Neal terms the “general character of the hero” is reminiscent of the heroic type common to tragedies (and to a lesser degree, melodrama), and, more specifically, to the character of “Bertram, whom Otho more closely resembles” (Neal, vi). As Neal explains, one reason for the likeness between Otho and Charles Maturin’s title character in his 1816 play *Bertram* is that Neal had tailored the role of Otho specifically for the actor Thomas A. Cooper, whom Neal had just seen play Bertram “better than I ever saw him play any thing else” (ibid.). For Neal, this performative mediation – Bertram via Cooper – sufficiently attenuates the relationship between the two fictional characters, eliminating the need for any shame. Further, Neal notes that, notwithstanding any similarity between his hero and other

⁴⁸ John Brougham and Frank B. Goodrich, *The Dark Hour Before Dawn. A Play in Five Acts* (New York: S. French, 1858), front matter, http://gateway.proquest.com/openurl?ctx_ver=Z39.88-2003&xri:pqi:res_ver=0.2&res_id=xri:ilcs-us&rft_id=xri:ilcs:ft:amdram:Z100749627:1 [accessed January 23, 2014].

⁴⁹ “Memoir of Mr. Edwin Forrest,” signed “B.B.,” unbound pages, Richard Penn Smith Papers, Rare Book and Manuscript Library, University of Pennsylvania.

characters, “the *distinguishing* characteristics of Otho are peculiar and original. He is desperate---like Bertram, I admit; but to me his desperation seems to have a more elevated---a more terrible sublimity in it” (Neal, vii, emphasis in original). Neal draws on a costuming metaphor to explain that, while “there are such resemblances in the outline---drapery---and perhaps in the configuration of my hero, to others of his race,” he has assembled more general traits into a *particular* character, which for him meets the test of originality (ibid.).

In examining his list of influences, it becomes clear that one of Neal’s primary concerns is not borrowing per se, but rather that some of it may have been inadvertent. He carefully documents his influences and parses degrees of originality with an earnestness bordering on the compulsive, suggesting that it is not (avowed) appropriation that is problematic, but rather dissembling about it. To acknowledge one’s sources of inspiration is manly; to deceptively try to pass them off as one’s own is shameful. To varying degrees, this conviction is echoed by other antebellum playwrights, as well. Barker, for example, highlights specific points of intersection between his 1812 play *Marmion* and the Sir Walter Scott poem that inspired it, resolving these relationships to the level of individual speeches: “This resemblance is principally to be found in the trial of Constance, the first soliloquy of Marmion in the fourth act, the parting scene between the abbess and Clara, the meeting of Clara and Wilton, and, above all, in the scene of Marmion’s death.”⁵⁰ Barker acknowledges that

⁵⁰ James Nelson Barker, *Marmion; or Floddon Field. A Drama, Founded on the Poem of Walter Scott [from the First London Edition, of 1812.]* (New York: The Longworth’s, 1812), 4, http://gateway.proquest.com/openurl?ctx_ver=Z39.88-2003&xri:pqil:res_ver=0.2&res_id=xri:ilcs-us&rft_id=xri:ilcs:ft:amdram:Z000612507:0 [accessed January 23, 2014].

“many persons may undoubtedly be disposed to censure a plagiarism of this description,” yet he argues that,

as the foundation of the story is *avowedly* borrowed from another, I hope that I shall meet with indulgence for having sacrificed an appearance of originality to the advantage of employing sentiments and expressions which every lover of poetry must confess to be striking and appropriate. (*Marmion*, 4, emphasis added)

Payne, too, discloses that he had not hesitated to adapt the “conceptions and language of my predecessors” when he felt they could strengthen his own work, explaining that his citation “has been so done as to allow of no injury to personal feelings or private property. Such obligations to be culpable must be secret.”⁵¹ The particular process of acknowledging one’s sources – the “so done” work of Payne’s preface – is intended to insulate him from culpability or charges of theft. It is only, or at least primarily, in the attempt to conceal one’s burgling that actual injury may occur, which explains in part the frequent documentation of source material common to prefaces of printed texts.

The specific instance of *presumptive* imitation that so concerned Neal involves the first appearance of his hero. Neal’s stage directions for the beginning of Act II set the scene: “Night. Prison---A clouded moon; Otho seen gazing upon it in an attitude of profound contemplation. Clank of fetters heard as he unfolds his arms and stretches his hands towards the skies. No light in the prison” (43). The hero, knowing his life is forfeit, cries out in anguish, “Farewell! Farewell!” (ibid.). Neal took his

⁵¹ John Howard Payne, *Brutus; or, The Fall of Tarquin. An Historical Tragedy, in Five Acts* (New York: David Longworth, 1819), preface, http://gateway.proquest.com/openurl?ctx_ver=Z39.88-2003&xri:pqil:res_ver=0.2&res_id=xri:ilcs-us&rft_id=xri:ilcs:ft:amdram:Z000619615:0 [accessed January 23, 2014].

inspiration for the moment from Byron's dramatic poem *Manfred*, in which the titular hero also bids a celestial body farewell on the eve of certain death. Byron's hero is far more loquacious than Neal's, as Manfred soliloquizes for more than a page in praising the "Glorious Orb! the idol/Of early nature, and the vigorous race/Of undiseased mankind."⁵² This evocative image of a man confronting his imminent demise, devastated not by the loss of his life but the knowledge that it means eternal separation from the exquisite glory of the natural universe, impressed itself deeply on Neal, who described it as "so commanding---so alone in its supernatural uplifting---so above the common reaching of the Drama" (v). For Neal, re-creating the essential, affective potential of this scene was too *presumptuous* an appropriation of such a singular, inimitable, and sublime image. He was not reluctant to borrow particular ingredients to be used in the creation of an original effect, but rather the effect itself.⁵³

It is important to note, however, that Neal's shame at *presumptive* appropriation was not one shared by the majority of his playwriting colleagues, many of whom saw the dramatist's task as precisely one of taking effects generated by fictive works in one medium – poetry, novels, foreign plays, etc. – and translating them into the language and conventions of the American stage. Barker, for example, seems to have been engaged in such a process with *Marmion*. Having read Scott's poem with "attention and pleasure," Barker wondered if an "equal effect" could be

⁵² Lord [George Gordon] Byron, *The Dramatic Works of Lord Byron* (New York: A. V. Blake, 1840), 34, <https://openlibrary.org/books/OL7216702M> [accessed January 23, 2014].

⁵³ This reluctance was not so compelling that Neal omitted the scene, however, as he continues by acknowledging that: "With such feelings, if sincere, one would expect that I should strike out the objectionable scene, or at least new model it: but the truth is, I like the scene---and though it is not altogether original, I still think there is enough originality in it to redeem it" (vi).

produced on the stage by altering the tale so as to make it more dramaturgically effective (*Marmion*, 3).⁵⁴ And Noah, in much the same way Smith used French melodrama as a vehicle for his patriotic treatment of General Jackson's victory at New Orleans, turned to a similar source for *The Grecian Captive*, "with the view of placing in a strong and effective light the dangers and sacrifices of our revolutionary soldiers---the hazards they encountered---the privations they suffered---the pains and penalties of their devotion to the sacred cause of liberty."⁵⁵ For both men, their patriotic content was particularly effective when paired with the vivid, emotional excess provided by the melodramatic form that had emerged in turn-of-the century France to perform a similar function. Indeed, one of the primary tasks of translators/adapters of foreign drama was precisely to take particularly effective moments and incidents and stitch them into the fabric of new works.

Returning to the category of *general* imitation, which Neal was so eager to defend, it is worth noting that these similarities have led some scholars to dismiss or disparage American playwriting. Wilmeth, for example, writes of the "excrescences of sentimentality, hackneyed clichés, stereotypical characters, and the general lack of intellectual underpinning found in many early American plays" (*Staging*, 1). Moses, too, sees American dramatists awkwardly aping British models, suggesting playwrights "never attempted, in the main, to reflect the spirit of their own time; but

⁵⁴ This involved contracting the time between the revelation of the forged letter implicating Ralph de Wilton in treason and de Wilton's subsequent exile, and lessening the ambivalence in the character of Constance de Beverley by making her punishment less severe.

⁵⁵ M[ordecai] M. Noah, *The Grecian Captive* (New York: E. M. Murden, 1822), preface, http://gateway.proquest.com/openurl?ctx_ver=Z39.88-2003&xri:pqil:res_ver=0.2&res_id=xri:ilcs-us&rft_id=xri:ilcs:ft:amdram:Z000619164:0 [accessed January 23, 2014].

they tried to infuse into a romantic invention some of the oratorical fustian which had a manner, and little else” (115). It is this “manner, and little else” that Grimsted correctly identifies as belonging to the conventional aspects of dramatic writing and performance, noting that “American drama failed because it did not break away from the conventions borrowed from, or shared with, Europe” (*Melodrama Unveiled*, 165). At its most basic, *general* imitation is essential to the phenomenon and function of genre; what Neal feels comfortable adopting and what some scholars see as a pejorative are those fundamental characteristics of a form that distinguishes it as such. If this sort of imitation were problematic it would put the antebellum dramatist – and, indeed, nearly any playwright, if the implicit criteria of the aforementioned critics are to be taken at face value – in an awkward position, certainly in light of Michael Goldman’s observation that “the first function of genre is that it be recognized” (quoted in Carlson, 6). At what point does writing in a form become unoriginal? When does creation *in* a tradition become cliché? Different scholars, of course, would answer this question in various ways, though most relevant here is how antebellum Americans conceived of the relationship between genre and originality.

In addition to the views of playwrights, which will be addressed shortly, contemporaneous critics can provide important insights into this dynamic relationship. Their responses existed on a continuum of tolerance towards imitation. At one end sniped critics like the anonymous writer in the *Portico, a Repository of Science & Literature*, who laments that “we adopt [England’s] practices, imitate her corruptions, and play nothing but her pieces; if her Stage is prostituted to the

puerilities of Spectacle, ours will also share the same deformity” (May 1, 1817).⁵⁶ A concern for the superficiality of these imitations is shared by a *Spirit of the Times* (NY) columnist who declares that the stage is like “a gorgeously-bedizened [*sic*] skeleton, a magnificent appearance of humanity, but wanting the vitality, the *soul* of the living creation” (January 21, 1843). In *The American Review*, Longfellow’s *The Spanish Student*, a dramatic adaptation of Cervantes’ *La Gitanilla*, comes under scathing criticism for the nature of the material Longfellow appropriates, leading the critic to conclude that “originality, as it is one of the highest, is also one of the rarest of merits. In America it is especially, and very remarkably rare” (1845, 2:126).

Midway along this continuum are critics willing to grant that material crafted in emulation of previous models might have some merit. *The Dial* begrudgingly acknowledges that a few contemporary plays benefit from their resemblance to canonical dramas, glowing in the reflected light of the “genuine fire” of the “master geniuses” (1844, 4:307).⁵⁷ Some critics saw such imitation as a necessary stage in the development of a distinctive American literary tradition, a juvenile tactic that allowed fledgling writers to find their wings with the assistance of established forms. Such a

⁵⁶ There were two general prescriptions advanced by those who bemoaned the degraded state of American drama: one was the active support of native dramatists and performers (which frequently involved calls to abolish the star system and/or reform management practices), and the other, which tended to fade in frequency over the period of this study, was a return to the “standard comedy and legitimate tragedy” of the recent past. Such is the position of this *Portico* critic, whose concern is with the contemporary state of the English theatre, rather than the country itself, and who recommends that since “the English have banished *Massinger, Jonson, Shakespeare, Otway, Congreve, and Young*; let us afford them a sumptuous asylum, in the American theatres.”

⁵⁷ Ultimately, however, the essayist concludes that “it is not because the touch of genius has roused genius to production, but because the admiration of genius has made talent ambitious, that the harvest is still so abundant” (4:307).

creative mode was hardly unique to America, as critics took pains to point out. For example, James K. Paulding, in the *American Quarterly Review*, observes

that all nations in their progress to maturity have enriched their literature, in the first instance, by borrowing. This has been the foundation of their national literature, which adapting what it borrowed to their peculiar habits, manners, language and opinions, at length by degrees infused into it the national spirit and genius. The Americans have been accused of imitating English literature, as the English borrowed and imitated the Italian and French; and as the Italian and French, in the first instance, borrowed from and imitated the Greeks and Latins. So goes the world, and so it will ever go. We begin by imitating, and end in setting up for ourselves as originals.⁵⁸

A luster provided by extant models was more likely to be excused in the context of new plays by native authors, defects of which critics frequently overlooked or treated with kid gloves. While Jürgen C. Wolter goes too far in claiming that “a play dealing with national events or written by an American was never received objectively, let alone condemned,” his observation certainly reflects a tendency, if not an axiom (14).⁵⁹ The *New-York Mirror*’s review of *The Gladiator*, for example, exhibits unusual delicacy in pointing out that Bird’s tragedy “has fallen into several trivial errors, which, as it is a first piece, it would be scarcely fair to dwell on. Here and there we note a probability a little violated, a situation not altogether new, or a period which has a tinge of similarity to something we have read elsewhere” (November 12, 1831). Until American authors grow out of the infancy, recommends *The American Review, and Literary Journal*, “it may be deemed proper that those labours which are

⁵⁸ Quoted in Jürgen C. Wolter, *The Dawning of American Drama: American Dramatic Criticism, 1746-1915* (Westport: Greenwood Press, 1993), 87.

⁵⁹ Wolter’s is one of the few treatments of American dramatic criticism to venture earlier than 1850. While also valuable, the focus of Tice L. Miller’s *Bohemians and Critics: American Theatre Criticism in the Nineteenth Century* (Metuchen: Scarecrow Press, Inc., 1981) deals primarily with the second half of the nineteenth century.

meant to contribute towards its support and improvement, should not only be exempted from the severity of criticism, but should be received with kindness and encouragement” (January 1, 1801, 1:64). American playwrights, themselves, also hoped for such sympathetic nurturance, though as Barker’s preface to *The Indian Princess* reveals it was not always forthcoming:

Dramatic genius, with genius of every other kind, is assuredly native of our soil, and there wants but the wholesome and kindly breath of favour to invigorate its delicate frame, and bid it rapidly arise from its cradle to blooming maturity. But alas! poor weak ones! what a climate are ye doomed to draw your first breath in! the teeming press has scarcely ceased groaning at your delivery, ere you are suffocated with the stagnant atmosphere of entire apathy, or swept out of existence by the hurricane of unsparing, indiscriminating censure!....But do not, O goody critic, apply the birch, because its unpracticed tongue cannot lisp the language of Shakspeare [*sic*], nor be very much enraged, if you find it has to creep before it can possibly walk.⁶⁰

Critics more tolerant of what Grimsted calls the “imitative originality” of American dramatists sometimes echoed the arguments of many of the playwrights themselves.⁶¹ Noah, for example, believes that native dramatists “cannot, in this country, and while occupied in other pursuits, spring up over night like asparagus, or be watered and put in the sun, like a geranium in a flower pot.”⁶² “Wait till we have a publisher, who will give us one thousand guineas for a work,” he promises, and

⁶⁰ James Nelson Barker, *The Indian Princess: or, La Belle Sauvage* (Philadelphia: G. E. Blake, 1808), preface, http://gateway.proquest.com/openurl?ctx_ver=Z39.88-2003&xri:pqil:res_ver=0.2&res_id=xri:ilcs-us&rft_id=xri:ilcs:ft:amdram:Z000612486:0 [accessed January 23, 2014].

⁶¹ Grimsted sees this characteristic in an array of native dramatists, though he writes here particularly of George H. Boker (*Melodrama Unveiled*, 155).

⁶² M[ordecai] M. Noah, *She would be a Soldier; or The Plains of Chippewa* (New York: Longworth, 1819), preface, http://gateway.proquest.com/openurl?ctx_ver=Z39.88-2003&xri:pqil:res_ver=0.2&res_id=xri:ilcs-us&rft_id=xri:ilcs:ft:amdram:Z000619189:0 [accessed January 23, 2014].

native talent will quickly bloom (*The Grecian Captive*, preface). Isaac Harby also draws on a botanical metaphor in calling for evenhanded treatment of his play *The Gordian Knot* (which he based on an Italian novel and one of its dramatizations). Native productions, he argues, should not be “elbowed from their proper sphere of exhibition” by spiteful critics, but rather sheltered, so that “the cold which almost withered a rose-bud, may hereafter blast a noble tree, whose shade might shelter, and whose branches ornament the soil it grew on.”⁶³ And Paulding expresses his aspirations for *The Bucktails; or, Americans in England* by declaring that “the foundation must be laid, however weak and unfinished, and a hope, not indeed very sanguine, is entertained that this experiment may at least be sufficiently successful to stimulate others better qualified to excel.”⁶⁴

Opposite those who revile “servile” imitation are critics whose views on originality align most directly with antebellum theatrical practice and exhibit a particular understanding of imitation’s foundational role in theatrical production. These defenders of both the drama and its reliance on extant material frequently position their work as a direct response to those who disparage the practice of borrowing, in particular, and the degraded nature of the drama, in general. For example, in a piece entitled “The Drama As It Is,” William Cox disgustingly explains

⁶³ Isaac Harby, *The Gordian Knot: Or, Causes and Effects, a Play, in Five Acts* (Charleston: Gabriel M. Bounetheau, 1810), x, http://gateway.proquest.com/openurl?ctx_ver=Z39.88-2003&xri:pqil:res_ver=0.2&res_id=xri:ilcs-us&rft_id=xri:ilcs:ft:amdram:Z000616037:0 [accessed January 23, 2014].

⁶⁴ James K. Paulding, *The Bucktails; or, Americans in England* (Philadelphia: Carey and Hart, 1847), front matter, http://gateway.proquest.com/openurl?ctx_ver=Z39.88-2003&xri:pqil:res_ver=0.2&res_id=xri:ilcs-us&rft_id=xri:ilcs:ft:amdram:Z000619448:0 [accessed January 23, 2014].

that “there are few subjects, if any, that have elicited a greater flow of mere words, than what is termed the ‘decline of the legitimate drama,’” calling it “one of the most approved and enduring themes extant for small declamation.”⁶⁵ Cox sarcastically attributes such bloviating to “‘smart young men’ and unfledged scribblers” who engage in “little frothy vituperations against the bad taste of the public, and the intellectual depravity of managers, actors, and modern authors” (26). These dramatic jeremiads are the work of the “profoundly ignorant,” according to Cox, who castigates the “witless” censures of men who fail to understand the innervating role of both the familiar and the novel in the dramatic undertaking (26-27). He cites the allegory of a French king who is confronted by a “worthy ecclesiastic’s” condemnation of the sovereign’s dalliance with someone other than the “lovely queen.” After inquiring of the priest’s favorite meal (partridge), the king imprisoned the sanctimonious scold for a fortnight, providing him with thrice-daily deliveries of the bird. When the clergyman begged for anything other than his once-beloved meal, he was brought before the king, who inquired of his change of palate. “Partridges are excellent,’ quoth the friar, ‘but *always* partridges!’ ‘The queen is excellent,’ retorted his majesty, ‘but *always* the queen!’” (29). Cox implies that the prescriptions of those

⁶⁵ Originally written for the *New-York Mirror*, Cox’s piece was reprinted in several newspapers in 1829 and was subsequently published in a collection of his essays titled *Crayon Sketches. By an Amateur*, ed. Theodore S. Fray (New York: G.P. Scott and Co, 1833), 2:26, http://books.google.com/books?id=5_oOAAAIAAJ&printsec=frontcover [accessed January 23, 2014]. A number of other defenders of the drama join Cox in remarking on the prevalence of such dirges. The *New-York Mirror*, for example, sarcastically notes that “The cry is heard, and ‘Echo from her thousand caves’ repeats it, that the drama is on the decline, and will shortly be extinct” (July 18, 1840). The *Spirit of the Times* (NY) references the “many croakings with which we have been affected concerning the decline of the Drama” (April 6, 1844), while the *Knickerbocker* sighs with relief that “the cant which ever and anon is doled forth in whining phrase of the ‘decline of the drama’ has been hushed for the time” (1845, 26:574). See also Wolter, 16-17.

seeking to cure the “ailing” drama echo the dictates of the pious priest, and that “Shakespeare, *always Shakespeare*” would surely surfeit audiences with a uniform diet (30). He extends the metaphor by observing that

the mind of man requires a variety of intellectual food, the same as his stomach requires a variety of animal nutriment; and that mind is perhaps the healthiest, and that stomach the strongest, that can enjoy themselves off whatever is set before them: what they lose in extreme delicacy, they make up for in vigour. (31)⁶⁶

The sweet meringue of a familiar, pantomimic afterpiece does not lessen the richness of a Shakespearean entrée, but rather balances it, both contributing to a healthful yet satisfying experience.

⁶⁶ Despite his avowedly catholic taste, Cox cannot stomach other “unmitigated evils” of the stage, particularly the mania for real water and fire in special effects, or the introduction of jugglers or children. Cox was not alone in drawing on culinary and gastronomical metaphors, which were commonly deployed by those assessing the health and function of the theatre (which seems appropriate, given the underlying metaphor of “taste” that tends to structure discussions of aesthetic criteria). The *Spirit of the Times* (NY) proposes that each theatre provides a different style of dish: “the one serves the feast with an offering of nationality, garnished with trimmings of a lighter order; another sets down his platter – an *olla podrida* of nationality, interspersed with seasoning of fancy and horror, while a third attracts attention from a mighty composition of mingled ingredients – wit, humor, and burlesque” (April 6, 1844).

Opponents of the stage also referenced audiences’ theatrical “consumption.” The editor of the *Knickerbocker*, in a recurring section appropriately titled “Editor’s Table,” writes: “Like a spoiled school-boy, who, instead of studying his primer, smacks his lips over a stolen repast of sugar-plums and bons-bons, and afterward refuses the wholesome dinner that is placed before him – so this good public, having vitiated their healthy appetite by extravagant spectacle, melo-dramatic absurdities, and other grossly physical exhibitions, can no longer enjoy the strong intellectual food which nature and truth were wont to spread before them” (1836, 8:239). The dramatic critic for the *Corsair* laments that “the eye and the ear have been feasted, whilst the heart and the understanding have been allowed to linger without nourishment” (July 27, 1839). The *New-York Mirror* complains that “public taste requires variety; and, no matter how great the talent may be, constant repetition palls the appetite, and people sigh for a change” (February 29, 1840), a diagnosis echoed by *Brother Jonathan*, which records that “the public taste, as regards theatrical performances, has become morbid and unhealthy – the tone of the stomach is partially destroyed, and they require strong stimulants to excite it to action” (1843, 5, 8:234). And an 1840 article in the *New-York Mirror* suggests that “the worthy public may rather be likened to a fine healthy boy, whose stamina are good, but who, like a patient lubber, submits to every kind of food that ignorance or mistaken kindness pours down his throat, until, crammed to repletion, his digestive organs deranged, and his palate out of order, he craves that which will but make him worse” (July 18, 1840).

Many of Cox's views are shared by a writer in the *Spirit of the Times*, whose 1855 article "Originality in Dramatic Writing" is one of the most extensive treatments of the subject in antebellum journalism. The essay exposes the underlying inspirations for much of the Western dramatic canon. Sophocles and Euripides took their plots from Aeschylus. Terence relied on translated Greek comedies. Shakespeare's works "were almost all founded upon the legends, novels, poems, and plays of other writers" (*King Lear*, *Hamlet*, *Macbeth*, *Richard III*, and *Othello* are specifically called out), and "whole speeches in his historical plays we read *verbatim* in Speed's Chronicles."⁶⁷ Wycherley, Congreve, and Cibber all cribbed their plots from other plays, while Sheridan's *The Rivals* was condemned by its first critics for being "made up of all the old materials that had had, time out of mind, possession of the stage" (ibid.). And Bulwer and Sheridan Knowles would have floundered had their libraries been stripped of French and German plays. The author cites this history not to disparage the work of these dramatic giants, but to point out the absurdity of critics who would denigrate the contemporary stage for its reliance on other materials, "as if the merit of the dramatist consisted in the invention of a plot, instead of being what the very etymology of the word 'dramatize' shows it conclusively to signify; to give a composition the form of a drama!" (ibid.).

To "dramatize" is less to generate than assemble, and the *Spirit of the Times* writer draws on a recurring metaphor to explain the relationship between inspiration and instantiation: Shakespeare, seeing the "stage effect" of those plays on which he

⁶⁷ "Originality in Dramatic Writing," *Spirit of the Times* (NY), April 7, 1855. Hereafter "Originality in Dramatic Writing."

built his tragedies, “took them as the skeletons of his own composition, adding to them the thew, the sinew, the muscle, the expression of his poetry” (“Originality in Dramatic Writing”). Dramatic originality, the writer concludes,

may very well consist with the use by the play-wright of the plot, the machinery, the skeleton furnished him by the novelist, the poet or the dramatist who has preceded him. It is his business to put spirit, soul, life, action, into that skeleton, and to clothe it with beauty and grace and expression. And if he does this, he may wear the crown he wins without being disturbed by the railings of the envious, the jealous, or the ignorant. (ibid.)

Paulding offers a more pragmatic explanation for the appropriation of existing material, arguing that it is, in fact, the necessary foundation on which more singular contributions may be constructed: “It has always, however, been customary for dramatic writers to borrow the groundwork of their plays, and long prescription justifies the practice. By having the incidents ready prepared to his hand, a writer is at full liberty to give the whole force of his genius to the thoughts, sentiment, and dialogue” (*American Quarterly Review*, 1827, 1:352). Originality in bespoke playwrighting, then, is to be found in the work of bringing together so many diverse elements and assembling them in such a way as to create something new; that some of those materials may have been invented and used by others does not in and of itself deny the possibility of original creation. As Neal understands originality, the characters in his play “are original: not in their materials---for that were impossible---but in the combination of those materials. And that is all we have a right to ask. Men are always the same in the stuff of their natures---and differ only in its oppoitionment [*sic*]” (Neal, viii).

James Lawson, a New York editor and close friend of Edwin Forrest whose tragedy *Giordano* was produced in 1828, refutes a common complaint that “every

scene, and every character that nature has formed in her gravest or most fantastic mood, has already been pictured in every variety of coloring,” thus ensuring that “all those who now attempt to draw character or depict scenery, are but adumbrations of writers of the present time, or of a former age.”⁶⁸ Not so, declares Lawson, referencing Nicolas Boileau-Despréaux’s maxim that “wit, and fine writing, do not consist so much in advancing things that are new, as in giving things that are known an agreeable turn” (quoted in Lawson, 8). “They who say our thoughts are not our thoughts, because they resemble [those of] the ancients” continues Lawson, here quoting Alexander Pope, “may as well say, our faces are not our own, because they are like our fathers” (quoted in Lawson, 8).

The most successful of the antebellum bespoke playwrights appreciated and defended a particular definition of “originality” and lauded the dramatic author’s ability to draw on a range of material in fashioning disparate elements into something that inspired affective experiences for audiences. They understood that while the skeletal form of the drama might be pieced together from antecedent works, it is the dramatist who “bodies forth” a new, living, singular creation. As the next chapter explores, the power (and peril) of those creations often inhered in the intimate relationship between a play and the immediate conditions of its performance.

⁶⁸ James Lawson, *Tales and Sketches by a Cosmopolite* (New York: Elam Bliss, 1830), 7, <http://books.google.com/books?id=hY4TAAAYAAJ&printsec=frontcover> [accessed January 23, 2014].

Chapter 2

The plays of the present day, too, are not written for the world – they are at best but mere outlines of a certain class of society – the tracing of the light vapors that float in its atmosphere, and are in themselves as ephemeral as the materials of which they are composed – they are generally replete also with local allusions and points, which are not understood, and cannot be appreciated by those who are ignorant alike of the people and the country.

–*Brother Jonathan* (1843, 6, 8:216)

PUFF. The pruning-knife – zounds! – the axe! Why, here has been such lopping and topping, I shan't have the bare trunk of my play left presently! Very well, sir – the performers must do as they please; but, upon my soul, I'll print it every word.

–Richard Brinsley Sheridan's *The Critic* (56)

In the fall of 1844, Philadelphia audiences looking for an evening's entertainment could choose between three theatres: the Walnut Street, the Arch Street, and the Chesnut Street. Each was still recovering from the Panic of 1837, which had resulted in part from the policies of Andrew Jackson.¹ Theatres had initially fared quite well, due to managerial policies and admission costs that made bank notes impractical, leaving theatres flush with valuable specie.² And, as Kenneth

¹ In the waning days of his administration, Jackson had issued an executive order known as the Specie Circular. Real estate speculation had exploded in the 1830s, fueled in part by the new land “acquired” through Jackson’s Indian removal policies. Many of these land sales were paid for not with “hard money” (the federal government at the time did not print any form of paper currency), but through a variety of notes issued by private, state-chartered, commercial banks. These notes fluctuated wildly in value, and by the mid-1830s, there was, in effect, a real estate “bubble” – a large number of land purchases backed by inflated currency that often exceeded the land’s actual value. The Circular declared that, going forward, the government would only transact large land sales in specie (actual gold or silver coinage); bank notes would no longer be accepted. The value of those notes immediately plummeted, contributing to the collapse of the banking industry and a severe depression. See Daniel Walker Howe, *What Hath God Wrought: The Transformation of America, 1815-1848* (New York: Oxford University Press, 2007), 503-504.

² Those policies sometimes frustrated patrons, however. Wemyss, for example, refused to give out specie as change when selling tickets, infuriating some of his customers in the early days of the Panic (though not enough to keep them from buying tickets) (277-278). As for admission prices, in 1844, Burton had opened the Arch Street in the summer at rates below the prevailing average – \$.50 for the boxes, \$.25 for the pit – forcing Wemyss to follow suit. See Durham, 54.

Cohen relates, the low cost of attendance made theatres an affordable entertainment, at least before the depths of the depression, turning the theatre business into an attractive investment opportunity for those not ruined by the initial shock of the panic; more than half a dozen new theatres opened in New York, Philadelphia, Boston, and Baltimore between 1837 and 1840.³ As the extent and duration of the depression became obvious, however, their fortunes changed, and the frequent turnover that characterized the tenures of antebellum theatre companies accelerated. Further pressure came in the form of literary and scientific lectures that appeared as an alternative, and cheaper, form of entertainment in the early 1840s. The *New Mirror*, commenting on the state of the drama on April 8, 1843, decried the race for ever more inexpensive forms of entertainment, noting that lectures “are now carried to such an extent, embracing so many subjects and so many lecturers, at from fifty cents down to a shilling admittance, that indifference, if not disgust, will follow, and some new attraction must be offered to the million.”

Philadelphia theatre managers could do little to directly compete with the lectures, though each sought to differentiate his venture from those of his rivals. William E. Burton, who leased the Arch Street for a summer season beginning the first of June, pitched his appeals to audiences who typically found theatre-going too coarse. He announced in the local papers he would “abolish the third-tier nuisance” – a euphemism for the prostitutes who advertised for clients in the darkest reaches of

³ Kenneth Cohen, “‘To Give Good Sport’: The Economic Culture of Public Sporting Events in Early America, 1750-1850” (PhD diss., University of Delaware, 2008), 490-491.

the theatres – by promising to expel any woman of the town.⁴ He also ended the sale of alcohol in the adjoining saloons, a significant source of profit for most theatre owners.⁵ In an advertisement in the *Public Ledger*, he explained his potentially risky decisions as intended to entice “the more frequent attendance of families who may depend upon experiencing at the Arch Street Theatre a wholesome entertainment of the highest character, without the possibility of witnessing any impropriety on or off the stage” (June 1, 1844). The move paid off: he managed to compile a solid company of comic actors with whom he battled Ethelbert A. Marshall’s Walnut Street Theatre all summer, and was successful enough to lease the Arch for the 1844-1845 season beginning in September.

Marshall had built a solid reputation at the Walnut by maintaining a strong company and investing in lavishly-produced melodramas. By mid-century, it was considered Philadelphia’s preeminent house (Durham, 534). He was able to charge more than his competitors, with boxes topping out at \$.75 instead of the usual \$.50. Each of the two theatres had an established identity, therefore, by the time Wemyss and his former managing partner Lewis T. Pratt were coerced into leasing the Chesnut Street. The depression had resulted in “the flight of the fashionable from the immediate Chestnut Street vicinity”; seeking to distinguish his company from its rivals, Wemyss chose to appeal to a broader, less affluent audience who may not have

⁴ Quoted in Rue Corbett Johnson, “The Theatrical Career of William E. Burton” (PhD diss., Indiana University, 1966), 214.

⁵ That Burton was able to make such an arrangement is an indication that the theatre’s owners were desperate for a lessee. See David L. Rinear, *Stage, Page, Scandals, and Vandals: William E. Burton and Nineteenth-Century American Theatre* (Carbondale: Southern Illinois University Press, 2004), 81-82.

been in the habit of regular theatre attendance (Durham, 198).⁶ T. D. Rice's tour, which witnessed the raccoon incident discussed in the introduction, was one part of that appeal, as the Jim Crow antics of Rice rarely failed to draw a raucous crowd.

On October 31, 1844, Philadelphia audiences had the opportunity to respond to the competition by expressing their gratitude to one of two performers who were receiving benefits.⁷ At the Arch, Fred S. Meyers had chosen the provocatively titled *Whigs and Democrats*; when Burton had produced the same play for his own benefit in 1839, he accompanied it with assurances that "the political allusions throughout the Comedy are not of an offensive nature to either party."⁸ T. D. Rice chose *Otello* and *Bone Squash Diavolo* for his benefit, both popular vehicles for his signature blackface performances. Rice's seems by far the tamer choice, given the targets of his satirical performances: Shakespeare's tragedy and the antics of grossly caricatured African Americans. As discussed in my introduction, however, it was one of his comic operas that proved the more incendiary, with Rice's raccoon co-star nearly inciting a riot, while *Whigs and Democrats* went off without a hitch. How did an explicitly political show performed on the eve of hotly-contested election make for a pleasant evening at the theatre, while a trained mammal nearly started a riot?

⁶ Again, while the theatre was located on Chestnut Street, advertisements at the time used the "Chesnut" spelling.

⁷ "Benefit" performances were offered to actors, playwrights, or, occasionally, for charitable causes. They typically allowed the beneficiary to keep any profits beyond the basic operating expenses of the theatre. See Grimsted, *Melodrama Unveiled*, 146-147.

⁸ Heather S. Nathans notes that this performance coincided with the Whigs' national convention in Harrisburg. See Heather S. Nathans, *Slavery and Sentiment on the American Stage, 1787-1861: Lifting the Veil of Black* (Cambridge: Cambridge University Press, 2009), 77. Burton had also produced the play at the Front Street Theatre in Baltimore on the eve of the 1840 Democratic convention, being held in the same city (*Baltimore Sun*, May 4, 1840).

In proposing an answer, this chapter explores another of the defining characteristics of antebellum American theatre that proved so frustrating to the playwrights who agitated for copyright reform: the remarkably intimate, responsive, and reflexive relationship between theatrical performances and the specific conditions of their production. As suggested by the *Brother Jonathan* writer quoted in this chapter's epigraph, what audiences saw when they went to the theatre were not plays "written for the world," but performances crafted for specific audiences under conditions that rewarded immediacy, relevance, and accommodation to local conditions. Focusing on the raccoon incident, *Whigs and Democrats*, and a near-riot at the Chesnut Street Theatre, I explore the dynamism that topicality imparted to artisan dramaturgy, as well as its potential dangers and limitations.

Act III. What's in a Name? *Whigs and Democrats*; or, No Politics to Love!

In order to understand the potentially incendiary nature of *Whigs and Democrats*, it is necessary to examine the intense partisanship that characterized the election of 1844. Tension between the two major parties – the Whigs and the Democrats – dated back to the former party's founding in the early 1830s.⁹ The name "Whig," intended to evoke images of the British anti-Tory party of the same name, coalesced around opposition to "King Andrew the First," whose trouncing of John Quincy Adams in 1828 had helped clarify divisions between various factions of the Republicans. Throughout the 1830s, a range of perennial policy issues defined and

⁹ These origins are succinctly described in the first chapter of Michael H. Holt's magisterial *The Rise and Fall of the American Whig Party: Jacksonian Politics and the Onset of the Civil War* (New York: Oxford University Press, 1999), 1-18.

divided each party: the Democrats were (rhetorical) advocates of a small federal government, against protective tariffs, against federal funding of internal improvements, and for the continued expansion of the nation across the continent. Whigs held a greater appreciation for the importance of central authority, including its ability to levy strategic tariffs to promote the economic health of particular industries (and, by extension, the nation) and to fund internal improvements such as canals and post roads; they were generally against further geographic expansion. As James M. McPherson succinctly states it: “While the Democratic notion of progress envisioned the spread of existing institutions over *space*, the Whig idea envisaged the improvement of those institutions *over time*.”¹⁰ It was conflicting views on the geographic expansion favored by the Democrats that came to a head in the election of 1844.

In early 1844, Martin Van Buren was expected to once again be his party’s nominee for president. His efforts as the “Little Magician” had been essential to the founding of the Democratic Party and the rise of Andrew Jackson (though he ultimately proved far more adept at building a political machine than running one). Never enamored of the rhetorical posturing against parties that had characterized much of the nation’s early existence, Van Buren firmly believed that political parties were essential to maintaining harmony in an increasingly large and diverse nation. Seeking to revive the “old contest” between the Republicans and the Federalists, Van Buren sought to fashion inter-sectional party alliances between the “planters of the

¹⁰ James M. McPherson, *Battle Cry of Freedom: The Civil War Era* (New York: Oxford University Press, 1988), 49. Emphasis in original.

South and the plain Republicans of the North” (quoted in Howe, 279). His strategy paid off in spades, netting the Democrats the presidency and both houses of Congress in 1828, and earning him a position as Jackson’s chosen successor.

While the financial crisis he inherited in 1837 was hardly of his own making, his poor handling of it doomed Van Buren’s four years in office, earning him the sobriquet “Martin Van Ruin” and providing the Whigs a winning issue to pursue in the 1840 contest (Howe, 505). While much has been made of the contrast between the hard-cider campaign of Indian-fighter William Henry Harrison and the “cold, aloof” Van Buren, Daniel Walker Howe calls much of this “mindless hoopla,” and suggests a Democratic contemporary writing to the defeated president correctly identifies the primary reason: aftershocks to the 1837 panic, “and no other cause whatever, has elected [Harrison] and would have elected any other man” (quoted in Howe, 576). After a brief withdrawal following his defeat, Van Buren and his allies “worked hard to maintain his place at the top of the coalition he had done so much to build,” and, despite grumbling from members of the party eager for new blood, most Democrats still anticipated Van Buren would once again be their candidate.¹¹ Throughout 1844, however, that grumbling grew louder, particularly in response to Van Buren’s views on an issue that had taken center stage following the death of Harrison.

President Harrison had called a special session at the beginning of his term to begin enacting an ambitious Whig legislative agenda, as his party had also swept control of both houses of Congress. The Whigs’ triumph was short-lived, however, as

¹¹ Joel H. Silbey, *Storm over Texas: The Annexation Crisis and the Road to Civil War* (New York: Oxford University Press, 2005), 62.

Harrison died less than a month into office. John Quincy Adams, who had served as a Whig member of the House since 1831, had been particularly elated at Harrison's victory (or, more precisely, at Van Buren's defeat), given Adams' trouncing at the hands of Jackson in 1828 was in part orchestrated by the "Little Magician." His disappointment at Harrison's death turned to outrage, however, when he learned that Harrison's running mate, John Tyler, was calling himself "president in fact and title," which Paul C. Nagel notes was questionably constitutional at the time.¹² Tyler was only nominally a member of the Whig Party, and he quickly parted ways with his erstwhile colleagues in Congress. Being called "His Accidency" galled Tyler, and he was committed to being elected in his own right in 1844. As Joel H. Silbey observes, Tyler needed a key issue around which to mobilize support: "his instrument for creating the necessary momentum in his favor was to accomplish the annexation of Texas to the United States, the popularity of which, he believed, would break the stranglehold that the major parties had on the electorate" (Silbey, 30).

Tyler's ambitions did, indeed, upset the plans of both parties. The Whig candidate in 1844, Henry Clay, was opposed to annexation for the same reasons as the rest of his party. Van Buren also wanted to avoid the subject, however, as he feared it would unsettle the inter-sectional coalition he had worked so assiduously to maintain. The union of the "lords of the loom" – northern Whigs in textile manufacturing who relied on Southern cotton – with the slave-owning "lords of the lash" was beginning show cracks, and Van Buren was wary of increasing internal

¹² Paul C. Nagel, *John Quincy Adams: A Public Life, a Private Life* (Cambridge: Harvard University Press, 1999), 382. The ambiguous title and powers of a vice president in Tyler's position were not clarified until 1967 when the 25th amendment was passed.

party pressures. Tyler's insistence on acquiring Texas, however, put Van Buren in a difficult position, given many Democrats wanted to press claims in Texas (as well as in the Oregon Territory), and Van Buren's ambivalence infuriated some in his party. An ill-advised letter to a fellow Democrat on the subject of Texas was, for many, the last straw, particularly given it revealed Van Buren's position was not all that dissimilar to that of Clay.¹³

While Van Buren entered the Democratic convention in Baltimore as the front runner, he had generated enough opposition that his selection was hardly a fait accompli. A coordinated group of detractors seized control of the convention in its opening moments and managed to push through a motion requiring a two-thirds majority vote to receive the nomination.¹⁴ This effectively assured Van Buren's defeat, as he lacked the necessary support, which became ever-clearer with each ballot. A compromise candidate – James K. Polk, who had entered the convention as the likely vice presidential nominee – ultimately prevailed. Clay and the Whigs were initially giddy at the upset, exulting that “we must beat them with ease if we do one half of our duty” (quoted in Holt, 173). Yet Polk proved remarkably adept at harnessing popular enthusiasm for acquiring Texas and standing up to the British in the Oregon Territory, ensuring that expansion was one of the key issues in the upcoming election.

¹³ See Silbey's “We Cannot Cary Virginia For You” chapter for a nuanced analysis of the Texas issue and the 1844 election (52-79).

¹⁴ Ironically, the rule was first introduced by Van Buren at the 1832 Democratic convention to emphasize support for him as Jackson's Vice President and heir-apparent (Silbey, 68).

With Van Buren gone, Clay's hopes of avoiding Texas were dashed. Out of a desire to avoid alienating Southern Whigs, who viewed expansion as essential to the preservation of slavery, he was forced to moderate his position and express support for some form of annexation, provided it was feasible "without dishonor – without war, with the common consent of the Union, and upon just and fair terms" (quoted in Silbey, 76). The preferred focus of the Whigs, however, was still very much the contrast between the two parties' economic policies, which had proven a winning strategy for them four years earlier. The approach of both campaigns was fundamentally divisive, as each sought to sharpen the distinctions between the two candidates. Clay advised Pennsylvania Whigs to emphasize the contrast between himself and Polk, writing: "If by such an exhibition of our respective views Pennsylvania remains unmoved, I know not what would operate upon her" (quoted in Holt, 175).

Philadelphia in 1844 was a contentious mix of Democrats, who generally held the district seats, and Whigs, who enjoyed a majority in the city.¹⁵ This volatile combination was complicated by a third party, the nativist American Republicans. In the summer of that year, tensions between the xenophobic, predominantly Protestant nativists and the Irish, predominantly Catholic immigrant population erupted in bloodshed in May and July, resulting in the deaths of dozens of people and hundreds of thousands of dollars in property damage. The violence was both ethnic and political in origin, as Jonathan Earle explains: the "overwhelming fear of a corrupting

¹⁵ Michael Feldberg, *The Philadelphia Riots of 1844: A Study of Ethnic Conflict* (Westport: Greenwood Press, 1975), 9.

capitalist aristocracy” that Jackson played on in both his campaigns and his two terms in office had, by 1844, begun to morph into suspicion and outright hostility towards foreigners.¹⁶ Fears of an immigrant conspiracy to subvert the cherished democratic process were used to mobilize nativist voters and rally them to safeguard “their” polls, and, if the pitched battle playing itself out in the Philadelphia papers was any indication, tensions were high going into the election that would begin on November 1st.¹⁷

This was a day after Meyers teased audiences with a play called *Whigs and Democrats* and Rice was foolish enough to retain a reference to a raccoon. Rice’s mistake is easy to understand. As noted in my introduction, the raccoon was not simply a raccoon – like any political symbol in the first half of the nineteenth century, it was a complex and overdetermined sign. Given that American minstrelsy is replete with raccoon references, it seems likely Rice intended no political commentary by the animal’s appearance, and was simply performing the piece as he always had.¹⁸ But what about the choice to produce *Whigs and Democrats; or, Love of No Politics?*

¹⁶ Jonathan H. Earle, *Jacksonian Antislavery & the Politics of Free Soil, 1824-1854* (Chapel Hill: University of North Carolina Press, 2004), 131.

¹⁷ The general election of 1844 was the last in which the dates of the election could vary by state. In January of 1845, Congress mandated future presidential elections take place on the first Tuesday following the first Monday in November. See Act of January 23, 1845, ch. 1, *Stat. II*, <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=005/llsl005.db&recNum=0758> [accessed January 23, 2014].

¹⁸ In describing the ruckus, the *Spirit of the Times* (Philadelphia) opined “we cannot think Mr. Rice intended any political allusion by the introduction of the animal, though on the eve of the election the introduction was an indiscreet one” (November 1, 1844). Whether he anticipated such an impassioned reaction or not, Rice was certainly not above introducing topical political material into his performances. In 1833, for example, he inserted verses referencing Jackson’s veto of the Second Bank of the United States’ charter into one of his Jim Crow songs: “But Jackson he’s the President/As ebery body knows;/He always goes de hole Hog./And puts on de wee-toes” (quoted in Raymond A. Saraceni, “A Philadelphia Story: Refinement and Resistance on the Nineteenth-Century Philadelphia Stage” (PhD diss., Tufts University, 2009), 176).

III.i. Partisanship Pruned!; or, The Wisdom of Burton

Whigs and Democrats was published anonymously in 1839 by Virginian James E. Heath, who served for several years as a state representative before assuming the post of Virginia's State Auditor in 1819, which he would hold for the next thirty years. He also penned a critically acclaimed yet commercially unsuccessful novel set in the Revolutionary War, and for a time edited the well-regarded *Southern Literary Messenger*, a journal that published some of the early stories of Edgar Allan Poe. Of Heath, Poe would write that he was "almost the only person of any literary distinction" residing in Richmond.¹⁹

The play is set in rural Virginia on the eve of an election for a seat in Congress. The Democratic incumbent, General Fairweather, arrives to visit his friend, Roundtree, a Major of the militia whom Quinn describes as a "local boss" (*History*, 284). Roundtree has several members of the "democracy" under his sway (a group of rustics with fittingly allegorical names such as "Chipps," "Rowdy," and "Bangall") and Roundtree assures his friend General Fairweather that he will do everything in his power to ensure a victory over the Whig challenger, Mr. Manly. Fairweather is not above bribing potential voters with chewing tobacco, liquor, or even a new schoolhouse, citing as his justification the maxim that "A statesman should take care of the public, and for so doing the public should take care of him" (Heath, 27). Roundtree's daughter Catherine – recently away pursuing what her father believes is a ridiculously expensive education – has secretly fallen in love with Fairweather's

¹⁹ Edgar Allan Poe, *The Complete Works of Edgar Allan Poe* (New York: Fred de Fau, 1902), 25:241.

son, Henry. When the General finds out his son intends to marry “the vulgar progeny of a tavern-keeper,” who is “a low, pot-house politician – a clownish Major of Militia,” he explodes, revealing his true “aristocratic” stripes (Heath, 56). Roundtree is similarly incensed upon learning of his supposed friend’s duplicity, exclaiming: “Odds bother it! This pretended democrat is a rank federalist in disguise – but I’ll fix his flint for him” (58). Fairweather ultimately loses the election. Properly chastened, he renounces his demagoguery and declares that, henceforth, he “shall endeavor to practice those various duties which are enjoined of a social, moral and created being” (80).

While Heath jabs at representatives of both parties, the Whigs emerge from the fray with far fewer scratches, accused of little more than being inflexibly virtuous and too enamored of “aristocratic” habits such as the education of women. Additionally, Heath’s text decides the election in favor of the Whig candidate, Mr. Manly, and concludes with a curtain speech in which Fairweather, in effect, apologizes for being a Democrat, admitting the mere lip-service he had formerly paid to the egalitarian rhetoric of his party’s founders. Such was the text Heath published anonymously in 1839.

However, that edition was markedly different from the one that was performed at the Arch that October evening, as revealed by an extant copy of Burton’s prompt-book.²⁰ The revisions he made may be grouped into two general

²⁰ The prompt-book is held in the Rare Books and Manuscripts division of the Boston Public Library. As noted, there were multiple performances of *Whigs and Democrats* between 1839 and 1844. As such, it is possible the prompt-book was cut for one of the pre-1844 productions of *Whigs and Democrats*. However, the prompt-book contains evidence of multiple “layers” or rounds of revisions, specifically of material that was amended but then later struck. Given managerial practices in this period, the prompt-book would have been retained by Burton to be used for future productions, and

categories. The first consists of cuts to redundant passages or obscure literary references that generally serve to tighten the dramatic structure and make for a livelier piece of theatre, but have little substantive effect on the content of the play. The second category consists of specific words and speeches with explicit political content, as well as a significant change to the play's ending.

As noted, Heath exhibits a bias towards the Whig position, one that Burton likely found untenable given the political climate late in 1844. While several of Heath's feistier jabs at the Whigs were removed – among them references to Whigs as wicked, slippery, “everything odious and detestable,” inveterate Whigs, and “rank federalists” – the majority of cuts were to those elements most critical of Democratic ideology or of the hypocrisy exhibited by some Democratic leaders such as Van Buren. For example, Fairweather poses this rhetorical question to his son, Henry: “Don't you know that these notions of human equality are mere empty speculations, and that we are obliged to take men, not as we would have them to be, but as we find them in reality?” (Heath, 26). While Fairweather concedes that the Whigs may indeed be fine fellows who follow the convictions of their hearts, he argues that they must still be held up to public hatred, asking Henry: “Else, how is it possible for our party to get along?” (29). Henry, who his father admits exhibits “a strong leaning to Whiggery,” is unmoved, declaring: “*Your* party, if you please, sir. As for me, I will never belong to any party whose creed would confound all distinction between public profligacy and private virtue; or whose principles would rebuke dishonesty among

further revised as needed to meet the demands of a particular context or company of actors. Given there are no known post-1844 performances of the play by Burton, it is likely that the version at the Boston Public Library is the one used for the 1844 performances.

individuals and yet tolerate and applaud it in governments” (Heath, 47, 29). Burton likely concluded that such sentiments, however artfully phrased, would have been too inflammatory for the stage of the Arch, and each was cut from the production.

He also altered Heath’s treatment of voting. Far from a sacred duty or a right of all Americans, the franchise becomes – for the members of the democracy in Heath’s Virginia – a burden from which the common-man must be rescued. In another passage that Burton removed, Roundtree boasts: “I think I’ve got the boys in good training hereabouts. I can make them wheel to the right or to the left with as much ease as I muster my battalion. I’ve only to blow a horn, and the rogues swarm around me like bees in summer time” (33). In Heath’s original, the local schoolteacher, Supine, sarcastically mocks this practice: “This is democracy with a vengeance! The Major is very kind to them in one respect however – he saves them the trouble of thinking” (73).

Perhaps the most significant change made by Burton was his decision to drop the last page and a half of the play. As previously noted, Heath’s text dictates Fairweather be beaten by the more honorable Whig candidate; in Burton’s production, Fairweather consents to his son’s marriage with Roundtree’s daughter, and then the curtain falls, with the outcome of the election still unsettled. There were, of course, pragmatic reasons to cut such a reference – to include it would be akin to making a prediction as to the outcome of the following day’s vote. But there no doubt would have been more immediate repercussions had Burton staged the ouster of a Democratic candidate from office as a crowd of Whigs looked on – in all likelihood, a chorus of “chicken-cocks” would have been the least of his concerns.

III.ii. Upon the Furor of the Moment!; or, Audiences Take the Stage

The treatment Heath's play received from Burton's pen was hardly unusual. Indeed, given the nature of antebellum production practices, it is unlikely any published text was ever performed as written. Even Shakespeare, the single most performed playwright in antebellum America and a man whose works were familiar to many Americans in performance and as literary texts, was routinely cut, consolidated, and even re-written. Between 1816 and 1831, the most popular play in Philadelphia, Charleston, and New Orleans was Colley Cibber's revision of *Richard III*. As Lawrence Levine explains, Cibber cut one-third of Shakespeare's lines and more than half of his characters, added scenes from Shakespeare's *Henry* plays, and even included his own verse, thus "muting the ambiguities of the original and focusing all of the evil in the person of Richard."²¹ Grimsted discusses in detail the various reasons Shakespeare's plays were cut in *Melodrama Unveiled*, which included a desire to reduce length, eliminate anachronistic or inappropriate language, better align the plays with contemporary political sentiments, or create more suitable starring vehicles (Grimsted, 111-122). If the Bard were so casually "improved," contemporary dramatists looking to sell a play could hardly expect better treatment. John Murdock, a Philadelphia hairdresser with theatrical ambitions, complained in the *Philadelphia Gazette and Universal Daily Advertiser* that his play, *The Triumphs of Love*, was "shoved into the world most unmercifully dissected, by what was called by

²¹ Lawrence W. Levine, *Highbrow/Lowbrow: The Emergence of Cultural Hierarchy in America* (Cambridge: Harvard University Press, 1990), 43.

the Managers, ‘necessary expunging’” (February 24, 1796).²² Dunlap lamented the practice, glumly noting that “the vice of imprudently altering and adding to an author has always existed and is increasing in proportion to the increase of our theatres and the decline of the Drama” (1:156).

More than simply pre-production editing, revising texts in rehearsal was a defining characteristic of artisan dramaturgy. In part, such alterations were a result of limited rehearsal time and the nature of the repertory system. In an 1827 essay titled “The Author’s Preface,” Leman Thomas Rede explains the life of an actor, who is required to

study about *five hundred lines per diem*...this will occupy the possessor of a good memory about six hours – his duties at the theater embrace four more in the morning for rehearsal, and about five at night; here are fifteen hours devoted to labor alone, to say nothing of the time required to study the character, after the mere attainment of the words.²³

Refreshing a company for a standard play in their repertory might be the work of a single rehearsal, or none at all, depending on how recently it had been played.²⁴ New pieces generally received between three and six rehearsals, each lasting two to four hours (Burge, 113). When touring stars were expected, those rehearsals would often be conducted without the principal character, who might appear the morning of

²² Nathans examines the play and its treatment in detail in her *Early American Theatre*, 92-106.

²³ Leman Thomas Rede and Francis Courtney Wemyss, *The Guide to the Stage, Containing Clear and Ample Instructions for Obtaining Theatrical Engagements...To Which Is Added, a List of the London Theaters...With Additional Information, Making It Applicable to the American Stage...Also a List of the American Theaters* (New York: S. French, 1858), 3, <http://books.google.com/books?id=W3oXAAAAYAAJ&printsec=frontcover> [accessed January 23, 2014].

²⁴ See Schaal, 54-57, 141-145.

his/her opening performance to run through a single rehearsal.²⁵ For performers who jealously guarded their plays, such as Edwin Forrest, a company might only receive a list of sides to study in advance, leaving little time to prepare for anything save keeping out of Forrest's way and trying to remember the tragedian's cue lines. As Mowatt's description of a *Fashion* rehearsal quoted in the introduction suggests, the fatigue of the actors often hindered what little time was available. Even then, as Edward Mayhew notes, the focus was generally on "the business of the stage," on ensuring actors knew where to stand and when and where to move, but the performance itself was rarely the focus: "the prompter holds the book, while they say a lesson. How the passionate passages are to be delivered cannot be guessed at. The consequence is, that the first night of a piece, when the author has all at stake, is, in truth, the first rehearsal."²⁶

That plays saw such (by today's standards) little rehearsal is not to suggest they were constantly butchered or travestied or "horribly imperfect," though this was certainly the judgment of the insurgent playwrights discussed in the following chapters. Rather, it suggests that precise recitation of the text was neither a goal of antebellum performers nor an expectation of antebellum audiences. Stock actors were expected to have a ready supply of similar characters whose speeches might serve in a pinch, and this was a period when intervention by the prompter was an accepted and

²⁵ According to Charles Durang, when Edmund Kean acted with William Warren's company the tragedian sent his promptbook to the theatre and came only for the final rehearsal (quoted in Calvin L. Pritner, "William Warren's Financial Arrangements with Traveling Stars – 1805-1820," *Theatre Survey* 6, no. 2 (November 1965), 85).

²⁶ Edward Mayhew, *Stage Effect: or, The Principles Which Command Dramatic Success in the Theatre* (London: C. Mitchell, Red Lion Court, Fleet Street, 1840), 102-103.

expected convention. Excessive prompting (or, more frequently, unskillful prompting) certainly came under censure from some newspaper critics, but audiences seemed far more entertained by an actor's ability to improvise around a blunder or distract with a joke.

The viability of this strategy is attested to by one of the most popular actors of the early nineteenth century, Thomas A. Cooper, who was i(n)famous for constantly forgetting his lines, and for inserting double entendres and topical jokes at will. Author and journalist Joseph Dennie describes William Warren following Cooper around the stage "to supply him with words approximate to those forcible gestures and expressions of countenance of which he is so complete a master" (quoted in Grimsted, *Melodrama Unveiled*, 95). Cooper's performance in *The Robbery* so incensed the *True American, and Commercial Advertiser's* critic that he felt compelled to complain in spite of himself:

Mr. Cooper got thro [sic] with *the* part of Orlando. We do not say that he played ill from beginning to end, for he was so totally deficient in point of recollection, that he could not fairly be said to play at all; he not only mistook the name of his beloved mistress...but he was even obliged to look up to Jefferson to know when to set down...such playing is certainly beneath all criticism.²⁷

William Wood describes actors surreptitiously hiding their lines on convenient tables or, in the case of one actress, writing them on her glove (Wood, 76-77). And the phrase "winging it" owes its definition to the practice of actors, called upon to act roles at the last minute, hiding copies of their part just offstage to study after each exit. "Under these circumstances," Olive Logan explains, "he is not expected to speak

²⁷ January 1, 1800, quoted in Moses Brown, ed. *The American Theatre as Seen by Its Critics, 1752-1934* (New York: W.W. Norton Co, Inc, 1934), 29-30.

the part correctly...an actor gets over it as well as he can,—he speaks the words as far as he remembers them, substitutes words of his own when he don't remember,—any way to get through the part, and enable the other actors to go on properly with theirs” (Logan, 57). Somewhat counterintuitively, Grimsted suggests that plays privileging spectacle over speeches actually offered actors an opportunity to study their lines more than was typical: “since they required extensive scenic preparation, they were given more adequate attention in other departments. At least the performers knew well in advance what was to be presented – knowledge often denied them in other presentations” (*Melodrama Unveiled*, 82).

III.iii. The Haunted, Hasty Repertory

These production practices created an unpredictability that contributed to the dynamic novelty that audiences found so compelling. The repertoire that existed prior to the Civil War was expansive, and one study suggests a relatively stable group of least one-hundred works was typically produced each year between 1835 and 1855 (Schaal, 126). While new plays provided an essential leavening and offered the opportunity for a wide range of non-professionals to see their work onstage, there was a paradoxical novelty in a system that relied so extensively on repetition. Assessing differences – in approach, in virtuosity, in interpretation – fostered a defining dynamism on the antebellum stage.

Marvin Carlson discusses this phenomenon, which he terms “ghosting,” in *The Haunted Stage*, where he explores the various associations that can “haunt” an actor in performance. Among other things, these associations are made up of previous performances that a particular actor may have given in the same or different roles, of

previous actors who have played the same role, and of the celebrity and life of the actor outside the theatre, all of which are potentially present simultaneously before an audience. The antebellum American repertory was certainly haunted, particularly given the instability of the dramatic script and the extensive improvisation involved in artisan dramaturgy. Spectral performances no doubt came to mind when reading playbills, as well, and past productions of a play hovered about a playhouse filled with recycled material: painted drops used to suggest locations in hundreds of plays over thousands of performances; actresses whose Lady Macbeth was shadowed by Charlotte Cushman's famous characterization, and whose own performance would linger with her as she assumed an entirely different role in the concluding farce; songs whose new lyrics overlaid a popular melody.

Again, perfect recapitulation of an author's text was rarely a priority on the antebellum stage and the improvisation demanded by these production practices made for a particularly responsive and synergistic relationship between performers and audiences. It was in the improvisation and frequent actor-spectator interaction that performances became truly "American," truly local. As evidenced by the "Row about a Coon," audiences frequently felt entitled to express their approbation or displeasure at a performance, clear in their understanding that the performers would accommodate themselves to whatever was requested (or demanded). Antebellum theatrical biographies abound with anecdotes recording audiences demanding something be repeated, condemning something they felt should have been excised, or calling for something they felt was missing. Grimsted captures the dynamic well when he writes that

popular entertainment must always take much of its color, chameleon-like, from its environment, but the theatergoing public of the period was particularly able to insure that no shading in the presentation deviated from its standards. This closeness of audience control made the drama more than any art form, the theatre as much as any social institution, immediately sensitive to public opinion. (*Melodrama Unveiled*, 62)

While the main pieces were set ahead of time, the interstitial entertainments, particularly popular songs, were often chosen and performed by the audiences themselves. This was particularly galling to Frances Trollope, an English writer whose tour through America inspired her unflattering portrait of the *Domestic Manners of the Americans*. In Cincinnati, for example, she disdainfully observes that “when a patriotic fit seized [the male members of the audience], and ‘Yankee Doodle’ was called for, every man seemed to think his reputation as a citizen depended on the noise he made.”²⁸

Disagreement over songs could become proxies for larger conflicts outside the walls of the theatre. In 1794, for example, tensions between the Federalists and pro-French republicans spilled into Boston’s Federal Street Theatre, resulting in a riotous atmosphere where competing songs became metonymical combatants – “Yankee Doodle” for the Federalists, “Ça Ira” for the pro-Jacobins – in a battle for the political soul of the theatrical event that ultimately took the life of an unsuspecting kettle drum (Nathans, *Early American*, 78-81). And British-born Wemyss was groundlessly accused of preventing his orchestra from playing the “National Airs.” He responded by printing a notice at the top of future playbills explaining that he had issued no such

²⁸ Mrs. [Frances] Trollope, *Domestic Manners of the Americans*, 4th ed. (London: Whittaker, Treacher, & Co., 1832), 117, <https://openlibrary.org/books/OL7171799M> [accessed January 23, 2014].

ban, and that, furthermore, the National Airs would henceforth be played between the main piece and the farce *every* evening (much to the chagrin of his orchestra leader, “who could not endure the frequent repetition of ‘Yankee Doodle,’ to the exclusion of Mozart, Weber, & c.”) (Wemyss, 147).

One theatregoer suggests that audience interventions were almost thought to be a responsibility, incumbent on them as investors in a particular performance:

We (the sovereigns) determine to have the worth of our money when we go to the theatre; we made Blangy dance her best dances twice; we made Mrs. Seguin repeat ‘Marble Halls,’ . . . and tonight we are going to encore Mrs. Kean’s ‘I don’t believe it’ in *The Gamester*. We hope she’ll prove agreeable and disbelieve it twice for our sakes. Perhaps we’ll flatter Mr. Kean by making him take poison twice; the latter depends upon the furor of the moment. (quoted in Grimsted, *Melodrama Unveiled*, 64)

Not all of the interaction was as benign as insisting on a particular song. When William Wood was a member of Thomas Wignell’s company at the Chestnut Street Theatre in 1802, the “want of a principal tragedian” forced a young actor named John Fullerton to assume a range of roles for which he was ill-suited (Wood, 84). A group of “disturbers” began heckling the actor nightly. “A nervous man at all times,” Woods reported, “poor Fullerton became nearly incapable of all effort. His terror and agony on entering the stage was truly pitiable” (85). Fullerton became so distraught, he began to talk of suicide; after an initial attempt was interrupted, he was subsequently found floating in the Delaware River. Publisher Mathew Carey was so appalled by the incident that he printed a tract entreating his fellow Philadelphians to treat each other with more charity, and censuring both the pit and the boxes, the former for their abusive treatment of actors, the latter for their almost total disregard

for the performers' well-being.²⁹ Perhaps the most extreme example of audiences acting directly to shape performances can be found in the handful of deadly theatre riots that occurred prior to the Civil War and climaxed in the Astor Place Riots, in which more than twenty people lost their lives.³⁰

Dion Boucicault observes that a successful play must be “written by its audience”; while the sorts of direct interactions discussed above were certainly one form of inscribing both meaning and shape to a performance, more literal forms of rewriting also occurred.³¹ As the treatment of *Whigs and Democrats* suggests, plays were modified to tailor them for new companies or contexts, and new plays, in particular, were frequently trimmed after premiers. The aforementioned examples of Tyler's *The Contrast* and Mowatt's *Fashion* were hardly unique. In the first performance of Dunlap's *Andre* in 1798, for example, an American officer (played by the British actor, Wignell) hurled his cockade to the ground in disgust at what he

²⁹ See Mathew Carey, *Desultory reflections, excited by the recent calamitous fate of John Fullerton. Addressed to those who frequent the theatre, and to the dramatic critics* (Philadelphia: printed for the author by Robert Carr, 1802), http://docs.newsbank.com/openurl?ctx_ver=z39.88-2004&rft_id=info:sid/iw.newsbank.com:EAI&rft_val_format=info:ofi/fmt:kev:mtx:ctx&rft_dat=10440462DAFC10D8&svc_dat=Evans:eaidoc&req_dat=10497FA79919C158 [accessed January 23, 2014].

³⁰ See Grimsted, *Melodrama Unveiled*, 65-74. Kenneth Cohen provides an intriguing analysis of the Astor Place Riots that convincingly argues the traditional interpretation of their cause – a nativist-inflected rivalry between Edwin Forrest and the British tragedian William Charles Macready – is inaccurate, and that the riots were “more of an anomaly produced by a misreading of space than a seminal turning point in the social organization of the theatre or mass culture industry” (581). By examining the occupations of those who were killed and comparing it with the identities of those arrested, he concludes the rioters were “not defined by a shared class identity. It was a group of young white men from different socio-economic backgrounds who all strained to defend the tradition of individual assertion and challenge at sporting events....the Astor Place riot represented the defense of a widely shared white male sporting culture more than the sudden boil of long-simmering working class resentment” (592).

³¹ Quoted in Owen Davis, *My First Fifty Years in the Theatre* (Boston: Walter H. Baker Company, 1950), 12-13.

perceived as the callousness of The General (a thinly-veiled George Washington). The insult elicited hisses from the audience and led to a hasty re-write before the second (and penultimate) performance of the play.³² After the opening night of Henry J. Conway's adaptation of *Uncle Tom's Cabin* in 1852, twenty-nine minutes were cut from its lengthy running time.³³ Actor and occasional-dramatist Harry Watkins' play *The Bride of an Evening*, adapted in only eight days from a story printed in the *New York Ledger*, ran nearly four hours at its first performance. Watkins quickly trimmed it significantly.³⁴ The evolution of another Watkins piece inspired by a newspaper story also illustrates the way plays could shift over time and be tailored to new circumstances. *The Pioneers*, written to help save P. T. Barnum's Museum from closing during the depression of 1857-1858, played more than forty-seven times, an unusually long run for the period. Watkins then took the play with him to London, where he changed "the action from our Revolution [*sic*] War to 1755 when France and England were struggling for supremacy" (quoted in Skinner, 238). After playing for two weeks, he compressed it into two acts at the request of the theatre's manager, and performed it for two more (242).

³² Elements of the play would return in *The Glory of Columbia: Her Yeomanry*, an enduring patriotic spectacle staged annually in honor of the nation's founding.

³³ Edward Kahn, "Creator of Compromise: William Henry Sedley Smith and the Boston Museum's *Uncle Tom's Cabin*" *Theatre Survey* 41, no. 2 (November 2000), 76. Kahn's piece presents an excellent illustration of the collaborative nature of bespoke playwrighting, as he chronicles the contributions of various individuals to the play's creation.

³⁴ Maud (Durbin) Skinner, Otis Skinner, and Harry Watkins, *One Man in His Time: The Adventures of H. Watkins, Strolling Player, 1845-1863, from His Journal* (Philadelphia: University of Pennsylvania Press, 1938), 227-228.

The speed at which Watkins wrote *The Bride of an Evening* is representative of the rapid pace at which many bespoke playwrights worked. The prefaces to published plays from the period are rife with statements recording the time devoted to the writing process. Of her *Slaves in Algiers*, Susannah Rowson explains that “the thought of writing a Dramatic Piece was hastily conceived, and as hastily executed; it being not more than two months, from the first starting of the idea, to the time of its being performed.”³⁵ Two months was positively indulgent, by some standards: Samuel B. Judah’s *A Tale of Lexington* was “planned, committed to paper, and given in the hands of Mr. Simpson, in the short period of four days,” while his *The Rose of Aragon* took only two.³⁶ This was one day less than it took Noah to write *She Would be a Soldier*, though longer than “the work of a few hours” devoted to George Washington Custis’ *The Indian Prophecy*.³⁷ Richard Penn Smith’s *The Eighth of January* and William Penn were both completed the day before each play opened.³⁸ The most prolific and successful bespoke playwright of all, Dion Boucicault,

³⁵ Mrs. [Susanna] Rowson, *Slaves in Algiers; or, A Struggle for Freedom: A Play Interspersed with Songs, in Three Acts* (Philadelphia: Wrigley and Berriman, 1794), preface, http://gateway.proquest.com/openurl?ctx_ver=Z39.88-2003&xri:pqil:res_ver=0.2&res_id=xri:ilcs-us&rft_id=xri:ilcs:ft:amdram:Z000620867:0 [accessed January 23, 2014].

³⁶ Samuel B. H. Judah, *A Tale of Lexington: A National Comedy, Founded on the Opening of the Revolution. In Three Acts* (New York: The Dramatic Repository, 1823), preface, http://gateway.proquest.com/openurl?ctx_ver=Z39.88-2003&xri:pqil:res_ver=0.2&res_id=xri:ilcs-us&rft_id=xri:ilcs:ft:amdram:Z000617159:0 [accessed January 23, 2014].

³⁷ Dunlap, 2:321; George Washington Parke Custis, *The Indian Prophecy, a National Drama, in Two Acts* (Georgetown, DC: James Thomas, 1828), preface, http://gateway.proquest.com/openurl?ctx_ver=Z39.88-2003&xri:pqil:res_ver=0.2&res_id=xri:ilcs-us&rft_id=xri:ilcs:ft:amdram:Z000614290:0 [accessed January 23, 2014].

³⁸ Smith, *Eighth of January*, preface; James Rees, *The Dramatic Authors of America* (Philadelphia: G. B. Zieber & Co., 1845), 128, http://books.google.com/books?id=aZVLAAAAIAAJ&dq=The+Dramatic+Authors+of+America&source=gb_s_navlinks_s [accessed January 23, 2014].

sometimes began rehearsing pieces as he was writing them. In a letter to Laura Keene discussing *The Colleen Bawn*, he explains:

My dear Laura: I have it [a novel, *The Collegians*, by Gerald Griffin]! I send you seven steel engravings of scenes around Killarney. Get your scene-painter to work on them at once. I also send a book of Irish melodies, with those marked I desire Baker to score for the orchestra. I shall read act one of my new Irish play on Friday; we rehearse that while I am writing the second, which will be ready on Monday; and we rehearse the second while I am doing the third. We can get the play out within a fortnight. (quoted in Moses, 158)

Such practices made iterative adaptation remarkably rapid, allowing for the swift evolution of signal American types. In much the same way the rate of biological adaptation and evolutionary change is directly related to generational duration – the lifespan of organisms such as viruses or bacteria, for example, is so short that mutations are adopted or rejected far more rapidly than in more complex organisms – dramatic experiments could quickly hone genres and characters for particular audiences. The advent and evolution of “Mose” is an excellent example. When actor Frank Chanfrau appeared dressed as “a true specimen of one of the [Bowery] B’hoys” in the second scene of a new afterpiece titled *A Glance at New York in 1848*, he was “received with shouts of delight from the thousand originals in the pit.”³⁹ The play was quickly rewritten to feature Mose as the protagonist; after two weeks of packed houses, the play was moved to a new theatre. Over the next two years, Chanfrau would play Mose at least 385 times in seven different “Mose” plays (ibid.).⁴⁰ Quinn describes this iterative nature of this dramatic recycling, noting that “as soon as a

³⁹ Peter G. Buckley, “Paratheatricals and Popular Stage Entertainment,” in Wilmeth and Bigsby, 460.

⁴⁰ These spawned versions tailored for other cities, as well, such as *Mose’s Visit to Philadelphia* and *A Glance at Philadelphia* (Quinn, *History*, 305-307).

lucky hit was made by a play or a character, other playwrights and managers hastened to profit by the success of the creator, who was not infrequently drawing himself upon earlier material” (Quinn, *History*, 292). Still, he continues, “out of this dramatic impulse, hasty as it often was, emerged an interesting and significant series of dramatic types which have persisted on the stage even today” (ibid.).

Act IV. Where Wemyss Went Wrong; or, The Dangers of Figuration in *The Quaker City*

Once the rambunctious crowd of raccoons and roosters had departed the Chesnut Street Theatre, the only real consequence for Wemyss was a handful of bemused newspaper articles noting a “Row about a Coon.” Less than two weeks later, however, a far more dangerous crowd gathered outside the doors of his theatre, and the articles following that incident were much more caustic. “Newspaper after newspaper reiterated the libelous falsehoods,” Wemyss complained, and he ultimately sued the *Spirit of the Times* for libel. Due in part to the controversy, his management soon ended in failure.

In September of 1844, a young journalist-turned-novelist named George Lippard had signed a contract with Philadelphia publisher George B. Zieber to print what was intended to be a four volume exposé of elite corruption in Philadelphia modelled on Eugène Sue’s hugely popular *Les Mystères de Paris*. The first installment of *The Quaker City; or, The Monks of Monk Hall* was issued on October 5th.⁴¹ That same month, a mutual friend put Lippard in touch with Wemyss, who was

⁴¹ There is significant confusion regarding the publication history of Lippard’s novel. Lippard’s earliest biographer, for example, states that the first issue was released on September 5th of 1844 (George Lippard and John Bell Bouton, *The Life and Choice Writings of George Lippard* (New York: H.H. Randall, 1855), 19, <https://openlibrary.org/books/OL6713531M> [accessed January 23,

looking for a new piece. The two men signed a contract stipulating that Lippard would, within two weeks, provide Wemyss with a play adapted from his novel. Lippard had no experience writing plays, though he was certainly familiar with the theatre, as his novels are filled with both theatrical imagery and explicit references to Philadelphia theatres.⁴² Charles Durang helped him with the scene plot, and new backdrops illustrating Philadelphia locations were painted (Durang, 246).

Wemyss had attempted something similar on November 13, 1843, when he adapted *The Mysteries of Paris*, the work that inspired Lippard's novel. Wary of being scooped by rival theatres (Wemyss was then at the Olympic), he literally divided sections of the novel's text among several other members of the company, each of whom took responsibility for dramatizing one of the acts, a process that was

2014]). Emilio Grazia also includes the September 5th starting date (though he may well have been basing it on Bouton's collection), and notes that it was a "bi-monthly" publication (Emilio De Grazia, "The Life and Works of George Lippard" (PhD diss., Ohio State University, 1969), 166). Least accurate is Joseph Jackson, who writes that the eighth installment of the novel had been published by the time the Wemyss' adaptation was announced. (The article appeared in the Philadelphia *Public Ledger* on August 14, 1932. A handwritten manuscript of Jackson's larger treatment of Lippard, titled *George Lippard: Prophet of the Proletariat*, is held in the Joseph Jackson Manuscripts, 1863-1930, Historical Society of Pennsylvania.)

However, advertisements for the publication – many of them printed by the *Public Ledger*, which handled Zieber's printing and was housed in the same building as Lippard's publisher – clarify the chronology. They indicate the first installment was published on October 5th, the second on October 19th, and the third on November 2nd. The final installment should have been released on November 16th, according to the initial publication schedule announced in the Philadelphia *Spirit of the Times* on October 2, 1844. As will be discussed, events intervened, and when the "final" issue was published on December 7th, it did not resolve the central narrative, and in fact introduced new characters and plot lines, clearly telegraphing that future installments would be forthcoming. In March of 1845, Lippard and Zieber contracted to publish a series of "sequels" to the novel, and later that same month, the first of what would become six additional numbers was released. When the ten installments of the novel had been completed in May of 1845, they were bound together and sold under the title *The Quaker City; or The Monks of Monk Hall. A Romance of Philadelphia Life, Mystery, and Crime*.

⁴² For example, in *The Quaker City*, a character relates: "One night, when about giving up the chase as hopeless, I strolled to the Chesnut Street Theatre. Forrest was playing Richelieu – there was a row in the third tier – a bully had offered violence to one of the ladies of the town" (George Lippard, *The Quaker City; or, The Monks of Monk Hall* (Philadelphia: published by the author, 1847), 1:53).

completed within twenty-four hours. The entire production was ready in three days, an astonishing feat considering it also featured spectacular effects such as thunder and lightning, torrents of mock human blood, and an effect whereby “the moon’s rays were made at night to reflect the blood of humanity mantling the waters of the Seine” (Durang, 221). It proved quite successful, and Wemyss no doubt hoped that the local nature of the author and story would make *The Quaker City* even more attractive.

When Wemyss posted a playbill announcing the piece for November 11th, however, it was torn down by a young clerk named Singleton Mercer.⁴³ This was only the beginning of Wemyss’ troubles, as he was soon contacted by individuals who had been portrayed in the serialized novel, among them Robert T. Conrad, whom Wemyss assured had been omitted from the script.⁴⁴ Philadelphia’s mayor asked Wemyss several times to pull the piece, citing the recent riots, participants of which were due to go on trial the day *The Quaker City* was to open (Grazia, 171-172). Mercer threatened that the theatre would be razed if the play opened, and he attempted to

⁴³ The playbill includes an elaborate breakdown of the plot and characters, as evidenced by its description of the first scene: “SCENE FIRST; AN OYSTER CELLAR; Mischief Proposed – the Pimp and the Pander. SCENE 2d – Parental Affection – The First False Step taken – Maiden Beware – An Aunt in the distance – A most convenient relation. SCENE 3D – STREET – Further development [*sic*] – Monk Hall is Prospect – A visit to the Astrologer, and a Rake’s code of morals – Enjoyment to the last” (Sari Altschuler and Aaron M. Tobiason, “Playbill for George Lippard’s *The Quaker City*,” *PMLA* 129, no. 2 (March 2014), 271).

At least two copies of the playbill are extant. The Historical Society of Pennsylvania has a copy donated by Wemyss’ family with what appears to be Wemyss’ own handwriting describing the cancellation on the playbill’s back (this is the version reprinted in *PMLA*). Another copy is held in the “Philadelphia Playbills Collection, 1836-1900,” at the Special Collections Library at Pennsylvania State University.

⁴⁴ Wemyss writes: “I told him he ought to know me better than to suppose I would tolerate such a thing against a friend, and handed him the sheet to which he alluded, his name having been struck out by my hand from the play” (395). There are indications other Philadelphians harbored a similar apprehension, and Wemyss remarks that, “had its satire been aimed at the low and vulgar, it would not have been assailed; but it struck at governors, judges, members of Congress, editors, as well as thieves and murderers” (398).

purchase two-hundred tickets “for the purpose of a grand row,” in Wemyss’ words (395).⁴⁵ General George Cadwalader, a member of the Chesnut Street Theatre’s board of agents, personally asked Wemyss to reconsider.

It was not until the evening of the 11th that Wemyss finally made up his mind. A large crowd had gathered and Lippard, who cultivated a Byronic image, stalked among them, “wrapped in an ample cloak, and carrying a sword-cane to repel assaults” (Lippard and Bouton, 20). Wemyss appealed to the Mayor for protection, but was told that “I really think you have struck the first blow in your play-bill,” and was denied police services (quoted in Wemyss, 397). Reluctantly, and with Lippard’s grudging assent, Wemyss canceled the production just before the theatre doors were to open. The reason that Wemyss’ attempt to stage a popular novel – a common practice for antebellum bespoke playwrights, and one that had proven profitable in the past – elicited such a firestorm involves events that occurred more than a year before Wemyss’ tenure at the Chesnut even began. Understanding the nature of those events and their relationship to the play’s cancellation reveals limits to the artisan dramaturgy’s ability to reflect and respond to the immediate conditions of theatrical performances. There could be ramifications for the reflexivity of such a topical form.

IV.i. Mr. Bastido, Accomplished Libertine

Thomas and Eliza Mercer were the heads of a wealthy, well-respected family, and active in the church and community.⁴⁶ Sarah Mercer, the second youngest of their

⁴⁵ Wemyss apparently chastised his manager for not selling them. Mercer later purchased twenty-five, requesting a refund when the production was cancelled (395).

⁴⁶ Information on the murder may be found in the extensive coverage of the trial presented in the *Public Ledger* between March 29 and April 8, 1843. The entire case is also treated in *A Full and Complete Account of the Heberton Tragedy: To Which Is Added Beauchamp, or, The Kentucky*

four daughters, was running an errand on Christmas Day of 1842 when she and one of her friends first encountered Mahlon Heberton. Sarah mistook Heberton for one of her brother-in-law's acquaintances, a Mr. Bastido.⁴⁷ Over the next several weeks, chance meetings turned into something more frequent, and more serious, and on February 6, 1843, Sarah vanished. Her frantic family offered a reward of \$50 for information on her whereabouts, and the Philadelphia papers ran brief news items regarding Sarah's mysterious disappearance. Word reached Singleton Mercer's father that his daughter was staying with Heberton. After being dragged before an alderman, Heberton was ordered to return the following morning for further questioning; Sarah was miraculously returned to her parents before that meeting could take place. Initially reticent to discuss her experiences, she soon confided in her mother the nature of her liaisons with Heberton, explaining how he had taken her to a house of ill-repute and consummated the relationship. Heberton, promising marriage, had continued to meet with Sarah clandestinely, and she believed they would soon elope.

Singleton Mercer, upon learning of his sister's – and, by extension, his family's – disgrace, demanded Heberton fulfill his vague promises of marriage. The seducer refused. Mercer then challenged Heberton to a duel, which was also refused. Frustrated and desperate, Mercer determined that his only recourse was to take his sister's life, an action that family members were able to prevent. Mercer then set his

Tragedy (New York: Published for the trade [by John B. Perry], [ca. 1849].) <http://nrs.harvard.edu/urn-3:HLS.Lib:1004906> [accessed January 23, 2014]), though much of it is material taken verbatim (sans attribution) from the *Public Ledger*.

⁴⁷ It is only in Sarah's testimony at her brother's trial that the name "Bastido" is used; other witnesses and the newspapers record it as "Bustedo."

sights on Heberton, stalking him for days before his quarry, on the advice of legal counsel, decided the best course of action would be to leave town until tempers cooled. On the evening of February 10th, both men boarded the *John Fitch*, a steam ferry that plied the Delaware River between the eastern docks and Camden. Only one would live to make the return voyage.

Mercer hid for most of the passage, one that would normally take five to six minutes, but that was lengthened by the extraordinary amount of ice on the river. As the *John Fitch* was pulling into the Camden slip, he stepped to the back of Heberton's carriage, drew a pistol, and fired four shots into its dark interior. One of them found its mark, passing through Heberton's back and lodging in his heart; he was dead within minutes. Mercer surrendered his pistol, and was taken – in Heberton's carriage, along with the lifeless body of his victim – to a local hotel, where he was promptly arrested. The subsequent trial, covered in newspapers from Florida to Maine, Ohio to New York, painted a sensational portrait of the destruction of a prominent Philadelphia family at the hands of Heberton, who was characterized as an unprincipled, accomplished libertine, a ruiner of virtue, and a wielder of the “magic power of the moustache and the imperial” (*Public Ledger*, February 14, 1843). In vivid detail, the press described how Heberton had stalked, seduced, and violated young Sarah. Driven mad by the prospect of his family's disgrace, Mercer had found himself with no legal recourse, and had taken justice into his own hands.

At his trial, an all-star team of attorneys, including a former US senator and a former Governor of New Jersey, relied on an insanity defense. They argued that Mercer, undone by Heberton's callous refusal to either marry or duel, and overcome

by the prospect of the damage done to his sister's virtue, lost his senses.⁴⁸ Despite the exhaustive legal and literary history of insanity presented to the court, the judge was deeply skeptical, and his instructions to the jury essentially ordered them to disregard the insanity portion of the defense when making their decision. Whether they complied or not, they certainly disregarded the judge's warning against spectators' reactions to the verdict: when the foreman, in a "tremulous voice," declared Mercer not-guilty, "a burst of feeling came from the crowd, and the court was in an uproar of delight" (*Account of the Heberton Tragedy*, 46). Once order had been restored to the courtroom, Mercer's release was quickly followed by a reunion with his family. It was an event the *Barre Gazette* called "a scene of extraordinary pathos" (April 14, 1843). Upon entering the hotel where his family had been staying during the trial, Mercer's mother

sprang from her bed, and threw herself into the arms of her son....Sarah, the sister, in the meantime, threw herself upon her knees before him, she cried and sobbed bitterly – and said 'Oh brother, will you forgive me?' repeating it again and again...[Mercer] then threw his arms around Sarah, kissed her, and said to her, 'I do forgive you.' (*Brother Jonathan*, 1843, 4, 15:443)

If Mercer's "magnanimous" gesture was the curtain line of his perilous narrative, then the curtain call would come the following morning. A crowd of Philadelphians had gathered at the Market Street Wharf to await the arrival of the

⁴⁸ In addition to the extensive focus on Mercer's mental state, the defense procured several witnesses who described a figure leaping from the ferry and sprinting away as it docked in New Jersey. It was, by then, nearly dark, and nothing further could be determined regarding the mysterious passenger. The defense suggested to the jury that such evidence made finding Mercer guilty beyond a reasonable doubt impossible.

John Fitch.⁴⁹ Despite the chill in the air, they were in a celebratory mood, and many had been since the previous evening when word of Mercer's acquittal had crossed the river, inspiring sporadic bursts of celebratory gunfire and the lighting of bonfires. By the time the ferry approached the dock at around half past one, excited Philadelphians could be found, in the words of the *Public Ledger*, "lining every avenue through which he was expected to pass, and clustering upon every wharf or prominence from which it was expected he could be seen" (April 8, 1843). By welcoming him with open arms, Mercer's supporters, many of whom had come to regard him as a champion of female virtue and defender of familial honor, could properly fête their hero upon his triumphant return, completing a story of virtue revealed and redeemed rivaling anything that could be seen on the boards of the Chesnut Street Theatre. They would provide the moral vindication of Mercer's actions, supplementing the legal vindication that had come in a New Jersey courtroom the night before.

As the last mooring line was secured, "one terrific huzza! rent the air, and the gentlemen threw their hats up, and the ladies waived their white handkerchiefs in the wind" (*Observer and Chronicle*, April 15, 1843). Mercer, however, had quietly returned to the city several hours earlier, and was resting with his mother and sisters. The celebrants were left with his father and defense team, who graciously accepted the crowd's thanks, and travelled to Bloodgood's Hotel along streets lined with Mercer's supporters, whose jubilation, according to the papers, was only slightly dimmed by the absence of its object. In the following days, Lippard wrote

⁴⁹ The account of his return is taken from articles in the *Public Ledger* (April 8, 1843), the *Boston Recorder* (April 13, 1843), the *Boston Daily Atlas* (April 10, 1843), the *Barre Gazette* (April 14, 1843), and the *New Englander and Yale Review*, 1843, 1, 3:442-451.

approvingly of Mercer's acquittal in the pages of the Philadelphia Weekly, the *Citizen Soldier*, and little more than a year later decided to turn the Mercer-Heberton affair, as it had come to be known, into a serialized novel.⁵⁰

IV.ii. The Melodramatic Media and the Triumph of Virtue

This dramatic narrative and the sense of poetic symmetry associated with Mercer's first step back onto his native soil were products of the extensive press coverage of the murder and subsequent trial. When Americans learned of the case, they did so in the tropes and imagery of melodrama, despite assurances to the contrary. For example, in his opening statement, Peter A. Browne, Mercer's lead attorney, had boldly stated: "These are the facts. They needed no varnish and have received none. Our defence is not addressed to your passions, but your judgments" (*Account of the Heberton Tragedy*, 32). This assertion is echoed in the pages of papers such as *Brother Jonathan*, which declared their intention to present an "impartial history" of the case and its outcome (April 15, 1843). Were these, indeed, their intentions, both Browne and the press failed spectacularly. Far from an objective presentation of the facts of the case, the accounts of the seduction, murder, trial, and acquittal consistently championed a particular interpretation of the events, and made explicit and sustained appeals to the emotional, rather than rational, faculties of their readers.

The reunion of Mercer and his family following the acquittal is characterized in a similarly theatrical fashion by many newspapers, each referring to an

⁵⁰ David S. Reynolds, *George Lippard* (Boston: Twayne Publishers, 1982), 32.

“eyewitness” or claiming to have spoken with someone who was present. Each account pays careful attention to blocking, treating the encounter almost as a series of stage pictures. The *New York Sun*, for example, describes Mercer carrying his swooning mother to her bed before returning to his sister, and each narrative portrays Sarah kneeling before her brother in supplication before he pulls her to her feet and absolves her from any guilt she may feel over his ordeal (April 15, 1843). If, as the *Daily Atlas* records, Mercer’s mother was overcome by “that joy and gladness which find no utterance in words,” the press suffered from no such affliction, and the papers’ approach strategically deployed language to trigger the same emotional reaction in their readers as had been experienced by those who witnessed the original moment (April 10, 1843). The evocative prose and overwrought emotions of these portrayals, as well as the aesthetic wholeness they seem designed to engender, gesture towards something beyond the scenes themselves, towards a significance greater than the ostensible circumstances and narratives they present. These qualities suggest the press accounts should not be approached as pieces of journalism, but rather as sustained attempts to evoke an aesthetic experience and, in effect, call into being an idealized reality of their own. They *represent* the facts of the case in a manner that mirrors the conventions and principles of the nineteenth-century’s dominant dramatic form: melodrama. This representative strategy played a significant role in conditioning public reaction to Mercer and his acquittal, to Lippard’s novelization, and to the play.

The nature of the melodramatic type – one dimensional, unrealistically good or evil, unmotivated – is one of the defining aspects of a form that has historically

occasioned significant criticism.⁵¹ Much of the press coverage employed distinct melodramatic “types” when characterizing the relevant players, and – while there is some question as to whether or not there is a proper hero – there was certainly a villain. In his study of melodrama, Peter Brooks writes that melodramatic “evil” in the post-sacred universe must be “highly characterized,” must be instantiated in an individual persona.⁵² This does not mean the villain need be a complex or psychologically motivated character: “on the contrary, he is reduced to a few summary traits that signal his position” (ibid.). It is Heberton, Sarah Mercer’s seducer, who was uniformly condemned and cast as a villain and an abandoned libertine, and his characterization as such was frequently established through the repetition of a few signal traits. Since Heberton was no longer among the living, many of the traditional hallmarks of the melodramatic villain were unavailable (there can be no monologues rhapsodizing motiveless malignity, for example). However, there were certainly attempts to establish a sort of retroactive villainy using both visual markers and second-hand reports of his actions. For example, nearly every account notes his facial hair, suggesting that the decision to wear “whiskers” marks him as one eager to draw on the “magic power of the moustache and the imperial”

⁵¹ Enough excellent scholarship has been produced since the publication of Grimsted’s *Melodrama Unveiled* to render melodrama’s recuperation unnecessary. Colloquially, of course, it is still frequently a pejorative, and for many of the reasons discussed here. However, my interest lies not with the artistic merits of the form in its historical context (and certainly not in a contemporary setting), but with what the aesthetics of melodrama may reveal about the audiences for whom it was so popular.

⁵² Peter Brooks, *The Melodramatic Imagination: Balzac, Henry James, Melodrama, and the Mode of Excess* (New Haven: Yale University Press, 1995), 33.

(*Public Ledger*, February 14, 1843).⁵³ The *Spirit of the Times*, after describing him as “rather tall, extremely well formed, [and] remarkably full in the chest,” succinctly associates those attributes with malicious intent by recording he had “a brilliant and rakish eye” (February 13, 1843).⁵⁴ Likewise, his apparel also signaled his nefarious intentions, as “his clothes were of the most costly material, and were made in the most fashionable manner. . . . he was just such a person as would be likely to excite, at first view, the admiration of a thoughtless school girl” (*New York Sun*, April 8, 1843).

While less verbose than, say, the Lawyer Cribbs’ gleeful declaration of his destructive intentions in *The Drunkard*, dialogue was sometimes placed in Heberton’s mouth. For example, in Browne’s oft-reprinted opening statement, he describes Heberton as boasting he could have any girl, and, upon being asked how he would react were someone to seduce his own sister, raging: “By God, I would blow his brains out. . . I would shoot him like a dog” (quoted in *Account of the Heberton Tragedy*, 29). He was cast as a “young man of wealth and idleness,” and when he did see fit to roll up his sleeves, his very occupation was corrupt: his “counting house was the brothel; his principle female companions were harlots; his merchandise was lust; his commerce was seduction” (*Brother Jonathan*, 1843, 4, 15:442). The New York

⁵³ This style of facial hair became so notorious in the days following Heberton’s death that the *Spirit of the Times* reported “Scarcely a *moustache* or *imperial*, is now to be seen on Chestnut street, since the fate of Heberton. All have been shaved off except two – and *their* owners are *hare*-lipped naturally. *Nannies*. (i.e. ‘goatees,’) are still, however, *de bon ton*” (February 16, 1843).

⁵⁴ Granted, sinister overtones in descriptions of his appearance and intentions are somewhat softened by the fact that he “was always accompanied by a brown setter dog, with a collar upon which his (Heberton’s) name was engraved in full” (*Spirit of the Times*, February 13, 1843). All references to the *Spirit of the Times* in this section refer to the Philadelphia newspaper.

Evangelist described how Heberton had travelled extensively, studying the “seductive arts in the use of which he had perfected himself in foreign climes” (April 13, 1843). As accomplished as he was in his debauchery, he was an utter failure as a son, squandering his widowed mother’s money on his conquests and bringing dishonor on her, his young sister, and his family’s name.

The *Spirit of the Times* indicates that some of Heberton’s friends claimed to have proof that it was, in fact, Sarah who pursued her supposed seducer. In a poorly concealed bit of apophasis, the *Spirit of the Times* observed:

We regret to see that some of the friends of the deceased are resorting to vile means to increase the sufferings of an already afflicted family. What can they expect to gain by traducing the lady? We might as well point to Heberton’s depraved nature. We might point to his boasts about our streets, of the females he had ruined, and the arts by which their destruction had been effected. We might point to his widowed mother, whom he has even laid his cowardly hands upon when she refused to supply him with funds to carry out his nefarious machinations. (February 15, 1843)

His character and actions, literally described as “evil,” stand in even starker relief when juxtaposed with the portrayal of his victim. Martha Vicinus argues that “much of the emotional effectiveness of melodrama comes from making the moral visible,” and it is often through the “passive suffering of virtuous characters” that this is accomplished.⁵⁵ In the Heberton-Mercer affair, it is Sarah – through the adjectives used to characterize her, through her suffering, and through the suffering of her family – who is almost uniformly portrayed as an abject victim. The *Public Ledger* and *Spirit of the Times*, while both remarking on Sarah’s beauty, also emphasized her simplicity and feeble intellect. At her brother’s trial, the Reverend Prior, who had

⁵⁵ Martha Vicinus, “‘Helpless and Unfriended’: Nineteenth-Century Domestic Melodrama,” *New Literary History* 13, no. 1 (Autumn 1981), 137.

taught Sarah in Sunday School, testified that “Sarah’s mind is not strong; her understanding is rather weak, but she was modest and retiring, and we often pointed her out to the others as an example of mildness and amiability” (New York *Sun*, April 3, 1843). Her brother’s defense attorneys were careful to note that Sarah “was never at a ball, play, or any other public place of amusement” (quoted in *Account of the Heberton Tragedy*, 24). And the *Ohio Statesman* lamented that she was “of the most exceptionable character, until a short time since” (April 12, 1843).

Attempts to suggest that Sarah was not a paragon of virtue were rare, and were generally given little coverage. In its closing argument, the prosecution challenged Sarah to provide any evidence of the crime, asking “where are the broken windows; the efforts to escape; the screams which would evidence an outrage,” and continuing “where, oh! where is the washerwoman that washed her clothes?” (New York *Sun*, April 8, 1843).⁵⁶ The character of Sarah – as evoked by the adjectives used to describe her nature, and when coupled with the absolute finality of her destruction suggested by the repetition of terms such as “fall,” “ruin,” and “corruption” – serves as a melodramatic device that stains her seducer and exculpates her brother.

If the extant coverage consistently casts Heberton as the villain and Sarah as the virtuous victim, there is less uniformity when it comes to portraying Mercer as the melodramatic hero. There are certainly those who saw him as such. The *Ohio Statesman*, in arguing for his acquittal, declares that Mercer “is a noble, brave,

⁵⁶ These challenges to Sarah’s presumed innocence, however, seem only to have been printed in the *Public Ledger* and the *Spirit of the Times* (and in the *Sun*, which re-printed the *Ledger’s* coverage), and were not addressed by those papers outside Philadelphia who devoted far less space to the case, or who summarized the entire affair only after the final verdict was rendered.

chivalric, glorious hearted fellow; and may the tongue blister, and the hand wither, that, for avenging a horrible outrage upon an innocent and defenseless girl, should sentence him to death, and carry that sentence into execution” (April 12, 1843). And many, in predicting the outcome of the case, communicated that there was a “strong expression of sympathy in favor of Mercer” (*Christian Observer*, April 17, 1843). However, while most of the religious papers that summarized the story were eager to condemn Mercer for his actions (though less harshly than Heberton’s), even the *Public Ledger* initially expressed unease at the precedent an acquittal would set, arguing that “when assassination is openly justified, and false notions of chivalry are made paramount to the laws, then the safety of individual life in the community is indeed uncertain” (February 14, 1843). Even those who lauded the acquittal and felt that a just system could not help but free Mercer seemed leery of advocating violence, and frequently turned away from thorny questions surrounding the morality of Mercer’s actions to the far less morally ambiguous call for anti-seduction laws.⁵⁷ Nevertheless, the fact that nearly every account or run of press coverage ends with the story of the family’s reunion, in which Mercer, upon seeing his mother and sister, “[discovers] all that intensity of affection which forms the most agreeable trait in his character,” and proceeds to forgive his sister, and attribute “the afflictions they had just passed through to one who had made a full and fearful atonement for his guilt” (referring here to Heberton), suggests a redemptive arc that is absolutely in keeping

⁵⁷ Both the Pennsylvania and New York legislatures passed “anti-seduction” legislation in the wake of the killing, which generally established harsh monetary penalties and even jail time for offenders. The text of the bill eventually passed in Pennsylvania may be found in the March 7, 1843, edition of the *New York Sun*.

with the journey of the melodramatic hero (New York *Sun*, April 10, 1843). *The Drunkard's* Edward Middleton, for example, nearly destroys his family before being plucked from the gutter and restored to his wife and child. While Mercer's actions may have been troubling, his motivation for those actions, and their ultimate outcome, was far more heroic and worthy of praise.

In addition to filling the stage with characters who lack psychological depth or conform too neatly to established types, melodrama has also been condemned for its reliance on excessive emotion, both the emotions of the characters onstage and the emotional conflagrations it attempts to spark in its audience. Indeed, Brooks argues that *excess* is precisely the mode of melodrama and that it continually posits a “signified in excess of the possibilities of the signifier, which in turn produces an excessive signifier, making large but unsubstantiable claims on meaning” (Brooks, 199). For Brooks, it is the loss of the sacred in a post-Enlightenment world that drives melodrama towards emotional excess, the absence of the inexorable and necessary that formerly “derived from the substratum of myth,” but that now inheres in what he calls the “moral occult” (14). This term refers, in some sense, to the ideology of the melodramatic, to a system for making meaning that attempts to outline a morality that is no longer immanent and anchored in divine purpose.⁵⁸ For Brooks, the intensity of

⁵⁸ To be clear, the “sacred” Brooks references is not synonymous with religion: the flames of spiritual revival that had kindled the nation in the early decades of the nineteenth century had yet to die out, and church membership had increased exponentially in the so-called Second Great Awakening (see Howe, chapters 5, 8, and 12). But as Grimsted notes, faith in a divinity was less and less faith in Divine Intervention: “the conduct of a God obliged to befriend orphans and protect innocence was stringently curbed; He was a legislator and judge who in making laws for man also bound Himself by them. And consequently what really mattered were the laws themselves, the moral mechanism that had been set in motion” (*Melodrama Unveiled*, 226). An explosion of reform movements, many based in evangelical Protestantism, assumed the formerly-sacred responsibility for mankind's salvation, battling

the melodramatic encounter makes the quotidian magnified and magnificent, as the audience is assured that “in the right mirror, with the right degree of convexity, our lives matter” (Brooks, ix). Melodrama also attempts to come to terms with a universe where meaning is more the product of agency than simply something to be received. It is a way of revealing and articulating a morality that might compel with the same force that religion once did in the pre-modern world.

The press coverage of the Heberton-Mercer affair, I suggest, was absolutely engaged in that struggle to reveal and articulate moral certainty. But in the context of a nation that was changing rapidly – one that provided its citizens with an unprecedented ability to govern themselves, yet systematically denied that privilege to a majority of its citizens; one that saw scientific and technological innovations that foregrounded how profoundly humanity could alter its own destiny, but that also served to de-humanize and upset traditional institutions; one dealing with the aftermath of a deep financial panic and recession; and one that was experiencing waves of immigration that, particularly in Philadelphia, led to instability and violence as the authority of religious and cultural institutions was being re-evaluated – it was not to the sacred that the press turned, but to the family. If, as Brooks suggests, the principal purpose of melodrama is to establish and reveal virtue, “virtue made visible and acknowledged, the drama of a recognition,” then the press coverage reveals that in the midst of real and imagined threats to its authority and existence, the family abides (27).

to abolish intemperance and slavery, and working to improve educational and even political opportunities for women.

The centrality of affect in melodrama is reflected in the press coverage, as well, which employs emotion as a persuasive tool, using vivid detail to communicate to readers the emotional experiences of both the participants and spectators at the trial. Mercer's mother, for example, is frequently overcome, and by the end of the trial must remain in her bed, unable to endure the uncertainty over her son's fate. When testifying of her encounters with Heberton, Sarah repeatedly collapses into sobbing, necessitating recesses and long pauses while she collects herself. And Mercer exhibits a manly stoicism, save for the day of his sister's testimony when he turns his chair away from the witness box, unable to watch Sarah recount her violation. This emphasis may also be seen in a telling change one paper made in its account of the trial. The Baltimore *Sun* of March 31st records that, during his opening statement, Mercer's attorney described how Sarah "poured the mournful history of her wrongs into [Mercer's] ready ear, and each word went like lightning to his brain." However, in summarizing the entire case for its readers, the April 8th special edition of the New York *Sun* presents the same speech, but instead states that "each word went like lightning to his *heart*" (emphasis added). Given Mercer's attorney was preparing an insanity defense and would try to convince a jury that Mercer was not in his right mind at the time of the crime, it makes sense that the effect of his sister's disgrace on his psyche would be emphasized. The New York paper, however, seems to have felt that the change in Mercer's heart was more in keeping with the story and sensation it wanted to convey.

In addition to highlighting emotional moments in its coverage, newspaper accounts also created a scenario in which the appropriate way to approach such

events was *through* emotion, rather than reason, through passion, rather than logic.

The *Spirit of the Times*, for example, posed the following question to its readers:

It is all very well to sit down, and with cool philosophy canvass the abstract property of all that Heberton's licentiousness, and the young girl's weakness led to; but reader – are you a brother? If so, and your domestic peace had been broken up by the artful and insidious designs of a professed and boastful seducer: if your sister had been degraded and cast out from among the pure and virtuous of your acquaintance: her name made a bye word and reproach in every mouth, and her error the subject of every villain's sneer, and every newspaper's comment: if an aged father were seen upon one side, tearing his white locks from his brow in all the madness of unabated grief: if upon the other lay a fond mother in convulsions: and here and there brothers and sisters weeping around in distraction and despair: Reader! could you behold all this, and your blood not boil within your veins for an opportunity to revenge it? (February 15, 1843)

The appeal does not ask its readers to approach the case as citizens of a republic, to weigh the crime of seduction against the crime of murder, to assess the threat each poses to society and decide whether Mercer's response was proportional or justified; rather, it calls on its readers to approach the case as members of a family, asking them to assume the role of Mercer, to feel his rage and frustration, and to assess the threat Heberton would pose to them as individuals.⁵⁹ In effect, the emotional appeal works to make the reader a victim by proxy of Heberton's crime.

Emotional intensity was also created through specific narrative techniques.

Among the most powerful: in summarizing prior events in their ongoing coverage of the trial, or in treating the entire chain of events in a single story, papers consistently

⁵⁹ In predicting the trial's outcome, many papers noted that, regardless of the nature of his crimes, it would be impossible to find a jury willing to convict Mercer, given that "his peers" would inevitably include fathers and brothers. Representative of this prediction is the *Daily Atlas* of February 17, 1843: "Any father, any brother, any man who merits the name of man, will confess that if human nature might in any case ask an excuse for the willful shedding of blood, this case must come within the rule."

worked to establish a sense of urgency and motion that parallels the typical melodramatic structure. This increasing tension and rising action can be seen in the following passage from the *Public Ledger*:

The youth and simplicity of the ruined child, the beauty and éclat of the ruiner, the respectability of the family thus made desolate, the frantic agony of the brother, the effort to effect a marriage, its sneering and heartless rejection, the challenge and its refusal, and the subsequent tragedy, all forms a combination of circumstances such as have seldom been presented to the public. (February 14, 1843)

The trial, both as narrative device and actual event, necessarily establishes a teleological structure, as each incident is tensed towards the climax of the verdict. Of course, the press had no way of knowing what that verdict would actually be (though the good money was on acquittal). However, by selectively printing trial excerpts (the significant majority of which were taken from speeches by Mercer's attorneys); and by consistently breaking out of those quasi-transcripts to comment on the Mercer family ("The witness [Sarah] was here violently agitated, and a deep sensation was produced on all around her."), the trial becomes not a consideration of a young man's murder, but the perilous journey of an already wounded family further threatened by the potential loss of their only son (*Public Ledger*, March 31, 1843).⁶⁰ What hangs in the balance is not the fate of a killer faced with justice, but the fate of a family faced with destruction. Finally, the fact that nearly every account includes a description of the emotional reunion that takes place after the family's escape from danger, as well as the joyous return of Philadelphia's newly-favorite son the following day, strongly

⁶⁰ The fact that the speeches of Mercer's attorneys, particularly of Browne, are apparently printed verbatim while other portions of the trial are glossed in single sentences suggests the press may have been given copies of the speeches in advance.

suggests that the *virtue* that is ultimately revealed is the preservation of *family*. The reason that crowds of Philadelphians – which included a large number of “ladies collected on Bloodgood’s balcony waving their handkerchiefs, and almost astounding the lawyers with the excess of their delicate sensibilities” – gathered to welcome home a man that most of them had likely never met, and the fact that they continued to celebrate even when they learned that man was absent suggests that it was not the salvation of Mercer that was so compelling, but the vindication of a defender of familial virtue (*Barre Gazette*, April 14, 1843). It was the ideal, and not the individual, that was the focus of their celebration.

IV.iii. Lippard’s Devious Designs

It can never be known whether or not Mercer would have reacted as violently to a dramatization of his story that mirrored the portrait of the press coverage described above. As with other Philadelphians (and, indeed, anyone outside the city who read of the case), Lippard’s only knowledge of the Heberton-Mercer affair came from his reading of that coverage. While the nature of the story and its outcome worked quite well with the press’s narrative approach and designs, Lippard had a very different purpose in mind, one that was concerned not with a conservative validation of the family as an index of morality but with a radical critique of the status quo, one that included attacks on the press, the justice system, and class structures in Philadelphia.

Lippard was a phenomenally prolific writer, publishing novels, short stories, and even his own newspaper, achieving an average output over his short career (he died at the age of thirty-one) of over one-million words annually, according to

biographer David Reynolds. Lippard's concern for the poor and his strident opposition to an oppressive economic system he saw depriving workers of the fruits of their labor manifested themselves in increasingly charged rhetoric. Near the end of his life, this frustration led him to found the Brotherhood of the Union, a quasi-Masonic secret society-cum-labor movement intended to once and for all save mankind from the ravages of unbridled capitalist enterprise.⁶¹ Lippard saw in the Heberton-Mercer affair an opportunity to strike at those he felt were directly responsible for the suffering of so many, and in 1844 he began serially publishing *The Quaker City; or The Monks of Monk Hall*.

On its surface, Lippard's novel exhibits many melodramatic devices; indeed, many of his harshest critics have focused their attacks on precisely those aspects. Representative of this attitude is Emilio da Grazia, who concludes: "Having no sense for the truly dramatic, Lippard was a master of the worst kind of melodrama. He capriciously made use of close calls, breathtaking escapes, chases, and wildly improbably reversals or surprises" (Grazia, 163). Set in Philadelphia, details of the Heberton-Mercer affair form the narrative skeleton of the novel, though a variety of other characters and storylines flesh out what would ultimately become roughly five-hundred pages of print. While the extensive press coverage meant that Lippard had a topic that much of his primary audience would be familiar with already, and while he

⁶¹ David S. Reynold's *George Lippard* remains the single most important biography of Lippard, though interest in him has been steadily increasing over the past several years. Also useful are: Bouton; Grazia; Roger Butterfield, "George Lippard and His Secret Brotherhood," *Pennsylvania Magazine of History and Biography* 79, no. 3 (July 1955); Carsten E. Seecamp, "The Chapter of Perfection: A Neglected Influence on George Lippard," *Pennsylvania Magazine of History and Biography* 94, no. 2 (April 1970); and Timothy Wade Helwig, "Race, Nativism, and the Making of Class in Antebellum City-mysteries" (PhD diss., University of Maryland, 2006), chapter 1.

was perfectly willing to pack *The Quaker City* with melodramatic staples, there were elements of the melodramatic narrative presented in the papers that were incompatible with the exposé he intended to write. Lippard was open to the conventions of the genre; it was the underlying conservatism of the form that was problematic for his purposes.

The central characters in *The Quaker City* ultimately resist sorting into the facile binary of the ideal melodrama (or even the slightly less clear-cut characters of the press coverage), and Lippard changes several relationships to further muddy any sharp distinctions. The reader learns that Byrnewood Arlington (the Singleton Mercer character) has seduced a servant girl working in his household, impregnating her, discharging her, then paying her to keep silent.⁶² Gus Lorrimer (the novelized version of the seducer, Heberton) is just as dashing, calculated, and “abandoned” as the press coverage portrayed his namesake, and is an idol for other aspiring libertines around town. Yet, at the start of the novel, both he and Byrnewood are friends, and are found in an oyster cellar plotting the night’s debauchery together. Lorrimer describes a modest and sweet girl he has had his eye on, and Byrnewood wagers that even the great Gus Lorrimer would be unable to land such a catch. Lorrimer accepts the wager. In a delicious twist, the very girl whom Byrnewood has goaded his friend into

⁶² Similar charges were actually leveled against Mercer. During his trial, the prosecution attempted to bring up the fact that the defendant had faced criminal charges in the past, but their effort was ruled out of order and it was never specified what those charges were (see *Public Ledger*, April 3, 1843). The *Hudson River Chronicle*, however, suggested Mercer had seduced a young servant girl in the family household, and indicated that “for the consideration of some three hundred dollars, was quietly hushed up. ‘Awful retribution,’ indeed!” (February 13, 1843). Several additional references to such malicious rumors appear in the *Spirit of the Times* (February 15 and 16, 1843), but the writer concludes that “most of them are sheer fabrications, gotten up in most instances for effect” (February 15).

pursuing is Byrnewood's sister, Mary. While an elegant device that increases the story's dramatic tension, Lippard essentially destroys the contrast the press took pains to establish – Lippard has taken the melodramatic “hero” of the press, the upstanding defender of women's virtue and family honor, and turned him into an accomplice of the very man who violated his sister. And that ostensibly evil man, Lorrimer, seems to feel genuine remorse when he sees the terrible consequences of pursuing Byrnewood's sister. Given Lippard's strong interest in advocating for the working class, he might well have chosen to make Byrnewood a mechanic, and turn Lorrimer's seduction of the working-class, virtuous young woman into a metaphorical violation vividly representing the way he saw elites of the time preying on the lower classes. The fact that Lippard destroys the sharp moral contrast between the two men, however, is merely a different approach to the same fundamental condemnation; Lippard is interested in showing the utter corruption of those elites – of which the seducer, Lorrimer, and the wronged brother, Byrnewood – are both prime examples.

In addition to adjusting the contrast between seducer and murderer, Lippard adds a new character named the Devil-Bug who, in the first installments of the novel, seems a villain tailor-made for the melodramatic stage. He is the hideous, deformed proprietor of Monk Hall, a labyrinthine complex in downtown Philadelphia filled with dark, opulent rooms and huge banquet halls. Nearly every room features a trap door, waiting to send unsuspecting guests hurtling into the darkness of the massive underground cavern brooding below Monk Hall. Each evening, the Hall's penitents come to worship at the shrine of decadence and debauchery. These “monks” are the

elite of Philadelphia – politicians, lawyers, doctors, judges, and ministers – come to eat, drink, and conduct whatever unsavory business they might desire with victims they bring themselves or are provided by the Devil-Bug.

With his two hulking henchmen, Devil-Bug murders, arranges trysts for men such as Lorrimer, and tortures his victims. He relates a tale of killing an old woman by picking her up and swinging her against a mantle, leaving bits of brain and skull splattered over the hearth. Yet, in many ways, Devil-Bug is the most honest inhabitant of *The Quaker City*. He is the least deluded of any character in the novel, and dedicates himself to his crime with an exuberance and wit that bring to mind MacHeath from the *The Beggar's Opera*. He is more honest in his vice than law-abiding citizens are in their virtue. And he is one of the only characters who experiences some sort of redemption. Throughout the course of the novel, he learns that the young lady one of his monks – the Reverend Pyne – is trying to drug and rape is in fact the Devil-Bug's daughter. After rescuing her, seeing she is safely settled with a new family and remains ignorant of the identity of her true father, he happily sacrifices his own life to keep her origin forever lost. There is no binary, no clustering around two poles of good and evil in Lippard's vision of Philadelphia, and its moral relativism, in which a series of flawed characters live their lives with no clear model of right and wrong, creates an ambiguity incompatible with the Manichaeian world of the ideal melodrama.⁶³

⁶³ While Philadelphians confronting the playbill would not have known, given only three of the ten installments had been published prior to the planned production, it is worth noting that the complete novel lacks the ideological conservatism that is one of the hallmarks of nineteenth-century melodrama. While accounts of the actual Heberton-Mercer affair conclude with the joyful reunion of the family and an emotional tableau, Lippard ends his narrative in a far less satisfying manner. Six months following his murder of Lorrimer, Byrnewood is living in the wilds of Wyoming with the

IV.iv. Characters, Figures, and a Toothless Drunkard

The violent response elicited by Wemyss' attempted staging of Lippard's novel suggests the limits of artisan dramaturgy. Its flexibility and speed made it incredibly responsive to its audiences, yet there were certain subjects that could not be safely treated in the immediacy of live performance. In what follows, I argue this is due, in part, to the process by which a *character* in a text becomes a *figure* onstage. While uses of these two terms are numerous, and while they may, in certain contexts, be used interchangeably, there are denotations of each that can illuminate important aspects of the dynamic exchange between the production and reception of different iterations of "Mercer." For there were, in fact, several versions of that individual in late 1844: there was the "Mercer" of the majority of the press accounts – a passionate young man who, faced with what he perceived to be a profound threat to his family's existence took it upon himself to obtain the justice that the legal system seemed incapable of providing. There was the "Mercer" that a few papers harshly criticized for resorting to deadly violence to solve what should have been a legal problem. There was the "Byrnewood/Mercer" of Lippard's first installment of *The Quaker City*, a hypocritical playboy guilty of the same crimes he suddenly finds visited upon himself, who seeks retribution rather than justice and is left with a broken facsimile of the family he ostensibly acted to protect. And, of course, there is Singleton himself:

servant he seduced and the child she bore. Wishing desperately to forget what has happened to him, he is tortured by guilt and regularly visits a secret room in his home featuring a massive portrait of Lorrimer. In the final tableau, his sister Mary, driven mad with the loss of her seducer, and Lorrimer's sister, similarly disturbed by the loss of her brother, burst in on Byrnewood staring at the painting. The two women fall to the floor overcome, whispering the name of the murdered libertine. Byrnewood looks down in horror, contemplating the legacy of his "justice" as the portrait of the murdered man gazes on. It is a parody of the joyful reunion that closes the press accounts, a family "restored," yet irrevocably broken.

the son and brother, known to his family and circle of acquaintances, unmediated by characterization in print, infinitely more complex than any of his literary incarnations, yet utterly inaccessible.⁶⁴ The nature of each of these manifestations influenced the nature of their reception, and, in trying to understand why the “live” version was so much more threatening than any of the other incarnations (while the novel generated significant controversy regarding the “sensuality” of Lippard’s work, there is no record of any attempt by Mercer to sue for libel), distinguishing between *characters* and *figures* may be useful.

In my formulation, *character* emphasizes the fictional nature of a creation whose realization is only ever the result of an engagement between a text and an individual reader, whose existence is manifest solely in the act of reception, and who is only real “in the sense of its springing to an imagined actuality.”⁶⁵ *Character* is the product of a transaction between the physical text – inanimate, fixed, latent – and the individual who is precisely the opposite, and who brings to the interaction a wealth of intertextual references, an ever-shifting web of associations that expands and contracts with each additional engagement with the text.

“Figure,” according to the *Oxford English Dictionary*, is “an embodied (human) form; a person considered with regard to visible form and appearance.”

Figure emphasizes a *represented* nature. As with *character*, it is the overdetermined

⁶⁴ In a sense, there is yet another “Mercer” created by printed accounts of his response to the playbill: the indignant acquittee who rallies a group of friends to threaten the planned production. Yet one more version, the “Byrnewood” that a rising young actor named George Jamison was to have vivified that November evening, died aborning.

⁶⁵ Bert O. States, *Great Reckonings in Little Rooms: On the Phenomenology of Theater* (Berkeley: University of California Press, 1985), 28.

product of an intentioned act of creation, yet it is also the instantiation of traits and tendencies, passions and predilections, in the physical form of a human actor. *Figures* exist outside the realm and restrictions of language, and – while they may certainly draw on them – are unbound by the strictures of any particular discursive system. While engagement with *figures* is also a necessarily intertextual interaction, they have an existence independent of any particular instance of reception, and a phenomenal presence that does not require any external subjects. It is the interaction between these two concepts, I believe, that made the various “Mercers” such a combustible combination in the context of the heightened and charged world of theatrical signs (more on this shortly), and the danger of that interaction depended, in part, on what the Chesnut Street audience would have brought to the theatre.

In her study of theatrical reception, Susan Bennett, drawing on Hans Robert Jauss’ work, writes of the critical importance of horizons of expectation in determining audience reception:

The hypotheses which constitute an audience’s immediate reading are inevitably influenced by, as well as measured against, the internal horizon of expectations of a performance. Where the text of the performance is known to some or all of the spectators, the *mise-en-scène* will likely be read against that knowledge. In that way, the audience can judge the presentation of the fictional world as more or less meeting its expectations, as unusual...or as aberrant.⁶⁶

Of course, there is no single “horizon of expectation” shared by every member of an audience (or by any two people, for that matter). However, there are frequently common elements. Identical volumes (or at least different revisions) can be found in

⁶⁶ Susan Bennett, *Theatre Audiences: A Theory of Production and Reception* (NY: Routledge, 1990), 151.

the intertextual libraries that different individuals carry into the playhouse. In the case of *The Quaker City*, those similar expectations were likely, and largely, the result of the press coverage and novelization of the Heberton-Mercer affair. The *character* of “Mercer” that audiences would have brought with them was, in Bennett’s language, the text, against which the *mise-en-scène* – specifically, the embodiment of Mercer in the *figure* of Byrnewood – would have been measured. As there was no single horizon of expectation, there was also no single “Mercer”; it is likely that any preconceptions would have been an amalgam of the “Mercer” and “Byrnewood/Mercer” *characters* (depending, of course, on factors such as their exposure to the case, whether they had read the first installments of Lippard’s novel, the degree to which the case or novel had been a topic of conversation with friends, their family makeup and history, and so forth). As with any intertextual set of associations, however, they would have been susceptible to revisions based on interactions with fellow audience members, advance reading of the playbill, the action of the play before the Byrnewood character was introduced, and, most importantly, based on the introduction of the “Byrnewood/Mercer/Jamison” *figure* that would have taken the stage. Rather than thinking of this quicksilver *figure* as an entity that is continually being refigured over the course of performance, we should account for the possibility that each iteration is, in fact, present simultaneously. Carlson’s concept of “ghosting” is absolutely applicable here, as the simultaneity he describes occurs in the *character/figure* interaction I propose here. Hovering above and around Jamison, at times obscuring or magnifying aspects of his *figuration*, would have been the specters of the other “Mercers,” the *characters* established in

print and imag(in)ed in the minds of newspaper and novel readers, creating a complex, multivalent theatrical sign. Jamison's performance would have been constantly read against the "text" of the case and the *character* of Mercer, the distance between the "Mercer" of each individual's horizon of expectation and the "Byrnewood/Mercer/Jamison" measured and evaluated for accord or aberrancy.

As noted, there was no single text, no one "Mercer." Given the nature of theatrical reception, however, it is possible that those varying portraits would have begun to converge over the course of the evening. In writing about changes in literary representations of crime in early America, Karen Halttunen notes that "modern reading is a private activity conducive to the psychic process of 'interiorization,' the creation of a secluded inner realm of silent thought where individual selfhood can be generated, free from the pressures of the immediate presence of others."⁶⁷ One of the key differences between the reception of *characters* and *figures* is the generation of "individual selfhood," which is hampered, if not rendered impossible, in the theatrical context. It is difficult to comprehend, conceive, and interiorize the theatrical event free from the influence of others, particularly in the context of the artisan dramaturgy of antebellum American theatre, when audiences approached theatergoing as a participatory event. Even with the introduction of gas lighting in the 1810s and 1820s, it was difficult to adjust levels or re-light jets that had been turned off, and until the introduction of electric lighting in the 1880s houses were frequently as well lit as the stage. As noted above, audiences were aware of each other, engaged with each other

⁶⁷ Karen Halttunen, *Murder Most Foul: The Killer and the American Gothic Imagination* (Cambridge: Harvard University Press, 1998), 82.

and with the performers throughout the play, and were perfectly willing to express their displeasure or approbation with the intention of altering a performance. Further, given the transactional and reciprocal engagement between actor and audience, even if one's fellow patrons were unable to penetrate a particularly determined individual's cognitive processes, they would still, in their interaction with the performers, be altering the terms of the event in ways that would ultimately affect the performance/reception dynamic for all present. Anyone who has ever attended a performance where laughter or tears seem infectious should appreciate the communicative nature of audience emotions, an influence that further serves to make reception a potentially communal event, where interpretive faculties may, to varying degrees, accommodate themselves to each other. It is also possible, however, that this audience dynamic may have the opposite effect, and may serve to sharpen and crystallize divergent interpretations in a potentially dangerous and disruptive fashion, as occurred when Rice's mammalian co-star took the stage.

This charged atmosphere is, in part, a function of the nature of theatrical signs, which Bert O. States treats eloquently in *Great Reckonings in Little Rooms: On the Phenomenology of Theater*. States suggests that anything put on stage "becomes an event in a self-contained illusion outside the world of social praxis but conceptually referring to that world in some way....As long as there is pretense, or playing, there is pretense *of* something, and this *of* constitutes a bridge between the stage and its fictional analogue of the world" (States, 19, emphasis in original). For my purposes, this *of* is crucial, as it seems to be driven, at least in part, by the interaction between *character* and *figure*, and is the field in which differing horizons of expectation

encounter and confront each other, confrontations which can sometimes be dangerous.⁶⁸ As my examples thus far should suggest, the *characters* I am interested in here are those that *characterize* actual individuals, as the various “Mercers” did for their flesh and blood analogue. This was, of course, one of the proximal causes of the cancellation: if Mercer had not recognized himself in the playbill and seen it as heralding a representation of his family’s traumatic experience he would have no reason to view it any differently than, say, the Walnut Street Theatre’s production of *Putnam, the Iron Son of ‘76* that was announced for the same evening. There seems to be something fundamentally different and (potentially) more threatening in the *figuration* of a person than there is in his/her *characterization*.

This is not to suggest that real-life individuals were never portrayed on antebellum stages, or that when they were similar controversies erupted. Indeed, portrayals of politicians, both living and lost, commonly trod the boards. George Washington was the subject of many dramas, including the aforementioned *Putnam, the Iron Son of ‘76; Andre; and The Glory of Columbia; Her Yeomanry!*⁶⁹ Andrew Jackson, as well, was featured in numerous plays, often performed on the anniversary of the Battle of New Orleans.⁷⁰ Soldiers frequently played themselves in tributes or

⁶⁸ In my formulation, *character* and *figure* cannot exist independently of each other; more specifically, while there are *characters* who are never embodied in performance, *figures* are representations of something, and that something is, by (my) definition, a *character*.

⁶⁹ As well as John Brougham’s *The Miller of New Jersey* and James Burnett’s *Blanche of Brandywine*.

⁷⁰ See, for example: Richard Penn Smith’s *The Eighth of January*; John Blake White’s *The Triumph of Liberty; or, Louisiana Preserved. A National Drama, in Five Acts*; James F. Brice’s *Andrew Jackson, an Interlude in Three Acts*; and *The Bank Monster, or Specie vs. Shinplaster*, “a melodramatic operatic burlesque, of peculiar species, produced at the Arch Street Theatre, Philadelphia, 1841” (Rees, *Dramatic Authors*, 124).

actual dramas, as when William Wood invited soldiers stationed in Philadelphia to assist with a production of *Alexander*, tasking them with leading the “assault of the walls by Alexander, by means of bridges formed with the shields of the soldiers, [which] produced a grandeur of effect unattempted on the American stage” (Wood, 80). While politics might seem a potentially incendiary subject, discussing political events and even portraying political figures was acceptable so long as the emphasis was patriotism, rather than partisanship. In Smith’s preface to *The Eighth of January* the author both references the possible dangers attending the *figuration* of eminent individuals and confirms that patriotism can alleviate them:

The difficulty of introducing a distinguished living character on the stage without offence to propriety, can be duly estimated by those alone who have attempted it; and if the writer of the following drama escape this censure, he will be satisfied; but should it attach itself to him, he can only plead in extenuation, that it is time that the principal events in the history of our country were dramatised, and exhibited at the theatres on such days as are set apart as national festivals, and that there are few more deserving of commemoration than that herein slightly touched upon. (Smith, *The Eighth of January*, preface)

Comic actor James Hackett understood this requirement when he asked John Neal to write him a play “spiced with some pungent glances at the present state of affairs without going deep enough to offend any party” (quoted in Grimsted, *Melodrama Unveiled*, 161).

Mercer was not, of course, a political figure, though some of the same dangers associated with political *figuration* discussed above may have compelled him to threaten violence in order to keep a version of himself off the stage of the Chesnut. In speculating as to his motivations (for he seems to have left no evidence explaining his reasoning), the simplest explanation is that Lippard’s characterization of him was not

at all flattering, for reasons dealt with previously. Perhaps Mercer preferred not to see himself portrayed as a hypocritical seducer who is far from insane when he plots and executes his revenge. He may well have been a private person, as well; despite his celebrity following the acquittal, his low-key return to Philadelphia and subsequent absence from the pages of local newspapers suggests he wanted little more than to put the entire incident behind him, though gathering a mob of several hundred young men with the express purpose of destroying a theatre if their demands went unfulfilled suggests this reticence was surmountable. I still believe, however, it was something more than simply an ugly portrayal, given his willingness to overlook Lippard's novel. Umberto Eco, in an influential essay on the semiotics of theatre, suggests a function of live performance that is relevant here. In exploring how one might stage drunkenness, he gives a quick sketch of the icons necessary to identify a drunken man as such, suggesting a red nose, ruffled hair, and old, rumpled clothes would likely be sufficient. But what, he asks, if the man was missing teeth? There is nothing suggesting that the type of a drunken man should be missing teeth, but – in the context of the theatrical scene – those characteristics take on a new significance: “Insofar as the man becomes a sign, those of his characteristics that are not pertinent to the purposes of representation also acquire a sort of vicarious representative importance. The very moment the audience accepts the convention of the *mise-en-scène*, every element of that portion of the world that has been framed (put upon the platform) becomes significant.”⁷¹ This is precisely what would have happened had

⁷¹ Umberto Eco, “Semiotics of Theatrical Performance,” *The Drama Review: TDR* 21, no. 1 (March 1977), 112.

The Quaker City gone on as planned, and possibly what Mercer feared. The press coverage was focused almost entirely on the narrative of the case and its ramifications. The novel, however, has a much broader scope and design. While the press was engaged in a valorization of the family, *The Quaker City* was engaged in a scathing expose of the corruption of Philadelphia elites, of a social system that permitted the rampant exploitation of the working poor for the benefit of the wealthy, and the hypocrisy of the moralizing middle classes. As such, the “Mercer/Byrnewood/Jamison” *figure* would have been viewed in the context of that project, taking on a “vicarious representative importance” that would stain Mercer not only directly, but by association, as a member of the very class Lippard is attacking.

The nature of the dramatic *figure* and the *Quaker City* incident further illustrates the locus of authority in the system of artisan dramaturgy. In writing of playwriting in the antebellum United States, Moses observes that “the actor seems to have been the mainstay of this early dramaturgy” (Moses, 92). While I would suggest the audience also bears consideration, it was certainly not the playwrights and their texts, however carefully prepared, that were most responsible for dramatic composition. Samuel Johnson’s oft-quoted observation that “The drama’s laws the drama’s patrons give/For we that live to please, must please to live” is certainly applicable to artisan dramaturgy, given the significant role antebellum audience members played in shaping theatrical performances. It was a role, however, that many of the insurgent playwrights resented.

“That Eminence It Is Surely Destined to Achieve”; or, The Campaign for Copyright Reform, 1835-1856. A Drama in 5 Acts.

Chapter 3

Dramatis Personae

The Insurgent Playwrights:

Robert M. Bird – Chief of the Insurgents. Earliest and longest in the field for the cause; tragically lost before the consummation of his efforts. A physician by training but an author by ambition. A Native playwright of high renown and a novelist of great acclaim (though little remuneration). Exhibits a leaning towards moderate Whiggery, evidenced in his editorship of important political journals. Of Philadelphia.

George H. Boker – Captain of the Insurgents. A poet of antiquated aspirations and fiendish wit, late to the cause but victorious at the close. By President Grant, a Minister to Constantinople. Yet able to copulate like the patriarchs, by which he measures his age.¹ Of Philadelphia.

Charles J. Ingersoll – A Democrat in a family of Whigs. Lawyer, diplomat, adolescent playwright of *Edwy and Elgiva*, mature playwright of the closet-bound tragedy *Julian*. Author and advocate of the monumental battles of H[ouse] R[esolution] 9 in 1844. “The cunningest and most treacherous cat of them all.”² Of a distinguished Philadelphia family.

Robert T. Conrad – Bird’s ablest lieutenant and agent in the Capitol City. By training a lawyer, oft a Judge. Know-Nothing Mayor of his native Philadelphia. Twice the author of *Jack Cade* (aka *Ayelsmere*, aka *The Noble Yeoman*). Saved from vilification at the hands of Geo. Lippard by his loyal friend, F. C. Wemyss.

Benjamin H. Brewster – Operative Extraordinaire in the Congressional Sewers. Lawyer by day, closet dramatist in the eve, dramatizer of Bird’s *The Infidel*. Vital intermediary between the Insurgents and their Political Co-Conspirators, chiefly Senator Seward and Representative Cadwalader. Defender of Ms. H.B. Stowe from the avaricious pen of a German translator of her great novel, *Uncle Tom’s Cabin*. President Arthur’s Attorney General. Of New Jersey.

¹ As Boker relates to his friend Richard Henry Stoddard, “I can still copulate like the Patriarchs, and by that I measure my age” (December 8, 1865, George H. Boker Letters and Papers (4055), Rare Books and Manuscripts, Special Collections Library, Pennsylvania State University; hereafter “Boker PSU”).

² John Quincy Adams, *The Diaries of John Quincy Adams: A Digital Collection* (January 1, 1844), http://www.masshist.org/jqadiaries/php/doc?id=jqad44_183 [accessed January 23, 2014]. Hereafter “Adams, *Diary*.”

Dionysius Lardner Boursiquot – Commonly Dion Boucicault. An Irishman of great dramatic talent and productivity. Of unknown aid to the cause, though a great beneficiary of its protections.

Their Political Co-Conspirators:

Henry Clay – Legendary for legislative legerdemain and Union-saving compromises. “Mr. Whig” and perennial contender for the presidency, while not dueling or hazarding games of chance. A Senator doggedly committed to international copyright protection, esp. in 1837. Of Kentucky.

Joseph R. Chandler – Philadelphia Representative and chief architect of HRs 406 and 39 in the 1850 campaigns. Driven from the field by the Know-Nothings.

William H. Seward – Senator, Secretary of state, given to speculation on large, unexplored landmasses. Escort of S[enate Bill]. 239, by which the ultimate victory was carried. Of New York.

Charles Sumner – Young clerk for Judge Story, present at the verdict of the influential *Wheaton v. Peters* contest. Senator from Massachusetts, would-be introducer of Seward’s bill, later assaulted while at his appointed tasks in the Senate chamber.

John Cadwalader – Democratic Operative for a single term, valiant partner to Seward in the successful battle of 1856. Of an eminent Philadelphia family.

Daniel Webster – Black Dan. Nearly meets the campaign’s objectives via secret treaty. Twice secretary of state, Representative of two states, senator. Tragically lost.

Inveterate Villains:

John Quincy Adams – Diplomat, President, unrequited poet. Massachusetts Representative, in which office he menaces the efforts of C. Ingersoll in the 1844 campaign. A “bad, bitter old man, who disgorges the black vomit of his malignant rhetoric without stint.”³

The British – Nefarious deceivers in Central America.

Edwin Forrest – Scheming usurper of the dramas of Bird, Conrad, and countless others. Early to register copyrights for plays of others’ devising and quick to litigate.

The Table – On which many promising copyright bills were laid, never to rise.

A Brittle Bolt – The Doom of Black Dan.

³ The description of Adams is taken from a letter from Joshua Martin to Charles J. Ingersoll, January 1, 1845, Charles J. Ingersoll Papers, Historical Society of Pennsylvania.

Supernumeraries:

Cornelius Mathews – Prolific journalist, editor, and occasional closet playwright. Founding member of American Copyright Club. Blamed for collapse of said club.⁴

Joseph R. Ingersoll – Brother to Charles J. Ingersoll, counsel in *Wheaton v. Peters*. Parties with E. Forrest in 1837.

Ralph I. Ingersoll – Cheerful. Attempted to assist Noah Webster with his copyright legislation. A distant cousin of Charles and Joseph. Of Connecticut.

David Ingersoll – An actor who substituted for the intemperate A. A. Addams in the role of Jack Cade. No relation to Joseph, Charles, or Ralph.

George Cadwalader – Brother to John Cadwalader, Theatre Agent, Brigadier General.

Noah Webster – Early copyright advocate, cousin to Black Dan.

Edward Bulwer-Lytton – British novelist, playwright, politician. The driving force behind “Bulwer’s Law,” whose copyright protections inspired the Insurgency.

⁴ See Burton R. Pollin, “‘The Living Writers of America’: A Manuscript by Edgar Allan Poe,” *Studies in the American Renaissance* (1991), 189n178.

Prologue

However peculiar may be the nature of the property – however differing in its characteristics, and the securities which it asks, from every other kind of property, it is only necessary to show it to be such, and to show where the right lies, to compel a new definition so as to compass the interest.

–William Gilmore Simms⁵

Noon was still hours away and Augustus A. Addams was well and truly drunk.⁶ More precisely, the rising tragic actor was *still* drunk, and had only just recovered from an attack of *delirium tremens* when Francis Courtney Wemyss came knocking at his door. Wemyss had rushed to the actor's house after a messenger sent to fetch Addams to the Walnut Street Theatre had returned alone. That Addams might be in his cups was hardly unusual, in and of itself, as the actor was known to be following a course of dissipation leading to the madhouse or the morgue. But this morning, of all mornings... Wemyss no doubt hoped the messenger had simply misunderstood, and that Addams was following shortly behind him. After all, the actor had promised less than a week earlier to dedicate himself to learning the part of Jack Cade, hero of new a drama written by Robert T. Conrad that was set to premiere that very evening.

The play had actually been set to premiere several times, and this was only the latest in a series of problems related to the preparation of *Jack Cade*. The origins of the play date to a proposal made earlier that spring in April, 1835. Addams was then making a name for himself at the American Theatre playing the sort of tragic roles

⁵ William Gilmore Simms, "International Copyright. Part 1," *Southern Literary Messenger* (1844), 10:458, <http://search.proquest.com/docview/126281298?accountid=14696> [accessed January 23, 2014].

⁶ The below events are described in Wemyss, 243-252.

that Forrest excelled in. Indeed, there were comparisons made between the two men that were more than evenly weighted. Addams was, according to Wemyss, graced by a countenance both handsome and expressive, with “a voice capable of being modulated to the tones of the softest flute, yet powerful enough to out-rant the loudest lungs of any actor who ever tore a passion to rags....He is the only one who ever had a chance of shaking Forrest in his position” (Wemyss, 244). While his talents had him “fixed so firmly in the good opinion of the audience, that nothing has been able to destroy his popularity...no man has labored harder to effect it,” and most of that laboring took the form of appearing before audiences while intoxicated (ibid.). Nevertheless, Addams was the man of the hour and Conrad had offered to write a vehicle suited to his talents. If Addams approved of it, Wemyss would buy it at a price to be determined by “two gentlemen of literary taste; one to be nominated by R. T. Conrad, the other by F. C. Wemyss” (245). The agreement made, Conrad began writing, and soon submitted *The Noble Yeoman* (renamed *Jack Cade* when Wemyss suggested it would draw better if named after the hero himself). Lawyers and editors Louis A. Godey and Morton McMichael were convened to decide on a fair price, and on October 2nd, all agreed that Conrad would receive \$300 in cash, and that he and Wemyss would split the proceeds of a third-night’s benefit (minus \$200 to cover house expenses) (ibid.).

Wemyss and Addams then left for Pittsburgh. In 1833, Wemyss had agreed to design a new theatre there and to raise and manage a company. He subsequently leased the Walnut Street Theatre in 1834, and found himself splitting his time between the two cities, carefully aligning touring stars and visits from the

Philadelphia company in an attempt to keep both theatres well-stocked with attractive entertainments. It was in that capacity that Addams performed at the Pittsburgh Theatre in October, leaving on the 25th to return to Philadelphia for the premier of *Jack Cade*. In anticipation, Conrad had arranged for his friends in the press to begin “puffing” the piece, fanning the flames of interest in the local papers. Wemyss no doubt read these announcements with satisfaction, though he was surprised in mid-November to learn from the same papers that Addams had instead decided to open his engagement with *Damon and Pythias*.

Along with the papers came a frantic letter from Wemyss’ Philadelphia treasurer, Philip Warren, then overseeing the American Theatre in Wemyss’ absence. Nothing Warren could say would induce Addams to play the role, despite the fact that the scenery, costumes, and cast were ready. Addams, Warren surmised, was not “perfect in his part,” though he was at a loss as to how remedy the situation (Wemyss, 246). Wemyss returned to Philadelphia, a voyage of 300 miles made on a mail coach that stopped only to change horses, a journey that typically took him just over four days. Immediately upon his arrival on Tuesday, December 1st, Wemyss met with Addams, who explained that he knew the role of Jack Cade flawlessly and only needed rehearsal time with the whole cast. Assured that his principal would be ready with several days of dedicated rehearsals, Wemyss’ planned the opening for the following Monday.

Conrad, meanwhile, had growing concerns that the delay might allow the puffing to inflate expectations beyond any hope of their being met. He wrote Wemyss on Thursday sharing his joy at his friend’s return, and explaining that he had ensured

that “those of my friends who had their hands on the bellows stopped, until they were certain the iron was in the fire” (quoted in Wemyss, 246). Addams’ assurances suggested he was, indeed, in the fire, and Conrad announced the puffing would resume in earnest, though he encouraged Wemyss to make whatever cuts or alterations necessary to ensure the play’s success. “Any change *you* approve will meet my full assent,” he assured the manager (quoted in Wemyss, 247).

While faithfully about his morning rehearsals the rest of the week, Addams failed to appear on Saturday, though he sent a note explaining that his time would be better spent studying his lines and asking the prompter to read his part so the rest of the cast could still rehearse. A common request from starring actors, Wemyss thought little of it, and announced the play for Monday. When Monday morning arrived but Addams did not, Wemyss hurried to the actor’s house, no doubt fearing the worst. The worst is what he found, specifically Addams “seated in an arm chair just recovering from an attack of the mania-a-potu!!!” (247). Despite his condition, he promised Wemyss he was prepared and would be at the theatre that evening. By 6:30pm, a large audience had responded to Conrad’s puffing and the tantalizing delay. In place of Addams, however, Wemyss received a note from the actor’s physician informing him that Addams “*was totally unfit to appear*” (ibid., emphasis in original). Wemyss seized upon a talented young actor named David Ingersoll and asked him to *read* the part for the next three nights in exchange for \$100. Ingersoll declined, but agreed to *play* it for three nights beginning on Wednesday. Wemyss assented and reluctantly made his way onstage to share with the excited crowd that they would be seeing *Ambrose Gwinette* instead of *Jack Cade*; Wemyss surrendered

more than half of them their money back, along with almost any hope of seeing a profit from his investment.

Conrad and McMichael both wrote Wemyss cautioning against the planned substitution. “Having been announced as written for Addams,” Conrad observed, “he will certainly draw in it better than any one else. If Mr. Ingersoll plays it, Addams probably *will not*, and we lose all chance of making much of the piece” (quoted in Wemyss, 248). McMichael was more concerned about the ethics of such a change, noting that because Conrad also had a financial stake in the play’s success, “the property does not absolutely rest in you” until Addams performed the piece, thus fulfilling the terms of the original agreement (quoted in Wemyss, 248). In a tight spot, and unwilling to delay the premier yet again, Wemyss decided to press ahead with Ingersoll as Jack Cade. The receipts were poor, and the third-night’s benefit yielded \$288.75, which Wemyss and Conrad split (after deducting \$200 for the expenses of the theatre).

Wemyss had not yet surrendered all hope, however, and when he renewed Addams’ contract later that month, it included several clauses ensuring Addams would appear in the role. It specified a date for the performance (February 1, 1836) and withheld half of the money already due Addams until he successfully fulfilled the terms of the contract. Addams also agreed to reimburse Wemyss for the “month due for sickness, occasioned by [Addams’] own imprudence” (250-251). Come February, Wemyss had his victory, such as it was: Addams played the role three nights to smaller receipts than Ingersoll had, not even earning Wemyss enough to pay for the advertisements announcing it.

Several years later, Wemyss suggested Conrad re-write the play for Edwin Forrest. Conrad did so, under the new title *Aylesmere*. The one condition Wemyss asked in exchange for his consideration in the original piece was that Forrest perform at Wemyss' theatre whenever playing the role in Philadelphia. Forrest did not perform it when in Philadelphia, which irked Wemyss. Not so much, however, that he would accept the Chatham Theatre's offer to buy the original *Jack Cade* so as to produce it (with Addams in the title role, no less) opposite Forrest's premier in *Aylesmere*. Wemyss wrote Forrest notifying him of the difficult decision, observing that he could certainly have used the \$200 offered for the manuscript and suggesting, given Forrest had yet to play the piece at Wemyss' theatre, that he might "leave it hereafter to be decided by Conrad and yourself whether I deserve any consideration at your hands" (Wemyss, 251-252).

Whether Forrest felt Wemyss was entitled to any consideration will be taken up in the epilogue, when I examine an 1857 lawsuit brought by Forrest over ownership of the performance rights to *Jack Cade*. The legal groundwork upon which Forrest's complaint rested did not exist when the first contract for the play was drawn up in 1835, and only came about through the concerted efforts of a group of men, among them Conrad, who took it upon themselves to ensure playwrights would have far greater control over money made from performances of their plays.



Chapters 3-5 pursue several projects. First, they acknowledge that for all their efforts to achieve success in the theatre the playwrights who worked for copyright reform often seemed to care little for the form itself. Whether complaining about

audience taste, the skills of the performers, or the ramifications each of those factors had on the integrity of their texts, they clearly perceived a significant gulf between the nature of the contemporary form and their own aspirations for it. Their understanding of the theatre was one grounded more in their literary encounters with the great playwrights and poets of the past than in any sustained engagement with the living form they saw butchering those texts (and their own). In their eyes, the affective potential of the drama lay in carefully crafted, precise dialogue, rather than in stage effects and manipulative performances. I juxtapose their preferences with the model of artisan dramaturgy discussed in the previous chapters, suggesting how their frustration led them to see copyright reform as beneficial to their interests. Ultimately, I suggest their theatrical aesthetic was informed by a vision of the theatre that existed in their particular conception of the past – which I explore in Act I (chapter 3) – and by a particular view of literature as a form of property.

Before examining those views, I uncover the legal framework in which they pursued their goals. Act II (chapter 4) traces the history of copyright from its genesis in the Statute of Anne in 1710 to its codification in American copyright law and its interpretation and clarification in an important legal case, *Wheaton v. Peters*, in 1834. I briefly discuss the creation of dramatic copyright in Britain in 1831, popularly known as Bulwer’s Law, that provided an important model for American agitators, particularly Robert M. Bird.

In Act III (chapter 4), I begin with Bird’s experiences while in London seeking to copyright his novels. While there, he saw firsthand both how the interests of British dramatists were protected and advanced and how Bulwer’s Law might

serve as a model for altering the American theatrical landscape. The insurgents took a view of their work that perceived appropriation by others as a sort of violation or even theft. I explore their particular conception of literary production as a form of labor that established a proprietary relationship with their creations, and examine the arguments they made to support their calls for greater control of their work in the form of expanded copyright protections. As a whole, they represent an attempt to, as this chapter's epigraph declares, construct a new definition of copyright that would "compass the interests" they sought to protect.

Early legislative attempts to "compass the interest" involved both efforts to establish international copyright protection and attempts to change the American laws, and are the subject of Act IV (chapter 4). If passed, the former would have allowed American playwrights to compete with their European counterparts in the market for published plays by minimizing publisher's incentives to print foreign works (for which no author had to be compensated). After several failures to advance the legislation, it became clear that the supporters of international copyright would not be able to surmount the formidable opposition brought by publishers. Narrowing the scope of their efforts, a small number of playwrights began lobbying individuals in Congress to introduce legislation establishing protection for the rights of representation, and the first such bill was introduced in 1841. It was unsuccessful, as were subsequent attempts in 1844, 1850, and 1853. The specific tactics adopted by each measure varied, but the general movement was away from language explicitly defining copyright or the right of representation as a species of property and towards legislation with an increasingly narrow scope. With the exception of the 1844 bill,

successive efforts also moved away from proposing a general right and towards amending the copyright provisions already established by federal law. In their totality, these approaches sought to establish a consistent relationship, regulated by statute, between the printed text and its manifestation in performance, privileging the underlying script over its enactment, and localizing, at least for the playwright, the value of the drama in the published play text.

The interlude in chapter 5 narrates a parallel but unrelated attempt to establish a copyright treaty with Britain that nearly passed, but was derailed in part by the death of its chief American negotiator, Daniel Webster. Had it succeeded, American theatre in the second half of the nineteenth century might well have developed in a dramatically different fashion. The attempt further reveals an important characteristic of the campaign that progressed between 1835 and 1856: the issue of dramatic copyright could never be neatly fitted into the mediating framework of partisan politics that so characterized political life in this period, particularly in the years between the 1844 debates over the annexation of Texas and the Civil War. This was both a weakness and a strength. It certainly allowed the issue to sometimes become associated with a particular party, as when Clay's support tethered the question of international copyright to his "American System" (a program advocating protective tariffs, a strong bank, and government support for internal improvements, all policies adamantly opposed by the Democrats). Yet it also permitted collaborations that would have been impossible had the issue assumed a distinctly partisan cast, as any opposition was generally personal instead of partisan, individual instead of ideological. Playwrights and politicians of all political stripes advocated on behalf of

copyright reform, and it was ultimately a collaboration embracing stalwart Democrats (Boker and John Cadwalader), a Whig-turned-Nativist (Conrad), and committed Whigs who later became radical Republicans (Charles Sumner and William H. Seward) that secured passage of the 1856 bill, which was signed into law by another Democrat.

Act V (chapter 5) chronicles the final push for the 1856 bill, which succeeded in part because its supporters continued to narrow the scope and nature of the protection they sought. Perhaps most important was the abandonment of arguments based on property rights. Throughout the 1840s and 1850s, Congressional activity was increasingly dominated by acrimonious debates on the existence and perpetuation of another species of property – chattel slaves. Questions over whether or not slaveholders would be allowed to take their “property” into the states being carved out of the Louisiana Purchase and land acquired from Mexico increasingly hinged on battles over who had the authority to restrict the existence of Constitutionally-protected property rights. It seems clear that arguments positing that the privilege of performing a play was a question of natural law and property rights would find it difficult to gain purchase in the halls of Congress.

The epilogue returns to *Jack Cade*, one of several plays Edwin Forrest registered copyrights for shortly after passage of the 1856 law. When a company mounted a production of the play in 1857, Forrest sued, and the arguments made in the course of the suit reveal both misunderstandings about what the law protected and presaged the expansion of copyright’s purview over the next half century.

In what follows, I make several contributions to the existing scholarship. First, I document the constellation of relationships and campaigns that contributed to the passage of the 1856 legislation, most of which are unexplored. When theatre historians discuss the law, they have tended to focus on a relatively small group of individuals – Boker, Boucicault, Bird, and, occasionally, Conrad – and temper their remarks on passage of the law by noting its failure to adequately protect American dramatists by recognizing foreign copyrights. For example, Quinn addresses the subject in his chapter on Boucicault. While he references an earlier “1840s” effort by Bird (based on a hint in a letter Bird wrote in 1853), Quinn suggests that it “came to nothing”; ultimately, he largely credits Boker with the achievement, noting that Boucicault supplied an important push (Quinn, *History*, 369). Quinn concludes that the 1856 law “has not, as a matter of fact, proved as effective as its sponsors hoped” (ibid.). Too, McConachie’s *Melodramatic Formations* credits the same three men (Bird, Boker, and Boucicault) with successfully agitating for the law. While McConachie states that “the legal protection of the copyright law made playwrights the potential equals of touring stars and manager-entrepreneurs in theatrical moneymaking,” he does not elaborate, and as the rest of his study makes clear much of this equalizing occurred later in the century (McConachie, *Melodramatic Formations*, 210). Montrose Moses’ single reference to the legislation in *The American Dramatist* concludes that “even the final passage of a copyright bill did not mend matters much: if it was not the inundation of the English product, it was the deluge of the stage with French melodrama” (Moses, 91). And Meserve implies another playwright and author, Cornelius Mathews, was central in the larger

movement that culminated, in part, in the 1856 law, though he does not cite any evidence linking Mathews to the passage of the bill and ultimately acknowledges that “Dion Boucicault receives much of the credit for the passage of a law” (Meserve, *Heralds*, 35).

In addition to the aforementioned theatre histories, biographies of the men primarily linked to the law include largely the same vague characterizations of the bill’s immediate context and rarely connect it to prior efforts. For example, Boker’s most recent biographer claims that his subject “wrote and impelled to legislation” the 1856 bill, concluding that its passage “marks the beginning of a playwriting profession in America and must be considered Boker’s most significant contribution to the writing profession.”⁷ Several studies of Boucicault claim he was instrumental in the bill’s passage, among them Richard Fawkes’ *Dion Boucicault: A Biography*, which claims Boker “made little headway until he was joined by Boucicault in 1855. Between them, they mounted such a campaign that in 1856 the amendment to the 1831 Act was carried.”⁸ These efforts neglect several important individuals, without whom the law would likely have met the same fate as its predecessors. Additionally, no one has adequately examined the passage of the 1856 legislation in the context of the international copyright reform movement started nearly twenty years earlier, nor

⁷ Thomas M. Kitts, *The Theatrical life of George Henry Boker* (New York: Peter Lang Publishing, Inc., 1994), 6, 199.

⁸ Richard Fawkes, *Dion Boucicault: A Biography* (London: Quartet Books, 1979), 91. The “1831 Act” is a reference to a revision of the copyright act originally established in 1790, which will be addressed in Act II (chapter 4).

has anyone studied how a series of unsuccessful attempts by playwrights and politicians to alter the law prior to 1856 determined the shape of the final legislation.

Further, while scholars of the law and literature have traced the history of copyright legislation throughout the nineteenth century, their interest has largely been on the law's relationship to literature, and has often been focused on successful attempts to alter that relationship.⁹ Many also exhibit biases, often deeply entrenched, that have tended to privilege and reiterate particular narratives. As McGill points out, for example, the work and consciousness of many literary scholars is imbued with an "authors'-rights bias," one partly based on the fact that many of the primary source materials related to nineteenth-century copyright reform were curated by individuals

⁹ A notable exception is James J. Barnes' *Authors, Publishers and Politicians: The Quest for an Anglo-American Copyright Agreement, 1815-1854* (Columbus, OH: Ohio State University Press, 1974), whose text chronicles the failures of international copyright reform through 1854. The most helpful of the studies dealing with nineteenth-century copyright have been: Barnes; Meredith L. McGill, *American Literature and the Culture of Reprinting, 1834-1853* (Philadelphia: University of Pennsylvania Press, 2003); Eaton S. Drone, "Authors' rights before publication.--the representation of manuscript plays," *The American Law Review* 9, no. 2 (January 1875); Eaton S. Drone, *A Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States* (Boston: Little, Brown, and Company, 1879), <https://openlibrary.org/books/OL250186M> [accessed January 23, 2014]; George Ticknor Curtis, *A Treatise on the Law of Copyright in Books, Dramatic and Musical Compositions, Letters, and other Manuscripts, Engravings and Sculpture, as Enacted in England and America* (Boston: Charles C. Little and James Brown, 1847), <https://openlibrary.org/books/OL22895637M> [accessed January 23, 2014]; Jessica Litman, "The Invention of Common Law Play Right," *Berkeley Technology Law Journal* 25 (April 2010); Zvi. S. Rosen, "The Twilight of the Opera Pirates: A Prehistory of the Exclusive Right of Public Performance for Musical Compositions," *Cardozo Arts and Entertainment Law Journal* 24 (2006-2007); Library of Congress and Thorvald Solberg, *Copyright in Congress, 1789-1904. A Bibliography, and Chronological Record of All Proceedings in Congress in Relation to Copyright from April 15, 1789, to April 28, 1904, First Congress, 1st Session, to Fifty-Eighth Congress, 2d Session* (Washington: Government Printing Office, 1905), <https://openlibrary.org/books/OL23291147M> [accessed January 23, 2014]; Edward S. Rogers, "The Law of Dramatic Copyright" (*Michigan Law Review* 1, no. 2 (November 1902)); and George B. Bryan, *American Theatrical Regulation, 1607-1900: Conspectus and Texts* (Metuchen, NJ: Scarecrow Press, Inc., 1993). Also of tremendous value has been the exhaustive collection of primary source material related to copyright in Europe and the United States archived at: *Primary Sources on Copyright (1450-1900)*, ed. L. Bently and M. Kretschmer, www.copyrighthistory.org.

involved in copyright agitation themselves (McGill, 82-83).¹⁰ It is a bias further ingrained by the canonization of many important nineteenth-century authors who vocally supported copyright reform. And much of the historical analysis undertaken by legal scholars is inflected by their familiarity with contemporary intellectual property law, which has led them to approach the law's development in a teleological fashion. McGill's work demonstrates the value of examining evidence ignored or downplayed by these traditional narratives, which allows her to present a far more nuanced account of the relationship between copyright legislation and republican philosophy. In a similar fashion, I show how a series of failed attempts to establish protection for the rights of representation provide a valuable insight into the ways notable antebellum playwrights viewed their craft and reveal where these authors felt their creative activity intersected with a legally defensible, proprietary interest.

Another contribution of this study is to show how the campaign to establish some form of dramatic copyright was related to efforts to establish an international copyright agreement. The nature of that relationship is illuminated by an extension of the martial metaphor suggested by the term "campaign." Like a military campaign, there were a series of distinct battles over particular pieces of legislation, battles that were nevertheless related to an overarching objective. There was certainly, at least in the context of the international movement, a determined opposition that successfully outmaneuvered copyright advocates and prevented them from taking any new ground. As in a military campaign, a complex and often equivocal chorus of justifications

¹⁰ For example, the primary chronicle and repository of material related to Congressional action – *Copyright in Congress, 1789-1904* – was compiled by Thorvald Solberg, who helped draft the legislation that was approved in 1891.

were put forth by leaders. Most useful, however, is the relationship between *strategy* and *tactics*. The overall strategic objective of the campaign was to grant playwrights greater control over how their work was manifest in performance (generally with the goal of ensuring greater remuneration for their writing). In pursuing that objective, several tactics were employed, though the two most important were attempts to establish international copyright agreements and efforts to ensure domestic protection of the rights of representation. Achieving either or both of those tactical goals would contribute to the success of the overall strategic objective. When the 1856 law passed, it seemed to many as if that ultimate goal had been achieved. Boucicault, for example, thanking William H. Seward for his efforts on behalf of the bill in the Senate, exulted that “as the Drama develops itself under the fostering influence of this law, and you see its growth towards that eminence it is surely destined to achieve – you may reflect with true and noble pride that its prosperity is your work.”¹¹

As will become clear, however, the series of compromises necessary to ensure the passage of a bill yielded an awkward form of protection ill-suited to the nature of mid-century theatrical production.

¹¹ Dion Boucicault to William H. Seward, August 21, 1856, in William Henry Seward, *The Papers of William H. Seward* (Woodbridge: Research Publications, 1982), reel 52. There are, as with the employment of any such metaphor, limits to its usefulness. Perhaps most crucially, there was no chain of command or single individual ultimately responsible for leading the effort. Yet the objective/tactics relationship seems valuable enough to merit its use.

Act I: “Throwing Stones at the Angels”; or, The Proprietary Aesthetics of the Insurgents of 1856 (in which appears a hippopotamus)

It is in the theater that scholars and men of letters have always had the greatest difficulty establishing the supremacy of their taste over that of the people and resisting the influence of the people’s taste on their own. The pit has often imposed its law on the boxes.

–Alexis de Tocqueville¹²

The fault of this comedy...is that it is too good to be played on a modern stage. It ought to have been written for antiquity two hundred years ago.

–George H. Boker (quoted in Kitts, 65)

The wild drama[s] accord well with our existence of unceasing excitement. They are something to catch the mind in its wearier hours, to arouse and interest it; and partake of the movement and bustle we live in. But we are, unhappily, prone to judge all productions of the mind by the touchstone of their effect upon sensations habituated to unnatural excitement; and to measure by dynamical rules, things which should be considered under conditions of repose. Before us lies a book of thought, traced by the skilful pen of a scholar, guided by the purest taste, and warmed by poetical feeling of a high order-and which it were injustice to estimate after such standards.

–*New York Review* (1839, 5, 10:440-441)

An acted (or, I might say more properly, an *actable*) play, seems to derive its value from what is *done*, more than from what is *said*;--- but the great power of a literary work consists in what is said and the manner of saying it: He, therefore, who best knows the stage, can best tell why, in the present temper of audiences, good poets should so often make bad dramatists.

–John Howard Payne (*Thérèse*, vii-viii, emphasis in original)

In a curious quasi-diary Bird kept irregularly between August and December of 1831, he discusses his frustrations with *The Gladiator*, which actually started well before the play’s premier on September 26, 1831.¹³ Bird had won one of Edwin

¹² Alexis de Tocqueville, *Democracy in America*, ed. Olivier Zuns, trans. Arthur Goldhammer (New York: Library of America, 2004), 563.

¹³ There are three dated entries (August 27th, October 26th, and December 14th), though portions of some seem to have been written between the listed dates and simply appended to earlier entries. Bird did not keep a diary so it is difficult to assess the tone, but the entries seem polished and witty enough to have been written for an audience beyond Bird himself. Calling them “Secret Records” also seems to suggest they were written with an eye to posterity. They are contained in the Robert Montgomery Bird Papers, Rare Book and Manuscript Library, University of Pennsylvania. Hereafter

Forrest's playwriting contests with his play *Pelopidas, or The Fall of the Polemarchs*.

He soon found himself inundated with suggested revisions from Forrest, quoted here

by one of Bird's biographers:

There ought to be, [Forrest] thought, 'a little more incident,' more 'bustling,' 'more action' in the first three acts. The speeches of Philadas and Archias, Forrest judged 'too long,' and of Philip 'much too long.' Act III., he went on, required 'a better climax,' for 'there is yet no action'; Acts IV. and V. are to 'remain as they are.' Finally, Forrest suggested that 'Pelopidas should end it quickly'; otherwise, he fears, "'twill be dull.'¹⁴

Ultimately, Bird gave up and simply substituted *The Gladiator* in its place, though it, too, required revising. Bird and Forrest worked on the task together while travelling around New England in the summer of 1831.¹⁵ When it came time for *The Gladiator*'s first performance at the Park Theatre in New York, Bird was dismayed at the sight of what his careful work had inspired: "There never was a play more miserably got up – old dresses, old scenes – many of them full of absurdities – and to crown all, the performers, with but one or two exceptions, were horribly imperfect. If there had been a wish among the managers to have the play damned, they could not have taken a better course" ("Secret Records").

As these complaints suggest, Bird's concerns were as much systemic as local, given the production practices he saw were common to the artisan dramaturgy that

"Secret Records." They have also been reprinted in Robert M. Bird, *The Secret Records*, in Richard Harris, "A Young Dramatist's Diary: *The Secret Records* of R. M. Bird," *The Library Chronicle* 25 (1959).

¹⁴ Clement E. Foust, *The Life and Dramatic Works of Robert Montgomery Bird* (New York: The Knickerbocker Press, 1919), 37-38, <https://archive.org/details/cu31924022010973> [accessed January 23, 2014].

¹⁵ John Collins Kilman, "Robert Montgomery Bird: Physician and Man of Letters" (PhD diss., University of Delaware, 1978), 79-80.

characterized antebellum American theatre. Indeed, he seems most vitriolic towards the single most influential group shaping contemporary performance practices: the audience. Whether Bird felt any gratitude for the opportunity to polish his play with assistance from the nation's preeminent tragedian, his views on the general compromises demanded of aspiring playwrights by audiences are clear. Bird was vexed by a process that made authors "submit their works to the arbitration of ignorance and brutality...of the audience" ("Secret Records"). "To write for, and be admired by the groundlings!" Bird grumbles, "villains, that will clap most, when you are most nonsensical, and applaud you most heartily when you are most vulgar! that will call you 'a genius, by G...,' when you can make the judicious grieve" (ibid.). Alas, he acknowledged in a letter to Forrest, his own play was not immune to the caprice of the audience: "In the *Gladiator*, as in most of the tragedies, the silliest and most ridiculous portions are the best for the theatre, because they always draw the greatest applause."¹⁶

Bird's fellow Philadelphia playwrights and copyright agitators, Conrad and George H. Boker, made similarly uncharitable assessments of American audiences. Conrad used his review of Boker's *Leonor de Guzman* to rail against the "mindless, tasteless, glowless and unformed mass of stupidity and vulgarity which engages our theatres," who "gaze, in rapt wonder, while a beef-eating pugilist roars with the voice acquired by the use of the fireman's trumpet; recites lines which he does not understand in a manner which no one understands" (*Graham's American Monthly*

¹⁶ Robert M. Bird to Edwin Forrest, April 10, 1832, The Edwin Forrest Collection, Rare Book and Manuscript Library, University of Pennsylvania. Hereafter "Forrest Collection."

Magazine, 1854, 44, 3:273-274). How, Conrad asks, can the giants of the past – Shakespeare, Ford, and Jonson – be asked to “endure the travestie [*sic*] of ignorance and vulgarity on the stage for the amusement...of ignorance and vulgarity in the boxes?” (273). After spending nearly half of his review excoriating the theatre as he found it, Conrad praised Boker’s work, seeing in it the potential to save the drama from its degraded state. Boker himself, however, found that if he wanted his plays before an audience, he would have to ensure they were something the audience was willing to patronize. In a letter to one of his closest friends, Boker flagellates himself, confessing that “I have felt what it is to debase a gift of God. I have degraded myself to write a play for the rabble – that was my purpose at least, no better, no purer – theatrical success had spoiled me – I was a fool, a poet no longer.”¹⁷ These men were enamored with the idea of the theatre, awed by a vision of what it once was and might yet be again, but the form itself, with all its messy compromises, concessions to audience taste, and ignorant performers, was a source of constant frustration.

Many antebellum critics shared these views.¹⁸ An 1831 reviewer writing for *The Euterpeiad* condemns the “unblushing indecencies resorted to for the applause of

¹⁷ Letter from George H. Boker to Richard H. Stoddard, April 26, 1851, George H. Boker Collection, Rare Books and Special Collections Department, Princeton University.

¹⁸ Indeed, Bird and Conrad wrote some of this criticism, as well as essays for journals and newspapers, and were part of a network of journalists and playwrights who puffed each other’s pieces in advance, defended them in production, and published their poetry. Boker’s friends Stoddard, Charles Godfrey Leland, and Nathaniel Parker Willis all engaged in this sort of activity (see Kitts, 31, 121). At Boker’s request, Bird included a mild puff of Stoddard’s work in the *North American and United States Gazette* (Boker to Stoddard, November 15, 1851, Boker PSU). George Pope Morris complimented his friends’ work in the *New York Mirror*, even when he knew it was undeserving, as when James Lawson, who handled business affairs for Bird and Forrest, tried his hand at a tragedy (see James Lawson to Richard Penn Smith, April 20, 1832, Richard Penn Smith Papers, Rare Book and Manuscript Library, University of Pennsylvania; and James Lawson to Bird, June 1, 1832, Bird Papers).

the depraved, by which modesty is abashed, virtue corrupted, and the profession disgraced” (June 1, 1831). As with the playwrights, such critics were generally careful to distinguish between their conception of the ideal or “proper” form of the theatre and its unfortunate manifestation in the present day. An essay in the *American Quarterly Review* represents well the general tone and take of these pieces:

This is a stigma which belongs, not to the system, but to its followers; -to the architects, not to the structure itself. At the same time, it is one which has palsied every effort for the improvement of man which might have been made by these means; and rendered useless that mighty engine, which, in the hands of the virtuous and good, could have been employed with such stupendous effect. As it is, the lofty and benevolent purposes of this noble art have been thrust aside, that its votaries might minister to the depraved tastes of a corrupt multitude. . . .Unnatural, baneful perversion! (1834, 15:352)

The disgraced state of the drama was a common subject throughout the antebellum era, and a search of the American Periodicals Series database returns no fewer than fifty-one articles opining on the “decline of the drama” between 1817 and 1850.¹⁹ Yet throughout that period, most of the harshest critics were forced to acknowledge that the theatre not only endured, but was growing, and even thriving. Their incredulity at this contradiction is captured in one critic’s reaction to *Metamora*, one of Forrest’s most successful prize-winning plays. Responding to its premier, the critic called it as “wholly worthless as any [play] ever acted upon any stage, and utterly unworthy of the great and original incidents it professes to delineate”; he continued, however, to

¹⁹ A number of these are scattered between 1838 and 1843, a period when the theatre, hard-hit by the Panic of 1837 and subsequent depression, suffered declining attendance (as addressed in chapter 2). Many of these managers responded by emphasizing those elements – particularly visually spectacular melodrama and novelty acts – that allowed them to better differentiate their entertainment from the competition. For newspapers discussing the competition, see: *Spirit of the Times* (March 7, 1840), *New-York Mirror* (January 23, 1841), *Knickerbocker, or New-York Monthly Magazine* (1841, 17:441), and the *New Mirror* (April 8, 1843).

observe that “it never fails in that sterling merit of having overwhelming houses, to the solid profit of both manager and actor.”²⁰

While some critics and playwrights hearkened back to earlier days of theatrical magnificence, there were only vague characterizations as to when that period was, if it was even specified at all. An 1830 essay in the *National Magazine; or, Lady's Emporium* declared that the drama had been in the decline since “the commencement of the present century” (1830, 1, 1:44). In 1843, the *Spirit of the Times* was unusually precise in locating the turn from the “palmy days” of the drama as having occurred in 1813, though the examples cited are all British; less ambiguous is the cause of its recently accelerated decline, which the author attributes to the rise of “burlesques” (January 21, 1843). By April of that same year, the *New Mirror* had concluded the apogee of the American theatre was actually 1790-1797, as at no other time was there “so much dramatic talent united as was concentrated in one single theatre...in the old American company at the theatre in John-street” (April 8, 1843). A *Brother Jonathan* article from 1843 looks fondly at 1823, when the theatre was “exalted,” did not involve variety acts, and focused on Shakespeare. And was in Britain (October 14, 1843, 6, 7:188). These are, however, largely exceptions to the rule, and the vision of the theatre against which the present day form was assessed existed largely in the minds of playwrights and critics whose understanding of the drama was informed by their study of its literary manifestation, rather than in performance. Leon Jackson's observation about the literary culture of elites in the

²⁰ Quoted in Walter J. Meserve, “Occupational Hazards of the Playwright during the Age of Jackson,” *Journal of American Drama and Theatre* 6 (Winter 1994), 7.

1820s is applicable for the theatre, as well. He writes of their “strident nationalism, their whiggishness, and their arbitrary definition of authorship as being, essentially, both belles-lettristic and above the concerns of mere profit-mongering” (Jackson, 10). Such opinions, he suggests, “tell us far more about the fantasies of the early republic’s literary elite, however, than either the social realities of that literary elite or of the literary rank-and-file” (ibid.). Those critics lamenting the “decline of the drama” were not attempting to accurately portray the theatre, but to push both the art form and, more importantly, audience aesthetics in a different direction; their purposes were not *descriptive*, but *prescriptive*. As Cohen notes of some of America’s earliest “intellectual theatre critics,” Washington Irving and William Dunlap, “their constant complaints reveal their minority opinions” (Cohen, 340).

Act I.i. Vapid in Perusal!; or, In and Out of the Closet

In order to understand the aesthetic principles shared by the insurgents of 1856, it is important to understand a distinction that has existed throughout much of Western theatre history, but that was particularly relevant in this period – the difference between literature and drama. The prefaces to many published antebellum plays engage directly with this dichotomy. Some playwrights took pains to point out their work was intended for the closet, and that they wrote with an eye to its success as a species of literature, rather than a script for performance.²¹ Others acknowledged the distinction in the course of explaining deficiencies that might be visible to a reader, as I discuss in chapter 1. Richard Penn Smith, for example, in submitting *The*

²¹ Barker, for example, explains in the preface to *Marmion* that “the great length of this drama would be a serious objection if it was intended for the stage, but it only ventures to solicit attention in the closet.” It was performed, though only after revisions.

Deformed to the public, begs “the reader to bear in mind that [its scenes] were written rather for the stage than the closet, and that many passages which are vapid in perusal, prove effective in performance. *The Deformed* is intended as an *acting play*, and as such its merits and defects are to be tested.”²² John Howard Payne’s plays are excellent examples, and many share the goal expressed in the preface to *Thérèse*:

One word to my friends, the Critics, and I have done. They have honoured me already with more attention than I ever coveted: but I wish them to understand, that this, like former publications of mine, is a work planned for stage-effect exclusively, and only printed for managers and actors. It is so necessary in the productions of the modern drama to consult the peculiarities of leading performers;---and not to offend the restive spirit of audiences, requiring strong excitement by means of situations almost pantomimic, and too impatient to pause for poetical beauty;---that it seems almost hopeless to look to the stage as the vehicle for permanent literary distinction. An acted (or, I might say more properly, an *actable*) play, seems to derive its value from what is *done*, more than from what is *said*;--- but the great power of a literary work consists in what is said and the manner of saying it: He, therefore, who best knows the stage, can best tell why, in the present temper of audiences, good poets should so often make bad dramatists. (Payne, *Thérèse*, preface)

Antebellum critics and playwrights wrote extensively about the characteristics and relative merits of both “acting plays” and plays intended for reading. In a review of Boker’s *Calaynos*, for example, the *US Democratic Review* summarizes well the most common understanding of the difference between the two:

In judging of a drama, the question that most naturally arises is, whether it was composed for reading, or for acting--for the closet or the stage. If the former be the case, we must turn our chief attention to the expression; if the latter, we must look principally to the effect. If a play be meant to be represented, it should possess certain conditions of plot, action, and scenic propriety; if on the contrary, the dramatic form be given to a poem, merely for convenience sake, less stress need be laid upon adaptation to the boards, and

²² Richard Penn Smith, *The Deformed; or, Woman’s Trial* (Philadelphia: C. Alexander, 1830), preface, http://gateway.proquest.com/openurl?ctx_ver=Z39.88-2003&xri:pqil:res_ver=0.2&res_id=xri:ilcs-us&rft_id=xri:ilcs:ft:amdram:Z000622001:0 [accessed January 23, 2014]. Emphasis in original.

infinitely more upon language, detail, and finish. In fact, a tragedy to be acted, and a tragedy to be read, bear no more resemblance to each other than a stump speech and a lecture, an improvisation in the Senate, and its revised report in the newspapers of the morrow. (1849, 24, 131:475)

This distinction was certainly not lost on men like Conrad, who understood that “it is easy to write verse in dialogue, and call it dramatic; but the loftiest and most arduous triumph of poetical genius, is so to portray *the action of passion* as to undergo successfully the ordeal of the stage” (*Graham’s American Monthly Magazine*, 1854, 44, 3:276). Boker, too, believed that successful dramatic dialogue required certain characteristics, the “golden points” of which were “strength, rapidity, and directness.”²³

The nature of much of their dialogue suggests, however, that while they may have understood the distinction on an intellectual level, the verse it inspired was still unsuitable for the stage. At least not without often significant changes, whether in the form of a manager’s pruning or an actor’s delivery, the latter of which many playwrights found particularly galling. The production practices described in previous chapters were ill-suited to a faithful preservation of the carefully crafted verse tendered to the printer, as many aspiring playwrights soon discovered. In the preface to *Gordian Knot: or, Causes and Effects*, Harby, humor intact, laments that “at the first representation of this Play, the two principal characters were *read!* and were I to mark with inverted commas what was omitted, I fancy the reader would be puzzled to account for the shifting of scenes; and upon the exits and entrances of persons, would

²³ George H. Boker to Richard H. Stoddard, March 23, 1854, Boker PSU.

wonder ‘how the devil they came there!’” (Harby, *Gordian Knot*, ix).²⁴ When Noah decided to produce his recently published *The Grecian Captive, or The Fall of Athens* for a single evening to benefit his uncle, the British comic actor, Joe Cowell, who had been cast as “what was said to be the best part in the piece; at all events, it was the longest,” explains his approach by paraphrasing Shakespeare: “‘And to cram these words into mine ears/Against the stomach of my sense,’ for one night only, was out of the question, and I made up my mind to speak the meaning of the part after what flourish my nature prompted, and so, indeed, I believe, had all the performers” (Cowell, 63). Of the first production of his play *Paddy’s Trip to America*, Charles Talbot sympathizes with the actor for whom it had been written: “In getting it up, his own talents could avail but little; having to contend with the stupidity of other performers, who here and there produced *one* word of the author with a dozen of their own.”²⁵

The more sensitive critics factored the exigencies of production into their analysis of performances, as in the Philadelphia *Inquirer’s* review of Richard Penn Smith’s *Caius Marius*:

There may be those who will see glaring defects in this production. Envy on the one hand, prejudice, ill nature and anti-American feelings on the other, will purposely forget that a first representation is always under disadvantages to the author – that the players have not yet perfectly committed their parts to memory, and frequently substitute awkward phrases to cover their omissions – that the supernumeraries are not properly drilled into their movements, and

²⁴ In one sense, Harby was lucky – at least the manager did not have to come onstage between acts to explain for the audience what vital information had been skipped, as Grimsted notes sometimes occurred (*Melodrama Unveiled*, 95).

²⁵ C[harles]. S. Talbot, *Paddy’s Trip to America; or, The Husband with Three Wives. A Farce, in Two Acts* (New York: printed for the author, 1822), preface, http://gateway.proquest.com.proxy-um.researchport.umd.edu/openurl?ctx_ver=Z39.88-2003&xri:pqil:res_ver=0.2&res_id=xri:ilcs-us&rft_id=xri:ilcs:ft:amdram:Z000623098:0 [accessed January 23, 2014].

that it requires long practice and frequent representation to have all the lights and shadows properly cast, and bought out in conformity to the wishes and intentions of the author. (January 14, 1831)

Nathaniel Parker Willis' *Bianca Visconti; or, The Heart Overtasked* was similarly defended by a critic from the *New York Spirit of the Times*, who suggests audiences, too, perceived the disparities between the text ostensibly being performed and what the performers actually said:

Now followed many scenes developing the plot of the tragedy, which was most barbarously murdered, for the simple reason that those to whom the parts were assigned had not condescended to commit them to memory, and thus whole passages were omitted, and line after line utterly marred, and in fact, the sense perverted or rendered nonsense. An author subject to such an ordeal as this was, must have some stamina, we take it, to escape unscathed. But fortunately so outrageous was their imperfection in this instance, that the audience, though ignorant of the text, were pretty well assured they were not listening to poetry or reason, and attributing the fact to the true cause, their sympathies for the suffering author were greatly excited, and rendered them lenient to any real imperfection the play might possess. (September 2, 1837)

Epes Sargent versified his disgust in a short, metatheatrical satire called *The Candid Critic*, which features Dionysius, the King of Syracuse and an aspiring playwright.

Referring to the first performance of one of his plays, Dionysius rages that it "There 'twas murdered,/Unconscionably murdered by the players."²⁶ He then declares that he subsequently improved the players' elocution (permanently). When asked how, he responds "Cut out the tongue of every one of them./Didst ever have a tragedy performed?/Be happy, in thy inexperience, then!/More woful [*sic*] than the woe of

²⁶ Epes Sargent, *Songs of the Sea, with Other Poems*, 2nd ed. (Boston: William D. Ticknor and Co., 1849), 172-173, http://books.google.com/books?id=u9YRAAAAYAAJ&vq=dionysius&source=gbs_navlinks_s [accessed January 23, 2014].

Niobe/Was it, to see the children of my brain/Dismembered, mangled, strangled, torn and swallowed,/By those word-butchers!” (Sargent, 172-173).

As noted above, Bird was forced to endure the “horribly imperfect” memorization of the Park Street company at the premier of *The Gladiator*. Kitts records that Boker, after the opening night of his *The World a Mask* (the play that he had “written for the rabble”), “reported that the actors rarely played scenes as written. Throughout the performance, either the audience heard the prompter’s voice or saw improvised scenes with confused actors transposing the lines of one scene with those of another” (Kitts, 59). Playwrights had little recourse when it came to unreliable actors, though they could at least have a say in revisions to their texts when they worked directly with a manager. The process could be maddening, however, as when Boker was asked to shorten *The Betrothal* four times, create a more conventional ending and add an epilogue, remove “god” and “hell,” and reduce his references to the devil (48). But such humiliation was often less unthinkable than the alternative of simply publishing them: “If I print my plays, the actors take them up, butcher, alter and play them, without giving me so much as a hand in my own damnation.”²⁷

That such procedures would seem meddlesome is understandable, particularly given the care that often went into their composition. Bird, in particular, researched his subjects extensively, delving deeply into Roman history for *The Gladiator* and contemporary travelogues of scholars who had visited South America for *Oralloossa* (Quinn, *History*, 230n205, 238n212). For Bird, writing dramas was a far more arduous task than working in other genres: “A tragedy takes, or should take, as much

²⁷ George H. Boker to Richard H. Stoddard, January 12, 1853, Boker PSU.

labour as two romances; and one comedy as much as six tragedies” (“Secret Records”). Given Bird and Boker’s descriptions of the almost brutal economy required of good dialogue, and the extensive research conducted by the former, it was doubtless all the more vexing when an actor cut a speech, simply forgot it, or decided to improvise something new.

While they understood that emotional engagement was at the core of the dramatic experience, the insurgent playwrights’ commitment to precise dialogue also ran afoul of the more spectacular aspects of artisan dramaturgy, which rarely held that words should speak for themselves. Plays of every genre were accompanied throughout by a band or orchestra, to such a degree that, as one scholar notes, trying to reconstruct a performance without accounting for the music is like “watching silent films in silence; at the time, it simply wasn’t done.”²⁸ There were musicians who specialized in composing the “musical glue” that held an evening’s bill together, such as Alexander Reinagle, Benjamin Carr, and James Hewitt (*ibid.*). Their responsibilities included the incidental orchestral music accompanying the drama, “waiting music” between acts, popular numbers interpolated by managers, and, of course, the music required for explicitly musical performances (*ibid.*). As discussed in chapter 2, audience members felt free to expand or amend the bill as they saw fit. John Hodgkinson, prior to the start of the American Company’s 1794-1795 season, announced that:

It is the interest of the managers that every part of their audience should be pleased; therefore popular tunes and favorite overtures will be performed at

²⁸ William Brooks, “Good Musical Paste: Getting the Acts Together in the Eighteenth Century,” in *Musical Theatre in America: Papers and Proceedings of the conference on the Musical Theatre in America*, ed. Glenn Loney (Westport: Greenwood Press, 1981), 38.

stated times...But a few riotous people must not expect the arrangement of the theatre, the peace, pleasure and feelings of the whole audience, to be sacrificed to their senseless whims and brutal love of indecency. (quoted in William Brooks, 50)

Such pronouncements availed little, and antebellum audiences continued to ensure their “pleasure and feelings” were reflected in the emotional tenor of the accompanying music. The close relationship between the music and the moments it heightened is suggested in Henry J. Finn’s *The Woollen [sic] Nightcap!*, a satirical farce lampooning the excessive emotion common to melodramas. The stage directions for the piece dictate

*Music productive of a sud-orific or sopo-rific effect. It is requisite that the greatest discrimination and nicety of genius be infused into the composition, as the narcotic influence must be confined to the performance, and by no means be permitted to extend to the audience. This will depend in some measure upon the composer! Aqualina hangs up the Stockings; and here the music must express, in as forcible faintness as possible, the silent drying of the Stockings! and the difference between the exhalations of Cotton and Worsted.*²⁹

Theatre manager Noah Ludlow versified his exasperation with the increasing focus on spectacle and its effects on the literary quality of plays, writing

Degraded Drama, nursed by viscious [sic] taste,
Has thrown off diamonds to adorn with paste.
Huge pots of paint, dutch metal, glittering foil,
Usurp the stage, its classic boards to soil.
The poet’s gift has proved a sorry failure,
He’s been deposed by fiddler and by tailor. (quoted in Grimsted, *Melodrama Unveiled*, 79)

²⁹ Henry J. Finn, *The Woollen Nightcap! Or...The Mysterious Flour Sack!!* (Boston: S. G. Goodrich, 1828), 122, http://gateway.proquest.com/openurl?ctx_ver=Z39.88-2003&xri:pqil:res_ver=0.2&res_id=xri:ilcs-us&rft_id=xri:ilcs:ft:amdram:Z000615497:0 [accessed January 23, 2014].

Men like Boker were also less than thrilled at these embellishments added in production, preferring to let their craft do the heavy lifting. Simms praised Boker for this approach, for using the “proprieties of art and nature” to move his audience, rather than relying on “the sensational and the mechanical,” and other “meretricious agencies of the stage, such as are familiar to the dextrous [sic] hands of such dramatists as BOURCICAULT [sic] and other playwrights, who employ the arts of the scene painter rather than of the poet.”³⁰ Yet Boker knew that if he wanted his plays produced, it could not be avoided, as he ruefully acknowledged in a letter to Stoddard. Discussing an upcoming production of his romantic comedy *The Betrothal*, Boker explains that “the manager is getting it up with unusual care and splendor,” with “spangles and red flannel flame through it from end to end. I even think of appearing before the curtain on horseback – nay, of making the whole performance equestrian, and of introducing a hippopotamus in the fifth act. What think you?”³¹ It was more than simply quadrupeds distracting audiences from an author’s words, however, and it was often mammals of the bipedal variety that most effectively upstaged the playwright.

Act I.ii. Beef-eating Pugilists

One of the more successful bespoke playwrights of the antebellum period, John Howard Payne, clearly understood this. In the preface to *Thérèse*, Payne makes

³⁰ Quoted in Jay B. Hubbell and George H. Boker, “Notes and Documents: Five Letters from George Henry Boker to William Gilmore Simms,” *The Pennsylvania Magazine of History and Biography* 63, no. 1 (January 1939), 70n7.

³¹ George H. Boker to Richard H. Stoddard, August 12, 1850, Boker PSU.

clear that much of the play's popularity came not from his writing, but from the powerful performance of Miss Fanny Kelly in the title role:

In the closing scenes of deep pathos, all could share in the agonizing interest she excited: all could feel that her acting was unaffected---irresistible....It was a picture of the most exquisite, heart drawn touches, equal in merit to the best conceptions of the best poets and painters; and leaving the beholders only to lament that, like kindred emanations of its sister arts, the beautiful image could not be fixed for the admiration of distant times and ages, when the gifted lady, whose genius has given it soul and loveliness, shall live only in her fame. (Payne, *Thérèse*, preface)

Descriptions of the most popular actors of the period almost always emphasized their ability to move an audience. Wemyss praises James Anderson, whose “greatest merit as an actor is the earnest manner with which he enters heart and soul into the assumption of character, and never flags from the commencement to the termination – thus carrying his audience, once enlisted in his favor, with irresistible force, along with him” (Wemyss, 393). Harry Watkins, playing the lead in *The Drunkard*, relates an incident where his rendition of the play's famous *delirium tremens* scene so affected a woman in the boxes that she fainted, leading her husband to approach Watkins after the show and warn him “not to play that part again.”³² That particular play's characters often moved audiences, according to Jeffrey H. Richards, who notes “it was no uncommon thing to see scores of men and women in the auditory weeping like children, while at the next moment their faces would radiate with smiles at the quaint humor of Bill Dowton, or the pompous peculiarities of Miss Spindle” (Richards, *Early American Drama*, 250).

³² Maud (Durbin) Skinner, Otis Skinner, and Harry Watkins, *One Man in His Time: The Adventures of H. Watkins, Strolling Player, 1845-1863, from His Journal* (Philadelphia: University of Pennsylvania Press, 1938), 82. It was a warning Watkins ignored, of course. See also Hughes, 66.

Few actors inspired more commentary – both positive and negative – for their powerful portrayals of emotion than Edwin Forrest. Particularly noteworthy is the way Forrest’s performances were reported to have palpable, even irresistible effects on those who witnessed them. The emotional vibrancy, and violence, of his performance as Spartacus in *The Gladiator* seems to transcend temporal boundaries, quickening anew the pulse of one *New York Standard* reviewer whose shift from the impersonal “the audience” to “you” suggests the intimacy of the encounter:

Spartacus is not only presented to us in the attitude of a slave of sturdy frame and ruffian aspect, degraded by bonds and stripes, but he is lashed into fury by repeated injuries....until stung to desperation and madness, he carries the sympathies and passions of the audience by storm, and while the blood runs quick through your veins, with clenched hands and half erect from your seat in a paroxysm of feeling, you view him rushing, in combat from the stage, crying, in his terrible voice, while pursuing his retreating enemy, Kill! kill! kill!’We delight to see the cruel, the oppressor, the proud and arrogant conqueror of the world, humbled by her captive.³³

A reporter for the *Dramatic Mirror, and Literary Companion* (April 23, 1842) describes Forrest’s delivery of Lear’s curse, which had “a startling and horrific effect, the very blood oozed turgidly in our veins whilst listening to the imprecations bestowed upon his undutiful daughter.” Forrest’s first biographer, James Rees, recalls another performance of that same curse that nearly resulted in the death of an audience member. Hearing “a sound so strange and unnatural,” Rees turned around to find “the eyes of the gentlemen fixed, his mouth open, and a death-like paleness overspreading his face. His hands were clenched together, and it was evident that all

³³ Quoted in Nancy Jane Buffington, “From Freedom to Slavery Robert Montgomery Bird and the Natural Law Tradition” (PhD diss., University of Arizona, 1998), 47.

voluntary motion was suspended.”³⁴ Grabbing the man by the shoulders, Rees felt him jerk suddenly, after which he “gave a gasp, and uttered a deep, heavy sigh,” recovering a moment later (ibid.). As clinical studies of the effects of Forrest’s performances, such accounts are suspect. Yet they provide valuable insights into how antebellum audiences viewed the affective potential of performance, particularly those given by Forrest. Jonathan Bate writes of the “representative anecdote,” the point of which “is not its factual but its representative truth.”³⁵ The fact that such incidents – and the memoirs of nineteenth-century actors and managers are replete with them – continue to be repeated suggests they distilled something important and revealing about particular individuals. Certainly, such anecdotes “ghosted” these actors’ performances, helping shape how new audiences formed opinions of them and contributing to the imagined community of theatergoing.

While he felt the profusions of praise for Forrest were “somewhat gratuitous,” Scottish author Thomas Hamblin could not deny the powerful impact the man had on audiences, who were “enraptured,” and “every increase of voice in the actor was followed by louder thunders from the box, pit, and gallery, till it sometimes became a matter of serious calculation, how much longer one’s tympanum could stand the crash.”³⁶ It would be difficult to imagine that many of those present at such a

³⁴ James Rees, *The Life of Edwin Forrest* (Philadelphia: T. B. Peterson & Brothers, 1874), 173-174.

³⁵ Quoted in Jacky Bratton, *New Readings in Theatre History* (Cambridge, UK: Cambridge University Press, 2003), 103.

³⁶ Thomas Hamilton, *Men and Manners in America* (Philadelphia: Carey, Lea & Blanchard, 1833), 35, <http://books.google.com/books?id=JkUTAAAAYAAJ&printsec=frontcover> [accessed January 23, 2014].

performance left the theatre awed by the skill of Bird or Boker, or whichever author wrote the piece Forrest was playing that evening. As Conrad's reference to the roars of "beef eating pugilists" suggests, some of these playwrights resented the fact that individual performances could so thoroughly efface their careful work (particularly if their careful work had been gutted by a performer to better shape it to his/her talents).

Act I.iii. Malignant Planets of the Stage!

It is ironic, then, that several of them found their greatest successes writing plays designed particularly for the very actors who would ensure such an effacement. The practice was part of a phenomenon called the "star system," a production practice that was an important characteristic of the artisan dramaturgy. There is some disagreement as to when, precisely, its rise should be dated. Douglas McDermott claims William Dunlap, having just taken over the lease for New York's Park Street Theatre in 1798, "inadvertently invented the star system," intending only to make a profit.³⁷ Some see British actor George Frederick Cooke's American tour (1810-1812) as its beginning.³⁸ McConachie suggests it was not until the "minor theatrical depression of 1828-1830, when overbuilding and competition in New York, Boston, and Philadelphia shifted the balance of power in negotiating starring engagements from local managers to stars."³⁹ Regardless of its roots, the underlying dynamics of

³⁷ Douglas McDermott, "Structure and Management in the American Theatre from the Beginning to 1870," in Wilmeth and Bigsby, 196.

³⁸ Cohen presents an extensive survey of primary source materials related to the star system (463-502). See also Calvin L. Pritner, "William Warren's Financial Arrangements with Traveling Stars—1805–1829," *Theatre Survey* 6, no. 2 (November 1965).

³⁹ Bruce A. McConachie, "American Theatre in Context, from the Beginnings to 1870," in Wilmeth and Bigsby, 148. McDermott points out one of the reasons for the various starting dates is the War of 1812, which significantly disrupted the circulation of stars from London theatres (196).

the system were generally consistent throughout the antebellum period: managers, often begrudgingly, found it necessary to supplement their stock companies of performers with touring stars. Often appearing in succession, these performers would negotiate the length of their stay and dictate the bill for each evening's performances. The practice was facilitated by the spread of post roads, canals, and eventually railroads, which extended touring circuits up and down the east coast, ever further west, and – less than a decade after the passage of the 1856 law – across the continent.

The rise of the star system significantly incentivized certain types of plays, requiring pieces that revolved around a single role, and that were written to display the talents of specific performers. In his *American Quarterly Review* article, Paulding wryly explains the need to structure plays around individual actors, noting “it is beneath the dignity of the theatrical stars to shine in constellations,” and even if managers could afford to book multiple stars at a time, which was rare, the “malignant planets of the stage” generally shared the spotlight grudgingly (*American Quarterly Review*, 1827, 1:338, 337). “Hence it has become supremely important,” Paulding complains, “for a dramatic writer to have but one real character in his piece. The rest must be walking ladies and gentlemen, mere necessary implements, or speaking automata, to afford the *catch-word*, and answer as foils to set off the glories of the *star*” (ibid., 336-337). The rehearsal practices discussed in chapter 2 worked in tandem with this emphasis, given a touring star might have time for a single run-through with a local company upon his/her arrival.

Many newspaper critics excoriated the practice for the way it restricted the scope of a play, requiring playwrights to “compose pieces not so much for the purpose of ‘holding up to nature’ as to suit the fancies of actors, a thing about as ridiculous as would be the writing of books to suit the tastes of composers” (quoted in Meserve, *Heralds*, 32). Managers also railed against the system, with Wood referring to it as “pernicious,” and arguing its influence on theatrical companies “necessarily destroys them, and with them the acted drama” (Wood, 436). And Wemyss writes sarcastically of the “blessings of the star system upon the managers,” who were frequently precluded from the potential benefits of a long starring engagement by touring actors’ prearranged schedules (Wemyss, 187). The insurgent playwrights also bridled against the constraints of the star system. Conrad, for example, resorts to a common metaphor to explain the “formula” for successful playwriting under such a system: “It was and is easy to win success...by selecting a popular actor, cutting out a play, as a tailor cuts a coat, and fitting it to his angularities, here a start and there a bellow – or by any of the many easy concessions to the prevailing peculiarities of the stage” (*Graham’s American Monthly Magazine*, 1854, 44, 3:277). Not only did they resent having to mangle a play so as to feature a single character, it made their plays all the more dependent on the available talents of a company, rather than the power of their verse. As Boker explains to Stoddard,

I have a play, “The Widow’s Marriage,” which has been accepted by Marshall. But now comes the trouble. He has no one, nor for aught I can see will he have one, who can fill the role of the principal character. A woman was engaged for the purpose; but on trial she falls far short of the requirements of the part.⁴⁰

⁴⁰ George H. Boker to Richard H. Stoddard, October 12, 1852, Boker PSU.

As may be apparent, the perpetuation of the star system was ensured not by the preferences of managers or playwrights, or by the many actors whose meager talents prevented them from breaking orbit and entering the firmament of their celestial colleagues; it was audiences who drove the practice, and it is easy to understand why. Bespoke plays written for stars established a productive synergy between performer and text, one that blended the skills of an individual star and the affective potential of a work crafted with those skills in mind. Again, *The Gladiator* is a prime example. After initial revising of the script undertaken by Bird and Forrest in the summer of 1831, Forrest trimmed the play still further, turning the role of Spartacus into a phenomenally popular vehicle perfectly tailored to his muscular physique and powerful voice.⁴¹ While he would not have allowed others to play the

⁴¹ The provenances of the various manuscript versions of *The Gladiator* are uncertain. In the Bird collection at the University of Pennsylvania, there are three versions of the manuscript that seem to reflect the piece at different stages of the composition and editing process. Foust explains his reasoning for selecting the version printed in *The Life and Dramatic Works of Robert Montgomery Bird*: “The following text of *The Gladiator* is based on the best and fullest autograph manuscript among the Bird papers in the Library of the University of Pennsylvania. The collection contains two other manuscripts of the play, a complete rough draft in the author’s hand, and a careful copy of the final draft in the handwriting of his wife. It seems that the MS. used for this text was submitted to Edwin Forrest, for whom it was written as a prize play, who suggested cuts and changes for the acting version. These alterations, marked with a pencil in the original, are enclosed in brackets of this form < >” (297). This is the version that has been most widely re-printed.

There are fragments accompanying the drafts of the manuscripts, however, that suggest some of the cuts may have been later interpolations by someone editing the manuscript in the 1880s. One, for example, reads “I should restore all the passage crossed with pencil. The marks merely indicate theatrical ‘cuts.’ The notes are in Forrest’s handwriting” (Bird Papers). The nature of the peritextual elements on the “final” version, however, are far more cursory than the notations Forrest made in marking up his other manuscripts, where he frequently included notations about entrances and exits, necessary props, effects, and music.

Regardless of the provenance of the accepted version, it does not accurately reflect the one Forrest performed. During his 1836-1837 tour to England, he played *The Gladiator* in London. Licensing requirements mandated a copy of any play intended for performance in the city be deposited with and approved by the Lord Chamberlain. The British Library’s Lord Chamberlain’s Plays collection holds the original manuscript copy of the text submitted by Forrest. While a comprehensive comparison of differences between the standard version and the acting manuscript is impossible – the last several pages of the play are missing from the British Library’s copy – it is apparent that Forrest cut significantly more (approximately one-fifth) of the script than is indicated by the copy in the Bird

role regardless, the nature of Forrest's tailoring certainly produced a garment ill-suited to most other performers; the gladiatorial garb sized for Forrest's broad shoulders would likely have been comically loose on actors with a less exuberant performance style (or less rigorous workout regimen). Forrest closely guarded the manuscript, and only let a select few friends take on the role later in his career, which suggests another characteristic of bespoke playwrighting that frustrated the insurgents: such a system tends to produce plays that are fundamentally specific – designed for particular companies and conditions, or the talents of particular individuals. As such, their general appeal and, more importantly, relevance across time are fundamentally limited. Comedies tend to have a shorter shelf life than tragedies, given what is “funny” is much more intimately bound to the context of its creation than what is “sad.” In a similar way, bespoke plays have often been perceived as “dated” and inaccessible to later audiences.⁴²

Papers. The majority of the revisions serve to streamline the play's narrative, and some subsidiary plot lines are trimmed or eliminated, often with the effect of making certain characters more overtly villainous than in Bird's original. Additionally, descriptions of Spartacus' emotional states – for example, when he expresses desperation over his wife's capture – that would have been far more succinctly and powerfully communicated by Forrest's physical performance were excised. Spartacus is also softened as a character, as his threats to kill any of his mutinying men who survive their foolish attack is eliminated, and his reunion with his brother, who led the mutiny, is less vitriolic.

Unfortunately, the loss of the last scenes leaves unknown how Forrest may have changed the ending, which has potentially significant ramifications for how Spartacus might be viewed by an audience. In one of the “earlier” drafts in the Bird Papers, Forrest's last lines read: “Well---never heed the tempest---/No care if all the sea be turned to blood./Set forth the sails: We'll be in Thrace anon.” Yet in the accepted “final” version, the line reads: “Well---never heed the tempest---/There are green valleys in our mountains yet.---/Set forth the sails: We'll be in Thrace anon.” This changes the tenor of Spartacus' final speech from vengeful retrospection to one oriented towards a hopeful future where he will be reunited with his slain family. Whether the ending was further sentimentalized in the version Forrest had settled on by 1836 may never be known.

⁴² As Walter Prichard Eaton notes of *The Second Mrs. Tanqueray*: “It is hopelessly ‘dated’ because once it was dated so accurately” (Walter Prichard Eaton, “American Drama Versus Literature,” *The Quarterly Review of the Michigan Alumnus: A Journal of University Perspectives* 44, no. 24 (July 1938), 285).

As Moses has observed, “these men [the Philadelphia School] were between two extremes of the time: the drama of the theatre and the closet-drama, which was to be read rather than spoken” (Moses, 130). Whether “the drama of the theatre” represents an extreme end of the dramatic spectrum (there were certainly many other types of performances taking place in theatres that did not use dramatic texts at all), Moses is correct that their aesthetic sensibilities lay towards the literary end of the continuum, yet their ambitions forced them to constantly engage with production practices that mandated artistic compromises. Moses continues by stating they “did not attempt to create a live drama, for they courted plots and phrases of a gone era; their imagery was cast in the Elizabethan mold, and their ear caught the Elizabethan accent” (134). While it seems clear that they *did* attempt to create “live drama,” or at least drama that could live on the stage, Moses is correct in pointing out Boker’s *Francesca da Rimini*, generally considered the author’s greatest play, “is riddled with mere paraphrases from the dramatist he loved so well, - Shakespeare” (ibid.). It would be unnecessarily pejorative to describe their plays as “stilted,” though it would be accurate to identify them as anachronistic. They were out of time, crafted with a sensibility informed by extensive reading of classical literature rather than extensive experience with the contemporary stage. The insurgent playwrights desired to write for the ages, to create works with the same “universal” appeal as Shakespeare, rather than participate in a form whose success was so intimately linked with the local context of performance and the particular make-up of an audience. Boker scoffed at the idea of such a topical focus for his art: “Local poetry!” a local Sun! a local sky! A local God almighty! These things seem equally absurd to me. That which is local,

which does not come home to the heart of universal man, is not poetry, or I have mistaken my vocation.”⁴³ Boker seemed to realize this, as suggested in the epigraph that begins this chapter, and in a letter to Simms in which he wryly acknowledges his criteria for success belongs to a past age:

Simms, Simms, Simms, William Gilmore Simms! what an age we live in for such fellows as we are! If we had lived two hundred years ago, we might have been comfortably immortal for the last century, laurel-crowned and all that; and we might now be standing together in some cool corner of hell, throwing stones at the angels, in our contempt for their imperfect kind of immortality. (Hubbell and Boker, 68)

It seems the “perfect” kind of immortality Boker desired was one that could not be won in the theatre. At least not the theatre as it was.

⁴³ George H. Boker to Richard H. Stoddard, January 23, 1853, Boker PSU.

Chapter 4

Act II: A Most Enlightening and Expository Act, Addressing a Statute, an Act of a Different Sort, a Story-ed Ruling, &c.

II.i. Anne's Statute and the Invention of Copyright

Prior to 1710, British authors were not recognized as having any statutory rights to their literary creations. It was the Stationer's Company, which held a monopoly on printing dating to a royal charter from 1557, and its network of printers and booksellers that controlled both access to printed works and held the copyrights associated with them. At a fundamental level, these "copyrights" were simply and precisely that: the right to make copies of a particular text. While there may not have been any statutory protection of authors' rights or Parliamentary control of the stationers, they hardly functioned in a regulatory vacuum. Over the years, they had developed a remarkably comprehensive, quasi-judicial framework that both established rules and provided for their enforcement, all within the structure of the guild itself:

Once secured, the right to print a particular book continued forever, and thus a "copy" might be bequeathed or sold to another stationer or it might be split into shares among several stationers. But only members of the guild – that is, booksellers and printers, not authors – might own copies. It was the guild that authorized the system and also administered it. Claims of infringement and other contentions about copyright were handled not in law courts but by the company's Court of Assistants.¹

This did not mean that authors lacked any rights whatsoever, as Oren Bracha explains, and "during the century and a half of pre-1710 copyright, there emerged

¹ Mark Rose, *Authors and Owners: The Invention of Copyright* (Cambridge: Harvard University Press, 1993), 12.

social norms – backed by sporadic enforcement of the Stationers’ Company – that created a measure of recognition of authors’ entitlement for compensation and, possible, for some control over first publication.”² This system was not without its flaws, however, and it was to mediate an intra-guild dispute between two booksellers, rather than between an author and a printer, that the crown’s assistance was invoked in late 1709 (Rose, 4).

In their initial petition to the House of Commons, a group of stationers asserted that “divers Persons have of late invaded the Properties of others, by reprinting several Books, without the Consent, and to the great Injury, of the Proprietors, even to their utter Ruin, and the Discouragement of all Writers in any useful Part of Learning.”³ The title of the bill that resulted from their petition – “A Bill for Securing the Property of Copies in Books” – clearly telegraphs the stationers’ assumption that their copies were, in fact, a species of property, and not merely a privilege granted by the crown. Ronan Deazley explains that their purpose was to establish that such copies were “a clearly recognisable form of property, equal in stature as with any other chattel or estate” (Deazley, “Anne”). Deriving their rationale from a Lockean conception of property, the stationers’ claims implicitly argued that the labor exerted by an author created a proprietary relationship between the individual and the text, though such rights could be transferred “for good

² Oren Bracha, “The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright,” *Yale Law Journal* 118, no. 2 (November 2008), 249n264.

³ Quoted in Ronan Deazley, “Commentary on the Statute of Anne 1710,” *Primary Sources on Copyright (1450-1900)*, ed. L. Bently & M. Kretschmer, www.copyrighthistory.org [accessed January 23, 2014]. Hereafter “Deazley, ‘Anne.’”

Considerations” to another entity, such as the stationer (who was, of course, the only entity then permitted to register copyrights) (Deazley, “Anne”). In his *Two Treatises on Civil Government* John Locke had set forth what would become not only the basis for government – to safeguard and preserve individual property rights – but the rhetorical justification for expanding the conception of “property” to include something like copyright. “Though the earth and all inferior creatures be common to all men,” wrote Locke,

yet every man has a “property” in his own “person.” This nobody has any right to but himself. The “labour” of his body and the “work” of his hands, we may say, are properly his. Whatsoever, then, he removes out of the state that Nature hath provided and left it in, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property.⁴

This right was not a civil one, granted by government, but a natural law, preceding and underpinning the social order.

As the stationers’ bill passed through Commons, however, its purpose and language were significantly altered. The implicit recognition of authors’ rights became an explicit grant of ownership, vesting for the first time the right to secure copyrights to authors themselves. Also eliminated was the stationers’ perpetual right to copyrighted works – which existing guild policy ensured – replaced with a framework that would serve a more general social interest. This shift is reflected in the altered title of the bill itself, which by the time of its passage in April of 1710 had become an Act “for the Encouragement of Learning, by Vesting the Copies of printed Books in the Authors or Purchasers of such Copies, During the Times therein

⁴ John Locke, *Two Treatises on Civil Government* (London: George Routledge and Sons, 1884), 204, <https://archive.org/details/twotreatisesonc02filmgoog> [accessed January 23, 2014].

mentioned” (Deazley, “Anne”). Commons had both focused and expanded the scope of the legislation, and in ways that were not in keeping with the stationers’ desires. Stripped away were the provisions extending guild control over imported works, and the more general protections sought by the guild were limited to the unauthorized printing of copyrighted works. Rather than giving statutory recognition of rights in perpetuity, as the guild had intended, the act established clear limits on the duration of copyrights: the right to print existing texts would expire twenty-one years after the passage of the act, and the right to publish new works would be limited to fourteen years (at that time, presuming the author were still alive, they would revert to the original creator). Not only did the statute severely restrict the duration of copyrights, it stripped the guilds of their monopoly by allowing other entities, notably authors themselves, to secure a copyright outside of the guild structure. Deazley argues the ultimate goal of the statute was to encourage the production of books by establishing a “cultural *quid pro quo*”: in order to provide the “Encouragement of Learning,” Parliament agreed to vest in the holders of a copyright the sole license to print and profit from a particular work for a finite period of time (*ibid.*).

The advent of statutory copyright protection raised questions as to whether such a scheme destroyed the natural or common law rights of property that had ostensibly predated the act. Had copyright become, in the words of legal scholar Craig Joyce, solely a “creature of statute, with all rights existing subject to constraints enacted by the legislature”?⁵ Or had a “common law entitlement, arising by virtue of

⁵ Craig Joyce, “‘A Curious Chapter in the History of Judicature’: *Wheaton v. Peters* and the Rest of the Story (of Copyright in the New Republic),” *Houston Law Review* 42, no. 2 (Summer 2005), 360.

an author's natural right in the product of her creations...survived its enactment unfettered by the Statute's limitations (including with respect to duration)" (Joyce, 360)? Throughout the remainder of the eighteenth century, a series of court cases and additional legislation wrestled with this issue, though the question remained uncertain. In *Millar v. Taylor* (1769), for example, it was held that a common law right did persist independent of the statutory protection, yet by 1787 the *Millar* decision had been overturned and the common law argument rejected.⁶ This uncertainty crossed the Atlantic, along with much of the British legal system and body of common law, and it was to the Statute of Anne that Congress looked in 1790 when drafting the first American copyright legislation.

II.ii. Wheaton Battles Peters

Several months before Thomas Wignell performed his "reading" of *The Contrast* in Philadelphia's City Tavern, members of the Constitutional Convention met in that same establishment to celebrate the conclusion of their business, where "they dined together and took a cordial leave of each other."⁷ The document they had just finished drafting, and which would be ratified the following year, contained language authorizing Congress to establish copyright protections.⁸ The only

⁶ An important decision in the case law is also related to the theatre. In *Macklin v. Richardson* (1770), Charles Macklin sued a magazine whose correspondents had attended performances of his *Love a'la Mode*, transcribed it, and published the first act. It was held that a performance was not a "publication" of the play such that he would be brought under the guidelines of the statute, and that he still retained his common law rights to his unpublished manuscripts; the magazine was enjoined from continuing publication.

⁷ George Washington, *George Washington's Diary* (September 13-18, 1787), Library of Congress, <http://memory.loc.gov/ammem/gwhtml/gw003.html> [accessed January 23, 2014].

⁸ The uncertainty regarding who proposed, supported, and amended the clause in the Convention is discussed in: Oren Bracha, "Commentary on the Intellectual Property Constitutional

enumerated power in the founding compact to carry with it a statement of its purpose, article 1, sec. 8 is clearly a descendant of the Statute of Anne, declaring that Congress shall have the power “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” Soon after it began meeting in May of 1789, the first Congress convened under the new Constitution received petitions from authors and inventors seeking statutory protection for their creations, and Congress soon set about considering legislation to establish copyright and patent protection.⁹ After languishing in a House committee until the end of the session, the topic’s importance was highlighted by President Washington in his address to a joint session of Congress, where he declared that “there is nothing that can better deserve your patronage than the promotion of science and literature” (quoted in Bracha, “Commentary on the U.S. Copyright Act 1790”). The Congress responded, and on May 31, 1790, Washington signed into law the United States’ first copyright statute.

Bracha observes that the 1790 copyright statute “imported wholesale the British institutional framework,” and many of the provisions are taken nearly verbatim from the 1710 statute and subsequent legislative revisions (Bracha, “Ideology,” 256).¹⁰ The American regime did add protection for charts and maps

Clause 1789,” *Primary Sources on Copyright (1450-1900)*, ed. L. Bently & M. Kretschmer, www.copyrighthistory.org [accessed January 23, 2014].

⁹ See Oren Bracha, “Commentary on the U.S. Copyright Act 1790,” in *Primary Sources on Copyright (1450-1900)*, ed. L. Bently & M. Kretschmer. www.copyrighthistory.org [accessed January 23, 2014].

¹⁰ In Britain, there were two types of protection: that secured by registering a copyright under statute, and patents granted by the crown. In America, an analogous practice continued, with Congress assuming the crown’s role. A handful of personal copyright cases were successfully ushered through

(which Joyce notes was particularly relevant for a nation with such ambiguous and ever-expanding borders) and set the period of protection for new works at fourteen years (renewable once for another term of the same duration) (Joyce, 338n19). It required registration at a local, federal district court; notice to be given in public newspapers (in at least one paper for a minimum of four weeks); and a copy to be deposited with the secretary of state (339). It added explicit protection for manuscript works, which could not be printed or published without their author's consent. Perhaps most importantly, it only recognized works published by citizens or residents of the United States. Not only were foreign works ineligible, the law emphasized that "nothing in this act shall be construed to extend to prohibit the importation or vending, reprinting or publishing within the United States" of any work "published by any person not a citizen of the United States, in foreign parts of places without the jurisdiction of the United States."¹¹ In 1802, the act was updated to require that a copyright notice be printed in all copies of a text, but the next major adjustment to the law did not occur until 1831.

The driving force for the 1831 revision was Noah Webster, whose copyright on his valuable *American Speller Book* was approaching expiration, and who was preparing to publish his *An American Dictionary of the English Language*. In 1826, Webster approached his cousin, Daniel Webster, then chair of the House Judiciary Committee, about pursuing changes to the copyright laws. Webster was encouraging,

Congress over the course of the nineteenth century, generally using personal connections between appellants and sitting members. These cases are listed in Solberg.

¹¹ "Copyright Act, New York (1790)," *Primary Sources on Copyright (1450-1900)*, ed. L. Bently & M. Kretschmer, www.copyrighthistory.org [accessed January 23, 2014].

and willing to help, but he left Congress before action could be taken. Noah Webster then turned to Ralph I. Ingersoll, a representative from Connecticut, “requesting him to use his influence to have a bill for a new law brought forward in Congress. Mr. Ingersoll very cheerfully complied.”¹² Despite prodding the Judiciary Committee to report a bill that would address some of Webster’s concerns, the legislation was left on the table, and the session expired without further action.

With the appointment of Webster’s son-in-law, William Ellsworth, to the Judiciary Committee in 1829, Webster’s prospects improved significantly. In the winter of 1830-1831, he took it upon himself to travel to Washington, where he spent several months personally, and successfully, lobbying members of Congress on behalf of his desired copyright revisions. In January, the bill passed the House, whereupon it went to the Senate, where Daniel Webster, now a senator from Massachusetts and the ranking member on the Judiciary Committee, smoothed its path. Upon final passage of the bill – which, while not the perpetual grant of copyright Webster wanted, did increase the length of protection to twenty-eight years, renewable for another fourteen, and made it inheritable – Webster recalled that: “In my journeys to effect this object, and in my long attendance in Washington, I expended nearly a year of time. Of my expenses in money I have no account, but it is

¹² Noah Webster, *A Collection of Papers on Political, Literary, and Moral Subjects* (New York: Webster and Clark, 1843), 177
http://books.google.com/books?id=89QDAAAQAAJ&dq=A+Collection+of+Papers+on+Political,+Literary,+and+Moral+Subjects&source=gbs_navlinks_s [accessed January 23, 2014].

a satisfaction to me that a liberal statute for securing to authors the fruit of their labor has been obtained” (Webster, 178).¹³

Daniel Webster would play a similarly crucial role in the next major development in the evolution of American copyright, which occurred in 1834. In 1815, the Supreme Court had hired Henry Wheaton as its third reporter. He had rather small shoes to fill. When the Supreme Court was created by the Constitution, there were no provisions for disseminating its decisions, and reporting in the Court’s early years was an ad hoc affair, with no fixed standards for what was reported, or how, and little consistency in quality.¹⁴ All of this changed with the appointment of Wheaton, who brought with him attention to detail and a rigorous work ethic. Within two months of the close of the 1816 term, Wheaton had completed his record of the Court’s opinions, arguments, and abstracts. He was entitled to publish the reports himself, an undertaking he assumed would bring him a substantial income; this was never the case, and he was forced to retain a growing catalogue of unsold volumes. He resigned the post in 1827 on assuming a far more lucrative diplomatic appointment to Denmark (Joyce, 353).

Wheaton’s successor, Richard Peters, Jr., was determined to make the privilege of publishing the reports financially viable. To this end, he printed the

¹³ An explicit protection was also added for musical compositions, though this only protected printed scores, which were already covered, and did not extend to any form of performance. A detailed history of the genesis and passage of the 1831 legislation may be found in: Oren Bracha, “Commentary on the U.S. Copyright Act 1831,” *Primary Sources on Copyright (1450-1900)*, ed. L. Bently & M. Kretschmer, www.copyrighthistory.org [accessed January 23, 2014].

¹⁴ This history is glossed in Joyce, 342-359, on whom I rely primarily for my knowledge of the case. Its ramifications for the development of American literature are also discussed extensively in McGill, chapter 1.

annual reports in much cheaper editions and, more importantly, decided to issue a condensed version (whose brevity did not extend to its title), called the *Condensed Reports of Cases in the Supreme Court of the United States, Containing the Whole Series of the Decisions of the Court from Its Organization to the Commencement of Peters's Reports at January Term 1827*. Joyce points out the issue this immediately created for Wheaton: “At one stroke, Peters’s *Condensed Reports* would supplant the entire market for all of his predecessors’ volumes through slashing both bulk and expense by seventy-five percent” (Joyce, 356). In May of 1831, shortly after the edition of Peters’s *Condensed Reports* covering Wheaton’s first volume was published, Wheaton filed suit, charging his successor with literary piracy. After two years of delays, the court finally ruled in favor of Peters, setting up an appeal to Wheaton’s erstwhile employer. To represent him, Wheaton hired two of his friends – Daniel Webster, already one of the most famous lawyers in the country, and Elijah Paine, a former senator and then judge on the US District Court for Vermont.¹⁵

Wheaton’s task was not an easy one. It was clear that the summaries, indices, and other editorial material were his own creation, and in and of themselves copyrightable. When it came to the Court’s opinions, however, Wheaton’s claim was far less certain. Wheaton believed that, inasmuch as the copyright protection was explicitly intended to incentivize the work of authors and inventors, he could reasonably expect the framers intended him to benefit from his publications, and that such benefit was only secure to the degree it was protected by copyright. However,

¹⁵ “Biographical Directory of Federal Judges: Paine, Elijah,” Federal Judicial Center, <http://www.fjc.gov/servlet/nGetInfo?jid=1826&cid=999&ctype=na&instate=na> [accessed January 23, 2014].

Wheaton was forced to acknowledge he had not adhered to all of the provisions of the copyright laws: he was unable to present evidence of the requisite announcements in public newspapers; and, while having provided to the government eighty copies of each report as required by law, he had not sent a copy directly to the secretary of state (Joyce, 367).¹⁶ Nevertheless, Wheaton personally felt he had fulfilled the spirit of the law, and as for those elements he may have neglected, they were “directory merely,” and “not a condition, the noncompliance of which forfeits the right” (quoted in Joyce, 367).

Wheaton’s attorneys, however, chose to base their defense largely on the Lockean understanding of an author’s property, arguing that the states “ha[d] not surrendered to the union their whole power over copyrights, but [had] retain[ed] a power concurrent with the power of congress”; as such, the Pennsylvania common law, which had preexisted the statutory protection established by Congress, was in no way abrogated by the federal provisions (this also addressed any criticism that Wheaton had failed to follow the letter of the law, given non-compliance would only affect his status vis a vis the federal statute, and not the common law to which they were appealing) (quoted in Joyce, 369). Here was the ambiguity raised by the passage of the Statute of Anne, and as yet unclarified by American case law or Supreme Court rulings. Finally, Wheaton’s team argued that the opinions were, in effect, transferred to Wheaton:

Were not the opinions of the judges their own to give away? Are opinions matter of record, as is pretended? Was such a thing ever heard of? They

¹⁶ As McGill explains, the justices ruled that, despite having sent eighty copies to the same address, “eighty did not equal one. Given the opportunity to judge on principle, the court retreated behind the letter of the law” (69).

cannot be matters of record, in the usual sense of the term. Record is a word of determinate signification; and there is no law or custom to put opinions upon record, in the proper sense of that term. (quoted in Joyce, 370)

While responding to each of Wheaton's arguments in turn, Peters's team – Joseph R. Ingersoll (a distant cousin of Ralph Ingersoll and son of Jared Ingersoll, a member of the Constitutional Convention and signer of the Constitution) and Thomas Sergeant (a justice on the Pennsylvania Supreme Court) – perceived the fundamental question to be whether judicial opinions may be copyrighted at all. Ingersoll argued:

Reports are the means by which judicial determinations are disseminated, or rather they constitute the very dissemination itself....The matter which they disseminate is, without a figure, the *law of the land*. Not indeed the actual productions of the legislature. Those are the rules which govern the action of the citizen....their promulgation is as essential as their existence. (quoted in Joyce, 371)

This argument, which McGill refers to as evoking the “radically performative nature of legal writing,” avers that it is impossible to separate the *publication*, the making public of the laws, from their actual function; not only is their promulgation “as essential as their existence,” it is, in a very real way, their only existence (McGill, 51). And Sergeant emphasized that Wheaton was granted the opportunity to profit from the decisions for a limited time, and “not for his own sake, but for the benefit and use of the public: not for his own exclusive property, but for the free and unrestrained use of the citizens of the United States” (ibid.).¹⁷ McGill succinctly distills the principles underpinning the sprawling, circuitous arguments of both sides: “Whereas the argument from common law sought to identify the text with inalienable private property, the argument from statutory law sought to establish print as a form

¹⁷ McGill deftly exposes the weaknesses in the arguments made by Wheaton's team in her first chapter, especially 49-58.

of public property that could only be rendered private at the whim, and for the benefit of, the state” (McGill, 63-64).

On March 18, 1834, Justice Story gathered the Court’s current and former reporters in his chambers to outline the decision that would be announced the following day. He hoped to negotiate some sort of an agreement that would compensate Wheaton for the use of his personal contributions to the reports reissued by Peters. It seems several of the justices felt bad about how utterly their decision would reject Wheaton’s arguments, and wanted to offer a face-saving opportunity to a man with whom many had been friends. On Webster’s advice, Wheaton rejected any such compromise. When the Court gathered the next morning, Story was absent, leaving Wheaton to grumble to his wife that the justice had left McLean “to fire off the blunderbuss [Story] had loaded, but had not courage to discharge” (quoted in Joyce, 376). A young Charles Sumner, who would play a role in agitation for a dramatic copyright law twenty years later, was present taking notes, tasked with reporting to Story on the outcome of the proceedings.

The Court’s decision and majority opinion were read aloud by Justice McLean; they went against Wheaton on nearly every significant point. As to the question of the common law and its relationship to the 1790 legislation, the Court was clear: the act, “instead of sanctioning an existing right...[had] created it” (quoted in Joyce, 380). Not only was there no common law protection for an author’s works at the federal level, the Court declared that there was “no common law of the United States” (ibid.). As to whether or not Wheaton had any property in his creation, the Court acknowledged that Wheaton’s *manuscript* might properly fall under state

common law protection; however, the act of publishing enacted a fundamental change. McLean's opinion specified this precise moment when he acknowledged that an author "is as much entitled to the product of his labour as any other member of society,...[but] he realises [*sic*] this product by the transfer of his manuscripts, or in the sale of his works, when first published" (quoted in Joyce, 379). It is at the moment of publication that an author surrenders any rights to a manuscript, save those guaranteed by federal statute. McClean's "realisation" is the moment private property – in the form of a manuscript – is transformed into public property – in the form of the printed text. In effect, the law relies on and establishes a distinction between handwriting and the printed word, between the personal property of the manuscript – an artifact as individual as the author's handwriting and fundamentally unique – and the published text – transformed by the act and mechanisms of publication into an impersonal commodity dedicated to the public good. The ruling confirmed the principles implicit in the Constitutional power to establish copyright: to publish is to surrender one's property rights in a particular, original creation. To incentivize such dissemination, the government cedes to authors and inventors the temporary privilege of benefitting from their creation, after which time the property reverts to the possession of the people. Ultimately, McGill sees the decision as setting forth a new "theory of authorship, [one] grounded in a republican belief in the inherent publicity of print and the political necessity of its wide dissemination" (McGill, 47).¹⁸ The ruling left Wheaton with little recourse, save pursuing a remedy

¹⁸ It is this republican valorization of universal access to knowledge that underpins what she calls the "culture of reprinting."

at equity in the state courts. He did so, though the litigation dragged on for years and the case was ultimately settled by the estates of the men more than two years after their deaths, with Wheaton's heirs receiving \$400 (Joyce, 387).

While it ultimately had little bearing on the outcome of the case, one of the arguments advanced by Peters's attorneys contained a claim with surprisingly radical implications. Invoking Blackstone, Paine had proposed that

the identity of a literary composition consists entirely in the sentiment and the language. The same conceptions, clothed in the same words, must necessarily be the same composition; and whatever method be taken of exhibiting that composition to the ear or the eye of another, by recital, by writing, or by printing in any number of copies, or at any period of time, it is always the identical work of the author which is so exhibited; and no other man, it hath been thought, can have a right to exhibit it, especially for profit, without the author's consent. (quoted in McGill, 53)

Paine's expansive characterization of "whatever method be taken of exhibiting that composition to the ear or the eye of another" would seem to open the door for the protection of performance as a "method of exhibiting," though such a protection was still more than twenty years distant. Several years earlier, however, the British Parliament had passed a law explicitly acknowledging performance, and extending it a degree of statutory protection.

II.iii. Bulwer's Law and the Genesis of Dramatic Property

In 1831, novelist and future playwright Edward Bulwer-Lytton was elected to the House of Commons. It was a body, and a nation, on the cusp of potentially radical social change driven by a series of reform movements inspired by the 1830 July Revolution in France, which had further eroded the power of the French monarchy. Bulwer shared the reformists' goals of revising representation in the British Parliament so as to expand the circle of those permitted to participate in the

governance of the nation; in what Jacky Bratton refers to as a “breathtakingly clever” maneuver, he also perceived a way to pursue a separate goal, copyright reform, by tying it to this much broader social movement that had gripped the nation’s attention (Bratton, 68). He called for a select committee – the Select Committee Appointed to Inquire into the Laws Affecting Dramatic Literature – to investigate two concerns: the “corruption” of the current patent theatres that exercised a stranglehold on the London theatre scene; and the lack of protection for dramatists, whose plays could be (and were) pirated with impunity. His committee produced a lengthy report, filled with testimony from individuals sympathetic to Bulwer’s assessment of the London theatre, and recommending two significant changes: the elimination of the patent theatre monopoly and the creation of a right of performance for British dramatists.¹⁹ While Bulwer’s desire to reform the system of theatre licensing collapsed in the House of Commons, the second project bore fruit. The select committee’s arguments are succinctly summarized in the introduction to their report:

In regard to Dramatic Literature, it appears manifest that an Author at present is subjected to indefensible hardship and injustice; and the disparity of protection afforded to the labours of the Dramatic Writer, when compared even with that granted to Authors in any other branch of Letters, seems alone sufficient to divert the ambition of eminent and successful Writers from that department of intellectual exertion. Your Committee, therefore, earnestly recommend that the Author of a Play should possess the same legal rights, and enjoy the same legal protections, as the Author of any other literary production; and that his Performance should not be legally exhibited at any Theatre, Metropolitan or Provincial, without his express and formal consent.²⁰

¹⁹ Bratton deals with this extensively in her third and fourth chapters. See also Stephens, 89-93.

²⁰ “Dramatic Literary Property Act, London (1833),” *Primary Sources on Copyright (1450-1900)*, ed. L. Bently & M. Kretschmer, www.copyrighthistory.org [accessed January 23, 2014].

In June of 1833, “An Act to amend the Laws relating to Dramatic Literary Property” passed Parliament and was signed by the king. While the nature of the protection extended to previously published works was ambiguous in the law and the subject of immediate litigation, the act was, in the words of John Russell Stephens, a “welcome recognition of the growing maturity of, and respect for, dramatic writing as a profession” (Stephens, 91). It was also significant in the development of American playwriting, as both the statute and the arguments advanced in its favor influenced a group of Americans who began advocating for similar protection in the mid-1830s.

Act III: Like Silk from a Spider’s Bowels; or, A New Species of Property

Given their more literary aesthetic, and given their preference for the authority and permanence associated with printed texts but not manuscripts, it is hardly surprising the insurgents of 1856 would seek the same protections extended to other forms of literature. Indeed, given the state of antebellum copyright law, it was only in books that writing received any sort of formal protection, given that journalists freely copied from and reprinted each other’s work. And because these men took a proprietary view of their work that characterized appropriation by others as a form of violation or even theft, it also makes sense that they might view their plays as a form of property, and the mistreatment of that property as a violation of their natural rights. This section explores their particular conception of literary production as a form of labor that established a proprietary relationship with their creations and examines the arguments they made to support their calls for greater control of their work in the form of expanded copyright protections.



III.i. By the Sweat of the Brain

In 1834, Robert Montgomery Bird, already one of America's most respected playwrights, prepared to set out for England. After securing numerous letters of introduction to prominent figures in the literary, theatrical, and publishing circles of London – including an introduction to James Wallack from Edwin Forrest, and one to Edward Bulwer-Lytton from Harper and Brothers – Bird set sail in April (Foust, 82). The day before his departure, he had completed arrangements with the Philadelphia firm of Carey, Lea, and Company to publish his first novel, *Calavar* (Buffington, 59). As part of the agreement, Carey and Lea would withhold the novel until Bird had the opportunity to secure a publisher for *Calavar* in London.²¹ At that time, works that had been previously published overseas were ineligible for protection in Britain. This sort of voyage by American authors was not uncommon. In 1832, for example, William Dunlap wrote to James Fennimore Cooper, then in London looking after his own publishing interests, asking if he would work to secure a copyright for *The History of American Theatre* and including the initial chapters from the work.²² While Cooper met with some success, Bird encountered a series of disappointments, and

²¹ The question of whether or not American authors could register copyrights in Britain at all, and under what circumstances, was an uncertain one prior to 1835, when a decision in *D'Almaine v. Boosey* clarified the process. See Barnes, 100.

²² Dunlap to Cooper, August 11, 1832, in James Fennimore Cooper, *The Correspondence of James Fennimore Cooper* (New Haven: Yale University Press, 1922), 1:276. Dunlap went so far as to name Cooper sole proprietor of the work at the end of his letter. He followed up by sending the remainder of the text to Cooper (portions of it still in manuscript form), including his hope “that it is printing in London at this time” (October 6, 1832, *The Correspondence of James Fennimore Cooper*, 298-299). A British edition, dedicated to Cooper, was released in 1833.

from his perspective the trip was a nearly irredeemable failure. He learned that it was not the custom of British publishers to pay for a new author's first work; they would print it without compensation, and if it was successful the author could expect to receive more traditional agreements for subsequent productions (Foust, 83-84). While Bulwer confirmed to Bird that "first works are always sacrificed," he was too busy to give Bird's manuscript of *Calavar* more than a cursory glance, vaguely noting that he had been "much struck with the force and vigour of the style, and I do not doubt that if the whole resembles the part, it will do you much credit in publication" (quoted in Foust, 85). Disillusioned, Bird cut short a stay he initially planned to last up to a year and sailed for America on July 20, 1834. Not only was he unable to return with the gifts he had promised to friends and family, he had lent all his remaining funds (save the precise amount he anticipated needing to complete the voyage back to Philadelphia) to a luckless American he had met in London.²³ While he may not have received support or even helpful advice from Bulwer, what Bird learned of the publishing industry and – perhaps more importantly – of the system by which playwrights were compensated in London informed a crusade for copyright reform he would pursue until his death.

After returning, Bird vented his frustration with a detailed description of British managerial practices and specific examples of playwrights' earnings, which he then compared with his treatment at the hands of Forrest.²⁴ The comparison was not a

²³ Curtis Dahl, *Robert Montgomery Bird*, Twayne's United States Authors Series, ed. Sylvia E. Bowman (NY: Twayne Publishers, Inc., 1963), 23.

²⁴ The notes, titled "Dramatic Authors, and their Profits," are in the Bird Papers. It is undated, but was certainly written after his visit to England and before his 1837 falling out with Forrest. Bird's frustration no doubt intensified upon learning that his work had been published in London without his

favorable one. While Bird's examples were hardly representative of the compensation tendered to a typical British dramatist and adopted an overly sanguine view of the state of the London theatre, he calculated that if those same arrangements applied to his plays he would be due at least \$5,000 for the first year's performances of *The Gladiator* alone. While a personal loan from Forrest complicated matters, Bird concluded he was still owed some \$4,000 by the tragedian based on their verbal agreement, "if there was a bargain between us, as I supposed there was" ("Dramatic Authors, and their Profits").²⁵ Absent a written contract, Bird had few options (the only witness to their agreement was a mutual friend named George McClellan, father of future Civil War General George B. McClellan, who had died before Bird attempted again in the early 1850s to press his claims with Forrest). During his stay in Britain, however, Bird had learned of recent legislation that might offer him some

consent: "Although he had failed to make any arrangements with the London booksellers, the work was almost immediately republished by Bentley, who also took the liberty of changing its name. Four handsomely printed volumes, under the title *Abdalla, the Moor*, were the only acknowledgment of his claims the author ever received from the English publisher" (Mary Mayer Bird, "Life of Robert Montgomery Bird," *The University of Pennsylvania Library Chronicle* 13, no. 2 (1945), 46-47, <http://archive.org/details/universityofpenn13univ> [accessed January 23, 2014]).

²⁵ Forrest had lent Bird \$2,000, the repayment of which Bird assumed would be made from Forrest's continued success from his plays. Bird had also, at Forrest's request, re-written another of Forrest's prize plays – John Augustus Stone's *Metamora* – a task Bird believed should earn him \$2,000, "for so I think it worth." None of Bird's arrangements with Forrest were codified in contract. In an 1851 letter to his friend John M. Clayton, Bird explained: "I rewrote for Forrest the play of *Metamora*, altering the story, characters, names, &c (except in the two chief Dram. Personae, to which I gave new words, &c) so that, so far as I can recollect, I did not linger above a dozen lines of the original play. I rewrote this in a great hurry just as F. was going to England to make his first attempt there, and had not time to make and reserve a copy for myself. He has the only copy in existence; and (in consequence of our quarrel – that is, in spite) he never has acted it. I may also say that he never has paid me for it. Two or three years ago, I desired him (through Conrad) to allow me to take a copy of it, pledging myself to cut out any thing belonging to his *Metamora*, names, words, and all, and rewrite again, so as to make it strictly my own play. He refused; and he still has the only copy in existence of what I deem to be my play; and of which, in putting it on the footing of the three other plays written for him, I had a right to a copy, as well as the author's copy=right" (Robert M. Bird to John M. Clayton, January 16, 1851, John M. Clayton Papers, Library of Congress). He was never compensated for the play.

recourse, were it adopted in the United States. This law – which he referred to in his notes by its common name, Bulwer’s Law – was the first legislation to establish the legal existence of “dramatic literary property.”

Bird began studying the British copyright movement, and was early in the field for the first major drive to establish international copyright protections.²⁶ In an article in the *Knickerbocker* published the following year, he made one of the first and most articulate appeals for the importance of reciprocal copyright legislation that would protect British authors in America (and vice versa). In the piece, he established several arguments that would become central to those who advocated for international copyright (which will be addressed further in Act IV).

The most common argument in favor of copyright reform depended on attempts, either directly or by implication, to liken copyright to a form of property. As previously described, the Stationers’ Company invoked a Lockean conception of property in their petition to Parliament, as did Webster in *Wheaton v. Peters*. Bird was quite familiar with the concept of “natural law” as articulated by Locke and as developed over the course of the eighteenth century, and possessed a complex and evolving conception of its relation to slavery and liberty, topics that reappear in many of Bird’s dramas and novels.²⁷ In Bird’s relatively brief *Knickerbocker* article, he uses the word “property” eleven times, vesting it with the import of a “right” or “natural right” (nine times), and characterizing the preservation of that right as “justice” (eight

²⁶ In the Bird Papers are numerous drafts of legislation and notes that indicate Bird was aware of efforts in Britain, and was beginning to formulate the outlines of an American bill that was modelled on the 1833 British law.

²⁷ Bird’s familiarity with and use of natural law is dealt with extensively in Buffington.

times).²⁸ Bird concludes his essay with an appeal to the reader's sense of decency, calling on a revision to the laws so that "all persons who choose, - foreigners and citizens alike, - may enjoy the benefit of what is, and manifestly should be considered property" (Bird, *Knickerbocker*, 289). Cornelius Mathews – a prolific journalist, editor, and occasional playwright who played a key role in the formation of the short-lived American Copyright Club in 1843 – declared that "the law of property, in all its relations and aspects, is one of these primary anchors and fastenings of the social frame."²⁹ And William Gilmore Simms, responding to those who would contest his claim that a book is a form of personal property, points out that an acknowledgement of its status as property is embedded in the language used to discuss it:

His right is based upon the peculiar and personal labor and skill by which his books have been made. They are emphatically *his* works. They are not *yours*. The very terms which we are compelled to employ in stating the simple fact of authorship embodies the very clearest notion of property. ("International Copyright," 455, emphasis in original)

The connection between property and "natural" rights is further emphasized by recurring references to the concepts and imagery of Locke's Second Treatise. Simms rhetorically asks "whether the right of the author to his book is less valid than that of him who first enters upon lands, who first tames the wild cow or the horse, who first takes the deer, who first snares the bird?" (ibid.). In an editorial in the *Daily Tribune*, Horace Greeley, discussing a speech given by Mathews in honor of Charles Dickens, asked:

²⁸ *The Knickerbocker*, 1835, 6, 4:285-289. Hereafter "Bird, *Knickerbocker*."

²⁹ Cornelius Mathews, *The Various Writings of Cornelius Mathews* (New York: Harper & Brothers, 1863), 359, <http://archive.org/details/variouswritings00math> [accessed January 23, 2014].

What possible act of human wit or effort shall give a clear title [to “the indefeasible right of property in his own productions”] if it does not? How shall it be maintained that the man, whether citizen or alien, who slays a deer in the common forest, who lures the fish from the wild mountain stream or tracks the bee to his secret hive, shall have exclusive property in the spoils which he has appropriated from the common stores of the race, while the author who builds out into infinite space – who peoples dreary chaos with the bright and beautiful creations of his genius, shall have none, but be left the prey of all who covet? (February 21, 1842)

These “common stores of the race” are not, Simms points out, finite or exhaustible resources. To the contrary, they are all the more individual and personal, given they are utterly independent of resources over which others might have claim:

The right of the author to the property in his productions, so far from being questionable, is really superior to that of all other producers. His works depend less upon extraneous assistance. They do not result from the application of his industry to physical substances – such as ores, lands, clay or lumber – things, which, in the possession of any artist, may be fashioned into peculiar forms, showing the hands of the maker, and which he thus converts into a means of profit. He is, under God, their sole creator, almost without agent or implement of any sort. They spring at his bidding from sources of which no man may obtain the control – of which no man suspects the abundance. He is as peculiarly the thing he makes as the spider is of his web of gossamer; spinning from his brains and his sensibilities, as the latter from his bowels, the structure which he endows and inhabits. (“International Copyright,” 456)

A haunting, disquieting image, Simms’ visceral metaphor speaks to an intimacy so profound as to collapse the distinction between producer and object, vividly evoking what he sees as the inviolability of the proprietary relationship.

Supporters of the movement also echoed Locke’s emphasis on labor as the crucial catalyst that transmutes the natural to the personal. In the *Daily Tribune*, Greeley endorses “the principle of giving all men the fruit of their brains as well as their muscle” (August 26, 1856). The New York *Spirit of the Times* asks rhetorically: “Why not extend to the playwright the same protection for his property, although it be

the coinage of the brain?" (May 3, 1856). And Mathews exposes the hypocritical arguments of publishers who, without laboring themselves, pursue their claims of ownership over the fruits of another's work:

Here, it is alleged, that the principals, the authors themselves, have no rights whatever in the products of their brain; yet, somehow or other, it happens that their agents, factors and underlings acquire through them and their labors some sort of rights about which all this pother of usage and courtesy and publishers' privileges is kept up! (*Various*, 364)

Melissa Homestead references these appeals when she observes that the "specter of the powerless author as slave, stripped of his rights in his own person, his labor uncompensated and his property turned into public property, haunts antebellum copyright advocacy" (Homestead, 9). Indeed, as Nicholas Bromell notes, the 1830s and 1840s were a period in which the relative importance of mental and manual labor were not yet fixed, and were the subject of considerable discussion. In *By the Sweat of the Brow: Literature and Labor in Antebellum America*, he surveys the complex ways in which these categories of labor were understood, and how authors analogized the process and products of mental activity to the far more tangible products of the manual laborer.³⁰ The tendency of the government to privilege and protect the latter while ignoring the former is ridiculed in a *Daily Times* article, which explains that, when a man invents a button,

he is adopted of the Patent-Office....The inventor waxes rich and fat on the proceeds of his manufacture, until his own buttons can no longer meet upon him...[But] if SHAKESPEARE had been an American, it would have been much more profitable for him to have made buttons than plays. (June 24, 1856)

³⁰ Nicholas K. Bromell, *By the Sweat of the Brow: Literature and Labor in Antebellum America* (Chicago: University of Chicago press, 1993). See particularly 15-39.

Following the passage of the 1856 act, the New York *Spirit of the Times* praised the recognition that poets were as productive as planters, declaring “there is no more good reason why the man who produces a good crop from the brain should not receive a fair compensation for it, than there is that the husbandman should not be paid for what he produces by the labor of his hands and the ‘sweat of his brow’ by tilling the earth” (September 6, 1856).

Even more common than declaring property a right inhering from natural law were analogies (though still, presumably, deriving their force from the assumed significance of the “right” underpinning the analogy) likening copyright to physical objects. In an early draft of his *Knickerbocker* essay, Bird likened literary property to more tangible, heritable objects capable of storing and transmitting value between generations: “the builder of a house knows it is his castle forever; but the man who writes a book which will amuse or instruct millions of his fellow creatures dies with the assurance that, in a few years, it will be snatched from the hands of his heirs, and divided among booksellers and the world at large.”³¹ In an article in the New York *Evening Mirror*, occasional playwright Nathaniel Parker Willis suggests the author has a God-given monopoly over “the vein from which [a book] is worked,” and asks whether “thought-smiths should be better paid than blacksmiths or goldsmiths,” given the relative value of their contributions to mankind (October 10, 1844).

A reliance on analogies linking copyright with material objects also serves to expose the absurdity of those who would deny protection to this particular species of property. Joseph S. Jones, an actor turned playwright (ultimately turned physician)

³¹ “The Effects of American Copyright [*sic*] Laws upon American Literature,” Bird Papers.

who served as the house dramatist for several theatres in the 1830s and 1840s, envisions a future for the drama once it obtains the protection granted to the most menial of objects: “But for the benefit of a new race of dramatic writers, I hope the subject will receive the attention it merits, and that the works of their pens – the inventions of the playwrights – may be secured to them as property by law, as are the rights of the inventors or improvers of patent corkscrews and ‘bottle stoppers’” (quoted in Quinn, *History*, 298-299). Mathews, in particular, resorts to agricultural analogies. In the preface to his play *The Politicians*, he writes of the glut of imported British drama on the market, sarcastically remarking: “To the invading graindealer, the voracious statesman sends a furious inspector to say, ‘None of your musty wheat enters this market ---we pray you mercy!’ Such is his reverence for the home-constructed flour-mill that satisfies his belly.”³² By implication, the “home-constructed” mills that satisfy the mind were left to the instability of the market, glutted as it was with foreign works. Rhetorically assuming the guise of anti-copyright critics who twist the wheat analogy to their own purposes, Mathews responds to those who support unfettered reprinting of foreign works, first by parroting a proverbial publisher:

We buy a new foreign book; it is ours; we multiply copies and diffuse its advantages. We also buy a bushel of foreign wheat, before unknown to us; we cultivate, increase it, and spread its use over the country. Where is the difference? If one is stealing, the other is so. Nonsense! neither is stealing. They are both praiseworthy acts, beneficial to mankind, injurious to nobody, right and just in themselves, and commendable in the sight of God. (Mathews, *Various*, 359)

³² Cornelius Mathews, *The Politicians: A Comedy, in Five Acts* (New York: B. G. Trevett, 1840) 5, http://gateway.proquest.com/openurl?ctx_ver=Z39.88-2003&xri:pqil:res_ver=0.2&res_id=xri:ilcs-us&rft_id=xri:ilcs:ft:amdram:Z000618135:0 [accessed January 23, 2014].

Mathews scathingly reveals the “error” of such a view, which conflates the individual, inimitable, and intangible product of the creative process with its mere physical instantiation:

This reasoner, of a pious inclination and most excellent moral tendencies, has made but a single error—he thinks the type, stitching and paper are THE BOOK! He forgets that when you buy a book you do not buy the whole body of its thoughts in their entire breadth and construction, to be yours in fee simple for all uses, (if you did, the vender would be guilty of a fraud in selling more than a single copy of any one work;) but simply the usufruct of the book as a reader. (Mathews, *Various*, 359-360)

Whether or not the intangible copyright is accorded the rights accruing to physical objects, there are certainly physical objects involved in the form of multiplied texts, and copyright proponents warned of the dangers those texts, particularly those of foreign provenance, could pose to the nation.

III.ii. A Sort of Idiotic Monster; or, The Dangers of Foreign Filth

Bird’s *Knickerbocker* essay succinctly outlines why excluding foreigners from copyright protection actually hurts American authors. American writers must work through printers, “who must be paid, of course, for their labor, employment of capital, etc., and receive also a profit upon each undertaking” (*Knickerbocker*, 288). Foreign works, by virtue of the fact that there is no author whose compensation must draw down the printing profits, are a far more attractive revenue stream. Cheap reprints of foreign works, selling for little above the margin, allow the entirety of the difference to remain with the publisher, there being, in effect, “no author to pay” (*ibid.*, 289). Since American books had to be sold at a price that still allowed the printer to make a profit, they would necessarily be priced higher: “the price of an American work being greater than that of a British reprint, the latter undersells the former, and thus ruins it”

(*ibid.*). The effect of the copyright laws was to impose “a mountain of obstruction to the growth of our youthful literature” (*Knickerbocker*, 286). Mathews cast the situation in far starker terms in his speech at the Dickens dinner: “There is at this moment, waging in our midst, a great war between a foreign and a native literature. The one claims pay, food, lodging, and raiment: the other battles free of all charges, takes the field prepared for all weathers and all emergencies; has neither a mouth to cry for sustenance, a back to be clothed, nor a head to be sheltered” (Mathews, *Various*, 355).

William Burton, in one of the earliest articles to tie the improvement of American theatre to the creation of international copyright legislation, begins his “Melioration of the Drama” by quoting a lengthy passage from *Blackwood’s Magazine* discussing the paucity of quality playwrights. Writing of the British theatre, *Blackwood’s* complains that “the failure of authorship is the true cause of the comparative failure of stage ability. The most vivid actor is but little less than a puppet, without a vivid part” (quoted in *Burton’s Gentleman’s Magazine*, 1837, 1, 4:292). So abysmal is the writing, in fact, that it saps the vitality of even the finest actors, as “no originality in the performer can make an audience find perpetual novelty in perpetual repetition” (*ibid.*). Concluding that “all our comedies are worn out; and, except Shakespeare’s, no tragedies are now capable of being performed,” *Blackwood’s* predicts that only a revival in dramatic literature can save the stage (*ibid.*). Burton argues that these criticisms are as applicable to America as to Britain. He attributes the stale state of the drama to inadequate copyright protection for American authors, lamenting that, until the situation is remedied, he doubts “we will

see anything beyond a trial tragedy, a Yankee farce, or a nigger foolery” (*Burton’s Gentleman’s Magazine*, 1837, 1, 4:292). Burton understood that simply granting American authors the rights of performance, as Britain had done several years earlier, would do nothing to stem the tide of cheap/free foreign imports. In effect, granting British playwrights legal recognition would function as a sort of protective tariff, raising the costs to managers to such a level that American products would start to look like a sound investment. This is particularly true, given the advantages of having an artisan that is not an ocean away, as managers “will assuredly prefer taking advantage of the local popularity of an author who can work to order and attend to any necessary alteration in his fabrication” (*ibid.*).

Bird understood the word “tariff” was a charged one, particularly given recent events; in 1832, South Carolina’s John C. Calhoun had led a movement threatening secession that was driven, in large part, by Southern opposition to protective tariffs (Howe, 395-410). The issue continued to be a source of bitter division between Democrats and the emergent Whig Party throughout the 1830s and 1840s, and Henry Clay, in advocating for international copyright in the Senate, had to carefully articulate a position that espoused protection but not protectionism. Bird anticipated this objection, declaring “we have said, that American writers seek no literary tariff. They do not; but they have a right to that protection which will enable them to compete with foreign writers, on fair and equal terms” (*Knickerbocker*, 287). There was another reason to raise such barriers, as noted by John Howard Payne – it would protect Americans from objectionable content: “If we can pay the actors of England for entertaining us, we can pay their authors too; and, if it were necessary to pay both

equally, it would save us from much foreign trash, and force advantages for writers of our own.”³³

In addition to being economically harmful, this glut of “foreign trash” was particularly insidious, as it corroded a reader’s aesthetic principles, depriving them of the discernment necessary to avoid the worst of what was up for offer:

Wanting in the healthy tastes of an original and productive people, it selects, not infrequently, the worst parts of the literature it appropriates. It has on every and all of these accounts, neither head, nor limbs, nor proper powers of motion, but tumbles about upon the stage of its existence a sort of idiotic monster, whose purposeless look and gaping mouth, craving every thing, sets the looker on into a roar. (Mathews, *Various*, 367)

American readers were not the only class affected by the lure of foreign models. Poe, in a series of articles in the *Evening Mirror*, analyzed how America writers were nearly as susceptible to such corruption. In a literary marketplace where financial remuneration was scarce to nonexistent, the contributions of “men of genius” would necessarily be repressed, as “genius, as a general rule, is poor in worldly goods and cannot write for nothing” (January 31, 1845). As a result, “we are written *at* only by our ‘gentlemen of elegant leisure,’ and mere gentlemen of elegant leisure have been noted, time out of mind, for the insipidity of their productions” (ibid.). While they may have been insipid, what flavor they had was of a distinctly European variety, given such gentlemen “are obstinately conservative, and the feeling leads them into imitation of foreign, especially of British models” (ibid.). Mathews, responding to arguments that the truly transcendent will rise regardless of financial support or compensation, acknowledges that “men of great genius will struggle into light and

³³ Quoted in Gabriel Harrison, *The Life and Writings of John Howard Payne* (Albany: Joel Munsell, 1875), 148, <https://openlibrary.org/books/OL24178919M> [accessed January 23, 2014].

cast before the world the thoughts with which their own souls have been moved,” regardless of the difficult circumstances under which they toil” (*Various*, 361). But, he continues, “there is a wide class – comprising the body of a national literature – who can claim no such power; essayists, philosophers, whose impulses are not great, periodical writers – all are silent when the law and the trade fail to befriend them. It is these that need the constant stimulus...of pay” (*ibid.*). While Boker himself had means of support other than his writing, he echoes Poe in arguing that simply allowing genius to flourish and leaving other voices to fend for themselves is damaging to the entire system:

Of course it is little to me whether magazine writers get paid or not; but it is much to you, and to a thousand others. Therefore I should be doing you and the thousand others the rankest injustice if I did not endeavour to obtain the highest price for my poems; for as my works rise in value, so must all others of a like kind. This principle is true in all cases; and therefore any writer who does not demand the best price for his articles, is a traitor to his class.³⁴

Perhaps more harmful than degraded preferences, the lack of international copyright had the potential to damage the very character of the nation. In an early draft of the *Knickerbocker* article, Bird expressed his concerns that the present copyright laws threatened American identity and virtue. He notes that, while America is known as a “nation of readers...It is also true, that the effect of such general reading is to give a great impulse to the public mind, the character of which, whether for good or for evil, is to be determined by the character of the books with which we are furnished.”³⁵ In his preface to *The Politicians*, Mathews lauds “a law to protect

³⁴ George H. Boker to Richard H. Stoddard, April 6, 1851, Boker PSU.

³⁵ “Community of Copy-Right between the United States & Great Britain,” Bird Papers.

the mind from foreign corruptions, to secure to the home-born offspring of that mind rights of remuneration and inheritance!” George P. Morris – editor of the New York *Mirror*, who corresponded frequently with Forrest, Bird, and Conrad, and who was himself a playwright – lamented the lack of a “republican literature,” declaring that “we wish to be taught to see with our own eyes, and hear with our own ears – and not to go on for ever thinking and feeling with the organs of perception and sensation belonging to strangers” (December 30, 1837). More than simply altered perceptions, the distinctions between America and Britain were in danger of dissolving, leaving an ambiguous, even monstrous, hybrid, obliterating “the traits and features which give us a characteristic individuality as a nation” (Mathews, *Various*, 359). Mathews warns of this loss of identity in language evoking an existential, spiritual threat:

The very angels have an identity of their own, in act and thought, over which they may be supposed to exercise the control of intelligent creatures. On this very truth, that each creature, each angel and each man, has an individual property in whatever constitutes his better being, hangs the immortality of the soul itself. If thought were held in common by all mankind, there could be in effect but one man-one being with multiform limbs and organs, and a single soul, in possession of the globe. It is in the doctrine of a personal identity, an individual and exclusive right to certain elements and issues of thought and feeling, now and hence-forward for ever, that the pains and penalties, the hopes and alarms of a present and a future being have their hold. (363)

In the *Evening Mirror*, Poe emphasizes that this threat to republican virtue is rendered all the more potent by the seemingly innocuous, attractive vessel in which it presents itself, warning that “irreparable ill is wrought by the almost exclusive dissemination among us of foreign, that is to say of monarchical or aristocratical sentiment, in foreign books: nor is this sentiment less fatal to Democracy because it reaches *the people* themselves, directly, in the gilded pill of the poem or the novel” (January 31, 1845).

By contrast, a final category of appeal connecting proponents of copyright reform was related precisely to America's place (more aspirational than actual) among the community of nations. Bird's *Knickerbocker* article, the title of which explicitly evokes the notion, argued (inaccurately) that "in all countries, save our own, a foreign writer is admitted to the privileges, such as they are, of their copy-right laws. He is justly esteemed a citizen of the world; for all the world shares in the treasures of his intellect. America, to our shame be it said, is the only civilized land in which these privileges are denied him" (*Knickerbocker*, 286). Mathews, too, refers to community when asking why it is that so much of the American public apparently saw nothing morally reprehensible in appropriating the property of others without compensation (*Various*, 360). In his series of articles in the *Evening Mirror*, Poe also worried about the ramifications of "the moral evil of the natural law violated," castigating the complacency of those willing to accept the "impolicy of our committing, in the national character, an open and continuous wrong, on the frivolous and altogether untenable pretext of expediency" (January 25, 1845). Such conduct, he predicted, would naturally result in

the animosity aroused in the whole active Intellect of the world — the bitter and fatal resentment excited in the universal heart of Literature — a resentment which will not, and which cannot, make nice distinction between the temporary perpetrators of the wrong, and that Democracy in general which not only permits but glories in its perpetration. (ibid.)

The paradigmatic publisher Poe parrots in his essays confesses his "guilt" over declining a native work with a wink: "It is little better than piracy, I know; but custom sanctions it, and, therefore, I do not feel called upon to blush *very* particularly when I commit it. At all events, I prefer to blush a little, and save my dollar" (New York

Evening Mirror, January 24, 1845). Warning his readers of the consequences of continuing to act irresponsibly, Burton's 1837 essay states flatly that "it will be an insult to the liberality and justice of the nation if ["the international copyright law"] does not pass, and that quickly" (292). At that very moment, a concerted effort by British and American authors to effect such a passage was already underway.

Chapter 5

Act IV: Left on the Table

In late 1837, two dinner parties brought together a mix of Philadelphia's finest, including prominent playwrights, politicians, journalists, and actors who would play key roles in the agitation for dramatic copyright protection that spanned the next nineteen years. The first was a large gathering in honor of Forrest, recently returned to America from a tour abroad where he had met and married Catherine Norton Sinclair. On December 15th, more than two-hundred guests gathered at Sanderson's Merchant's Hotel, a newly constructed building "regarded as unequaled in the country," and featuring the largest banquet hall in Philadelphia.¹ That evening, it was sumptuously decorated, and "the name of the chief guest was woven in wreaths around the pyramids of confectionary, branded on the bottles of wine, and embossed about various articles of dessert."² A committee of eighteen had arranged the fête.³ Among their officers were Peters's attorney Joseph R. Ingersoll, then between stints as a congressman from Pennsylvania's Second district; and Ingersoll's elder brother, Charles, who as a congressman from the Third (later Fourth) district would introduce a bill in 1844 that would have granted dramatists sweeping protections, a bill doomed

¹ Joseph Jackson, *Market Street Philadelphia: The Most Historic Highway in America, Its Merchants and Its Story* (Philadelphia: Joseph Jackson, 1918), 71, <https://openlibrary.org/books/OL6609698M> [accessed January 23, 2014].

² William Rounseville Alger, *Life of Edwin Forrest, the American Tragedian* (Philadelphia: J. B. Lippincott & Co., 1877), 1:326, http://books.google.com/books?id=EJAVAAAAAYAAJ&printsec=frontcover&vq=326&source=gbs_ge_summary_r&cad=0 [accessed January 23, 2014].

³ The membership of the committee is printed in Rees, *The Life of Edwin Forrest*, 147. Further information on the guest list is contained in Durang, 147.

in large part by the antipathy of John Quincy Adams.⁴ While not one of the organizing committee's officers, Joseph R. Ingersoll's successor in Congress, Joseph R. Chandler, spoke about his close friendship with Forrest; in 1850, and again in 1853, Chandler would introduce the legislation that would ultimately be signed into law in 1856. Also speaking was Robert T. Conrad, who as Mayor of Philadelphia in 1856 would lobby on behalf of Chandler's efforts.

Around the same time, a more intimate party honoring Edgar Allan Poe, recently employed by William E. Burton to help run the *Gentleman's Magazine*, was held at the house of Richard Penn Smith (who had also given a speech at the larger Forrest dinner).⁵ Burton, of course, had argued in the pages of his magazine that international copyright was essential to the development a distinctly American drama. Also present were Forrest and his new wife, as well as Chandler, Taylor, and Bird.⁶

⁴ Charles' district was re-drawn, changing from the Third to the Fourth during his time in office (William Montgomery Meigs, *The Life of Charles Jared Ingersoll* (Philadelphia: J. B. Lippincott & Co., 1897), 224, <https://archive.org/details/lifecharlesjare00meiggoog> [accessed January 23, 2014]). Ingersoll was also a playwright. At the age of eighteen, he had written *Edwy and Elgiva*, produced at the Chestnut Street Theatre in 1801, with Thomas A. Cooper in the lead role. Ingersoll and Cooper would remain close friends, with Ingersoll assuming some of Cooper's debts and arranging a benefit performance for him in 1833 (Geddeth Smith, *Thomas Abthorpe Cooper: America's Premier Tragedian* (Cranbury, NJ: Associated University Presses, 1996), 240). In 1831, Ingersoll published a verse tragedy titled *Julian*, which seems never to have been performed.

⁵ The evening was described decades later by Smith's son, Horace Wemyss Smith, here quoted by Hyman Pollock Rosenbach in the *American* magazine ("Reminiscences of Edgar A. Poe," *American*, 13 no. 342 (1897), <http://www.eapoe.org/papers/misc1851/18970226.htm> [accessed January 23, 2014]). It recalls the event as having taken place "about 1837," though it references Forrest's recent return from England, which occurred on September 18th, as per the September 23rd *Spirit of the Times* (Philadelphia). The guest list is taken from Smith's account.

⁶ No doubt it was an awkward meeting for Bird and Forrest. In November, the two men had severed their friendship after a heated meeting at Bird's house, where the playwright had attempted to recover his copy of *Metamora*, which he had re-written at Forrest's request, as well as obtain compensation he felt he was owed. Bird's wife, Mary, then pregnant with their first child, heard their argument from upstairs. Upon asking who her husband had been speaking with, she was told: "That scoundrel! He is not fit to be in the presence of a lady" (quoted in Foust, 71).

All told, no fewer than four editors of influential periodicals were on hand, including Louis A. Godey (*Godey's Ladies Magazine*), Conrad (*Daily Intelligencer*), Chandler (*United States Gazette*), and Adam Waldie (*Waldie's Circulating Library*), as well as Bird and Morton McMichael, future editors of the Whig Party's organ the *North American and United States Gazette*. Dinner was delayed for several hours until Burton's fellow theatre managers, Wemyss and Wood, arrived after the close of the theatres. The guest of honor, having succumbed to the lure of the "side-board," had to be carried up the stairs to the dining room, "and when he was seated was in no condition either to entertain or be entertained" (Rosenbach).

While no record of the private conversations at either party exist, the relationships formed (and dissolved) between these men would play an important role in the 1856 changes to the copyright law. Many of the men had written plays and were committed to ensuring playwrights could determine how and when their plays were performed, among them Bird, Boker, Conrad, Charles Ingersoll, Smith, and Burton. Some were ambivalent. Forrest, for example, seems to have had little reason to oppose it, though he also had little reason to push for its passage. He already had a stable repertory of pieces that would be unaffected by any future changes to the ways playwrights worked with actors, and his system of paying writers to craft vehicles for him would likely continue regardless. Yet he jealously guarded his manuscripts, and would no doubt have welcomed additional protections to ensure rivals could not encroach on "his" roles. Others were indifferent, among them Wemyss and Wood, neither of whom seemed concerned their managerial practices would change significantly if playwrights had greater control over their work.

For the insurgents, though, the need was clear, and was clearly best met by establishing greater legal protections. Based on the British precedent, and based on the proprietary approach many of these men took towards their plays, copyright seemed the most appropriate avenue of appeal. Such an approach, however, was untenable under the existing copyright regimes and the underpinning for such protections as elaborated in *Wheaton v. Peters*. If copyright held the key to the protection they sought, its definition would have to be expanded “so as to compass the interest,” as Simms so eloquently puts it. For Simms, the interest, as stated in the Constitution and codified in subsequent copyright legislation, is to encourage the spread of knowledge by securing to “Authors and Inventors the exclusive Right to their respective Writings and Discoveries” (“International Copyright,” 458). That security, Simms argues, must be the overriding principle, and must be secured by redefining copyright; such a redefinition is the responsibility of the legislator, who “has this peculiar province committed to his care” (*ibid.*). It is to the guardians of that “peculiar province” that advocates for the right of representation directed their appeals, and it is the story of their efforts, and of the ultimate passage of the 1856 revisions, that comprises Acts IV and V.

IV.i. Falling on Their Knees?!; or, The First Push for International Copyright Reform

In 1836, British author Harriet Martineau helped draft and circulate a petition destined for Congress; it would ultimately bear the signatures of fifty-six prominent British authors, and call on American lawmakers to “grant them the Exclusive Benefit

of their Writings within the United States.”⁷ She sent copies to various influential American authors, publishers, and politicians, asking them to lend their support. Among the recipients were former a former president (John Quincy Adams, then a representative from Massachusetts), a scholar and future Secretary of state (Edward Everett), the editor of the *Evening Post* (William Cullen Bryant), and two Supreme Court Justices (Joseph Story and James M. Wayne) (Barnes, 61). Likely a result of the support he expressed for the movement in his *Knickerbocker* piece, Bird also received a copy.

In a letter dated January 20, 1837, Bird replied to Martineau. In explaining his refusal to sign the petition, Bird criticized the timing of the appeal. Congress was then in a lame duck session, due to end with the inauguration of Van Buren in March, “which is reason enough to anticipate death by neglect for any business brought

⁷ “Petition of British Authors, Washington D.C.” *Primary Sources on Copyright (1450-1900)*, ed. L. Bently & M. Kretschmer, www.copyrighthistory.org. [accessed January 23, 2014].

A significant body of scholarship addresses the development of American copyright law and the role played by both foreign literature and laws. McGill’s text is an ideal starting point for any exploration, as her exhaustive research and insightful analysis provide a comprehensive introduction to the subject, particularly for scholars of literature. In addition to the works mentioned above, Bruce W. Bugbee’s *Genesis of American Patent and Copyright Law* (Washington, DC: Public Affairs press, 1967) details the extant British custom and the many state laws that existed under the Articles of Confederation. Homestead’s *American Women Authors and Literary Property, 1822-1869* deftly exposes the peculiar problems faced by women, who – in addition to navigating relationships with the same publishers as their male counterparts – also faced significant legal challenges, particularly in the form of coverture laws.

For the history of British reform related to dramatic copyright, see: Stephens, particularly chapter 4. For reform efforts generally: Catherine Seville, *Literary Copyright Reform in Early Victorian England: The Framing of the 1842 Copyright Act* (Cambridge University Press, 1999). Arno L. Bader’s “Frederick Saunders and the Early History of the International Copyright Movement in America,” *The Library Quarterly* 8, no. 1 (January 1938) discusses efforts by British publishers to make inroads on the American market by establishing branches of British publishing houses in New York.

before Congress not of great public importance.”⁸ Far less promising than the timing, he continued, was the general approach of the authors, which he called “singularly injudicious, and even objectionable.” He felt the tone of the letter was unhelpful, and one of “complaint and reproach.” He read in the petition’s reference to “the works thus appropriated by the American booksellers [that] are liable to be mutilated and altered at the pleasure of said booksellers” an imprudent attack on American publishers, a tactic Bird believed would backfire and inspire a determined opposition. Bird urged them instead to craft

a simple, briefly expressed, and dignified claim to a privilege which they think they should be allowed to enjoy, - not an exposition of their grievances, or of the grievances of other people, - not an argument to prove the wisdom of granting their demand, - not a denunciation of American booksellers for doing what English, and all other, booksellers would, under similar circumstances, just as certainly do.

Bird shrewdly read a veiled denunciation of slavery as a move that would necessarily cast the appeal in a sectional, partisan light, and would make enemies of the “Southern gentlemen” who would otherwise “be among its best friends.” Bird had exchanged novels with just such a gentleman – Simms – through their mutual friend, James Lawson, and his political views were already pushing him towards the Whig Party, which had a complicated relationship with the institution (Dahl, 23). Bird’s fear that any foreign criticism of slavery would create a host of new enemies was justified: when Martineau attacked the “peculiar institution” in her *Society in*

⁸ Robert M. Bird to Harriet Martineau, January 20, 1837, Bird Papers. All subsequent quotations in this paragraph refer to this letter.

America, published the following year, Simms excoriated it in a lengthy review printed in the *Southern Literary Messenger*.⁹

Bird urged a far more pacific and conciliatory tone towards the booksellers than he had in his *Knickerbocker* article of two years earlier. He acknowledged they were simply businessmen acting in their own self-interest, and were not, on principle, “opposed to granting [British authors] a just property in their works.” In part, it was a matter of economic necessity, as the number of American works published annually would hardly be sufficient to keep them all solvent. Bird suggested the publishers would be amenable to international copyright if there were a stipulation that only “bona=fide [*sic*] American publishers” would be allowed to publish British works in America. Bird, after encouraging Martineau to try again with a more moderate petition “containing nothing but your simple prayer for protection,” ended with a warning that, were the petition considered in its current form, it might “produce the apprehended effect of throwing the whole business back for five or ten years.” As it turns out, it would be another sixteen years before international copyright had a remote chance of passing, though this had as much to do with the American political system as the British petition, as will be discussed below.

Bird’s criticism of the petition’s timing was somewhat disingenuous. In less than two weeks, another petition calling for the creation of an international copyright agreement was delivered to the Congress; Bird’s name was among those American

⁹ See William Gilmore Simms, “The Morals of Slavery,” in *The Pro-Slavery Argument As Maintained by the Most Distinguished Writers of the Southern States* (Charleston, SC: Walker, Richards & Co, 1852), <https://openlibrary.org/books/OL23334775M> [accessed January 23, 2014].

authors who had signed.¹⁰ The printed version of the petition does not include the date on which the original was drafted, though a significant amount of time was no doubt required to gather the thirty signatures. Several years later, for example, another petition on international copyright was delivered to the Senate by Charles Sumner; it included the signature of James Fennimore Cooper, who had by then been dead for more than a year (Barnes, 227). It is certainly possible Bird signed it well before it was delivered to Congress, and could not have known it would arrive so near the end of the session. Still, it would have been charitable to extend to the British authors, whose lead time no doubt exceeded that of his petition, the benefit of the doubt. The petition bearing his signature at least abides by the advice he provided Martineau. Declaring that “they believe native writers to be as indispensable as a native militia,” the petition’s authors acknowledge that the current system made foreign works cheaper than native productions, and suggest that Americans should rather be looking “to their own authors, as to their own *soldiers*, whatever may be the cost *in dollars and cents*.”¹¹ The appeal closes by arguing that extending copyright protection to foreign authors would discourage monopolies and ensure “the commonwealth of literature [was] opened to a fair and liberal competition” (ibid.).

To be fair, Martineau’s approach to Congress was not one based on a clear understanding of the partisan dynamics of the American political system. Writing to

¹⁰ Joining Bird in signing the petition were several other playwrights, including Dunlap, Noah, and Samuel Woodworth.

¹¹ “Memorial of a Number of Citizens of the United States,” *Primary Sources on Copyright (1450-1900)*, ed. L. Bently & M. Kretschmer, www.copyrighthistory.org [accessed January 23, 2014]. Emphasis in original.

Henry Brougham, she explained that she “never met with an American (not a bookseller) who did not agree with me on this subject,” and confided that “I rather think both Houses will fall on their knees on the receipt of our petition” (quoted in Barnes, 60-61). Such an assessment did not augur well for the effort she was helping spearhead. Upon receipt of the petition, Senators Henry Clay (Anti-Jacksonian-KY) and William Campbell Preston (Nullifier-SC) ensured it was referred to a select committee. Among the committee’s members were Clay (chair), Preston, James Buchanan (Democrat-PA), Daniel Webster (Anti-Jacksonian-MA), and Thomas Ewing (Anti-Jacksonian-OH).¹² Two weeks later, the committee issued a report supporting the goals of the petition, along with a bill that would enact them (S. 223). The bill extended the right to register copyrights to “any subject or resident of the United Kingdom of Great Britain and Ireland, or of France, in the same manner as if they were citizens or residents of the United States.”¹³ Clay knew the bill’s greatest opponents would be American publishers, whose business model would be threatened by the elimination of much of the free content on which they relied. In a letter to Epes Sargent, Clay wrote that he agreed with Sargent about the importance of the measure, but warned that “the Booksellers, or rather some of them, are making [*sic*] effort to defeat it by procuring signatures against it, and if they are not counteracted they may possibly succeed” (quoted in Barnes, 66). Clay sought to preempt their primary

¹² *Journal of the Senate of the United States*, 24th Cong., 2nd sess., 1836, 26, 192. Unless otherwise noted, all references to Congressional records may be found through “American Memory: A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates 1774-1875,” Library of Congress, <http://memory.loc.gov/ammem/amlaw/lawhome.html>.

¹³ “A Bill to amend an act entitled ‘An act to amend the several acts respecting copy-right,’” S. 223, 24th Cong., 2nd sess.

objections by including a provision that any work of a foreign author must be printed in the United States to be eligible for protection.

There seemed to be little support for the measure outside of Clay and Preston, however, and the bill died the death of so many related to copyright; it was read twice and tabled, the session expiring without a crucial third reading and vote. Clay brought the measure back three more times over the next several years, each attempt eliciting a deluge of petitions and memorials opposed to the idea. Between January and June of 1838, for example, eleven petitions against the measure were laid before the Senate, against only three in favor (Bader, 35). Joseph Story, writing to Martineau about the fate of the measure in 1837, explained that

it was exceedingly well introduced, and sustained by Mr. Clay and Mr. Preston. But the body of our booksellers, or the trade, as they call themselves, is opposed to it. Nevertheless, I do believe, that if Congress had sat a month longer, the bill would have passed. All our American authors are in its favor, and the public are beginning to be enlightened on the subject, and to understand its bearing upon literature and genius, and a just liberality to authors, and last, but not least, upon their own immediate interest.¹⁴

Clay, too, in enumerating the challenges faced in pushing for copyright reform, lamented to Charles Dickens that “these are the difficulties to be overcome; and they can only be subdued by enlightening public opinion, or causing it to flow in a correct channel” (quoted in Barnes, 73). Clay, the consummate dealmaker and master of legislative legerdemain, exhibits here the same keen political insight that served him so well throughout his political career (decisions regarding cabinet posts notwithstanding), though such public “enlightenment” was not his forte.

¹⁴ Joseph Story to Miss Harriet Martineau, April 7, 1837, quoted in Joseph Story and William W. Story, ed. *Life and Letters of Joseph Story* (London: John Chapman, 1851), 2:275, <https://archive.org/details/lifeandlettersj07storgoog> [accessed January 23, 2014].

IV.ii. “This peculiar province”: The First Attempts at Legislative Action

The first known legislative attempt at dramatic copyright is, perhaps fittingly, the one about which least is known. The *House Journal* for March 14, 1836, reads: “On motion of Mr. Johnson, of Louisiana, by leave, *Resolved*, That the Committee on the Judiciary be instructed to inquire into the expediency of enacting a law, securing, in addition to a copy right, a privilege for the performance of dramatic compositions by citizens of the United States.”¹⁵ While nothing is known of what Johnson envisioned, it may be inferred from the resolution’s language that he was not advocating a revision of the copyright statute, but rather the creation of a new privilege, one distinct from the protections associated with copyright.

Similarly, the first bill intended to grant to playwrights the rights of representation – S. 227: “A Bill to secure to the authors of dramatic works their property therein” – did not seek to explicitly revise or redefine copyright, but to establish a *new* right. The bill was introduced in the Senate in 1841 by Senator Preston. His interest in dramatic copyright is uncertain, though his earlier work with Clay reveals he was a supporter of the broader movement.¹⁶ Several other

¹⁵ *Journal of the House of Representatives of the United States*, 24th Cong., 1st sess., 1835, 29, 513. Henry Johnson was an Adams-Clay Republican turned Whig, according to the Biographical Directory of the United States Congress, 1774-Present, <http://bioguide.congress.gov/biosearch/biosearch1.asp> [accessed January 23, 2014]. While the docket for the Judiciary Committee, held at the National Archives’ Center for Legislative Archives, contains an entry recording the charge, there is no evidence of any further action. A small “r” was written across from the entry, suggesting a report had been called for, though there is no evidence of one having been created. My thanks to the invaluable assistance of Rodney Ross at the National Archives, who combed through many a binder of crumbling papers to find original copies of bills and committee records.

¹⁶ Preston was apparently a lover of the theatre, and it was a particularly moving encounter with the British tragedian William Charles Macready that impelled Preston to seriously study oratory. According to James Murdoch, Preston had become enamored of the affective power of the spoken word after seeing Macready: “the consequence has been that my interest in language as a medium of expression has been considerably increased, my ear better tuned to an appreciative state of hearing, and my vocal powers very much improved” (quoted in James Murdoch, *The Stage, or Recollections of*

relationships suggest possible influences, as well. Fellow South Carolinian Frances Lieber, a professor at South Carolina College, had corresponded with Clay about his push for international copyright, and encouraged him to continue his efforts.¹⁷ As part of this campaign, Lieber had enlisted the aid of historian William H. Prescott (Freidel, 202).¹⁸ Prescott contacted Daniel Webster, who promised his support of the measure, were it to come to a vote. While Webster believed the bill continued to lack the necessary support, Lieber “did not despair so easily, for he counted heavily upon the support of the South Carolina Whig senator, William C. Preston, who was a gifted and persuasive orator” (ibid.). To encourage Preston and provide him material for Senate debates, Lieber wrote an extended “letter” intended ultimately for publication (it would be published, though, to his chagrin, at his own expense), which was unable to save Clay’s final attempt at passage of the bill.¹⁹ Preston was still engaged in the international copyright issue, however; in a letter dated two days after Preston submitted his 1841 bill, Epes Sargent described efforts he was taking as editor of the *New World* to convince the publishers to change their mind and drop their opposition to the movement.²⁰ It may well have been another contact, however, that was most

Actors and Acting from an Experience of Fifty Years (Philadelphia: J. M. Stoddart and Co., 1880), 94-95, <http://archive.org/details/stageorrecollect00murdriч> [accessed January 23, 2014]).

¹⁷ Lieber’s involvement is discussed in Frank Freidel, “Lieber’s Contribution to the International Copyright Movement,” *Huntington Library Quarterly* 8, no. 2 (February 1945), 200-206.

¹⁸ Prescott, in turn, reached out to Washington Irving, who demurred, citing habitual procrastination.

¹⁹ It was printed by Wiley and Putnam in 1840 under the title *On International Copyright, in a Letter to the Hon. William C. Preston*. See Freidel, 204.

²⁰ Epes Sargent to William C. Preston, January 31, [1841], Preston Family Papers, Special Collections Research Center at the Earl Gregg Swem Library College of William and Mary.

influential in the bill's creation. The chairman of the Judiciary Committee, to which S. 227 was referred, was Thomas Clayton, a senator from Delaware and cousin of Robert M. Bird's close friend John M. Clayton.

Bird would certainly have been interested in the protection proposed in the legislation, and he had retained manuscript copies of several of the Forrest plays in hope that America might one day pass legislation similar to Bulwer's Law.²¹ Further, in an 1853 letter to Boker, Bird explains that "(eleven or twelve years ago, as I made mention to you I endeavored showing an attack of the old ardor scribendi) to get such a bill introduced into Congress."²² The 1841 bill was introduced twelve years earlier (to the month), and Bird's letter indicates his efforts were "near the close of the session," which is, indeed, when Preston's bill was introduced.²³ This calendric alignment has led some scholars to assume a connection between Bird and the 1841 bill.²⁴ Further, the 1841 legislation borrowed heavily from the 1833 British Act (or "Bulwer's Law," as Bird termed it), which Bird was certainly familiar with, though it made some crucial changes.²⁵ Nearly verbatim are the lists of what is protected: the

²¹ Robert M. Bird to John M. Clayton, January 16, 1851, John M. Clayton Papers, Library of Congress.

²² Robert M. Bird to George H. Boker, January 31, 1853, in Bird Papers.

²³ Prior to the passage of the 20th Amendment, new Congresses were sworn in on March 4th; the 26th Congress expired the evening of March 3rd, at which time any legislation not disposed of would be lost.

²⁴ Russell Sanjek, citing no sources, writes that Bird "used his Washington connections during the 1840s in an unsuccessful effort to have the law changed" (Russell Sanjek, *American Popular Music and Its Business: The First Four Hundred Years, Volume II: From 1790 to 1909* (New York: Oxford University Press, 1988), 2:33). Oren Bracha's otherwise insightful commentary accepts Sanjek's claim, and concludes that "it is likely that the main figure behind [S. 227] was the playwright and journalist Robert Montgomery Bird" (Bracha, "Commentary on the U.S. Copyright Act Amendment 1856").

²⁵ On a technical level, S. 227 is not actually a revision of copyright law. It ostensibly stands alone, and is not written to explicitly amend or supplement the existing law of 1831. Rather than an

British bill covers “the Author of any Tragedy, Comedy, Play, Opera, Farce, or any other Dramatic Piece or Entertainment”; the American version covers “the author of a tragedy, comedy, play, opera, farce, or any other dramatic entertainment.”²⁶ The American bill adds another category, however, extending protection to “the translator of any such production from a foreign language,” an addition that suggests the insight of someone familiar with American theatre and the nature of its repertory. Both bills state that the author “shall have as his own property, the sole right of representing, or causing to be represented” (though the British bill uses “liberty” rather than “right”), and both bills make this right assignable. Both establish a duration of the protection – twenty-eight years for the British statute, fourteen for the American. While twenty-eight years was the standard term for traditional copyright in both countries, the American bill for some reason uses the shorter duration that had existed prior to the 1831 revisions. The British law establishes procedures for registration, as well as remedies for authors whose rights have been violated; the American bill, by contrast, contains neither.

While both bills apply retroactively, they differ in subtle but important ways.

The British statute covers anything published in the ten years preceding its passage,

intentional strategy (in which case it was a poor one, as it lacks the comprehensiveness to establish a right not currently in existence), it seems more to be a reflection of the bill’s purpose – to propose a right that would, with further work in committee, be situated at an appropriate place in federal law. For instance, it contained no language relating it to the existing copyright statutes, was ambiguous in places and poorly worded in others, and lacked crucial elements such as registration procedures and remedies. The fact that it was referred to the Judiciary Committee, generally the committee of jurisdiction for copyright issues, further attests to this purpose.

²⁶ See: “Dramatic Literary Property Act,” *Primary Sources on Copyright (1450-1900)*, ed. L. Bently & M. Kretschmer, www.copyrighthistory.org [accessed January 23, 2014]; and “A Bill To secure to the authors of dramatic works their property therein,” S. 227, 26th Cong., 2nd sess.

as well as any manuscript not published at the time of its passage; however, the twenty-eight year duration only begins upon publication, allowing authors who do not publish their works a perpetual right. The American statute, by contrast, covers anything published within the previous five years, as well as any unpublished manuscripts, though the term of protection for both begins with the passage of the bill. In effect, the dramatic copyright embodied in S. 227 would, on enactment, grant protection to every extant play (under the then-existing statutes, only plays that were published were protected, and then only as species of literature), but eliminate that protection after fourteen years. Plays such as Bird's prize-winning tragedies, for example, would be stripped of any statutory protection fourteen years after the bill's passage.

While Bird's involvement with the 1841 legislation cannot be confirmed, it does seem possible that he was involved in its drafting. Several factors, however, cast doubt on his participation, at least in any sustained fashion. The brevity and ambiguity of the bill – which ran less than a page – would have been uncharacteristic for Bird. He conducted extensive research on his subjects before beginning a project, and he was a compulsive drafter, his papers replete with multiple versions of letters he intended to send.²⁷ In negotiating with Carey and Lea over the contract for publishing *Calavar*, for example, there are two complete drafts of one of his

²⁷ Bird's approach to playwriting, for example, relied on careful planning and research. In preparing *The Gladiator*, for example, he consulted not only contemporary scholars, but Florus, Livy, Eutropius, Plutarchterculus, Appian, and Tacitus, among others (see Foust, 72). His papers are also replete with detailed prospectuses for a variety of planned dramatic pieces, which are detailed in the second chapter of: Richard Harris, "The Major Dramas of Robert M. Bird: A Critical Analysis of Their Structure and Development" (PhD diss., Indiana University, 1966).

proposals – labelled “Letter A” and “Letter B” – as well as numerous fragments devoted to experimenting with various sections of the letters.²⁸ Years later, while editing the *North American*, Bird wrote several missives castigating George R. Graham, the periodical’s former owner, whom Bird had retained as an editor.²⁹ Again, multiple drafts of each exist, and the general pattern was to clarify, condense, and moderate the passions of earlier iterations. Bird had also studied the 1833 British law a great deal, and his papers contain numerous drafts of possible legislative language, most of it more precise and detailed than the language of Preston’s bill. In addition to being a careful writer, Bird was a disciplined one, having set out an ambitious plan to complete *The Infidel; or The Fall of Mexico*, in less than four months, “planning to write thirty-five pages a week and thus to end his task on the following February 13. In reality he exceeded his hopes and was finished by February 6” (Dahl, 23). The cursory and casual approach of the bill hardly seems in keeping with Bird’s process.³⁰

Several additional factors cast doubt on Bird’s involvement. His *Knickerbocker* article makes clear that, at least in 1835, he believed copyright protection for authors should be perpetual, a far cry from the modest fourteen years

²⁸ Bird was responding to an offer he felt was inadequate (though it was ultimately the one he would have to accept). Letter A was far more defensive and biting, while Letter B took a more delicate approach, suggesting that while *Calavar* was his first novel the fact that he had written several successful plays should save him from being treated as a “beginning” author. These letters may be found in the Bird Papers.

²⁹ See Foust, 137. Graham’s financial troubles were affecting the magazine, and the letters indicate Bird’s increasing frustration.

³⁰ In a memoir of her husband, Mary Bird describes that process in detail. See Mary Mayer Bird, “Life of Robert Montgomery Bird,” *The University of Pennsylvania Library Chronicle* 12, no. 3 (1944), 71-116, 112-113, <http://archive.org/details/universityofpenn12univ> [accessed January 23, 2014].

proposed in the legislation. Additionally, the 1853 letter in which Bird references his earlier involvement also records that, “it being near the close of the session, I laid it over for next year, by which time my attention was absorbed by other matters”; the 1841 bill was not laid over, suggesting Bird was either referencing another piece of legislation or that Preston continued to pursue the matter after Bird had decided to wait.³¹ Further, Bird’s caution in writing letters sometimes led him to conceal information from correspondents; one such instance appears in the very letter to Boker referencing his efforts “eleven or twelve years ago,” which will be discussed below. Regardless of Bird’s possible involvement, the bill was reported out of the Judiciary Committee on the final day of the legislative session, March 3, 1841, and tabled.³² The next attempt would be far more ambitious, seeking to introduce protection for the rights of representation into an extensive overhaul of the entire copyright regime.

IV.iii. Radically Depraved Principles!; or, Charles J. Ingersoll and the Sweeping Reforms of 1844

In an 1823 oration delivered to the American Philosophical Society, Charles J. Ingersoll set out to explore the “philosophical condition of this country, and explain the influence of America on the mind.”³³ His talk, later published by the society, charted the course of American intellectual development, including the present state

³¹ Robert M. Bird to George H. Boker, January 31, 1853, in Bird Papers.

³² The Center for Legislative Archives indicates there are no extant records from the Judiciary Committee for the second session of the 26th Congress when the bill was considered.

³³ Charles J. Ingersoll, *A Discourse Concerning the Influence of America on the Mind*. (Philadelphia: Abraham Small, 1823), 5, <http://books.google.com/books?id=WCaEBYvdDFsC&printsec=frontcover> [accessed January 23, 2014].

of American literature and its dependence on foreign imports. “America cannot contribute in any comparative proportion to the great British stock of literature,” he acknowledged, “which almost supercedes [*sic*] the necessity of American subscriptions” (Ingersoll, *A Discourse*, 13). He took comfort in the fact, however, that the result had been a focus on higher subjects, as “the American mind has been called more to political, scientific, and mechanical, than to literary exertion” (13). He was not ready to give up on American literature, however, and he identified what he saw as one of the chief impediments to its development:

It is to be regretted, that literary property here is held by an imperfect tenure, there being no other protection for it than the provisions of an inefficient act of Congress, the impotent offspring of an obsolete English statute. The inducement to take copyrights is therefore inadequate, and a large proportion of the most valuable American books are published without any legal title.
(18)

In 1844, committed to rectifying this problem, Ingersoll proposed an extensive overhaul of the American copyright regime that was, in the words of Zvi S. Rosen, a “revolutionary bill for its day,” one Bracha calls “surprisingly modern in its structure.”³⁴

On December 7, 1843, Ingersoll gave the required notice that he intended to introduce a new bill. On the 16th of that month, Ingersoll’s colleague in the House, John Quincy Adams, presented a petition of American publishers and booksellers “praying the passage of an international copyright law, for the purpose of securing to the authors of all nations the sole right to dispose of their compositions for

³⁴ Rosen, 1162; Oren Bracha, “Commentary on the U.S. Copyright Act Amendment 1856.”

publication in the United States.”³⁵ A select committee was created, with Adams and Ingersoll among its members. When Ingersoll’s bill, designated HR 9, was finally submitted on January 3, 1844, it was referred to the newly created select committee. It was an awkward fit for two reasons. First, Ingersoll’s bill dealt only with domestic copyright, and Adams would later grouse in his diary that it was “not even touching upon the subject first referred to the committee, [which was] a memorial for international copyright law” (*Diary*, February 9, 1844). Second was Adams, himself.

The relationship between the two men stretched back decades, and was initially quite cordial. As early as 1812, Ingersoll had written the elder John Adams, and the two men had discussed Ingersoll’s law reading, Adams making suggestions as to works that the young lawyer should acquaint himself with.³⁶ When John Quincy Adams was secretary of state under James Monroe, he and Ingersoll discussed relations with Great Britain and the Adams-Onis treaty, with Adams closing his letters “very faithfully your friend.”³⁷ Ingersoll had supported William H. Crawford’s bid for the presidency in 1823 rather than supporting Adams. Yet upon becoming president, Adams reappointed Ingersoll to the post of United States District Attorney for Pennsylvania, which he had held in the Monroe administration.³⁸ While Ingersoll

³⁵ *Journal of the House of Representatives of the United States*, 28th Cong., 1st sess., 1844, 39, 58.

³⁶ See, for example, John Adams to Charles J. Ingersoll, March 15, 1814, Charles Jared Ingersoll Papers, Historical Society of Pennsylvania.

³⁷ John Quincy Adams to Charles J. Ingersoll, July 23, 1821, Charles Jared Ingersoll Papers.

³⁸ Ingersoll had actually served in the position since 1815, when he had been appointed by Monroe’s predecessor, James Madison. The fact that Adams retained Ingersoll in the position likely had little to do with any personal relationship between the two of them, as Adams was opposed on principal to what would become known under his successor, Andrew Jackson, as the “spoils system.” Adams even retained members of Monroe’s cabinet throughout his administration, some of whom worked against Adams in his reelection bid. John McLean, for example, serving as postmaster general,

preferred Jackson in 1828, he felt unwilling to vote against the man who had continued him in office, and so cast no vote at all (Meigs, 150). When he joined the Democratic Party, he felt compelled to explain his failure to support Old Hickory, which he did in a letter likely intended for republication in the Democratic press. In it, he explained that in 1826, “Mr. Adams, without my application, under very peculiar circumstances, reappointed me to the office conferred by Mr. Madison.”³⁹

Relations between Ingersoll and Adams were showing signs of strain by 1832, when the younger man sent Adams a copy of a July 4th oration he had delivered. In deliciously damning praise, Adams observed that the work was like “a forced meat ball in Turtle Soup; rich and spicy – with sometimes a dash of Salt or Pepper till it irritates while it gratifies the Palate – Full of original thoughts upon an exhausted topic and demanding assent to so many things that at last I ask myself if there could not be detected among them here and there a paradox.”⁴⁰ Any remnants of the friendship were no doubt permanently dispersed when Ingersoll joined Adams in the House in 1841. Mere months after taking his seat, Ingersoll took the floor to battle Adams over the so-called “gag rule,” by which the House refused to receive anti-slavery petitions. The rule infuriated Adams, who had made its abandonment one of his highest priorities. In his speech, Ingersoll accused Adams of hypocrisy on the

“was ardently working to elect Andrew Jackson” (Nagel, 317). Indeed, in his four years in office, Adams dismissed only twelve of the more than eight-hundred positions appointed by the president (Gordon Wood, *The Radicalism of the American Revolution* (New York: Vintage Books, 1993), 301).

³⁹ Charles J. Ingersoll to S. B. Davis, T. M. Pettit, Charles Brown, and Anthony Lauput, December 11, 1830, Charles Jared Ingersoll Papers.

⁴⁰ John Quincy Adams to Charles J. Ingersoll, August 22, 1830, Charles Jared Ingersoll Papers. This is the last item of correspondence between the two contained in the Charles Jared Ingersoll Papers.

subject.⁴¹ Adams would ultimately prevail when the House supported his motion to repeal the 25th standing rule, over Ingersoll's objections, in December of 1844.⁴² That vote was still months away, however, when the select committee on which they both served took up Ingersoll's bill.

Given the subject matter, it is fitting that Ingersoll's legislation was cribbed, almost in its entirety, from the recently enacted British copyright reforms of 1842 (even to the point of retaining language that referenced protections that did not exist).⁴³ The statement summarizing the purpose of Ingersoll's bill declares it is "to afford greater protection to literary works," and it is, in fact, protection that emerges most clearly as the driving goal of Ingersoll's legislation.⁴⁴ HR 9 adds a number of different categories of artistic expression to the list of protected productions, and establishes a variety of remedies for those whose rights have been infringed upon. Duplicating the term of copyright established in the British bill, Ingersoll's legislation mandates that protection "shall endure for the natural life of such author, and for the further term of seven years" or forty-two years, whichever is longer, thus creating a

⁴¹ Charles Jared Ingersoll, *Speech of Mr. Charles J. Ingersoll of Pennsylvania: On the Subject of the Reception of Abolition Petitions / House of Representatives June 8 and 9, 1841* (Washington, DC: Printed at the Globe Office, 1841), <http://digital.library.villanova.edu/Item/vudl:15334> [accessed January 23, 2014].

⁴² *Journal of the House of Representatives of the United States*, 28th Cong., 2nd sess., 1844, 14, 7.

⁴³ See "Copyright Act, London (1842)," *Primary Sources on Copyright (1450-1900)*, ed. L. Bently & M. Kretschmer, www.copyrighthistory.org [accessed January 23, 2014]. Ingersoll also incorporated protection for various types of sculpture by slightly modifying the text of an 1814 act of Parliament that had introduced such protections.

⁴⁴ By contrast, the 1842 British bill states its primary purpose is to "afford greater Encouragement to the Production of literary Works" ("Copyright Act, London (1842)"). "A Bill Relating to copyright," HR 9, 28th Cong., 1st sess., 1. Hereafter "HR 9."

definite, if short-lived, heritable right (HR 9, 3). Both extend the new copyright terms to previously published works, which receive the full duration established by the new law, though the British version denies this privilege to copyrights held by entities other than the original author, stipulating that only works whose copyrights were held by the author or acquired by virtue of “natural Love and Affection” would be extended (“Copyright Act, London (1842),” 406). Both also include a significant shift in the way work for hire is protected. Material an author is paid to produce – including material published in encyclopedias, newspapers, magazines, and other periodicals – is taken to be the property of the entity paying for the work, entitling publishers the same protection in a work “as if he were the actual author thereof” (HR 9, 13).⁴⁵ In the British bill, however, if the author were still alive twenty-eight years after registration of the copyright, the work would revert to him/her; no similar provision is included in Ingersoll’s bill. Both bills also explicitly define copyright as a species of property – “all copyright shall be deemed personal property, and shall be transmissible by bequest, or, in case of intestacy, shall be subject to the same law of distribution as other personal property” – a radical departure from the precedent set forth in *Wheaton v. Peters*, which established publication as the moment personal property was surrendered (HR 9, 12). These were the primary innovations contained in Ingersoll’s original bill that were considered by the select committee on January 5th.

⁴⁵ No such provision would be adopted in America prior to 1909, at which time was established “the modern work-for-hire doctrine that explicitly vested ownership in employers rather than the actual creator of a work” (Bracha, “Ideology,” 248). This shift in authorial agency is dealt with in detail in Bracha, “Ideology,” 248-263.

The only record of the committee's deliberations comes from Adams' diary, which does not mince words about the former president's views of the legislation or its author.⁴⁶ Adams did not elaborate on his specific objections, noting only that he "offered some suggestions as to the natural right of literary property to the principles of which, as entertained by me, Ingersoll immediately declared his dissent" (*Diary*, January 5, 1844). This led Adams to conclude that Ingersoll's "principles are radically depraved and never can harmonize with mine" (*ibid.*). Later that day, while the House was entertaining petitions, Ingersoll crossed Adams on a point of procedure. Adams was already a beloved, and reviled, figure for using his mastery of parliamentary procedure to bedevil the Democrats' attempts to keep anti-slavery petitions off the House floor. A challenge related to petitions from Ingersoll was no doubt irresistible to Adams. When the chair (a Democrat) sided with Ingersoll, Adams promptly appealed his ruling, to which Ingersoll apparently took offense. In Adams' words, "Ingersoll exploded with a volley of insolent billingsgate upon me and finished by withdrawing his motion to suspend the rules" (*ibid.*). Some of Adams' animosity towards Ingersoll – he had earlier written of him as the "cunningest and most treacherous cat of them all" – may be partially explained by the latter's position as chair of the Foreign Relations Committee, which was even then considering the annexation of Texas, which Adams adamantly opposed (*Diary*, January 1, 1844).

⁴⁶ While a collection of materials from select committees of the 28th Congress is extant, the Center for Legislative Archives confirms there are no materials from the body formed to consider petitions supporting international copyright.

On January 18th, Ingersoll introduced a series of amendments to HR 9, which were also referred to the committee. It was in these amendments that he proposed a series of protections allowing authors to control performances of their work. As with the underlying bill, the amendments, too, lifted much of the language of the 1833 and 1842 British bills, though Ingersoll made some important changes. The bill ensured “the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, song or musical composition... as his own property, the sole liberty of representing, or causing to be represented or performed, at any place or places in the United States, any such production as aforesaid.”⁴⁷ Ingersoll did not specify the duration of the protection, which presumably would have mirrored the term established in the underlying bill. The protection not only covered the representation of published works, but those retained in manuscript form as well. While establishing a method of registering copyrights in unpublished manuscripts (involving deposit of a title page, biographical information on the author, and the time/place of the first performance), the bill also included language specifying that the registration procedures were not mandatory to secure protection, which existed independent of the copyright.⁴⁸ In effect, the bill would have granted statutory protection to a species of property – the manuscript – that, after *Wheaton*, was under the purview of the

⁴⁷ “Amendments Proposed by Mr. C. J. Ingersoll to ‘A Bill Relating to copyright:’ to follow section eighteen of the original bill,” 28th Cong., 1st sess., 1.

⁴⁸ One of the most crucial distinctions between Ingersoll’s bill and the British law on which it was based is that the former held “the first public Representation or Performance of any Dramatic Piece... equivalent, in the Construction of this Act, to the first Publication of any Book” (“Copyright Act, London (1842),” 412). Here was a provision that would have sidestepped the awkward process called for by Ingersoll. When the first American dramatic copyright legislation passed in 1856, it, too, used a process based on submission of a title page and copy of the text, rather than adopting the British system of deeming performance to be a form of publication.

common law. Such a right would be nearly impossible to enforce, no doubt requiring transcripts of a performance against which an unpublished manuscript could be compared. Regardless, the protections extended to the drama were sweeping and unprecedented in American copyright law, as was the protection Ingersoll proposed for statutory, a term defined so expansively as to include almost any three-dimensional form of artwork or artistic expression, and requiring multiple witnesses to register a design.

Even had there been support for Ingersoll's bill in the select committee, it would have been nearly impossible to overcome a determined Adams; as Barnes explains, "Adams had been strongly opposed to international copyright and his views had overshadowed those of other members on the Select Committee" (Barnes, 84). After seeing the amendments, Adams dismissed Ingersoll's scheme as "an entire but most incongruous system of copyright property; fit for nothing but to multiply litigation" (*Diary*, February 9, 1844). It did not help matters that Ingersoll missed the meeting where the amendments were considered, and the bill was never reported out of committee. By the time the dramatic copyright legislation next appeared before Congress in 1850, the bold claim contained in the 1844 bill – that copyright was by statute a form of property – had moderated, morphing into the more ambiguous phrase, "shall have as his own property the sole right of representing."

**A Short Interlude Relating the Lamentable Tale of Daniel Webster.
Featuring a Violent, Democratic, Anti-British Squall, Got-Up
with the Most Assiduous Attention to Detail and Effect**

In 1851, shortly after completing work on a treaty between the United States and Great Britain with Secretary of State John M. Clayton, Sir Henry Bulwer returned to London to recuperate his health, having been replaced as Minister by John F. Crampton.⁴⁹ The so-called Clayton-Bulwer Treaty had settled, or so it seemed at the time, Central American boundary disputes between the two nations. Edward Bulwer-Lytton's son, Robert, was left behind as a secretary for the British legation, and, in keeping his father abreast of current affairs, he saw an opportunity to advance the cause of international copyright, an issue that had become "inseparable from the Bulwer family" (Barnes, 177). That opportunity took the form a powerful group of lobbyists referred to as "The Organization."

The amorphous membership of this group has been carefully excavated by Barnes, who shows that it was comprised largely of men who had come to prominence in the Polk administration. Among the members were Joseph Knox Walker (Polk's nephew), William L. Marcy (Secretary of War), Robert J. Walker (Treasury Secretary), Edmund Burke (Commissioner of Patents), John Y. Mason (Attorney General and Secretary of the Navy), and for a time, George M. Dallas (Vice President).⁵⁰ The primary function of members of the Organization was to serve as claims agents, individuals who lobbied the government on behalf of various clients. As Barnes explains, claims agents were needed because "there was no way a

⁴⁹ Henry was the brother of Edward Bulwer-Lytton.

⁵⁰ See Barnes, chapter 10.

private citizen could directly sue the United States Government to collect damages or recover property” (Barnes, 186). Prior to 1855, these claims were dealt with by Congress on an individual basis, and the assistance of an agent familiar with the process was essential. Corruption of elected officials was endemic, so much so that in 1853, Congress passed legislation prohibiting sitting members of Congress or other government officials from accepting payments to press claims (192). Nevertheless, they exhibited a significant amount of influence, particularly when coordinated, as members of the Organization were.

Robert Lytton (hereafter “Robert”) had certainly become convinced of their influence, as indicated by his characterization of the group to his father: “So powerful and widely spread is this system of ‘Organization’ that the fate of almost every measure is generally known and settled long before it is brought into the House and before even the session commences” (quoted in Barnes, 184). Robert had been convinced after speaking with members of the Organization that passage of an international copyright bill could only be secured with their assistance, which he believed could be done if “the authors in England were willing to subscribe among themselves for a certain amount -perhaps ten or twelve thousand pounds for a sum to buy *the American Congress*, and then seriously and without joking - but in *sad and sober earnest*, I think the thing *might be done*” (ibid.). Bulwer-Lytton set about trying to raise sufficient support, and Crampton proceeded to secure the necessary authorization from his government to begin treaty negotiations. The Organization planned to simultaneously work through the executive branch – in the form of a treaty – and the House, “requesting them to present a favourable committee report and to

support a proposed bill” (quoted in Barnes, 217). Crampton’s work with Webster on a treaty was progressing well when he learned distressing news from Robert: in his initial letter to his father describing the Organization’s terms, Robert had written “hundreds” rather than “thousands” of pounds sterling. Bulwer-Lytton’s assessment that such an amount could be raised was based on the much lower figure. When the Organization learned of the error, they offered to lower their fee to approximately one-third of the initial amount, though even this proved difficult to squeeze from skeptical publishers and impoverished authors in Britain. Nevertheless, Crampton continued his work, and by mid-1852, he and Everett had agreed on a draft treaty.

The “British American Copyright Convention” would have granted to authors of either country the rights guaranteed to their counterparts overseas. The copyright would protect the publication of “books, of dramatic works, of musical composition, of drawing, of painting, of sculpture, of engraving, of lithography, and of any other works whatsoever of literature and of the fine arts.”⁵¹ Protection was also to be extended to “the representation of dramatic works and to the performance of musical compositions, in so far as the laws of each of the two Countries are or shall be applicable in this respect” (6-7). While there were, of course, no laws “applicable in this respect” in the United States, it was assumed such protections would be established upon ratification, given the reciprocal nature of the treaty. The initial term of the agreement was five years.

⁵¹ “British-American Copyright Convention Draft,” *Primary Sources on Copyright (1450-1900)*, ed. L. Bently & M. Kretschmer, 5-6, www.copyrighthistory.org [accessed January 23, 2014].

Webster believed it would be impossible to get the treaty through the Senate in the autumn, and intended to present it to Congress at the beginning of the next session. Several circumstances upset this timeline, the most important being Webster's death in October. Webster's replacement as secretary of state, Edward Everett, reached out to Charles Sumner for an assessment of the treaty's chances in the Senate; President Fillmore did the same with James A. Pearce (Barnes, 232-233). The support these men expressed boded well, though a number of senators were soon to become "lame ducks" whose terms would end in March of 1853. On February 14, 1853, Fillmore finally signed the treaty, whereupon it went to the Senate for ratification.

While no action was taken before the session ended, a special session was called, giving the Senate another month to complete its unfinished business. Meanwhile, several personnel changes augured well for the treaty's prospects: while Everett had resigned, he had subsequently been appointed to one of Massachusetts's Senate seats; William L. Marcy, one of the founding members of the Organization, had taken Everett's place at State; and John M. Clayton, still grieving the loss of his friend Bird several months earlier, assumed his place as one of Pennsylvania's senators (Barnes, 242). Near the end of the special session, however, another complication occurred. As Crampton described it in a letter to London: "News arrived here on the 16th of the supposed proceedings of the 'Devastation' at Truxillo & Limas, distorted & magnified as usual, and produced one of those violent Democratic Anti British Squalls in the Senate, during which neither reason nor common sense could be heard" (quoted in Barnes, 244). The dispute centered squarely on

ambiguities in the Clayton-Bulwer Treaty, and Clayton found himself defending his role in negotiating the agreement rather than pursuing his late friend's long-sought copyright protection. Between difficulties mustering a quorum and distractions over a different treaty with the British, consideration of the "British American Copyright Convention" was tabled in April, effectively ending any chance of ratification before Fillmore's successor took office.

Pierce re-submitted it to the Senate, but before the start of the first session in December, word of it leaked to the public. In January of 1854, Philadelphia publishers began gathering petitions opposing any agreement; New York publishers followed shortly thereafter. Senator Everett "had the embarrassing task of having to present negative petitions from 127 people in his home state of Massachusetts" (Barnes, 257). When Crampton, responding to pressure from publishers in England, insisted on a change Everett was unwilling to make, momentum slowed even further. When Everett resigned from the Senate in June citing poor health, he recommended to the Foreign Relations Committee that it not allow the treaty to be brought to vote, effectively killing the prospect of achieving both of the insurgents' tactical objectives at once (258-259).

Act V: Success!

While the stillborn treaty languished in the Senate, those insurgents had not been idle. In an 1851 letter to his friend Clayton, Bird asked for legal advice regarding the prize plays he had written for Edwin Forrest. Bird explained that he had retained copies of three of them (*The Gladiator*, *Oralloossa*, and *The Broker of Bogota*) "in M.S., one main reason being the hope of getting Congress to pass a

Dramatic author's law (such as exists in England) securing to writers the acting, as well as the printing rights."⁵² The agreement between Bird and the great tragedian was a verbal one, though Bird declared that "the whole basis of the arrangement was an understanding that the copies and the acting rights were special to him...but not implying any rights in him to give copies or delegate rights to act to other persons. The copy right was always understood to be mine" (ibid.). Bird had learned that morning that *Oralloossa* was being performed in New Orleans by Andrew Jackson Neafie (a friend and frequent supporting player to Forrest), whom Forrest had apparently lent a copy of the manuscript. The problem, as Bird saw it, was that "if F[orrest] can convey such a right with one play, he can convey it in the case of the two others; and thus all my chance of making money by a Dramatic author's bill (there is one now before Congress) goes to the dogs" (ibid.).

V.i. Chandler Enters the Lists!

The bill Bird refers to is likely HR 406, introduced by Joseph R. Chandler on December 10, 1850.⁵³ Chandler was a prominent Philadelphia Whig and had been present with Bird at the 1837 dinner honoring Poe. He was also the former editor of the *United States Gazette*, a respected daily that had merged with the *North American* in 1847 to form the *North American and United States Gazette*, over which Bird

⁵² Robert M. Bird to John M. Clayton, January 16, 1851, John M. Clayton Papers, Library of Congress.

⁵³ "A Bill for the Encouragement of Dramatic Literature by Securing to the Authors the Sole Right of Representation," HR 406, 31st Cong., 2nd sess., 1. Hereafter "HR 406." This bill is not available through the "American Memory" website, and was only discovered through the patient assistance of Rodney Ross of the National Archives.

assumed a share of the editorial duties.⁵⁴ The bill Chandler submitted (HR 406) bears similarities to both the 1841 (S. 227) and 1844 (HR 9) attempts.⁵⁵ Chandler's version adopts the more moderate property claims of S. 227, ensuring an author "shall have as his own property the sole right of representing, or causing to be represented" protected works. As with the previous two iterations, HR 406 is retroactive, covering anything published in the ten years prior to its passage. While HR 9 (1844) would have reset the copyright terms of already registered works, Chandler's bill, as with S. 227 (1841), simply applies the new term of protection to the original publication date; for Chandler's bill, the duration is the same as the existing law (twenty-eight years, renewable for another fourteen). HR 406 is far more expansive than the earlier Senate bill, however, detailing many of the same types of provisions as were contained in HR 9 (1844). It explicitly preserves any extant performance agreements; it includes detailed registration procedures; it establishes penalties (\$10 for each infringing performance or the "full amount of the benefit or advantage" stemming from the infringement, as well the recovery of full costs of suit) and provides explicit authority for courts to grant injunctions against infringing productions; it provides a statute of

⁵⁴ See Foust, 134-143. The most thorough treatment of Bird's tenure as an editor appears in Robert L. Bloom's "Robert Montgomery Bird, Editor," *The Pennsylvania Magazine of History and Biography* 76, no. 2 (April 1952), 123-141.

⁵⁵ The authorship of the legislation is unclear. In a letter to Edward D. Ingraham, who had asked for a copy of the bill, Chandler explained that, while "it is not of my drawing up...I think it meets the needs of the authors, who, it appears to me have as much right to the benefit upon the Representation of their plays as from the printing" (J. R. Chandler to Edward D. Ingraham, esq., December 19, 1851, Joseph R. Chandler letterbook, 1850-1851, Library of Congress). Ingraham was a Philadelphia lawyer who was at that time serving as a commissioner adjudicating claims made under the recently passed Fugitive Slave Act of 1850. It should be noted that while both HR 406 and Ingersoll's 1844 bill pull extensively from the British versions (both the 1833 Dramatic Literary Property Act and the 1842 Copyright Act revisions), differences in what was adopted suggest both Ingersoll and Chandler were working from the British bills, and that Chandler was not simply basing his on Ingersoll's.

limitations for violations; and it splits the assignment of copyright proper (the ability to reproduce copies) and the performance right, which are not automatically conveyed together. As with the previous two bills, protection is also extended to plays in manuscript. Unlike HR 9 (1844), however, Chandler's version requires manuscripts be registered (a process that entails submitting a written title page and \$.50 to the clerk of the relevant district court), and, more crucially, only extends protection to those who register "before the first representation of such production as aforesaid, or if published, then before the first publication thereof."⁵⁶

After Chandler's bill was referred to the Judiciary Committee, Bird continued his efforts on its behalf. In a response to Bird's letter of January 16, 1851, Clayton assured his friend that he would "not fail to write to some of the Senators about the bill in Congress."⁵⁷ He also recommend writing to Senator James A. Pearce (Whig-MD) "who, as chairman of the joint committee on the library, has charge of the bill." Bird, in his reply of January 23rd, thanked Clayton, but explained that the bill "has not yet reached the Senate; and consequently Pearce cannot yet feel any interest in it. It is before the Judiciary Committee of the House, who have not yet reported. I am very

⁵⁶ Such a provision would presumably have permitted an author (such as Bird) to reclaim control of older plays (as from Forrest). For example, *The Gladiator*, having already been performed, would be ineligible for registration under the requirements for unpublished manuscripts. However, never having been published, copyright could still be registered prior to the first *printing*, which would theoretically be available to whichever man beat the other to the nearest district court with a printed title page in hand. Whether that would have permitted Bird to then assign performance rights to the text would have been a difficult, and likely costly to litigate, question.

⁵⁷ John M. Clayton to Robert M. Bird, January 19, 1851, Bird Papers.

soon expecting some intelligence, and may possibly run down to Washington to push the bill, if it be deemed advisable.”⁵⁸

Chandler himself may well have been the source of that expected intelligence, as he was also coordinating communication between various other interested parties. In mid-January of 1851, for example, Chandler gloomily informed Conrad that their contact on the Judiciary Committee – Judge Daniel Breck (Whig-KY) – spoke “discouragingly of the [bill’s] prospects.”⁵⁹ Chandler also reported that “among the reasons arrayed against the bill I think [Breck] mentioned the ‘beautific thought’ that we should be legislating against the religious feelings of many persons!!!” (ibid.).⁶⁰ It was also nearing the end of the session, leading Chandler to conclude that “it now seems almost hopeless to try for any bill this session excepting some that are of public necessity or public injury” (ibid.). Boker, too, was following events from afar, and had sent Chandler information related to the bill. After sharing that information with Breck, Chandler learned that the committee was “about equally divided on the subject,” and again references the presence of “persons on the Committee who seemed to be fastidious about legislating upon dramatic performances.”⁶¹ In Breck’s

⁵⁸ Robert M. Bird to John M. Clayton, January 23, 1851, John M. Clayton Papers. I have found no evidence Bird decided to lobby in person (and, indeed, his significant responsibilities as the editor of the *North American* consumed most of his days, making such an excursion untenable). Bird’s responsibilities and their detrimental effects on his health are discussed in Kilman’s tenth chapter.

⁵⁹ J. R. Chandler to Robert T. Conrad, January 17, 1851, Joseph R. Chandler letterbook, 1850-1851, Library of Congress.

⁶⁰ This is the only evidence I have found, aside from the aforementioned entries in John Quincy Adams’ diary, of the response of other legislators to one of these bills. Chandler’s incredulity seems warranted, given such protection would likely serve to diminish the more objectionable elements of the theatre (at least from a religious perspective).

⁶¹ J. R. Chandler to George H. Boker, Esq., January 25, 1851, Joseph R. Chandler letterbook, 1850-1851, Library of Congress.

estimation, the consensus seemed to be in favor of reporting the bill to the full House, though without a positive recommendation. Chandler, realizing that “a bill reported without the concurrence of the Committee from which it comes has but a poor chance,” apparently decided that consigning the bill to the oblivion of an indifferent committee was better than risking its outright defeat on the floor; no further action was taken on the matter, and it expired at the close of the session in March (Chandler to Boker, January 25, 1851.). While no legislation was introduced in the following congress, efforts to build a network of support continued.

V.ii. A Bird Mentors a Boker

Bird and Boker were collaborating at least as early as mid-1852, as suggested by a brief note in the Bird Papers: from Boker to Bird, dated April 26, 1852, the scrap reads “Dr. Bird, James X. McLanahan, of Pa Chairman of the Committee on the Judiciary in the House of Representatives; Mr. Butler in the Senate,” indicating the men who would chair the committees considering any copyright legislation. The timing of this correspondence contributes to confusion surrounding the relationship between these two men. As quoted earlier, Bird’s draft of a letter to Boker dated January 31, 1853, explains that “(eleven or twelve years ago, as I made mention to you I endeavored showing an attack of the old ardor scribendi) to get such a bill introduced into Congress.” Yet Bird’s letters to Clayton clearly show he was actively engaged in pushing the 1851 bill, and it seems odd that Bird would try to conceal his involvement with the effort. Perhaps he was frustrated at its failure, though the earlier bill came to nothing, as well, a fact he readily admits to Boker. Perhaps he was embarrassed to reveal that he still harbored hopes for his plays, given he had long

since abandoned writing for the theatre and had enjoyed success as a novelist and editor in the intervening years. Characterizing the earlier effort as the product of a “period of youthful vigor and enthusiasm” as he does allows Bird to assume the guise of the wise sage who has realized his dalliance with the drama was simply a mark of immaturity. Bird had certainly planned that his playwriting would be superseded by more substantial literary genres such as novels and histories.⁶² There is also evidence Bird was similarly unforthcoming earlier in his career. In 1836, he wrote and published *Sheppard Lee*, a satirical psychological study significantly different from any of his previous works. It is surprising that he concealed his authorship from his friends, even McClellan, for, as Kilman observes, “Bird surely had to go to great lengths to keep his work on one of his longest novels from being known by one of his most constant companions” (Kilman, 157-158). In the case of the novel, perhaps Bird was similarly reticent to publicize his relationship to a new style, particularly given it was a calculated risk (one that ultimately proved a failure). Regardless of his motivations for concealing his literary experiments or legislative activity, Bird provided Boker sound advice based on his experiences.

Bird’s letter advises the younger man on how best to pursue passage of the bill.⁶³ Rather than pursuing the slow process of building public support advocated by Clay in 1837 (or simply purchasing legislative influence, which none of the

⁶² In an unfinished biography of her husband, Mary Mayer Bird explains: “His course, as marked out by himself at that early day, was to appear boldly before the world as a dramatist; to follow up three or four plays with a succession of romances; reserving as the suitable expression of age, a series of histories, already in his mind’s eye” (Mary Mayer Bird, 112).

⁶³ A draft of a bill in Bird’s papers suggests Boker had sent him a copy of the legislation well in advance of its submission at the end of 1853; there is no evidence Bird was involved in the creation of this iteration.

insurgents had the resources to accomplish), Bird suggests the strategic enlistment of a handful of leaders in the House. He rightly points out that the weakness of the bill “or of the cause it represents (which is also, or ought to be, its strength) – is that nobody cares anything about it one way or the other.”⁶⁴ The issue is “so utterly insignificant that Members of Congress cannot be expected to trouble themselves, or even to think about the bill, to ask what it means or what object it is to subserve” (ibid.). Bird perceives “absolutely, no opposing interest,” as actors, managers, publishers, and politicians are all indifferent; only playwrights had any significant interest (ibid.).

Bird’s belief that there was no opposition to granting dramatic authors the rights of representation may well have been accurate. There seems to have been little public interest in the subject (though this may also be due in part to the fact that this campaign, as with previous attempts, was conducted largely between individual authors and politicians, and outside of the public view). Of the articles that appeared when the 1856 bill was presented in Congress – the first time the public at large became aware of one of these attempts – all spoke positively of the change. And one of the earliest supporters of both international and dramatic copyright was manager/actor/dramatist William E. Burton, suggesting Bird understood well the perspective of theatre artists. Many agreed with Bird that dramatic copyright would likely improve the aesthetic qualities of the theatre, in general. The current laws, he believed, dissuaded many talented writers from “try[ing] their fortunes on the stage, where the risk is great and the condition of success is the surrender of every

⁶⁴ Robert M. Bird to George H. Boker, January 31, 1853, Bird Papers.

aspiration for literary fame” (Bird to Boker, January 31, 1853). In a draft of a speech entitled “Author’s Night,” Bird observed that “there is no lack of talent in the country; offer but the proper encouragement, and it will show itself. Encouragement has, in all ages of the world, revealed & discovered talent” (Bird Papers). The lack of such protection, Bird told Boker, was the reason he had stopped writing plays, and “if there had been such a law in existence twenty years ago, I should not have abandoned Dramatic writing, as I did, in what was the moment of success and the period of youthful vigor and enthusiasm.” While Forrest seems only to have learned of the movement’s existence after the bill’s passage, he was quick to register copyrights for his prize plays within months.⁶⁵

Given the paucity of American plays, which made up a relatively small portion of those performed each year, actors and managers would have seen little immediate impact. In Philadelphia in 1850, for example, only 14% of the 937 recorded performances were plays written by American authors (Grimsted, *Melodrama Unveiled*, 260). Additionally, the current repertory would be unaffected, and nothing in the legislation would prevent the continued importation of foreign works ad libitum. Politicians, too, seem to have been indifferent to the issue, excepting the religious objections raised by at least one member of Congress noted above. The publishers, so potent a force in opposing any international copyright

⁶⁵ The Forrest Papers contain a letter from Forrest’s lawyer, Daniel Dougherty, which includes the text of the legislation and some speculation as to whether or not Conrad’s prior publication of *Jack Cade* would prevent Forrest from registering a copyright. Within a year, Forrest would bring a lawsuit against a theatrical producer that hinged, in part, on this question. The case is dealt with in the epilogue.

agreements, initially reacted forcefully against the 1856 legislation. When William H. Seward introduced the bill that would eventually become law, he grumbled that

inasmuch as the notice which I gave on a previous occasion has brought me into an uncomfortable correspondence with authors and publishers, I desire to state, in regard to this bill, that the only provision which it contains is a provision to the effect that the copyright for dramatic composition shall be extended so as to give to authors a property for a given period of time in the acting or enacting of their own compositions.⁶⁶

This seems to have mollified the publishers, as the bill proceeded to pass the Senate without objection. All in all, Bird seems to have been right that there was little opposition to legislation protecting the rights of representation, though this did not remove the congressional indifference that perpetually thwarted their efforts. It was apathy, not antipathy, that continued to bedevil. Conrad reported from Washington what it might take to surmount that apathy, sharing with Bird that he was “still in doubt and tribulation in relation to our law. Our views of the corruption of this place were far in the rear of truth. Money is omnipotent here; and it of course demands extraordinary exertions to carry an honest measure by honest means. I have strained every faculty...to carry our bill” (March 6, 1853, Bird Papers). None of the men had the financial resources to invoke the omnipotence of money, so Bird, Boker, Chandler, and Conrad would have to make do with careful planning, a more strategic lobbying effort and, perhaps most importantly, with a piece of legislation significantly narrowed in scope.

⁶⁶ *Congressional Globe*, 34th Cong., 1st sess. (1855), 847. If Seward received such correspondence, he did not see fit to preserve it, as there are no such letters in his papers.

V.iii. [Exit Chandler, Pursued by a Nativist.]

On December 6, 1853, the day after the start of the legislative session, Chandler gave notice of his intent to offer an amendment to “An act supplementary to an act to amend the several acts respecting copyrights.” On December 14th, Chandler submitted HR 39, which was referred to the Judiciary Committee. The bill was, indeed, streamlined and focused on securing only the core protections necessary to establish a statutory right of performance. Unlike Chandler’s previous bill, HR 39 sought to explicitly insert protection of the rights of performance directly into the existing copyright regime.⁶⁷ Gone are any references to property, and the additional protection does not apply retroactively. Gone, too, is the list of dramatic genres, replaced with the more succinct “dramatic composition, designed or suited for representation.”⁶⁸ Protection, rather than a right inhering from a proprietary relationship, was simply tied to the statutory protection already extended to printed plays; in the words of the bill, any copyright

shall be deemed and taken to confer . . . along with the sole right to print and publish the said composition, the sole right also to act, perform, or represent, or cause to be acted, performed, or represented, on any stage or public place, during the whole period for which the copyright is obtained. (1)

Duration and registration procedures would remain the same as for any other copyrighted text. The bill set minimum penalties for violations – not less than \$100

⁶⁷ While a copy of Chandler’s initial submission is not extant, a manuscript version of the bill the Judiciary Committee reported out on July 25, 1854 (under the new number HR 500) suggests only minor amendments were made. Again, my thanks to Rodney Ross at the Center for Legislative Archives for locating the original copy of HR 500.

⁶⁸ “A Bill Supplemental to an Act entitled ‘An Act to Amend the Several Acts Respecting Copyright,’ approved February third, eighteen hundred and thirty-one,” HR 500, 33rd Cong., 1st sess., 1. Hereafter “HR 500.”

for the first offending performance, and not less than \$50 for each subsequent representation – but gave discretion to increase damages “as to the court having cognizance thereof shall appear to be just” (HR 500, 2). Gone was protection for unpublished manuscripts that would have been covered in previous iterations. As previous attempts had shown, sweeping revisions based on bold declarations of property rights inhering from natural law were simply untenable in light of the conception of copyright set forth in *Wheaton v. Peters* and in light of more pressing debates over human property.

Despite the more calculated approach, however, the bill met a similar fate. On July 25, 1854, it was reported out of the Judiciary Committee, read twice, and left to expire, along with the “British American Copyright Convention” – still waiting for a ratification vote that would never come – at the end of the session. The chairman of the committee, Frederick P. Stanton, was a claims agent associated with the Organization, though if there were any relationship between the abandonment of the bill and the debacle associated with the recent treaty attempt, I have found no evidence of it. While Bird had not lived to see the attempt fail, Boker and Conrad would continue the effort without the assistance of Chandler, who had been defeated for reelection in 1854 after a nativist backlash against his recent conversion to Catholicism.⁶⁹ They would, however, be joined by several new allies.

⁶⁹ The events leading to his defeat are detailed in Frank Gerritty, “The Disruption of the Philadelphia Whigocracy: Joseph R. Chandler, Anti-Catholicism, and the Congressional Election of 1854,” *The Pennsylvania Magazine of History and Biography* 111, no. 2 (April 1987).

One of these was Boucicault, though his precise role in the success of the 1856 bill is unclear.⁷⁰ Several sources claim he was instrumental in its passage, among them Richard Fawkes, who claims Boker “made little headway until he was joined by Boucicault in 1855. Between them, they mounted such a campaign that in 1856 the amendment to the 1831 Act was carried” (Fawkes, 91). Fawkes does not specify what evidence led him to the conclusion, nor does Russell Sanjek, who goes so far as to claim Boucicault “was chiefly responsible for passage of the new revision” (Sanjek, 33). Quinn makes the more modest claim that Boucicault “added his efforts and finally the first copyright law was passed” (Quinn, *History*, 369). In a letter to Seward following passage of the law, Boucicault thanked the New York senator for his assistance, predicting that “as the Drama develops itself under the fostering influence of this law, and you see its growth towards that eminence it is surely destined to achieve – you may reflect with true and noble pride that its prosperity is your work.”⁷¹ I have found nothing else to suggest the nature of his role, but he was clearly involved in some capacity.

V.iv. [Enter Brewster.]

One individual whose central role is more solidly documented is Benjamin H. Brewster. Brewster was a Philadelphia attorney who, in 1836, dramatized Bird’s

⁷⁰ Boucicault would become one of the most prolific and successful playwrights of the second half of the nineteenth century, and would successfully lobby Parliament for reforms to Britain’s copyright treaty with France. Boucicault discusses his role in that process in Dion Boucicault, “International Copyright,” *Watson’s Art Journal* (1867) 6:85-86, <https://archive.org/details/jstor-20647650> [accessed January 23, 2014].

⁷¹ Dion Boucicault to William H. Seward, August 21, 1856, *The Papers of William H. Seward*.

novel *The Infidel* for Wemyss, then managing the Walnut Street Theatre (Wemyss, 264). He also represented Harriet Beecher Stowe in her 1853 copyright lawsuit over translation rights for *Uncle Tom's Cabin* and would later serve as attorney general in the Chester A. Arthur administration. Brewster would assume principal responsibility for coordinating efforts in both the Senate and the House.

On January 1, 1856, Brewster wrote to Seward that he and Boker had shared a “most interesting conversation...upon the subject of a proposed supplement to the Copy Right Law so that Dramatic Authors may be protected.”⁷² After briefly describing that American dramatists such as Boker “are now at the mercy of pirates and of lawless actors who use their productions, earn the reward and laugh at them when they ask for compensation,” Brewster informed Seward that a copy of Chandler’s bill could be found in the records of the House Judiciary Committee, along with “papers and proofs and stationary explain[ing] the whole business” (ibid.).⁷³ On March 22nd, Brewster followed up with Seward, asking him to “remember the bill for the relief of Dramatic Authors.”⁷⁴ On March 19th, however, it was Charles Sumner who gave notice in the Senate of his intention to introduce “A bill to amend the law of copyright.”⁷⁵ Sumner was a friend of Boker’s, which likely explains his interest in the subject (Kitts, 118). It is unclear why he never introduced a

⁷² Benjamin H. Brewster to William H. Seward, January 1, 1856, *The Papers of William H. Seward*.

⁷³ Alas, the Center for Legislative Archives reports none of the materials are extant.

⁷⁴ Benjamin H. Brewster to William H. Seward, March 22, 1856, *The Papers of William H. Seward*.

⁷⁵ *Congressional Globe*, 34th Cong., 1st sess. (1855), 680.

bill, though it may well be because all spring he had been “storing up wrath toward what he considered ‘The Crime Against Kansas’” (quoted in McPherson, 149). Sumner was increasingly occupied by the preparation of what he called “the most thorough and complete speech of my life,” intended as a rebuke to aggressive slave expansionists who were engaged in a bloody conflict over the future of the institution in the Kansas Territory (ibid.). He rehearsed the speech before Seward, and he may well have asked the New York senator to take charge of the dramatic copyright bill for him.⁷⁶ Regardless, on April 2nd, Seward gave notice of his intention to submit a bill “supplemental to ‘An act to amend the several acts respecting copyright,’ approved 5 February 1831.” A week later, Seward received (via Brewster) a lengthy letter from Boker laying out seven arguments in favor of the legislation; Brewster’s cover letter explains that Boker was retaining several plays in manuscript form until the bill was passed.⁷⁷ On April 10th, Seward introduced S. 239, suggesting it be “referred to the Committee on the Judiciary, which I suppose is the proper

⁷⁶ Sumner delivered his “Crime against Kansas” speech on May 19th and 20th. In it, Sumner referred to South Carolina Senator Andrew Pickens Butler as the Don Quixote of slavery, who “has chosen a mistress to whom he has made his vows, and who, though ugly to others, is always lovely to him; though polluted in the sight of the world, is chaste in his sight – I mean the harlot, Slavery” (Charles Sumner, *The Crime against Kansas. Speech of Hon. Charles Sumner, of Massachusetts. In the Senate of the United States, May 19, 1856* (New York: Greeley & McElrath, 1856), 3, <https://openlibrary.org/books/OL7137678M> [accessed January 23, 2014]). On May 22nd, Butler’s cousin, a second-term South Carolina Representative named Preston S. Brooks, attacked Sumner on the Senate floor with a gutta-percha cane, beating him senseless and bloody. The day that S. 239 was considered by the House, South Carolina Representative Laurence M. Keitt gave an hour long speech praising the honor of Brooks, who had just resigned from the House. Brooks was subsequently “lionized” by the South and quickly re-elected to fill the same seat (McPherson, 151). Sumner would survive the attack, though he would be unable to resume his duties in the Senate for several more years.

⁷⁷ Benjamin H. Brewster to William H. Seward, April 9, 1856. Both letters are contained in the Senate Judiciary Committee records for 34th Congress, held at the Center for Legislative Archives (file SEN 34A-E6). All of the points Boker raises have been discussed previously.

committee.”⁷⁸ It was amended slightly in committee, and reported out July 16, 1856, whereupon another minor amendment was made, and it was approved.⁷⁹

Brewster’s attention then shifted to the House of Representatives, where another Pennsylvania Representative, John Cadwalader, did yeoman’s work on behalf of the bill. The Cadwaladers were one of the oldest and most distinguished families in Philadelphia. Lambert Cadwalader, John Cadwalader’s great-uncle, had served in the first Congress, and had served on the ad hoc House committee of three that drafted the original 1790 copyright legislation (Solberg, 113, 118). John’s brother, George Cadwalader, was a member of the Chesnut Street Theatre’s Board of Agents during the *Quaker City* incident, and thanks to the work of Benjamin Brewster, was appointed a Brigadier General and tasked with raising a Pennsylvania battalion for

⁷⁸ *Congressional Globe*, 34th Cong., 1st sess. (1855), 847. No copy of the bill is available through the American Memory website. Again, Rodney Ross at the Center for Legislative Archives shared with me a copy of the original manuscript version of the bill. It (literally) has George Boker’s name on it, though why is unclear. The bill’s language identical to the version submitted by Chandler in 1853.

⁷⁹ The committee reported the bill “with amendment,” though no record of the specific changes exists. Given the bill’s similarity to HR 500, they were likely insignificant. When on the floor of the Senate, it was pointed out that the language referring to “action on the case” would “not hold in the civil law courts in some of the States, and of course the remedy would not be sufficient,” so the phrase “or other equivalent remedy” was inserted (*Congressional Globe*, 34th Cong., 1st sess. (1855), 1643). The following day, Senator James Bayard (Democrat-DE) asked that the bill be reconsidered to correct a grammatical error. He moved to insert after “perform or represent” the phrase “the same,” and after the word “cause,” “it” (*Congressional Globe*, 34th Cong., 1st sess. (1855), 1647). There being no objections, the bill was then forwarded to the House with a request for concurrence.

service in the Mexican War.⁸⁰ John Cadwalader had run as a Democrat in 1854, and would serve a single term.⁸¹

During that term, however, he was instrumental in shepherding the bill through the House, which was, as previously noted, frantically trying to complete its business before the close of the session. While Cadwalader's specific actions are unrecorded, Boker testified to their importance in a revealing letter to Brewster, quoted here in its entirety:

My dear Sir,

The deed is done. You may have noticed that our bill passed the House of Representatives on Saturday last, and, according to the information contained in Mr. Cadwalader's letters, was signed by the President on Monday last; so that it is now the law of the land. *Gaudeamus igitur!*

We owe the success of the bill in the House entirely to Mr. Cadwalader. He has worked at it with the most pertinacious zeal, and amidst all the excitements of a closing Congress, he has made time to write me almost daily accounts of the progress of affairs. I believe that it was owing to his determined exertions that the bill was forced through during the present Session, and that my private interests were protected from the ruinous delay which threatened them. When I show you his correspondence with me, I am sure that you will be astonished at the amount of labour which he lavished upon an object which must have seemed a small one in his eyes. I do not understand all this; do you?

I suppose, my dear sir, that you begin to grow weary of my wordy gratitude to you, and ask yourself why I dwell upon this particular instance of your kindness to me, when your general conduct has been nothing but kindness. I have many reasons for singling out this act from among so many others. You suggested my present successful efforts; you employed your private friendship with Mr. Seward in my behalf; you spoke nobly of a man whom you do not

⁸⁰ Brewster had met twice with President James K. Polk in December of 1846, when he lobbied on George Cadwalader's behalf (see Benjamin H. Brewster to George Cadwalader, December 14 and December 22, 1846, Cadwalader Family Papers, Historical Society of Pennsylvania). Brewster wrote again on March 4, 1847, to deliver the good news.

⁸¹ He was subsequently appointed by President James Buchanan to the United States District Court for the Eastern Region of Pennsylvania, where he ruled in the important *Keene v. Wheatley* case, which held that theatre managers had rights in plays adapted by actors in their employ.

like, and obtained for me the invaluable aid of Mr. Cadwalader; and I will be sworn that there is no man living who more heartily rejoices over our joint success than yourself. *From the first to the last you have been the mainspring of this whole movement*; and through you alone a darling object of my desires has been reached. Therefore I thank you again and again; nor shall I ever grow weary of thus expressing my gratitude.

If the official documents – records, I mean – touching the Bill should fall into your hands, or if you may be able to procure them from Washington, be so good as to preserve them for me until my return.

With my best wishes for your health and happiness, I remain, my dear Sir,
Sincerely yours.⁸²

On August 16th, it was reported in the Senate that the House had approved the measure without amendment.⁸³ Two days later, President Franklin Pierce signed it into law, giving American authors, for the first time, the rights of representation in their work. The insurgency finally had its victory.

⁸²August 19, 1856, George H. Boker Collection, Manuscripts Division, Department of Rare Books and Special Collections, Princeton University Library. Quoted with permission of the Princeton University Library.

⁸³ *Congressional Globe*, 34th Cong., 1st sess. (1855), 2212. When the chairman of the House Judiciary Committee, George A. Simmons (Opposition Party-NY), asked leave to report the bill, James Thorington (Whig-IA) objected, leading Simmons to ask the rules be suspended (they were, and the bill was read a third time and passed). There is no indication why Thorington objected to the bill's consideration (see *Congressional Globe*, 34th Cong., 1st sess. (1855), 2187).

Epilogue

Following passage of the law, the *Daily Tribune* declined to speculate on the effects of the new protections, remarking: “We shall not venture to predict the effect of the new law upon what is called our infant drama. Whether the lusty child will grow in grace and size, whether our *litterateurs* will devote their talents to its service...are questions we leave to others” (August 26, 1856). The *Daily Times* of September 9th was somewhat less diffident, and satirized the sorry scene that followed news of the bill’s passage:

The Act for the protection of dramatic copy-right having passed the Senate and House of Representatives, all the great American dramatists hastened *en masse* to the tumble-down District-Attorney’s office, in College-place, to register the titles of their plays. For some days subsequent to the passage of the Act Murray-street was haunted by singular-looking men, with long hair and inky finger-nails, each with a bundle of soiled paper under his arm or sticking out of his coat pocket, in cases where the coat had a pocket that would hold anything. All these gentlemen wore an expression of mingled triumph and anxiety. They cast curious glances at each other, and eyed each other’s bundles with ill-disguised curiosity. The fact was, every one of the distinguished dramatists was alarmed, lest his companion should be about to copyright a version of his play; for these dramatic rivulets had one source – one fountain-head – Paris; and each looked upon the rival stream with the hatred usual among members of the same family.

Furtively-grasped translations were not, of course, all that was copyrighted, and Boker wasted little time in securing the rights to several plays he had been withholding, contracting with Boston publisher Ticknor and Fields to release a two volume set of his collected works.¹ While Boucicault was not the first to register a

¹ The plays included *Calaynos*, *Anne Boleyn*, *Leonor de Guzman*, *Francesca da Rimini*, *The Betrothal*, and *The Widow’s Marriage*. Also included were several dozen poems, songs, and sonnets. Unfortunately for Boker, not even the additional protections would safeguard his pocketbook, as “he must have been a loser by more than five hundred dollars for his trouble in publishing his plays at all” (Arthur Hobson Quinn, “The Dramas of George Henry Boker,” *PMLA* 32, no. 2 (1917), 265).

copyright in New York – that honor going to E. G. P. Wilkins’ for his adaptation of a French comedy entitled *My Wife’s Mirror* – he was third on the list, and copyrighted no fewer than nine of his plays (*Daily Times*, September 9, 1856). Forrest soon took out copyrights on his major prize plays, including Bird’s *Oralloossa*, *The Gladiator*, and *The Broker of Bogota*; Richard Penn Smith’s *Caius Marius*; John Augustus Stone’s *Metamora*; and Robert T. Conrad’s *Jack Cade*.² While there are no detailed studies of play publishing in the antebellum period, the law certainly seems to have triggered an upsurge in copyright registrations: the most comprehensive database of American plays from the nineteenth century indicates that in the five years preceding the bill’s passage (1851-1855), there were at least fifty-one plays published in the United States; in the five years following its passage (1856-1860), there were no fewer than 162.³



On a Saturday morning a year after Forrest registered his copyrights, a stationer named William Maurice, who handled Forrest’s properties and finances when the actor was on tour, passed by the Arch Street Theatre. There, he saw a

² The copyright registrations Forrest made on November 6, 1856, listed the name of each author, followed by “The Property of Edwin Forrest.” Microfilm copies of the registration pages are contained in volumes 270-280 (reel 67) of the Copyright Record Books, District Courts, 1790-1870, Library of Congress. While registration procedures at the time required deposit of a complete copy of each work, the plays are no longer extant. District Court records were periodically forwarded to the secretary of state’s office (where copyright records were held prior to 1870), though the works themselves did not always accompany them. Even if they did, staff in the United States Copyright Office indicated a “purge” happened in the early twentieth century, and many pre-1870 dramas were intentionally destroyed.

³ These figures are taken from: *American Drama 1714-1915*, Chadwyck-Healey Literature Collections, http://collections.chadwyck.com.proxy-um.researchport.umd.edu/home/home_ad.jsp.

playbill for that evening announcing the opening of “Judge Conrad’s celebrated tragic play, entitled Jack Cade:”⁴ While the colon is likely a typographical error, given nothing follows it on the playbill, it is somehow fitting. It inspires ambiguity and a sense of mystery – in most plays from this period, the most descriptive portion of the title typically followed the signal punctuation. It also resonates with the messy history of the text, the origins of which are discussed in chapter 3. There is the “original” *The Noble Yeoman Conrad sold to Wemyss*, renamed *Jack Cade* at Wemyss’ suggestion and revised by him in production. There is the version Conrad re-compiled and tailored for Forrest, which was itself revised significantly by the tragedian. There is the iteration Conrad published in 1851 under the title *Aylmere, or The bondman of Kent; and Other Poems*. There is the version Forrest copyrighted in 1856 under the bet-hedging title *Jack Cade; or, the Kentish Rebellion; or, as Published under the Title of Aylmere, or the Bondman of Kent* (Copyright Record Books). And there is Wheatley’s iteration, revised by his Arch Street company from Conrad’s 1851 text. The errant punctuation is also fitting because it gestures *towards* something, a future yet absent but anticipated, imminent but deferred. Rejecting the closure of a period, it rather heralds. In the case of the playbill, what it heralded was a hastily-written letter from Forrest to Wheatley demanding a cancellation of the performance.⁵ And a

⁴ A copy of the playbill may be found in: “*Forrest v. Wheatley and Fredericks*,” October Session 1857, US Circuit Court, Eastern District of Pennsylvania – Equity Cases, National Archives at Philadelphia.

⁵ Forrest had learned of the planned production several days prior to its announced opening, at which time he wrote Wheatley. He received no reply.

lawsuit, perhaps the first brought under the copyright protections established in 1856.⁶

When he saw the playbill, Maurice informed Forrest, who “hurriedly prepared” a bill of complaint against the managers of the Arch, William Wheatley and W. S. Fredericks (*The Press*, October 12, 1857). When Wheatley’s attorney asked for a continuance until Monday to allow time to prepare a response, Justice Robert Grier (who had ruled against Harriet Beecher Stowe and her attorney Benjamin H. Brewster several years earlier in her copyright infringement case) determined that any damage that might result from the performance could be made good by the managers.⁷ The play was ultimately performed only twice. On December 2nd, Forrest withdrew his initial suit and brought a new, far more extensively documented one against William Wheatley, the man who had played the villainous Lord Say opposite Forrest’s Jack Cade in the play’s 1841 premier.⁸

Forrest’s case rested on the argument that his 1856 copyright filing secured him the acting rights to *Jack Cade*, which were violated when Wheatley produced his play at the Arch. Forrest’s complaint included a history of the play’s development, copies of letters he and Conrad exchanged during the writing of the piece, comments

⁶ The only earlier evidence of legal action brought under the law dates from November 20, 1856, when three managers of the Boston Athenaeum were apparently arrested at the behest of Boucicault. On September 15th and 16th, their theatre had presented *Rose; or The Career of an Actress*, which Boucicault claimed was “a literal copy of his copyrighted piece called *Violet; or The Life of an Actress*” (*Boston Daily Atlas*, November 24, 1856). The men were released on bail of \$500 each, and ordered to appear before the court on May 10, 1857. I have found no subsequent references to the case. Given Boucicault’s remedy under the 1856 law would have been only \$200, it is likely the case was settled before going to what would no doubt have been a much costlier trial.

⁷ The Stowe case is covered in detail in *Homestead*’s third chapter.

⁸ The cast list is printed in Rees, *The Life of Edwin Forrest*, 437.

on his extensive contributions to the writing and revising process, and a copy of the letter he had sent Wheatley.⁹ There were several problems with Forrest's arguments, however, which Wheatley noted in his deposition. The Arch had worked from printed copies of Conrad's 1851 publication, which were identical to the 1835 manuscript copy Wemyss still possessed. "If the Complainant did own the said play," Wheatley explained, "and allowed it to be printed and published without injunction or less formal objection [in 1851]...this respondent verily believes that any right to prevent a performance of said play was thereby relinquished – that having given his tacit consent...he cannot revive the right which he had for years abandoned." He also pointed out that if Forrest's version and the one Wheatley worked from were identical, then Forrest's 1856 copyright registration would have been invalid, given the publishers of Conrad's 1851 edition had already secured a copyright in the work. Wheatley rejected, however, Forrest's claim that the 1851 printing was identical to Forrest's acting version, pointing to the very revisions Forrest boasted he had made. Finally, Wheatley noted that he had "received permission to perform the piece from Judge Conrad – having requested it not as a matter of right or necessity, but of courtesy – nothing was paid or promised, asked or received for the privilege of playing the piece." Both men volunteered to submit copies of "*Jack Cade*" – Forrest his acting manuscript, Wheatley his promptbook assembled from a published copy of

⁹ Forrest also submitted several letters from Conrad praising the significant pruning. For example, in a letter from February of 1841, Conrad writes: "Dear Sir, I have looked very carefully over the corrections, and find my opinion of the judgment with which they have been made more than confirmed. Should the piece succeed, its success may, in great measure, be ascribed to them: for I find much in it, as first written, which must be heavy in representation" (quoted in "The Play of Jack Cade," *The Press* (December 7, 1857)). Karl M. Kippola examines in detail differences between the 1835 and 1841 versions in the third chapter of *Acts of Manhood: The Performance of Masculinity on the American Stage, 1828-1865* (New York: Palgrave Macmillan, 2012).

the 1851 printing; both encouraged Grier to compare carefully the two plays in assessing their claims.

No decision in the case is recorded, though it almost certainly would have been dismissed.¹⁰ The fact that the 1856 law was not retroactive meant that any agreements made prior to its passage did not secure any of the new protections. More telling, Forrest's understanding of "dramatic compositions" was one informed by a long theatrical career operating by the rules of the artisan dramaturgy. His *Jack Cade* was a bespoke play, its incidents and story, and – most importantly – the character of Jack Cade fashioned for Forrest himself. It was distinctive and distinctly *his*, purchased when he bought Conrad's revised work, improved by his careful attention to the manuscript, and so distinguished by his performances over nearly two decades that, in his mind, the two were intimately linked and inextricable. He owned Jack Cade because he *was* Jack Cade, and Jack Cade would have been nothing without him. It was his vehicle. While the complaint's legal arguments pursued his claims in the language of the statute, they were poorly suited to conveying the synergistic intimacy that bound Forrest and his creation.

The law, of course, did not recognize such claims to ownership or distinctiveness or lineage. The words printed on the pages following the copyright notice, when duly registered, were what was protected. If those words were identical to the 1851 edition published by Conrad, Forrest's 1856 copyright would have been

¹⁰ The last action on the case entered in the docket is dated May 3, 1861, when the master in the case prepared a list of questions to be asked of one Bertram H. Howell, a New York resident who was apparently familiar with the circumstances surrounding one of the versions of the play (it is unclear which).

invalidated. If they were different, which was clearly the case, it would have been left to the court, without any guidance from the statute, to determine if the divergences were sufficient to eliminate a finding of infringement. The prospect of Judge Grier poring over two iterations of the text points out the awkward nature of the new system. Forrest's manuscript was likely a clean transcription, a relatively stable version reflecting the revisions and business that had solidified into the *Jack Cade* he toured all over the country, one that would be entrusted to a local prompter for the duration of the performance and then returned to him afterwards. Wheatley's, by contrast, was literally cobbled together, the once pristine pages cut from their bindings and pasted onto larger sheets in a bound volume, cues for music and effects jostling a choreography of exits and entrances and crosses in the messy margins. And how would Grier determine whether or not Forrest's text had indeed been represented in performance without actually seeing the performance, a task further complicated by the imprecision and imperfectness of the actors' delivery? How else could Grier assess the consonance between the copyrighted work and its enactment without witnessing it? Grier, sitting in the Arch Street Theatre, reading along by gaslight in Forrest's handwritten promptbook, noting the accidental or improvisational deviations that characterized the artisan dramaturgy, errors that would no doubt be multiplied when the actors caught sight of the book-wielding jurist in the front row. Awkward, indeed.

As is hopefully apparent from chapters 3-5, that awkwardness is in large part due to the dimension of contingency that suffused the campaigns for copyright reform. Adopting a legislative approach and focusing efforts on the copyright

protections of federal statute were strategic decisions made by a relatively small group of men who initially aligned themselves with the expanding movement for international copyright. Throughout the campaign, different legislative tactics that might have yielded quite different outcomes were taken up, then discarded. Abandoned, for example, was the 1841 bill's provision extending protection regardless of registration status, which would have protected the manuscripts so essential to antebellum production practices. Rejected, too, was the approach of the 1844 and 1850 versions, which would have allowed registration of just the title page. The stillborn treaty of 1853 might have met two of the campaign's objectives with the stroke of Fillmore's or Pierce's pen, establishing both international copyright agreements and protection for the rights of representation. Perhaps most crucially, none of the efforts adopted the British system that held first performances as equivalent to first printings, a far less awkward solution better suited to manuscript plays crafted primarily for performance. The 1856 bill, however, recognized only the printed text, and treated "dramatic compositions" as any other printed work eligible for protection. As such, in order for playwrights to secure the rights of representation in their work, they had to register their title with the clerk of a district court and deposit, within three months, a complete copy of the work. In short, the only way for playwrights to control performances of a piece was to publish it. The ramifications of such a policy for a theatre of and by manuscripts were significant.

Of course, the law was not intended to work in tandem with the practices of antebellum theatrical production, but to undermine them by altering the relationship between text and enactment that had previously distinguished artisan dramaturgy.

Playwrights suddenly gained a new lever with which to influence and even determine aspects of production over which they previously had little or no say. Mowatt's experiences with the post-premier cutting of *Fashion*, where she learned that the managers and actors "singly and collectively entertained the opinion that an author never knew the true meaning of his own words," would have likely been quite different had the Park Theatre been required by law to obtain, in advance, a license to perform her published play. Managers who took liberties with such a text, or who permitted actors to do so, might well find themselves passed over the next time that particular author had a popular play to peddle, and would be fearful of earning a reputation that might dissuade other playwrights from working with them. Hasty rehearsals that left the actors insufficient time to become "perfect in their parts" could now have ramifications beyond audience confusion.

In a larger sense, the playbill's stray colon heralded a change in the economic relationships between playwrights and managers, a transition from ownership to licensing that began almost immediately to erode the incentive system that had inspired antebellum playwrights. Whereas those plays that had been most successful prior to the passage of the act were often tailored for specific companies or individual stars, such particularity started to become a liability. There was only one Edwin Forrest; had Bird been able to permit other companies to produce *The Gladiator*, for example, defects that might be effaced by the power and compulsion of Forrest's presence would be more apparent in the hands of lesser actors. Further, performances of a play like *The Gladiator* could never occur simultaneously, only successively, restricting the potential profit from such works. Plays suited to a company rather than

a performer would be more attractive to managers, who frequently griped about the significant premiums star performers demanded. The immediacy of bespoke plays produced in the first half of the nineteenth century grew less attractive for a playwright hoping to create work that would appeal across geographical and temporal space. In short, plays crafted to succeed under the protections of the copyright statute were likely to be more general than topical, to rely less on specific actors than companies, and to be the result of a more deliberate process that ensured greater fidelity between an author's words and those spoken by the performers.

This new incentive structure proceeded in tandem with other developments that prioritized similar qualities. The long run, for example, appealing to managers who relished the prospect of a consistent draw and steady box office receipts, made the bespoke one-offs of the artisan period less and less attractive. Fewer plays performed more frequently contracted the repertory, and allowed greater resources to be invested in plays that might anchor a significant portion of a season. The photographs of correspondents in the Civil War also had a profound effect on the aesthetic criteria of audiences: the recycled, generic, one-dimensional scenic backdrops of the previous era were soon replaced with three-dimensional set pieces selected with an increasing eye to creating the illusion of "realistic" environments. The rise of the genre of realism also contributed significantly to this inertia. Realist playwrights increasingly focused on social issues of the present, whose treatment benefitted from situations and characters readily recognizable to their audiences. In pursuit of ever more "realistic" environments, playwrights included ever-expanding stage directions, dictating precisely the environment, the characters, the emotions

necessary to create their effects. The advent of electric lighting permitted for the first time the easy lowering of house lights, and performers and audiences who had previously interacted under the same general level of illumination were increasingly separated into the well-lit stage and the darkened house. A “fourth wall” established in part by lighting was raised between the performers and their patrons, the former increasingly expected to sit quietly and bear witness, rather than actively create.

Playwrights were not content to stop with the 1856 law, either, and before the turn of the twentieth century, a series of court cases and additional statutes further solidified the authority of the dramatic author. Distinctive scenes recreated in entirely different contexts were taken to be protected. In 1870, novelists were given the ability to control dramatizations of their own work, and photographs were added to the list of protected material. Finally, in 1891 Congress approved a law permitting the negotiation of international copyright agreements, a series of which quickly followed.

The Janus-faced aesthetics of the insurgent playwrights campaigning for copyright reform stood at the cusp of a significant change in the nature of theatrical production. Looking backwards to the giants of a tradition they saw as nearly extinct, their attempts to recapture that past propelled the theatre into a future none of them could have anticipated. Despite their classicist orientation, from the vantage point of the mid-nineteenth century, it was the insurgents who bore the burden of exceptionalism; the production practices they militated against had existed in some fashion throughout the previous two millennia of Western theatrical performance. The revolutionary aesthetics that informed the tactics of their insurgency, however,

would ultimately shift that burden onto an increasingly “archaic” past, characterized by “amateurism,” “hackwork,” and immature mimicry.

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